

**** Since written, resolutions have been updated and references may have changed.**

In other cases, new resolutions may offer additional interpretative and implementation guidance. **

An Overview of the CITES Permit Regime

As explained below, the permit regime devised by the drafters and adopted as the final text of CITES supports the notion that the object and purpose of CITES is to protect wildlife through the management of international trade. The permit regime also supports the notion that CITES employs two primary tools for managing international trade: science and market control.

The application of these tools is based on whether a species is listed in one of the three CITES Appendices. Appendix I species are those presently “threatened with extinction and which are or may be affected by trade.”¹ Trade in Appendix I species is “subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.”² Appendix II species are those “not necessarily now threatened with extinction,” but which “may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.”³ Appendix II also includes so-called “look-alike species,” those species that so closely resemble Appendix I or Appendix II species that they must also be protected “in order that trade in . . . specimens may be brought under effective control.”⁴ CITES also allows a Party to list species unilaterally in

¹ CITES, *supra* note 1, at art. II(1).

² *Id.*

³ CITES, *supra* note 1, at art. II(2)(a).

⁴ *Id.* at art. II(2)(b). The treaty provides for Appendix II listings when the species looks like a species already listed on Appendix II. Resolution Conference 9.24 allows “look-alike” listings for species that look like Appendix I species. CITES, *Criteria for Amendment of Appendices I and II*, Res. Conf. 9.24 (Rev. CoP14) (1994) [hereinafter Res. Conf. 9.24]. The Parties realized that it would not make sense to allow look-alike listings only if a species looked like an Appendix II species.

Appendix III.⁵ These are species subject to domestic regulation that a Party identifies as requiring “the cooperation of other Parties in the control of trade.”⁶ Unlike Appendix I and II listings, an Appendix III listing does not require biological findings as a precondition for trade.⁷

The structure of the permit regime makes clear that the drafters intended that science would be a fundamental management tool for preventing over-exploitation. Before a Party’s Management Authority may issue a permit for the export of specimens of an Appendix I⁸ or II⁹ species, the Party’s Scientific Authority must determine that such export will “not be detrimental to the survival of that species.”¹⁰ This determination is known as a non-detriment finding (NDF). The Secretary-General has called the issuance of adequate NDFs “obviously essential for achieving the aims of the Convention” and “requires sufficient knowledge of the conservation status of the species and that a positive advice should not be given in the absence thereof.”¹¹ The Secretary-General’s statements confirm the link between the scientific basis of the permitting scheme and the object and purpose of CITES: Before any specimen of a listed species may be exported, the exporting country must ensure that the export will not be detrimental to the species.¹²

While the Convention clearly sets a baseline of non-detriment to the species, it also

⁵ CITES, *supra* note 1, at art. II(3); see also Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 *Env’tl L.* 841, 872 n. 229 (1996) (“Species are listed in Appendix III solely on the basis of a decision by the country of origin”).

⁶ CITES, *supra* note 1, at art. II(3).

⁷ CITES, CITES ‘Non-detriment findings’ (2010), <http://www.cites.org/eng/prog/ndf/index.shtml> (last visited May 17, 2010).

⁸ CITES, *supra* note 1, at art. II(1).

⁹ *Id.* at art. II(2)(b).

¹⁰ This language appears in Article III(2)(a), which pertains to Appendix I exports, and Article IV(2)(a), which pertains to Appendix II exports. *Id.* at arts. III(2)(a), IV(2)(a). Article III(3)(a), which pertains to Appendix I imports, uses slightly different language, as non-detriment finding requirements for Appendix I imports are different from those of Appendix I and II exports. *Id.* at art. III(3)(a).

¹¹ WIJNSTEKERS, *supra* note 33, at 67.

¹² Beyond the initial NDF, a Scientific Authority from each Party must monitor both the export permits granted and the actual number of exports to ensure that trade in the species remains non-detrimental. CITES, *supra* note 1, at art. IV(3). In addition to monitoring, each Party must maintain records of its trade in listed species and submit annual reports to the Secretariat. *Id.* at arts. VIII(6), VIII(7)(a).

makes clear that control of commercial markets is necessary for species threatened with a higher degree of risk—that is, those species listed in Appendix I. Before issuing an import permit, the State of import must determine that import under review will be for purposes that are not detrimental to the survival of the species involved.¹³ This provision requires an analysis of whether the purpose will increase demand for and trade in specimens of the species at issue.¹⁴ The State of import also must be “satisfied that the specimen is not to be used for primarily commercial purposes.”¹⁵ These provisions clearly support the Convention’s intention to regulate commercial markets for Appendix I specimens. In fact, the drafters of CITES banned trade for primarily commercial purposes because they viewed it as inherently harmful to these species.¹⁶

The export and import permit findings, and the overall permit regime, represent the drafters’ efforts to devise a scheme to protect species from over-exploitation due to trade based on sound science and market control. The Convention clearly contemplates that commercial demand for Appendix I species in the international marketplace is such an inherent risk to the survival of the species that such trade is presumed to be detrimental to the survival of the species. In fact, at the Washington Conference, the delegate from Tanzania noted that “[t]he treaty should be flexible enough to deal with the whole range of commercial threats.”¹⁷ As such, the permit regime explicitly gives effect to the Convention’s object and purpose by strictly managing trade in wildlife.

I. The Permit Regime and the Sustainable Use Debate

The non-detriment and primarily commercial purposes findings are the heart of the

¹³ *Id.* at art III(3)(a).

¹⁴ WIJNSTEKERS, *supra* note 33, at 69.

¹⁵ CITES, *supra* note 1, at art. III(3)(c).

¹⁶ *See infra* p. III(C).

¹⁷ Washington Conference, *supra* note 34, at Opening Statement by the Delegate of Tanzania, at Summary Record – Sixth Plenary Session, Feb. 28, 1973, SR/6 (Final).

CITES regime. They represent the fundamental means by which Parties are to prevent the over-exploitation of species in international trade. Yet, despite the fundamental importance of these provisions, the Convention fails to define either term. As a result, much debate has ensued over the implementation of these findings, and they became the early focal point of the debate between the “facilitation of trade” and “facilitation of conservation” camps. This section begins by describing the conditions that gave rise to what has been termed the “sustainable use debate.” It then identifies how early proponents of sustainable use attempted to reshape implementation of CITES’ core provisions and why the Parties largely rejected these attempts. This section describes not only these failed attempts and the Parties’ current understandings of the provisions but also ways that the Parties could improve implementation of the non-detriment and primarily commercial purposes findings to better support the object and purpose of the Convention. Finally, this section describes the latest attempts to ensure that trade facilitation and sustainable use remain on the CITES agenda.

A. Non-Detriment Findings

CITES requires that Scientific Authorities make non-detriment findings (NDFs) before allowing the import, export, or introduction from the sea of specimens of Appendix I or Appendix II species.¹⁸ If a Scientific Authority finds that trade in a specimen of a species could be detrimental, or has insufficient information to conclude that the trade will not be detrimental to the species, that Party may not issue the necessary permit. In addition, a Scientific Authority from each Party must monitor both the export permits granted and the overall number of exports to ensure that the level of trade in the species remains non-detrimental.¹⁹

Despite its obvious importance, neither the Convention nor any resolution defines what

¹⁸ *Id.* at arts. III(2)(a), III(5)(a), IV(2)(a), IV(6)(a).

¹⁹ *Id.* at art. IV(3). In addition to monitoring, each Party must maintain records of its trade in listed species and submit annual reports to the Secretariat. *Id.* at arts. VIII(6), VIII(7)(a).

“not detrimental” means or provides clear guidelines for making an NDF. Additionally, the Parties have not clarified the differences between when the purposes of an import might be detrimental and when an export might be detrimental. The lack of Party-driven guidance, as well as the lack of transparency in making NDFs, has led to inadequate implementation of the non-detriment finding provisions and has allowed the NDF—in particular the export finding—to be fodder for the “sustainable use” debate. This section documents the lack of concrete guidance for Parties and proposes substantive changes to the existing guidance in order for Parties to clearly understand the NDF process based on the true purpose of both the export and import findings.

1. The Export Non-Detriment Finding

Although the export NDF is a pillar of the Convention, the Parties have long struggled to agree on what an adequate NDF entails because the Convention does not define the term “detrimental.” In part due to this lack of agreement, the NDF is a flashpoint in the sustainable use debate and is inextricably tied to the Parties’ diverging interpretations of CITES. Parties and other advocates of using CITES as a means to facilitate trade have argued that an NDF should assess the economic and other co-benefits of species exploitation, including supporting livelihoods and funding for conservation efforts.²⁰ Under this theory, a Scientific Authority must consider the possible benefits of the exporting Party’s conservation programs when making an NDF.²¹ For example, beneficial trade may occur when a community learns to value a species because the Scientific Authority allows the community to trade in the by-products of natural mortality or grants a quota for hunting trophies.²² Moreover, they argue that any trade in

²⁰ Species Survival Network, *supra* note 87, at para 2.

²¹ See notes 80-81 and accompanying text.

²² “[M]any of the most valuable wildlife products . . . result from natural mortality or they may arise as a by-product of management” Doc. 8.48, *supra* note 75 (emphasis removed).

specimens deriving from the by-products of natural mortality or wildlife management is *per se* non-detrimental.²³

However, this misconstrues the nature of the export NDF. The export NDF provides the scientific basis for ensuring a species is not over-exploited for trade. More fundamentally, it also recognizes that the survival of species in the wild is contingent on maintaining a biologically meaningful number of individuals in the wild and meaningful diversity within the population, including age structure, gene pool, and sex ratio, among other characteristics. The NDF reflects the drafters' concern that the demand for species in trade may have deleterious effects on populations if not maintained at scientifically sound levels, and it is the primary tool through which the drafters intended to give effect to the object and purpose of the Convention.²⁴ The Parties have made clear that the NDF is a scientific finding and have routinely recognized that it is a scientific standard.²⁵

Many key CITES players have made clear that additional guidance is needed, including the Secretary General.²⁶ Nonetheless, many Parties lack the technical expertise, financial resources, or political will to make appropriate NDFs—problems that have been widely acknowledged.²⁷ The IUCN, for example, reported that “many species continue to be traded in the absence of information about the impact of such exploitation on the wild population.”²⁸

²³ *Id.* at Annex (b).

²⁴ DAVID S. FAVRE, *INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES*, 62 (1989).

²⁵ See CITES, *Designation and Role of Scientific Authorities*, Res. Conf. 10.3 (1997) [hereinafter Res. Conf. 10.3].

²⁶ See notes 111-112 and accompanying text.

²⁷ “Clearly, action is needed to improve the situation and to assist Scientific Authorities in making non-detriment findings.” CITES, *CITES Scientific Authorities Checklist to Assist in Making Non-Detriment Findings for Appendix II Exports*, at 1, Inf. 11.3 (2000) [hereinafter Inf. 11.3].

²⁸ ALISON ROSSER, *IUCN Assistance to Develop Guidance for CITES Scientific Authorities on the Making of Non-Detriment Findings*, in IUCN SPECIES SURVIVAL COMMISSION, *GUIDANCE FOR CITES SCIENTIFIC AUTHORITIES: CHECKLIST TO ASSIST IN MAKING NON-DETRIMENT FINDINGS FOR APPENDIX II EXPORTS* 3, 3 (A. Rosser & M. Haywood eds., 2002).

2. The Import Non-Detriment Finding

With respect to imports of Appendix I specimens, the State of import must determine that the *purpose* of the import, such as captive breeding, display, or scientific research, is not detrimental to the survival of the species.²⁹ The Parties have not provided any guidance on the import NDF, but the provision itself suggests an inquiry into the effects on the species of a particular type of use upon import, such as captive breeding, display, or scientific research, since each use may pose a different threat to a particular species. For example, imports for basic scientific research may have fewer effects on species than imports for display, because display might make a species more appealing to the public and thus stimulate demand for specimens of that species. Whether an importing Party looks at the same type of information as the exporting Party or reviews an entirely distinct set of factors is left for each Party to decide for itself and little is known about how Parties make this finding. By focusing on the purpose of the import, however, the drafters signaled their intent to evaluate the effects of individual market types on the species and to provide an important safety-check on trade in Appendix I species that differs from the export NDF.

Although the drafters of CITES clearly considered the import NDF qualitatively different than the export NDF, the absence of guidance creates several interpretative questions for the Parties. The first question is whether the relevant inquiry is merely a review of the population data and other information that the exporting country relied on in making its export NDF. Depending on how the importing Party uses that information, the importing Party may merely duplicate the export NDF—in many cases, simply rubber-stamping the exporting country's NDF analysis.

While duplicating efforts may yield some benefit, the text of CITES clearly conveys that

²⁹ CITES, *supra* note 1, at art. III(3)(a).

the import NDF inquiry differs from the export NDF. Consequently, to implement the import NDF in a manner consistent with the drafter's intent, the importing Party should consider the information reviewed by the exporting Party, however such data must be put to different uses during the import NDF evaluation. For example, an assessment of whether the purpose of the import is detrimental to the survival of the species presumably requires an analysis of whether the purpose will increase demand for and trade in specimens of the species at issue or whether it might stimulate poaching and illegal trade. Analyzing whether trade may increase enough to be detrimental to the survival of the species would require reference to population data and trends, but these data are used in a different context by the importing country's Scientific Authority than the way those same data were used by the exporting country.

A second interpretive question is whether the importing country should assess the potential detriment to the same taxonomic level that the exporting country assessed. For example, if Bhutan proposes to export ten Appendix I Asiatic black bears to zoos in the United States, should the United States determine whether the importation for exhibition in a zoo is detrimental to the survival of the Bhutan population of Asiatic black bears only or should it assess the impact on all Asiatic black bear populations? Or alternatively, should the importing Party assess the impact of that trade on all bear species generally? The answer may depend on the specific purpose of the import or the individual characteristics of the specimen being imported. In the example given, exhibition of bears in a zoo will not likely lead to increased trade in bears only from Bhutan, unless such bears exhibit unique behavioral or physical characteristics that are particularly attractive. In the absence of such characteristics, future demand for zoos is likely to be for bears generally, not necessarily for bears from Bhutan. Consequently, in this example the United States should probably assess the impact of the import

on the Asiatic black bear species as a whole. In a different situation, the purpose of the import or the unique characteristics of a species may suggest that the import NDF analysis focus on the potential impact to the specific population from which the specimens derive. For example, only certain populations of bottlenose dolphins have learned to use tools.³⁰ If such dolphins are imported for exhibition and prove to be especially popular exhibits, future demand for bottlenose dolphins may focus on those populations that use tools.

A third question is whether the importing country should assess the impact of only the one import for a specific purpose to a specific site or whether it should expand its inquiry to all similar imports. For example, assume that Captive Breeding Facility X, a facility with particularly good captive breeding results, wishes to import a male and female bird for its captive breeding program. Should the importing Party assess the potential impact of this one shipment to this particularly successful captive breeding facility? Or should it also take into account the impact of similar requests to other facilities that are less successful and thus will request additional imports to replace or supplement breeding stock? If so, should the importing Party limit its analysis to captive breeding facilities in its own country or should it look beyond its borders to consider the total imports of these birds to captive breeding facilities worldwide?

The issues have yet to be fully resolved. However, because the import NDF focuses on the purpose of the import, the importing country should, at a minimum, take into account the impact of similar requests to facilities that are less successful and thus will request additional imports to replace or supplement breeding stock. Notably, Article III does not require the importing country's Scientific Authority to determine that the import will not be detrimental to the survival of the species—an inquiry more clearly focused on the impact of a single, specific

³⁰ Michael Krützen et al., *Cultural Transmission of Tool Use in Bottlenose Dolphins*, 102 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES 8939, 8939 (Jul. 21, 2005), available at <http://www.pnas.org/content/102/25/8939.full.pdf>.

transaction. Instead, the language of the Convention asks whether the *purpose* of the import is detrimental to the survival of the species— a larger question that requires an assessment of additional imports for the same or similar purposes.

As is the case regarding export NDFs, the Parties would greatly benefit from thoroughly considering the drafter’s intent and adopting a resolution that sets out specific principles for making an import NDF. By including such specific language, the drafters clearly determined that the import NDF was an important factor in making CITES work. The drafters intended that the Parties would curb any trade the purposes for which would detrimentally affect the conservation status of endangered species. In other words, it was obviously important to the drafters that markets and uses in importing countries would not affect a species conservation status.

B. The Primarily Commercial Purposes Finding

Whereas the NDF is CITES’ fundamental conservation tool for avoiding adverse biological consequences to the survival of species in the wild, the primarily commercial purposes finding represents the drafters’ recognition that commercial trade is *per se* detrimental to Appendix I species because commercial markets stimulate demand and encourage black market trading. The primarily commercial purposes finding is the drafters’ attempt to strictly control markets for Appendix I specimens: The Management Authority of the State of import or State of introduction, in the case of marine species taken on the high seas, must be “satisfied that the specimen is not to be used for primarily commercial purposes.”³¹

Because the primarily commercial purposes finding represents essentially a blanket prohibition of commercial international trade, interpretation of it has fueled significant debates among the Parties. From the perspective of the proponents of sustainable use, a blanket prohibition against commercial uses of Appendix I specimen does not give sufficient weight to

³¹ CITES, *supra* note 1, at arts. III(3)(c), III(5)(c).

the potential beneficial impacts on conservation and on the livelihoods of the rural poor, especially when the specimens in trade derive from natural mortality or government management programs. The Zimbabwe Resolutions, as well as later proposals, have attempted to relax the meaning of “primarily commercial” to allow some level of commercial trade in Appendix I specimens. This section examines how the Parties have defined “primarily commercial purposes” and their attempts to redefine the term.

1. Defining “Primarily Commercial Purposes”: A Presumption of Strict Control

Eventually, the Parties recognized that interpretation of the term “primarily commercial purposes” varied among Parties and that trade in listed-specimens would involve a variety of fact-specific transactions.³² As a result, the Parties adopted Resolution Conf. 5.10 in 1985 to help the Parties determine whether an import should be considered as for “primarily commercial purposes.” Resolution Conf. 5.10 defines an activity as “commercial” if its purpose is to “gain economic benefit, including profit (whether in cash or in kind) . . . [when it] is directed towards resale, exchange, provision of a service or other form of economic benefit.”³³ Importing countries are to interpret the term as “broadly as possible so that any transaction which is not wholly ‘non-commercial’ will be regarded as ‘commercial.’”³⁴ The resolution addresses the intended scope of “primarily” when it says that any use of imported specimens whose non-commercial aspects “do not clearly predominate shall be considered to be primarily commercial in nature.”³⁵ The burden of proving whether the intended use is primarily commercial lies with the entity seeking to import the specimen. The overall effect of these general principles is to categorize a large category of activities as for “primarily commercial

³² See CITES, *Definition of “Primarily Commercial Purposes,”* at Preamble paras 3, 4, Res. Conf. 5.10 (1985) [hereinafter Res. Conf. 5.10].

³³ *Id.* at para 2.

³⁴ *Id.* at para 3.

³⁵ *Id.*

purposes,” thus strictly limiting the commercial marketplace for Appendix I species.

The drafting history of the Convention supports a strict reading of “primarily commercial purposes.” By the time the drafters gathered for the Washington Conference in 1973, the working draft of the Convention contemplated two options for restricting trade in Appendix I specimens.³⁶ The first option contemplated a complete ban on trade in some Appendix I specimens, whether commercial or not.³⁷ The second option considered restricting trade in Appendix I specimens to a narrow list of purposes, limited exclusively to human health research or the restoration of species.³⁸ Both options are strict trade prohibitions and neither option contemplates commercial trade of Appendix I specimens. Thus, while the final text of the Convention does not adopt either of these options, instead including a more flexible approach to limiting commercial trade in Appendix I specimens, the intent of the drafters to require strict trade control for Appendix I specimens remains clear.

2. “Primarily Commercial Purposes” and the Sustainable Use Debate

Despite the clear intent of the Convention to strictly regulate trade in Appendix I specimens and cut off commercial markets for wild-caught Appendix I specimens, the Zimbabwe Resolutions,³⁹ and later a resolution proposed by Namibia,⁴⁰ attempted to reshape implementation of the primarily commercial purposes finding to facilitate “beneficial” trade and sustainable use. The proponents of these Resolutions, cut off from commercial markets for wild-caught Appendix I specimens, ivory in particular, argued that banning commercial trade when an exporting State certifies that the export will be beneficial to the survival of the species raises issues of equity,

³⁶ See Washington Conference, *supra* note 34, at Working Paper Doc. 3, arts. II, III (Nov. 21, 1972).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Doc. 8.51, *supra* note 73; Doc 8.50, *supra* note 74; Doc. 8.48, *supra* note 875 Doc. 8.49, *supra* note 76; Doc. 8.52, *supra* note 77 (collectively, these proposals represent the Zimbabwe Resolutions).

⁴⁰ CITES, *Revision of the Definition of “Primarily Commercial Purposes,”* Doc. 10.38 (Rev.) (1997) [hereinafter Doc. 10.38].

creates a prejudice against trade, and attaches undue stigmas to trade.⁴¹

As discussed above, the Zimbabwe Resolutions also attempted to infuse the NDF with considerations of the “benefits” of wildlife trade, including the possibility that trade could reap financial benefits for conservation and for the rural poor. However, even if such considerations led to the issuance of a positive NDF, the Convention still prohibits trade in Appendix I specimens for “primarily commercial purposes.” As such, the Zimbabwe Resolutions sought to redefine the trigger for making the “primarily commercial purposes” finding by proposing to apply the term only “to those cases of commercial trade which are clearly non-beneficial to the species concerned.”⁴² According to the proposal, trade would be viewed as beneficial “wherever the returns so derived are reinvested to maintain or increase wild populations.”⁴³ Under these circumstances, trade could occur even if the purpose of the import was commercial.

The proposals to redefine the primarily commercial purposes restriction were withdrawn, but at COP10, Namibia again proposed to redefine “primarily commercial purposes.” Namibia proposed to amend Resolution Conf. 5.10 to allow any conservation benefits in the country of origin resulting from trade to be considered in the determination of “primarily commercial purposes.”⁴⁴ Before the proposal was withdrawn, a large number of Parties objected to the proposal, emphasizing that Article III(3)(c) clearly asks whether the purpose of the import is

⁴¹ See Doc. 8.49, *supra* note 56, at para 10(c) (“The Convention tends to prejudice those successful examples of conservation based on small-scale commercial trade arising from sustainable use.”); *Id.* at para 12 (“[T]he draft resolution seeks to mitigate the prejudicial nature of the [primarily commercial purposes] clause . . .”); Doc. 10.38, *supra* note 134; CITES, *Notes in Support of Amending Resolution Conf. 5.10 Definition of “Primarily Commercial Purposes,”* at para 3, Doc. 10.38.1 (Rev.) (“Having accepted that trade can be beneficial to conservation, the retention of the phrase ‘primarily commercial purposes’ indicates that there still remains a prejudice against trade and a stigma attached to trade.”); *Id.* at para (2) (“Trade may not take place even if the range State has certified that the export will be beneficial to the survival of the species. This is one of the equity issues that concern Parties It is difficult to accept that, notwithstanding competent rulings by the Authorities in the producer State, the final decision lies with the importing country.”).

⁴² Doc. 8.49, *supra* note 76.

⁴³ *Id.* at para 8.

⁴⁴ Doc. 10.38, *supra* note 134.

commercial.⁴⁵ Resolution Conf. 5.10 further clarifies that the nature of the transaction between the owner of the specimen in the exporting country and the recipient in the importing country is irrelevant.⁴⁶

Moreover, this interpretation is consistent with the drafters' intent. As the drafters crafted language to provide some flexibility to the working draft's total trade prohibition while retaining the underlying assumption that commercial trade is inherently detrimental to Appendix I species, Australia proposed an amendment that became the basis for the Convention's current language.⁴⁷ Australia proposed that the importing country must find that the "recipient does not engage in commercial transactions involving Appendix I and II species."⁴⁸ The focus on the recipient's activities makes clear that from early drafts of the "primarily commercial purposes" provision, the drafters intended the provision to apply to the end use of the specimen in the importing country. Even though the drafters modified the focus of the amendment from the recipient to the purpose of the specific import, this history reflects CITES' clear intent to eliminate commercial markets for Appendix I species.

C. The Exemptions

Like most conventions, CITES establishes a number of exemptions to its permitting rules. These exemptions serve a number of purposes. The exemption for trade in specimens obtained before the Convention applied to the relevant species is designed to promote fairness since the seller did not have notice of any trade restrictions when she acquired the specimen.⁴⁹ The

⁴⁵ See CITES, *Summary Report of the Committee II Meeting, Fifth Session: 13 June 1997*, at para 12, 216-217 (1997) (concern voiced by the delegations of the Netherlands, on behalf of the European Union, and the United States).

⁴⁶ See Res. Conf. 5.10, *supra* note 126, at para 4.

⁴⁷ See Washington Conference, *supra* note 34, at Proposed Amendments to Article III, PA/III/10 (proposed by Australia) (Feb. 15, 1973).

⁴⁸ *Id.*

⁴⁹ FARVE, *supra* note 96, at 172 (regarding pre-Convention specimens: "The policy in support of such an exemption is that since the animals or plants were removed prior to the creation of these laws, exercise control over them will not help the remaining wild specimens . . .");

exemption for trading in certain captive-bred specimens is thought to promote conservation by relieving pressure on wild populations.⁵⁰ The exemption for shipments in customs control and destined for other countries is designed to promote efficiency.⁵¹ This section reviews arguably the most challenging and vexing exemptions: the personal and household effects exemption and the two captive breeding exemptions.

1. Personal and Household Effects

While exemptions always increase complexity by making enforcement more difficult, the “personal and household effects” exemption has proven to be one of the more difficult exemptions for the Parties to administer, primarily because the language is convoluted.⁵² Moreover, it is a broad exemption that excludes from the CITES permitting requirements many specimens of listed species, including all tourist souvenirs made from Appendix II species, except in certain circumstances. Although the Parties have variously interpreted the exemption more or less narrowly in the past, currently Resolution Conf. 13.7 (Rev. CoP14) broadens the exemption in important ways.⁵³

a. Applying the Terms of the Convention

Article VII(3) provides that the permit requirements “shall not apply to specimens that

⁵⁰ CITES, *Relationship Between Ex Situ Production and In Situ Conservation: Report of the Standing Committee*, 2 at para 8, CoP14 Doc. 48 (Rev. 1) (2007).

⁵¹ FARVE, *supra* note 96, at 168 (describing the administrative burdens of requiring re-export certificates for specimens if the specimen was shipped to through more than one country during transit).

⁵² CITES, *supra* note 1, at art. VII(3) (“The provisions of Articles III, IV and V shall not apply to specimens that are personal or household effects. This exemption shall not apply where: (a) in the case of specimens of a species included in Appendix I, they were acquired by the owner outside his State of usual residence, and are being imported into that State; or (b) in the case of specimens of species included in Appendix II: (i) they were acquired by the owner outside his State of usual residence and in a State where removal from the wild occurred; (ii) they are being imported into the owner's State of usual residence; and (iii) the State where removal from the wild occurred requires the prior grant of export permits before any export of such specimens; unless a Management Authority is satisfied that the specimens were acquired before the provisions of the present Convention applied to such specimens.”).

⁵³ CITES, *Control of Trade in Personal and Household Effects*, Res. Conf. 13.7 (Rev. CoP14) (2004) [hereinafter Res. Conf. 13.7].

are personal or household effects.”⁵⁴ Thus, the basic exemption is broad. However, the very next sentence states that the exemption shall not apply in certain circumstances.⁵⁵ The drafters crafted limitations on the application of the exemption—in other words, exceptions to the exemption.

In the case of Appendix I specimens, the exemption does not apply if a person acquires an Appendix I specimen outside her State of usual residence and attempts to import it into that State.⁵⁶ Thus, if a U.S. citizen who lives in Florida travels to Cameroon and buys earrings made from African elephant ivory or the hairs of a lowland gorilla, the exemption does not apply because the U.S. citizen is outside her place of usual residence and returning with Appendix I specimens to her place of usual residence. To return home with these specimens, she must first obtain an import permit from the State of import and then obtain an export permit from the State of export, as required by Convention’s permit regime. Thus, the personal and household effects exemption applies only in limited circumstances for Appendix I specimens, such as when a person is moving to another country as part of his or her job. In this case, the person would be moving from her place of usual residence to another State, and therefore the exemption would apply.

The language is more complicated for Appendix II specimens. The exemption *does not* apply if

- (i) a person acquires an Appendix II specimen outside his State of usual residence;
- (ii) the person acquires the specimen in a State where removal from the wild occurred;
- (iii) the person attempts to import it into his State of usual residence; *and*
- (iv) the State where removal occurred requires the prior grant of an export permit.⁵⁷

Thus, if a British citizen travels to Brazil and buys a desk sourced from Brazilian mahogany and

⁵⁴ CITES, *supra* note 1, at art. VII(3).

⁵⁵ *Id.*

⁵⁶ *Id.* at art. VII(3)(a).

⁵⁷ *Id.* at art. VII(3)(b) (emphasis added).

wants to return to London with it, she must ask herself whether all of the criteria above apply, i.e. (1) Was the specimen acquired outside her usual State of residence? (2) Was the specimen acquired in a State where removal from the wild occurred? (3) Is the specimen being imported into the State of usual residence? (4) Does the State where removal occurred (in this case, Brazil) require an export permit for export of mahogany? In this scenario, the answer to the first three questions is yes, and if Brazil does require an export permit for all mahogany exports, the personal and household effects exemption would *not* apply because all of the criteria are met—in other words, the British citizen in this scenario would have to obtain an export permit.

However, should any one of the criteria not be met, no export permit is required because the specimen would meet the personal and household effects exemption of Article VII. For example, if a British citizen travels to Brazil and buys a desk sourced from Peruvian mahogany, the exemption applies because the traveler bought the Peruvian mahogany in Brazil. In this case, the specimen does not meet criterion (ii)—that the specimen was acquired in the State where removal from the wild occurred. In the same way, if she acquired Brazilian mahogany in Brazil, but Brazil did not require an export permit for such trade, the personal and household exemption would apply, and the British citizen would not have to obtain an export permit.

b. Reversing the Presumption

For international trade in Appendix II specimens under the personal and household effects exemption, the most significant potential limitation is the requirement for an export permit by the State of export. When a State requires an export permit for an Appendix II species, that State is essentially prohibiting the application of the personal and household effects exemption for exports of specimens of that species removed from that country. Thus, communication of export permit requirements is imperative to ensure that importing States apply

the personal and household effects exemption according to the exporting State's regulations. However, the Parties have failed, on the whole, to communicate their export permit requirements.

Currently, Resolution Conf. 13.7 (Rev. CoP14) advises that the Parties shall not require export permits or re-export certificates, for personal and household effects which are dead specimens, parts or derivatives of Appendix-II species except . . . where they have been advised through a Notification from the Secretariat or on the CITES website that the other Party involved in the trade requires such documents.⁵⁸

Thus, the current system provides that the Parties presume that an export permit is not required. However, throughout the history of CITES, the Parties have used three different methods to communicate whether international trade in personal and household effects requires an export permit: the case-by-case method, the presumption that a permit is not required, and the presumption that an export permit is required.⁵⁹ The first system is the case-by-case method, which requires importing States to contact the exporting Party to determine whether an export permit is required. Because a Party is required to contact another Party every time a person seeks to use the personal and household effects exemption, the case-by-case method is impractical and the administrative burden likely weighs too greatly on the Parties to make it a plausible approach.

Unlike the case-by-case method, the other two methods are based on a basic presumption—either that the exporting Party requires an export permit or that it does not. Under both methods, the Parties must report their specific requirements to the Secretariat if their requirements conflict with the presumption in place.⁶⁰ For example, if the Parties establish a presumption that exporting Parties require export permits, a Party must notify the Secretariat if it

⁵⁸ Res. Conf. 13.7, *supra* note 183, at. at para 22(b)(i).

⁵⁹ WIJNSTEKERS, *supra* note 33, 144–45.

⁶⁰ Resolution Conf. 13.7 creates a presumption that export permits are not required under the personal and household effects (PHE) exemption. Res. Conf. 13.7, *supra* note 186.

does not require an export permit for exports of Appendix II personal and household effects. Similarly, if the Parties adopt the presumption that exporting Parties do not require export permits for the personal and household effects exemption, any Party that in fact does require an export permit must inform the Secretariat.

Establishing a presumption is administratively efficient. First, it streamlines the case-by-case method by creating a standard by which Parties may follow each time a person attempts to trade under the personal and household effects exemption. Second, by using the Secretariat as a clearing-house for information, Parties need only communicate to one entity, the Secretariat. Conversely, an importing Party need only check with the Secretariat, either directly or via its website, to know whether a permit is required.

Although either presumption is efficient, the system that requires Parties to presume an export permit is required better supports the goal of CITES to prevent the over-exploitation of listed species by strictly regulating international trade. Historically, the Parties have tended not to report their export permit requirements.⁶¹ If Parties assume the exporting Party does not require an export permit and if Parties tend not to report permit requirements, unintentional overuse and misapplication of the exemption is likely. The Convention is based on the basic premise that trade in listed species requires a permit unless an exemption applies.⁶² By establishing a presumption that a permit is not required, regulation of personal and household effects becomes the exception, not the norm. Moreover, a presumption that an export permit is required better comports with the object and purpose of the Convention and better facilitates the sort of trade that both the drafters and the Parties intend to exempt from the permit requirements.

⁶¹ WIJNSTEKERS, *supra* note 33, at 146 (“Practically, the Secretariat has found that Parties rarely report their domestic requirements for permits or lack of requirements for permits.”).

⁶² ROSALIND REEVE, *POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE* 28 (2002).

c. Tourist Souvenirs as Personal and Household Effects

Given the difficulty of interpreting and implementing the terms of the Convention, it is easy to understand why some Parties and non-governmental organizations want to clarify the application of the personal and household effects exemption to “tourist souvenirs.”⁶³ As written, Article VII provides a large exemption for trade in tourist souvenirs of Appendix II specimens. The drafters clearly intended the provision to apply to tourist souvenirs—essentially deeming trade in such specimens per se non-commercial and non-detrimental, probably given the lower levels of tourist souvenir exports at that time. However, the Parties must ensure that the provision is not interpreted so broadly as to exclude from the permit regime any quantity of specimens that accompany an individual in her luggage. In other words, the exemption should not become a means to export quantities of tourist souvenirs that suggest the exporter’s intent to sell the specimens commercially or to export raw or unworked specimens that a dealer could later sell as trinkets or other such worked specimens without the permits and NDFs otherwise required.

Resolution Conf. 13.7 (Rev. CoP14) does not currently avoid this result. It states that a “tourist souvenir specimen” is a personal and household effect acquired outside the owner’s State of usual residence and is not a live specimen.⁶⁴ While the Parties helpfully exclude live specimens from the meaning of “tourist souvenir specimen,” the definition does not provide other qualitative or quantitative restrictions, unless the Parties adopt one with a two-thirds majority vote for a specific species⁶⁵—for example, the Parties have adopted a restriction of up to four specimens of crocodilian species per person as qualifying for the personal and household

⁶³ At the 15th Conference of the Parties considered amending the terms of reference for the working group to also consider the relationship between personal and household effects and hunting trophies. *See* CITES, *Personal and Household Effects*, CoP15 Doc. 40 (2009).

⁶⁴ Res. Conf. 13.7, *supra* note 183 (“DECIDES also that, for the purposes of this Resolution, the term ‘tourist souvenir specimen’ shall apply only to personal and household effects acquired outside the owner’s State of usual residence and not be applied to live specimens”).

⁶⁵ *Id.* at Annex

effects exemption.⁶⁶

To avoid misuse of the exception, the Parties should add two new criteria to the definition of “personal and household effects” to help ensure that trade under the exemption is truly personal and non-commercial. First, personal and household effects should be limited to specimens that are finished products.⁶⁷ Most personal items and tourist souvenirs are finished products. In comparison, most raw materials or unfinished goods will undergo additional processing to become either a usable or a saleable good. Therefore, any specimen, which is a raw material rather than a finished good, is most likely not a personal or a household effect. For example, if a person attempts to export raw mahogany, it is less likely to be a personal item or part of a household move, than a finished mahogany table.⁶⁸ Defining “personal and household effects” as finished goods may not be precise in all instances, but limiting the definition in this way does not have the effect of prohibiting the export of any particular specimen. In fact, the individual would simply need an export permit. This revision recognizes both the intention to allow trade through the application of certain exemptions and the intention to manage trade such

⁶⁶ *Id.* at Agrees(b)(ii).

⁶⁷ David Favre, in his book *International Trade in Endangered Species: A Guide to CITES*, created a set of five parameters to help define “personal and household effects.” First, the personal and household effects exemption cannot be used as a pretense for commercial activities. Second, the specimens cannot be sold or exchanged after importation. Third, in most cases, the product should be a finished product. Fourth, personal ownership should not be a cover for illegal activity; therefore, the specimens must have been acquired legally. Last, the specimens must be goods that are worn or used in personal settings rather than in business situations. FAVRE, *supra* note 96, at 184. Currently the definition of “personal and household effects” limits personal and household effects to personal or non-commercial specimens. Res. Conf. 13.7, *supra* note 183. Practically, the current definition does not create guidelines that help limit the application of the personal and household effects exemption to personal and non-commercial goods. To ensure the specimens exported under the personal and household effects exemption are used for non-commercial or personal purposes, Favre suggests that the specimens should not be sold or exchanged after importation, should be finished products, and should be personal items (i.e. not ones used in business settings). *Id.* However, to require importing Parties to ensure that goods are not actually sold or exchanged after importation is logistically impractical. In addition, limiting the personal and household effects exemption to goods that are objectively used in personal settings does not provide any further guidance beyond requiring that the goods be non-commercial. However, Favre’s last suggestion that the definition should be changed to specify that “personal and household effects” are limited to finished products creates a clear guideline.

⁶⁸ Three species of mahogany are listed in Appendix II. CITES, Appendices I, II, and III (22/05/09), <http://www.cites.org/eng/app/e-appendices.pdf> (listing *Swietenia humilis*, *Swietenia macrophylla* (populations of the Neotropics), and *Swietenia mahagoni* as Appendix II species) (last visited May 24, 2010).

that demand for wildlife products is not detrimental.

Second, the Parties should establish a general quantitative restriction for exports of “personal and household effects” to complement the species-specific limits in Resolution Conf. 13.7 (Rev. CoP14). This general quantitative restriction would limit exports of other “personal and household effects” to quantities suggestive of personal use. This definition would reasonably limit the exemption to quantities indicative of non-commercial intent, while allowing the type of trade that the drafters envisaged under the exemption. A general quantitative limit would also help ensure that any trade in Appendix II specimens under the personal and household effects exemption is not detrimental to the survival of the relevant species.

Lastly, the Parties should also assess the impact of trade in tourist souvenirs on the population or species to ensure that such trade is not detrimental to the survival of the species. The Parties could do this in a way similar to the approval of export quotas. While recognizing that such trade is exempt from the requirement to make an NDF, Article IV(3) of CITES requires the Scientific Authority in each Party to “monitor . . . actual exports of [Appendix II] specimens.”⁶⁹ The Scientific Authority must also advise the Management Authority of “suitable measures” to be taken to limit the grant of export permits for specimens of that species whenever the export of specimens of any Appendix II species “should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I.”⁷⁰ While the provision speaks to limiting export permits, the same justification should be used to limit the use of the personal and household effects exemption for tourist souvenirs. If trade in tourist souvenirs may become detrimental to the survival of a species, then

⁶⁹ CITES, *supra* note 1, at art. IV(3).

⁷⁰ *Id.*

a State of export should limit or eliminate the use of the personal and household effects exemption for that species and allow trade only upon issuance of an export permit.

2. Captive Breeding of Appendix I Specimens

The application of CITES to captive-bred specimens has long been a contentious issue for the Parties. In fact, the drafters of CITES also struggled with the relationship between the Convention's species protection goals and trade in captive-bred specimens.⁷¹ The relationship is difficult to define for a number of reasons. On one hand, captive-bred specimens, traded as live animals or as parts or derivatives, are not taken from the wild, suggesting that the trade would have no impact on the survival of the species in the wild.⁷² In addition, breeding facilities may have conservation goals and may sustain a species in the wild or re-introduce a species in an area of extinction.⁷³ On the other hand, traders may capitalize on the market for captive-bred specimens and trade wild caught specimens, possibly falsely labeled as specimens bred in captivity.⁷⁴ In addition, at times specimens must be taken from the wild to supply the breeding stock of a particular captive-bred specimen, thus reducing the species' existing wild population and possibly inhibiting its ability to rebound from population declines. In either context, regardless of species endangerment concerns, animals suffer in captive breeding situations and broad interpretation risks promoting wildlife farming and industrialization of wildlife.

The drafters' and later the Parties' attempts to weigh the various costs and benefits of

⁷¹ Washington Conference, *supra* note 34, Summary Record — Third Plenary Session, S/R3 (Final) (Feb. 24, 1973).

⁷² CITES, *Relationship Between ex situ Production and in situ Conservation*, para 2, AC19 Inf. 5 (2003) (noting that with proper regulations, captive breeding would not cause detriment to wild populations) [hereinafter AC19 Inf. 5].

⁷³ Craig R. Enochs, *Gone Today, Here Tomorrow: Policies and Issues Surrounding Wildlife Reintroduction*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 91, 94 (1997) (noting that captive breeding operations helped recover the whooping crane and the black-footed ferret populations).

⁷⁴ Garrison, *supra* note 67, at 327.

captive breeding is evident in the plain language of the Convention and in the many resolutions that have tried to further define the Convention's captive breeding provisions. As in the case of personal and household effects, the drafters understood that certain trade in captive-bred specimens would not impede conservation efforts, and they even understood that captive breeding could reduce exploitation of wild populations.⁷⁵ However, the exemptions are poorly drafted and ambiguous. Because of this, and as described below, the Parties have struggled to define the scope and relationship between the two exemptions.

*a. Two Paragraphs, Two Exemptions*⁷⁶

The drafters clearly contemplated that trade in captive-bred specimens was unlikely to cause over-exploitation of wild species as long as some control over the trade was in place. For that reason, the drafters created the following two exemptions from the permit requirements of Article III, IV, and V for captive-bred specimens. Article VII(4) states that “specimens of an animal species included in Appendix I bred in captivity for commercial purposes . . . shall be deemed to be specimens of species included in Appendix II.”⁷⁷ This means that a trader may trade captive bred Appendix I specimens for commercial purposes as long as she obtains an Appendix II export permit. Article VII(5) provides that “[w]here a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity . . . a certificate by the Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Article III, IV or V.”⁷⁸ The plain language of Article VII(5) suggests that a Party may trade in captive bred specimens of any listed species

⁷⁵ Washington Conference, *supra* note 34, Summary Record — Third Plenary Session, S/R6 (Final) (Feb. 28, 1973); AC 19 Inf. 5, *supra* note 203; *see also* CITES, *Resolution*, para 5, Res. Conf. 1.6 (Rev.) (1976) (encouraging captive breeding in relation to the pet trade) [hereinafter Res. Conf. 1.6].

⁷⁶ While the exemptions also apply to plant species, this section only discusses captive breeding of animal species because the Parties have struggled more significantly with applying the exemptions to animals.

⁷⁷ CITES, *supra* note 1, at art. VII(4).

⁷⁸ *Id.* at art. VII(5).

as long as the Management Authority in the State of export issues a “certificate.” In other words, all captive-bred specimens are exempt from all permit requirements.

The language of the Convention is facially ambiguous because Article VII(5) is not limited in scope and by its plain language covers all captive-bred specimens, presumably even those covered by Article VII(4). If Article VII(5) is interpreted as broadly as the plain language suggests, Article VII(4) becomes superfluous. Given that the drafters took care to include two exemptions and that treaties should not be interpreted so as to render provisions superfluous or meaningless, the Parties must give effect to both provisions.⁷⁹ The Parties have long struggled to best give effect to the distinction between the two exemptions, especially as it pertains to Appendix I captive-bred specimens.

The Parties’ current interpretations have the effect of reducing the scope of Article VII(4) and broadening the scope of Article VII(5) for Appendix I specimens, as follows:

- Article VII(4) deals with the import of specimens of Appendix I species that have been bred in captivity for commercial purposes (for example, sale in pet stores). These facilities must be registered before they can begin selling their offspring under the exemption. Once registered, these specimens bred in captivity may be traded for commercial purposes, provided that an export permit is issued consistent with Article IV.
- Article VII(5) deals only with the import of specimens of Appendix I species bred in captivity for noncommercial purposes (for example, reintroduction to the wild, such as gold lion tamarins at the National Zoo in the United States for reintroduction in Brazil). These need only a certificate of captive breeding; they do not require the issuance of any import or export permits. Significantly, these specimens may be traded for commercial or non-commercial purposes.⁸⁰

Thus, the Parties interpret each paragraph as a distinct exemption, but the basis for the distinction is the nature of the breeding facility—registered commercial breeding facilities may trade pursuant to Article VII(4) and only non-commercial breeding facilities may trade pursuant to

⁷⁹ See SINCLAIR, *supra* note 21, at 114–15.

⁸⁰ CITES, *Specimens of Animal Species Bred in Captivity*, at Preamble para 4, Res. Conf. 10.16 (Rev.) (1997).

Article VII(5), but these “non-commercial” facilities may export specimens for commercial purposes. By emphasizing the nature of the facility as the distinction between paragraphs (4) and (5), as opposed to the nature of the trade, the Parties may have read the application of paragraph (5) to Appendix I specimens more broadly than the drafters’ intended.

Certainly, it would have been equally plausible to interpret paragraph (4) as applying to trade in Appendix I specimens bred in captivity for commercial purposes and paragraph (5) as applying to trade in Appendix I specimens bred in captivity for non-commercial purposes and trade in all captive-bred Appendix II specimens. In this way, commercial trade under paragraph (4)—regardless of the nature of the facility—would require an export permit and thus an NDF. Trade for non-commercial purposes, with a presumption of less harmful impacts, would need only a certificate, regardless of the nature of the facility. Given the overall distinction in CITES between commercial trade and non-commercial trade, this interpretation would seem more consistent with the structure of CITES.

The potential for the exemptions to be loopholes for trade in wild-caught specimens further supports a narrow reading of Article VII(5). The Parties acknowledge that captive breeding programs may provide conservation benefits by reducing poaching of wild species through supplying captive specimens to meet consumer demands.⁸¹ Even though this potential exists, high levels of wild Appendix I specimens continue to be declared as captive-bred and traded contrary to CITES.⁸² In fact, some Parties have expressed concern that the commercial trade allowed under Article VII paragraphs (4) and (5) actually stimulates poaching of many

⁸¹ Res. Conf. 1.6, *supra* note 206, at (b) (identifying benefits of captive breeding in relation to the pet trade); Res. Conf. 8.3, *supra* note 81, at Preamble para 6 (recognizing legal trade of wildlife can provide incentives to reduce poaching).

⁸² CITES, *Review of Alleged Infractions and Other Problems of Implementation of the Convention*, para 22, Doc. 9.22 (Rev.) (1994); *see generally id.* at Annex (summarizing alleged infractions, some of which include fraudulent use of the captive breeding exemption).

Appendix I species.⁸³ Oftentimes, wild specimens are easier to obtain, less expensive to produce, and preferred by consumers over captive-bred specimens. While Parties require captive-bred specimens to be marked in a manner clearly distinguishable from wild specimens, reliable mechanisms to verify claimed origins do not exist.⁸⁴ Consequently, the only readily available way to combat elevated levels of Appendix I poaching is through adequate enforcement from all Parties on the national level.⁸⁵ To accomplish this, the Parties must construe the captive breeding exemptions narrowly.

b. The Role of the Captive Breeding Registry

To give full effect to the early understanding of the distinction between Article VII, paragraphs (4) and (5), the Parties adopted a registration process for breeding facilities commercially trading Appendix I specimens under Article VII(4).⁸⁶ Parties intended that such a registry would reduce the high volumes of wild Appendix I specimens laundered under the exemption.⁸⁷ However, over time, the registration procedure has become overly complex as both the Secretariat and the Parties have become more active in reviewing applications to determine

⁸³ CITES, *Interpretations and Implementation of the Convention, Exemptions and Special Trade Provisions, Operations that Breed Appendix-I Species in Captivity for Commercial Purposes, Evaluation of the Process for Registration*, at Annex point 6, CoP13 Doc. 56.1 (2004) [hereinafter Report of the Animals Committee].

⁸⁴ CITES, *Guidelines for a Procedure to Register and Monitor Operations that Breed Appendix-I Animal Species for Commercial Purposes*, para 11(f), Res. Conf. 12.10 (Rev. CoP14) (2002).

⁸⁵ Report of the Animals Committee, *supra* note 214, at Annex point 6.

⁸⁶ CITES, *Control of Captive Breeding Operations in Appendix I Species*, at Recommends (a) and (c), Res. Conf. 4.15 (1983).

⁸⁷ William C. Burns & C. Thomas Duncan Mosedale, *European Implementation of CITES and the Proposal for a Council Regulation (EC) on the Protection of Species of Wild Fauna and Flora*, 9 GEO. INT'L ENVTL. L. REV. 389, 410 & n.153 (1997).

whether specimens produced by a facility qualify as “bred in captivity.”⁸⁸ Consequently, many Parties ignore the registration requirement and continue to trade Appendix I specimens from unregistered facilities for commercial purposes.⁸⁹ Some unregistered facilities continue to trade under Article VII(4) while others trade high volumes of specimens under Article VII(5).⁹⁰

The Secretariat has long opposed the required registration for commercial breeding facilities and believes that individual Management Authorities should determine a breeding facility’s eligibility to trade under Article VII(4).⁹¹ On one hand, the Secretariat may be right: if the Parties continue to blur the application of Article VII, paragraphs (4) and (5), the mandatory registration requirement seems less useful and the resources invested in maintaining the registration process may no longer be justifiable.⁹² On the other hand, if the Parties reinterpret paragraph (4) as applying to imports for commercial purposes and paragraph (5) as applying only to imports for non-commercial purposes, then the registry would be a useful compliance and enforcement tool.

The ambiguity of the captive breeding exemptions has resulted in long-standing interpretive issues for the Parties. Although the Parties have adopted several resolutions to

⁸⁸ The Secretariat cannot list a breeding facility until evidence is submitted to show compliance with “bred in captivity.” The first commercial breeding operation for an Appendix I species must receive a two-thirds majority vote from the Parties to be included in the registry. CITES, *Control Procedures for Commercial Captive Breeding Operations*, Res. Conf. 6.21 (1987). At COP7, the Parties adopted specific procedures and scientific standards for approval by the Parties for first time species listed in the registry. CITES, *Format and Criteria for Proposals to Register the First Commercial Captive-Breeding Operation for an Appendix I Animal Species*, Res. Conf. 7.10 (1989). Parties may object to proposed listing, automatically triggering a review by the Animal Committee. CITES, *Guidelines for a Procedure to Register and Monitor Operations Breeding Appendix-I Animal Species for Commercial Purposes*, Res. Conf. 8.15 (Rev.) (1992) (clarifying the roles of the Secretariat, Management Authority submitting the application, and other Parties). Unresolved objections are determined at the next Conference of the Parties by a two-thirds vote. *Id.*

⁸⁹ CITES, *Interpretation and Implementation of the Convention, Trade Control, Trade in Appendix-I Species*, at Annex 2 pt. 2, SC54 Doc. 20 (2006).

⁹⁰ *Id.* at 21.

⁹¹ CITES, *Review of Resolutions, Annex 12: Resolution Conf. 12.10 (Rev. CoP14), Guidelines for a Procedure to Register and Monitor Operations that Breed Appendix-I Animal Species for Commercial Purposes*, para 7, CoP15 Doc. 18 (2009) (“The Secretariat is of the long-standing opinion that the registration programme for animals is unnecessarily complicated.”).

⁹² *Id.* (estimating the breeding registry costs \$65,000 per year to maintain).

address these shortcomings, further review is needed to eliminate any possible loopholes created by the Parties' interpretations of the exemptions. This includes reevaluating the current distinction between the exemptions, the emphasis on the nature of the breeding facility, and altering the registration process for facilities wishing to trade under Article VII(4).