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ADRIANA CAMPUZANO

Endangered Species Protection: A Proposal to Modify the Legislation in Colombia
(Under the direction of THOMAS J. SCHOENBAUM)

The Convention of International Trade of Endangered Species of Wild Fauna and Flora (“CITES”) is praised as a successful international treaty in protecting and preserving endangered species. However, the effectiveness of CITES is reliant upon member States enforcing and implementing CITES provisions. Colombia has enacted laws implementing CITES but has experienced an increase in the number of endangered species despite these laws. On the other hand, the United States’ implementation of CITES through the Endangered Species Act (“ESA”) is viewed as a sophisticated and successful CITES implementation programs.

This thesis makes an attempt to offer viable proposals to help improve the current endangered species protection system in Colombia. To achieve this goal, the existing U.S. and Colombian legal frameworks are compared and contrasted. Finally, a series of recommendations are offered to the Colombia’s species protection in view of the ESA.

INDEX WORDS: Convention of International Trade of Endangered Species of Wild
Fauna and Flora, U.S. and Colombia Endangered Species
Legislation

ENDANGERED SPECIES PROTECTION: A PROPOSAL TO MODIFY THE
LEGISLATION IN COLOMBIA

by

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CHAPTER 1

INTRODUCTION

Aware of the importance of preserving the fauna and flora species from over exploitation through trade, the international community developed a system directed to the preservation of the species. This system is laid out in the Convention of International Trade of Endangered Species of Wild Fauna and Flora (“CITES”)¹, which has been in effect since 1975. CITES has been praised as the most successful of all international treaties regarding endangered species preservation².

CITES attempts to protect fauna and flora endangered species by establishing a compromise between the member States to control their particular trade of species³. Therefore, the effectiveness of CITES relies on the member States enforcement and implementation of CITES provisions.

The United States has implemented CITES by enacting the Endangered Species Act (“ESA”), a comprehensive and sophisticated statute for the preservation of endangered species⁴. The ESA objective is not only to establish a

¹ CITES, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, ELR STAT. 40336.

² John B. Heppes and Eric J. McFadden, *The Convention on International in Endangered Species: Improving the Prospects for Preserving our biological Heritage*, 5 B.U. Int’l L.J. 229, 229 (1987) (quoting Simon Lyster, *International Wildlife Law*, 240 (1985)

³ CITES, *supra* note, art. VIII (1)

⁴ See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978), noting that the U.S. claim to have one of the most organized CITES implementation program in the world.

program to achieve CITES goals, but also to conserve and recover the species in danger of extinction.

On the other hand, Colombia has implemented CITES primarily by enacting Law 99 of 1993. As opposed to the ESA, Colombian rules do not go beyond regulating the trade of the protected species under CITES. In addition, as a means of improving CITES effectiveness, Colombian laws relies on the idea of sustainable use of endangered species rather than completely prohibit the trade of such species. However, the number of endangered animal and plant species has increased over the years as a result of inadequate environmental protection policies and their implementation.¹

This dissertation is therefore devoted to study CITES legal framework and its implementation by United States and Colombia. Finally, the dissertation evaluates the Colombian efforts to execute CITES and suggests recommendations in light of the one of the most sophisticated CITES implementation programs of all the signatories of the treaty, the ESA.

¹ Constitutional Court, Judgement C-305, July 13, 1995. Justice Alejandro Martinez Caballero. Reprinted in *Regimen Legal del Medio Ambiente*, s. 1116. Legis editores, (1st ed. 1997)

CHAPTER 2

CONVENTION ON THE INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES)

On March of 1963, the representatives of several nations joined together in Washington D.C. to sign CITES, which is “perhaps the most successful of all international trade treaties dealing with the conservation of wildlife”¹. Through this treaty, the parties of the Convention, are seeking to protect wildlife fauna and flora from excessive exploitation caused by unregulated international trade.²

In order to meet the protection of the species goal, CITES employs the use of permits to trade wildlife fauna and flora. As a result, the trade of the protected species is not banned but limited and regulated.³ The permits required to trade the protected species are issued by the government of the countries involved in such a transaction. The requirements to obtain these permits varies according to the

¹ John B. Heppes and Eric J. McFadden, *The Convention on International in Endangered Species: Improving the Prospects for Preserving our biological Heritage*, 5 B.U. Int’l L.J. 229, 229 (1987) (quoting Simon Lyster, *International Wildlife Law*, 240 (1985)

² CITES, *supra* note 2, preamble. In terms of the Convention, trade means to export, re-export, import and introduce the wildlife species by sea.

³ CITES, *supra* note 2, arts. II, III, IV, V, VI. S. Exec. Rep. No. 14, 93d Cong., 1st. Sess. (1973).

protection deemed necessary for the species, either because of vulnerability of the species to trade or its danger of extinction.¹ The Convention, relies on the premises that every country is, and should be, the best protector of their native species.² Therefore, the implementation of this system of government permits is left to each country that is a party to the Treaty. The parties, thus, are entitled to adopt stricter measures than that established in CITES or even prohibit the trade of the species.³ Essentially, the CITES treaty is only a floor for species protection. The success of CITES depends, therefore, on the international cooperation.⁴

A. CITES Appendices

CITES based its different degree of protection on the amount of protection deemed required by the wildlife fauna and flora by classifying the species in one of three appendices.⁵ Each appendix represents a different level of trade restriction. Before trading any endangered species at the international level, the importers, exporters or re-exporters of the species at issue, must complete the requirements set forth in the respective appendix and obtain a trade permit.⁶ This permit applies to “specimens”, which includes alive or death species, subspecies, separate population as well as “any readily recognizable part or derivated thereof.”⁷

¹ *Id.*

² CITES, *supra* note 2, Preamble.

³ CITES, *supra* note 2, art. XIV (1) (a) - (b).

⁴ CITES, *supra* note 2, arts. III, IV, V.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at art. 1

Appendix I contains a list of species threatened with extinction and are currently affected by trade.⁸ Because of the danger that Appendix I species are facing, trade with these species is strictly regulated and may only be approved under exceptional circumstances.⁹ Thus, CITES requires for one to trade these species, both export and import permits. In order to obtain the export permit, the designated scientific authority of the exporting country must determine three crucial issues. The first issue is whether or not such a trade is detrimental to the species' survival.¹⁰ The second issue to be established is whether or not the endangered species have been obtained in violation of the laws of the exporting country.¹¹ The third and final issue is whether the specimen that is alive is being transported in a way that minimizes the risk of jeopardy to the species.¹² On the other hand, in order for one to obtain the import permit three conditions must be met. First, the scientific authority of the importing country should determine that the import of the species is not detrimental to the species' survival.¹³ Second, the same authority must find that the recipient of the living wildlife has suitable accommodations to transport and care for the species.¹⁴ Third, the Management Authority must make a determination that the importation of the species is not primarily for commercial purposes.¹⁵

Appendix II lists species that may become threatened with extinction unless their trade is regulated and controlled as to prevent "utilization

⁸ *Id.* at art. II (1).

⁹ *Id.*

¹⁰ *Id.* at art. III (2) (a).

¹¹ CITES, *supra* note 2, art. III (2) (b).

¹² *Id.* at art. III (2) (c).

¹³ *Id.* at art. III (3) (a).

¹⁴ *Id.* at art. III (3) (b).

incompatible with the [species] survival.”¹⁶ Trade is prohibited when it may causes a detriment to the species existence.¹⁷ The permit requirements to export an Appendix II species are similar to those in Appendix I. However, the import permit it is not required. Another difference between Appendix I and II species is that CITES does not prescribe a outright prohibition to trade an Appendix II species for commercial purposes.¹⁸

Both Appendix I and II include the “whole genera of a species if ‘most of their species are threatened with extinction and if identification of individual species within the genus is difficult’.”¹⁹ The purpose of the protecting the entire family of the species is to control “look-alike” species trade and, therefore, prevent violations of CITES’ controls.²⁰

Appendix III gives every Convention party the option to include its native species, which, although already being protected within the party’s national borders, now is granted international protection.²¹ Trade with an Appendix III species requires an export permit. In this case, the requirements to obtain the permit are less strict than those that apply to an Appendix I or II species.²² To import the species, the party must present a certificate of origin.²³

¹⁵ *Id.* at art. III (3) (c).

¹⁶ *Id.* at art. II (2) (a).

¹⁷ *Id.* at art. IV (2) (a).

¹⁸ *Id.* at art. IV (4).

¹⁹ Michelle Ann Peters, Comment: *The Convention on International Trade of Endangered Species of Wild Fauna and Flora: An Answer to the Call of Wild?*, 10 Conn. J. Intl. L. 169, 176 (1994) (quoting Simon Lyster, *International Wildlife Law* 239, 243 (1985)). According to the comment the protection of the whole genera of the species is known as the Berne Criteria. *Id.* at FN 56

²⁰ *Id.*

²¹ CITES, *supra* note 2, art. II (3).

²² *Id.* at art. V (2). This provision only requires that the exporter country authorities determine that the specimen was obtained in accordance with the national laws, and the use of adequate shipment to protect the alive species.

²³ *Id.* at art. V (3).

B. Obligations of the Parties

Articles VIII and IX of the CITES Treaty, explicitly laid out the Parties to the Treaty obligations. These provisions obligate the parties to take adequate measures to implement the Convention and enforce its provisions,²⁴ designate a scientific and management authorities to regulate trade,²⁵ submit national reports to the Secretariat regarding the implementation of the Convention,²⁶ and designate ports of exit and entry for the specimens trade.²⁷

1. National legislation to implement CITES

The Convention recognizes that countries could not commandeer the sovereigns or legislators of other countries.²⁸ Therefore, the Convention leaves it up to the parties to “take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof.”²⁹ Thus, the Convention implementation and enforcement is vested solely in national laws. As a consequence, “[w]hen measures are not taken [by the parties] the effectiveness of [CITES] is seriously undermined.”³⁰ The parties are expected to penalize trade and/or possession of the endangered species,³¹ as well as to confiscate or return illegally traded species to the exporting country.³²

²⁴ *Id.* at art. VII (1).

²⁵ *Id.* at art. IX (3).

²⁶ *Id.* at art. VII (7).

²⁷ *Id.* at art. VII (3).

²⁸ 16 I.L.M. 390, 392 (1977).

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

³⁰ CITES Secretariat, Implementation of the Convention within the European Union, Proceedings of the Ninth Meeting of the Conference of the Parties, U.N./CITES Doc. 9.23, 4 - 5 (1994). *See also*, Thomsen and Brautigam, *CITES in the European Economic Community: Who Benefits?*, 5 B.U. Int'l L.J. 269, 273 (1987)

³¹ CITES, *supra* note 2, at art. VIII (1) (a).

³² *Id.* at art. VIII (1) (b).

2. Management and Scientific Authorities

The member States must designate Management and Scientific Authorities to implement CITES.³³ The former is responsible for issuing the import and export permits,³⁴ deny or cancel these permits,³⁵ enforce the confiscation mechanisms,³⁶ and to waive articles III, IV, V obligations.³⁷ The Scientific Authority, in turn, is responsible for determining whether the trade is detrimental or not for the species' survival,³⁸ and monitors the export on endangered species.³⁹

3. National Reports

Member countries should maintain records of trade for species included in Appendices I, II and III of CITES.⁴⁰ These reports should contain information about the exporters and importers of the wildlife,⁴¹ identification of the species and the countries involved in the transaction.⁴²

In addition, CITES requires the parties to prepare annual and biennial reports concerning the implementation of the Convention and to report them to the Secretariat.⁴³ The annual report should contain a summary of all the incoming and outgoing trade involving the protected species.⁴⁴ The biennial report must

³³ *Id.* at art. IX (1).

³⁴ *Id.* at arts. IX (1) (A); III; IV; V.

³⁵ *Id.*

³⁶ *Id.* at art. VIII (4) (b).

³⁷ *Id.* at art. VII.

³⁸ CITES, *Supra* note 2, at arts. III (2) (a) - (3) (a) - (5) (a); IV (2) (a).

³⁹ *Id.* at art. IV (3).

⁴⁰ *Id.* at art. VIII (6).

⁴¹ *Id.* at art. VIII (6) (a).

⁴² *Id.* at art. VIII (6) (b).

⁴³ *Id.* at art. VIII (7).

⁴⁴ *Id.* at art. VIII (7) (a).

cover all the legislative and administrative measures taken by the party to enforce CITES.⁴⁵

Accurate record keeping and trade reports are essential to CITES' effective operation. In fact, all the data received from the parties is processed by the Wildlife Trade Monitoring Unit of the IUCN.⁴⁶ The results of the analysis of the data gathered provides the basis for updating CITES' appendices,⁴⁷ and to become aware of illegal trade transactions regarding protected species.⁴⁸ Moreover, the records and reports help the Secretariat to uncover discrepancies that the member parties have concerning the interpretation or application of CITES.⁴⁹

4. Designation of ports

To facilitate the transit of protected species, the parties may designate inbound or outbound ports, or both, where specimens are presented for clearance.⁵⁰ The port designation allows the parties to gather their wildlife inspectors and record keepers at ports that have the highest activity with international trade.⁵¹ As a consequence, it will be easier for the parties to be

⁴⁵ *Id.* at art. VIII (7) (b).

⁴⁶ William C. Burns, *CITES and the Regulation of International Trade in Endangered Species of Flora: A critical appraisal*, 8 Dick. J. Int'l L. 203, 213 (1990)

⁴⁷ CITES Secretariat, Proceedings of the Third Meeting of the Conference of the Parties, U.N./CITES Doc. 3.6, Annex 3, 297 - 303 (1991).

⁴⁸ *Id.* See also, CITES Secretariat, Proceedings of the Fifth Meeting of the Conference of the Parties, U.N./CITES Conf. 5.5, (1985.).

⁴⁹ Alan H. Schonfed, *Note, International Trade in Wildlife: How Effective is the Endangered Species Treaty?*, 15 Cal. W. Int'l L.J. 111, 128 (1985)

⁵⁰ CITES, *Supra* note 2, at art. VIII (3).

⁵¹ Sarah Fitzgerald, *International Wildlife Trade: Whose Business is it?*, 325 (1st ed. 1989)

assure of the compliance of all CITES' trade requirements, as well as the proper care given to the species during their transportation.⁵²

C. Exceptions to CITES

CITES contains seven exceptions under which it is not applicable to the import or export permit requirements established in articles III, IV, and V of CITES. The first exception covers goods in transit.⁵³ CITES does not require permits from countries where the species makes a temporary lay over in a port before moving onto its final destination. However, the species must remain under customs control.⁵⁴

The second exception relates to specimens acquired prior to the date CITES was deemed in force, July 1, 1975.⁵⁵ Species acquired before either being listed in CITES' appendices or before the country became a party to the Convention do not require import or export permits as well.⁵⁶

The third exception is related to the personal or household effects.⁵⁷ People are not required to show import or export permits when traveling with these items. Nevertheless, this exception does not apply when the Appendix I or II species is acquired in a foreign country and are being imported into the country of residence of the traveler.⁵⁸ In practice, the personal and household exemption is difficult to enforce mainly because CITES does not define the meaning or scope of the concept "personal or household effects".

⁵² CITES, Supra note 2, at art. VII.

⁵³ *Id.* at art. VII (1).

⁵⁴ *Id.*

⁵⁵ ELR. STAT. 40336.

⁵⁶ CITES, Supra note 2, at art. VII (2).

⁵⁷ *Id.* at art. VII (3).

⁵⁸ *Id.* at art. VII (3) (a) - (b).

The fourth exception includes Appendix I specimens bred in captivity or plant species artificially propagated for commercial purposes.⁵⁹ In this case, the Appendix I species receive the treatment of an Appendix II species.⁶⁰ In other words, to trade Appendix II specimens, all that is needed is an export permit.

The fifth exception pertains to Appendix II or III specimens bred in captivity or plant species artificially propagated for commercial purposes.⁶¹ For one to trade these species, all that is required is a certificate issued by the Management Authority authorizing the transaction.⁶²

The sixth exemption relates to non-commercial trade.⁶³ No import or export requirements are needed to trade species that are “non-commercial loan, donation, or exchange between scientist or scientific institutions registered by a Management authority of their State, of herbarium specimens, and live plant material which carry a label issued or approved by a Management authority.”⁶⁴

The seventh and final exception allows for movement of species without permits whenever the species are part of a traveling zoo, circus or exhibitions, provided that the full details of the species are registered with the Management Authority. The species are either under exceptions number II or IV, and the method for transportation of the specimens is deemed adequate.⁶⁵

⁵⁹ *Id.* at art. VII (4).

⁶⁰ *Id.*

⁶¹ *Id.* at art. VII (5).

⁶² *Id.*

⁶³ CITES, Supra note 2, at art. VII (6).

⁶⁴ *Id.*

⁶⁵ *Id.* at art. VII (7) (a) - (c).

D. Reservations

Article XXIII of the Treaty allows the parties to make reservations with respect to the trade of the species listed in Appendices I, II or III, or parts or sub-products of species include in Appendix III.⁶⁶ CITES does not establish limits or restrictions to the parties to exercise their right to make a reservation.⁶⁷ The party that enters a reservation is considered a third party with respect to the trade of the species upon which the reservation was placed.⁶⁸ Therefore, the Convention does not require parties who have made a reservation to fulfill CITES' obligations or to provide trade reports. As a consequence, "the greater the number of reservations made by a country, the more the viability of CITES will be threatened."⁶⁹ Nevertheless, CITES drafters did not consider the reservation provision a shortcoming of the Convention. In fact, the drafters assumed that "the benefit of having numerous parties to the nascent Convention seemed to outweigh the potential abuse of this reservation provision."⁷⁰

E. Trade with non-parties to the Convention

CITES allows the parties to trade wildlife species with countries who are non-parties to the Convention.⁷¹ To trade the protected species with these third-party states, it is adequate to present "comparable documentation issued by the competent authorities in that State which substantially conforms with the

⁶⁶ CITES, Supra note 2, at art. XXIII (2).

⁶⁷ *Id.* at art. XXIII (3).

⁶⁸ *Id.*

⁶⁹ See Peters, Supra note 12, at 185.

⁷⁰ Karl Jonathan Liwo, *The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora during the 1990's*, 15 Suffolk Transnat'l L.J. 122, 138 (1991).

⁷¹ CITES, Supra note 2, at art. X.

requirements of the present Convention for permits and certificates...”⁷². This provision has been severely criticized because CITES does not provide any guidance to determine the scope of the terms “comparable documentation” or “substantially conforms”.

F. Administrative infrastructure

1. Secretariat

The Convention established a Secretariat located in Lausanne, Switzerland, to assist members in their implementation of CITES.⁷³ The parties are responsible for implementing and enforcing CITES within their own territory.⁷⁴ The Secretariat merely performs administrative duties to enforce the Convention.⁷⁵ The Secretariat’s administrative duties include: (1) setting the meetings for the parties;⁷⁶ (2) taking part in the process of Amending Appendix I, II, or III;⁷⁷ (3) providing scientific and technical support to the parties to implement the Convention;⁷⁸ (4) monitoring the parties implementation of CITES;⁷⁹ (5) calling the parties attention regarding their obligations under CITES;⁸⁰ (6) updating and distributing editions of Appendices I, II or III;⁸¹ (7) preparing annual reports regarding its work as well as the implementation of

⁷² *Id.*

⁷³ CITES Secretariat, Proceedings of the Ninth Meeting of the Conference of the Parties, U.N./CITES Doc. 9.6, 1 (1994).

⁷⁴ *See* comments Chapter III (b) (1) of this dissertation.

⁷⁵ CITES, *Supra* note 2, at art. XII.

⁷⁶ *Id.* at art. XII (2) (a).

⁷⁷ *Id.* at art. XII (2) (b).

⁷⁸ *Id.* at art. XII (2) (c).

⁷⁹ *Id.* at art. XII (2) (d).

⁸⁰ *Id.* at art. XII (2) (e).

⁸¹ *Id.* at art. XII (2) (f).

CITES;⁸² (8) making recommendations on the implementation of the Convention.⁸³

The Secretariat may be assisted by qualified inter-governmental or non-governmental organizations as well as national agencies.⁸⁴ These organizations are allowed to participate in the Conference of the parties as observers but have no right to vote.⁸⁵ However, these organizations have played an active role regarding CITES implementation. These organizations monitor the parties enforcement of CITES, prepare scientific and technical studies, train customs inspectors and provide advise to less developed parties.⁸⁶ Thus, inter and non-governmental agencies “oversight of parties’ implementing actions under CITES has been a key variable in achieving whatever success CITES has achieved. In the absence of [these organizations] participation, CITES would very likely have followed the route of many other international wildlife measures into obscurity.”⁸⁷

2. Conference of the parties

CITES provides for biennial conferences of the parties and for extraordinary meetings at any time.⁸⁸ At these meetings, the parties discuss and analyze the implementation of the Convention,⁸⁹ adopt amendments to the appendices,⁹⁰ and make recommendations to improve the effectiveness of

⁸² *Id.* at art. XII (2) (g).

⁸³ *Id.* at art. XII (2) (h).

⁸⁴ *Id.* at art. XII (1)

⁸⁵ *Id.* at art. XI (7).

⁸⁶ Laura H. Kosloff and Mark C. Trexler, *The Convention on International Trade in Endangered Species: Enforcement Theory and Practice in the United States*, 5 B.U. Int’l L.J. 327, 335-36 (1987)

⁸⁷ Laura H. Kosloff and Mark C. Trexler, *The Convention on International Trade in Endangered Species: No Carrot, But Where is the Stick?*, 17 ELR 10222, 10226 (1987).

⁸⁸ CITES, *Supra* note 2, at art. XI (2).

⁸⁹ *Id.* at art. XI (3)

⁹⁰ *Id.* at art. XI (3) (b)

CITES.⁹¹ Also, at the extraordinary meetings, the parties may consider and adopt amendments to CITES.⁹² Such amendments must be approved by a “two-thirds majority of the parties present and voting”.⁹³

⁹¹ *Id.* at art. XI (3) (e)

⁹² *Id.* at art. XVII (1)

⁹³ *Id.*

CHAPTER 3

U.S. IMPLEMENTATION OF CITES

The United States has implemented CITES primarily through the enactment of the Endangered Species Act (ESA)¹ and the Lacey Act.² The United States “has responded to CITES with a system of complex, highly sophisticated programs which regulate the import and export of wildlife and wildlife products. The United States has taken a lead among CITES parties in wildlife legislation essentially because of its wealth and resources.”³

A. The Endangered Species Act (ESA)

ESA’s objective is to establish a program to conserve the endangered and threatened species and to take the necessary steps to achieve CITES goals.⁴ For this purpose, the regulations below were conceived and issued.

1. Management and Scientific Authorities

ESA appoints the Secretary of Interior and the Secretary of Commerce as Management and Scientific Authorities under CITES.⁵ The ESA further provides that the Secretary must perform its duties, through the United States Fish and

¹ 16 U.S.C. s 1431- 1543 (1991)

² 16 U.S.C s 3371 - 3378 (1994).

³ Shennie Patel, *The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn*, 18 Hous. J. Intl’l L. 157, 173 (1995)

⁴ 16 U.S.C. s 1531 (b).

⁵ 16 U.S.C. s 1537 (a). This dissertation uses the term “Secretary” to refer to the “Secretary of Commerce” or the “Secretary of Interior” indistinctively, because the duties of either Secretary are similar. The term “Secretary” is used as well to refer to the agencies through which the Secretary acts, “NMFS” or “FWS”.

Wildlife Service (FWS),¹ a subdivision of the Department of Interior. The FWS is in charge of protecting the terrestrial species. The Secretary of Commerce, acting through the National Marine Fisheries Service (NMFS) is responsible for marine species.² Both FWS and NMFS are allowed to issue Federal Regulation to implement CITES.³

2. Listing Endangered Species

i) Listing Process. The ESA requires that the endangered or threatened species⁴ of fish, wildlife or plants be identified and listed⁵ by publication in the Federal Register⁶. Only the species that are listed in this register are entitled to receive the protection provided by the act. The listing process is, therefore, the keystone of the ESA⁷.

The first duty assigned by the ESA to the Secretary is to determine whether to list the species as endangered or threatened.⁸ A species is considered endangered when the species is in “danger of extinction throughout all or significant portion of its range”.⁹ A species is threatened when is likely to become endangered within the foreseeable future.¹⁰ The ESA establishes a listing of criteria to be considered by the Secretary when making the listing

¹ *Id.*

² 16 U.S.C. s 1532 (15); 1533 (a) (2).

³ See 16 U.S.C. s 1531 (C) (1). “Federal authorities shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” *Id.*

⁴ According to the ESA the term “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any subspecies of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. s 1532 (16) (1988)

⁵ 16 U.S.C. s 1533 (a) (1).

⁶ 16 U.S.C. s 1533 (b) (3).

⁷ H. R. Rep. No.567, 97th Cong, 2d Sess. (1982). Reprinted in 1982 U.S.C.C.A.N. 2807, 2810

⁸ 16 U.S.C. s 1533 (a) (1)

⁹ 16 U.S.C. s 1532 (6); 1533 (a)

¹⁰ 16 U.S.C. s 1532 (20).

determination. The criteria include five factors such as habitat modification or degradation, overutilization of the species for different purposes, disease or predation, inadequacy of the current mechanism of protection, and all other man-made factors that might affect the species existence.¹¹ In addition, Congress, through the 1982 ESA's Amendment, directs the Secretary to make the listing classification "solely on the basis of the best scientific and commercial data available to him".¹² As a consequence, the economic impacts of listing a species are not to be considered.¹³

Listing entails the following regulated process. The Secretary may start the process by his own initiative or by petition of an interested person.¹⁴ The Secretary has ninety days to determine whether or not the petition contains "substantial scientific or commercial information" to continue the process.¹⁵ If the petition contains the substantial information required, the Secretary has twelve months to decide whether the listing petition may be warranted, not warranted, or warranted but its proposal, promulgation and implementation precluded by pending proposals of other species¹⁶ in greater danger.¹⁷ This decision is subject to judicial review.¹⁸ The judicial review is governed by two rules. First, there is

¹¹ 16 U.S.C. s 1533 (a) (1)

¹² 16 U.S.C. s 1533 (b) (1) (A).

¹³ 50 C.F.R. 424.11 (b) (1994). Nevertheless, non-scientific factors have been considered sometimes in making listing decisions. In the *Northern Spotted Owl v. Hodel* Case, the FWS decided not to list the Spotted Owl as endangered species, disregarding "all the expert opinion on population viability, including, that of its own expert, that the owl is facing extinction". The agency substitute the expert opinion by the agency own expertise. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (1988).

¹⁴ 16 U.S.C. s 1533 (b) (3) (A).

¹⁵ *Id.*

¹⁶ 16 U.S.C. s 1533 (b) (3) (B).

¹⁷ H. R. Rep. No. 567, 97th Cong, 2d Sess. (1982). Reprinted in 1982 U.S.C.C.A.N. 2807, 2821.

¹⁸ The Administrative Procedure Act (APA) allows judicial review of agency actions "made reviewable by statute and final agency actions for which there is not other adequate remedy in a

the arbitrary and capricious standard.¹⁹ Conceding judicial deference to the Secretary's decision, this standard permits the courts to set aside that decision where it has failed to "articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made".²⁰ In deed, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment".²¹

Secondly, there is the hard look principle.²² This principle recognizes that the courts cannot "interject itself within the area of discretion of the executive branch as to the choice of the action to be taken".²³ However, the principle requires the courts to assure that the agency has taken an in depth study of the environmental consequences of its actions during the decision-making process.²⁴

ii) Critical Habitat Designation. The decision to list species as endangered or threatened triggers the determination of the species critical habitat.²⁵ In fact, ESA requires the critical habitat designation at the same time

court." APA, 5. U.S.C. s 704 (1977). *See*, 16 U.S.C. s 1533 (b) (3) (C) (ii) allowing judicial review over the agency decision to not warrant the listing petition or warrant it but preclude its implementation. *See also*, *United States v. Guthrie*, where the Eleventh Circuit Court of Appeals applied the judicial review standard over the agency decision to list the Alabama red-bellied turtle as an endangered species.

¹⁹ APA, 5. U.S.C. s 706 (2) (A).

²⁰ *See*, the *Northern Spotted Owl case*, where the U.S. District Court of the Western District of Washington struck down the FWS decision to not list the owl as endangered or threatened under the ESA, as arbitrary and capricious or contrary to law. The court hold that the arbitrary and capricious standard is "narrow and presumes the agency action is valid, [...]" but it does not shield agency action from a 'trough, probing, in-depth review [...]' Courts must not rubber - stamp the agency decision as correct'. Rather, the reviewing court must assure itself that the agency decision was 'based on the consideration of the relevant factors'..." *Northern Spotted Owl v. Hodel*, at 482 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983))

²¹ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1997), (quoting *Citizens to preserve Overton Park, Inc. v. Volpe*, 401 U.S.402, 416 (1971)).

²² *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

²³ *Id.* at 410.

²⁴ *Id.*

²⁵ 16 U.S.C. s 1533 (b) (2). *See also*, *Northern spotted Owl v. Lujan*, 758 F. Supp. 621 (1991).

that the species are listed.²⁶ The concept of critical habitat includes not only specific areas currently occupied by the species when listed, but also all other areas, which contains physical or biological conditions “essential to the conservation of the species”.²⁷ In deed, the courts have explained in such respect that critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention. Habitat not currently occupied by the [species] may be designated as critical only upon a determination by the Secretary [...] to ensure that such areas are essential to ensure the conservation of the species”.²⁸ An area is essential for the species conservation when it contains features that permit the growth of the species. Such things as food, water resources, shelter and breeding, and if the area represents the historic distribution of the species are all taken into account to determine if the territory should be deemed critical.²⁹

The initial factor used to designate an area as critical habitat is to rely upon the best scientific data available to the Secretary.³⁰ However, unlike the listing determination, ESA also allows the Secretary to make its determination based upon “probable economic or other impacts on human activities resulting from the critical habitat designation”³¹.

The Act provides three exemptions to an area that is designated as a critical habitat. The first exemption considered is when an analysis determines

²⁶ 50 C.F.R. s 424.12 (a).

²⁷ 16 U.S.C. s 1532 (5) (a) (i).

²⁸ *Northern spotted Owl v. Lujan*, at 623

²⁹ 50 C.F.R. s 424.12 (b) (1992).

³⁰ 16 U.S.C. s 1533 (b) (2).

³¹ *Northern spotted Owl v. Lujan*, at 623. *See also*, 16 U.S.C. s 1533 (b) (2).

that the benefits of the exclusion exceeds the benefits of the designation.³² The second exemption considered is where the habitat of the species could not be determined.³³ A habitat for a species is not determinable if there is no information to perform an impact analysis,³⁴ and/or the biological needs of the protected species are not known enough so as to determine a more accurate assessment of their critical habitat.³⁵ The third and final exemption considered is an analysis that the determines that the designation is just not prudent.³⁶ The critical habitat designation is not prudent when such a designation would increase the threat of capturing to the species³⁷ and/or would not be beneficial to the endangered species.³⁸

iii) Recovery Plans. In addition to the designation of critical habitat, ESA directs the Secretary to develop and implement' recovery plans "for the conservation and survival of [the listed species], unless he finds that such a plan will not promote the conservation of the species".³⁹ The term "recovery has been defined as the "improvement in the status of listed species to the point at which listing is not longer appropriate..."⁴⁰

³² 16 U.S.C. s 1533 (b) (2).

³³ 16 U.S.C. s 1533 (a) (3).

³⁴ 50 C.F.R. s 424.12 (a) (2) (i).

³⁵ 50 C.F.R. s 424.12 (a) (2) (ii).

³⁶ 16 U.S.C. s 1533 (a) (3). *See also*, the United States FWS Endangered Species Listing Handbook, which contains several reasons under which the critical habitat designation is not prudent. These reasons include, for instance, vandalism, difficult enforcement of "taking" and "harm" prohibitions, negative publicity, lack of benefit. *U.S. FWS Endangered Species Listing Handbook* 61 (1989), (Cited by Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U.Colo. L. Rev. 277, 285).

³⁷ 50 C.F.R. s 424.12 (a) (1) (i).

³⁸ 50 C.F.R. s 424.12 (a) (1) (ii).

³⁹ 16 U.S.C. s 1533 (f) (1).

⁴⁰ 50 C.F.R. s 402.02. *See also*, Federico Cheever, *The Road to recovery: A new way of thinking about the endangered species Act*. The author, based on the FWS guidelines for Planning and Coordinating Recovery of Endangered and threatened Species, states that "recovery is the process

Each recovery plan must contain (a) “a description of such site-specific management actions [...] necessary to achieve the plan’s goal for the conservation and survival of the species”; (b) the “objective measurable criteria” to assure the removal of the species from the list; (c) and estimates of the time and cost required to carry out those measures.⁴¹

There are different court approaches as to whether the terms of the recovery plan are enforceable or not. The majority of the courts are reluctant to enforce the terms of recovery plans based upon the recognition of the Secretary’s discretion to implement and develop approved plans.⁴² For these courts, “the recovery plan itself has never been an action document. It left open different approaches and contemplates that when an agency or group made specific proposals for achievement of a particular objective of the plan, there would be a need for further study.”⁴³

Some other courts, in contrast, consider it their mandatory duty to enforce the plans. Thus, the power of the court is used to develop and implement recovery plans.⁴⁴ Other courts, however, have developed an eclectic approach, which differentiates between the implementation and the terms of the recovery

by which the decline of an endangered or threatened species is arrested or reversed, and threats to its survival are neutralized, so that its long-term survival in nature can be ensured. The goal of this process is the maintenance of secure, self-sustaining wild population of species with the minimum necessary investment of resources.” Federico Cheever, *The Road to recovery: A new way of thinking about the endangered species Act.*, 23 Ecology L.Q.1, 41 (1996) .

⁴¹ 16 U.S.C. s 1533 (f) (1) (B).

⁴² See, e.g. *National Wildlife Federation v. National Park service*, 699 F. Supp. 384 (1987); *Defenders of Wildlife v. Lujan*, 792 F. Supp. 843 (1992).

⁴³ *Defenders of Wildlife v. Lujan*, at 835.

⁴⁴ *Sierra Club v. Lujan*, 1993 W.L. 151353 (W.D. Tex. 1993).

plans. The courts in this case have asserted that the implementation and development of the recovery plans is mandatory, but their terms are not.⁴⁵

3. Consultation Requirement

The protection provided by ESA is to listed species and their critical habitat. The protection process begins with the ESA's consultation requirement. Thus, the Act directs each and all-federal agencies to consult with the Secretary to insure that a proposed action "is not likely to jeopardize the continued existence of any endangered [or threatened] species or result in the destruction or adverse modification of [its critical] habitat."⁴⁶ The Supreme Court of the United States have interpreted the consultation provision literally. This has had the effect of being one of the strengths of the consultation process. In fact, the Court has mentioned that federal agencies duty to avoid jeopardy is absolute.⁴⁷ The terms of this requirement are plain⁴⁸ and admit no exception⁴⁹.

i) The Jeopardy Standard. Even though the ESA does not define the term jeopardy or its scope, Federal regulations have undertaken this task. According to these regulations, the jeopardy concept means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both survival and recovery of a listed species in the wild by reducing the reproduction numbers or distribution of that species".⁵⁰

⁴⁵ *Morrill v. Lujan*, 802 F. supp. 424, 433 (1992)

⁴⁶ 16 U.S.C. s s. 1536 (a) (2). *See also, Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978)

⁴⁷ *TVA v Hill*, at 173

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 50 C.F.R. s 402.02 (1991). *See also, Idaho Department of Fish and Game v. National Marine Fisheries Service*, where the court mentioned that the records of the 50 C.F.R. s 402.02 shows that "in many cases [...] the difference between injury to survival and to recovery [is] virtually zero".

Furthermore, Federal agencies have developed a jeopardy standard. This standard lies in a two factor criteria.⁵¹ The first factor considers whether the proposed actions reduce species mortality in a determined period.⁵² The second factor considers whether the same action will stabilize the species in the long term.⁵³

ii) Balancing Test. Prior to 1978, lower courts holdings regarding challenges to the ESA's consultation section were contradictory. Examples of this assertion are represented by *Sierra Club v. Froehlke*⁵⁴ and *National Wildlife Federation v. Coleman*⁵⁵ cases. On one hand, the *Froehlke* court considered that ESA should be construed in a "reasonable" way⁵⁶ to insure a "reasonable" conclusion.⁵⁷ Thus, the court allowed the application of a balancing test. In other words, this court compared and weighed the benefits derived from a dam construction against the disadvantages of jeopardizing an endangered species and its critical habitat.⁵⁸ The court, then, went onto dismiss the claim based upon plaintiff's failure to probe the dam's negative effects over the endangered species.⁵⁹

There is not a clear difference between these two concepts. *Idaho Department of Fish and Game v. National Marine Fisheries Service*, 850 F. Supp. 886, 894 remanded, 56 F. 3d 1071 (9th Cir. 1995) (quoting 51 Fed. Reg. 19934 (June 3, 1986)).

⁵¹ *Idaho Department of Fish and Game v. NMF S*, at 896.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 534 F. 2d 1289 (8th Cir. 1976).

⁵⁵ 529 F. 2d 359 (5th Cir.), Cert. denied, 429 U.S. 979 (1976).

⁵⁶ *Froehlke*, at 1304.

⁵⁷ *Id.* at 1301.

⁵⁸ *Id.* at 1305. The plaintiffs, Sierra Club, sought the injunction of the Meramac Park Lake Dam project, which consisted in impounding a reservoir of 23,000 acres in the Meramac Basin. It was alleged that the reservoir would jeopardize the Indiana bat, an endangered species, and destroy the bat caves where the species hibernate.

⁵⁹ *Id.*

On the other hand, the *Coleman* court made a strong emphasis on the mandatory nature of the federal agencies duty to avoid endangered species' jeopardy.⁶⁰ Therefore, when there is a failure to observe this duty the penalty results in the injunction of the proposed activity. The court, thus, rejected the application of a balancing test.⁶¹ Consequently, the project at issue in this case was enjoined until the agency could show that it would not jeopardize the endangered species or its habitat.⁶²

In 1978, the Supreme Court of Justice in *Tennessee Valley Authority v. Hill*⁶³ settled the differences in the lower court opinions regarding the ESA's consultation provision. The facts on this case were undisputed. In 1967, T.V.A. undertook the construction of the Tellico dam on the Little Tennessee River. The project would impound part of the river as well as farmland. Eight years later, the Secretary of Interior listed the Snail darter as an endangered species. Also, the portion of the river that was going to be inundated was designated as the species critical habitat.

By this time, the Government had already spent approximately one hundred million dollars. The Court struck down the balance test theory and ruled in favor of the endangered species.⁶⁴ As a consequence, the Court halted the agency project.⁶⁵ The Court based its holding upon two grounds. The first ground

⁶⁰ *Coleman*, at 371. In this case, the plaintiffs sought that the Federal Highway Administration and the Mississippi State Highway Department deviate a segment of the Interstate Highway I-10 to protect the Mississippi Sandhill Crane, an endangered subspecies. *See also, defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (1977).

⁶¹ *Id.* at 374 - 75.

⁶² *Id.*

⁶³ 437 U.S. 153 (1978).

⁶⁴ *Hill*, at 194.

⁶⁵ *Id.*

is the analysis of the language used in the consultation provision. According to the Court, it is hard to find plainer terms than those used in the consultation section.⁶⁶ The words of the section “affirmatively command all federal agencies ‘to insure that their actions [...] do not jeopardize the continued existence’ of an endangered species or ‘result in the destruction or modification of habitat of such species’ [...]. This language admits of no exception.”⁶⁷ The second ground is the Act’s legislative history. The ESA’s history indicates that Congress recognized the endangered species as one of the “highest of priorities”.⁶⁸ Congress’ purpose in enacting ESA was to halt and reverse the trend toward species extinction whatever the cost.”⁶⁹ Indeed, the main concern during the ESA’s congressional debates was “to devote whatever effort and resources were necessary to avoid further decreases of national and worldwide wildlife resources”.⁷⁰ Therefore, the Supreme Court concluded that it would be difficult to balance the money spent during the construction of the Federal dam against the “incalculable” value of the endangered species.⁷¹ Evidence that the dam would eradicate an endangered species was enough to enjoin the agency from ESA’s violation.⁷² This holding was made by the Court notwithstanding that the dam construction began before ESA’s enactment .⁷³

⁶⁶ *Id.* at 173.

⁶⁷ *Id.*

⁶⁸ *Id.* at 173- 74.

⁶⁹ *Id.* at 184.

⁷⁰ *Id.* at 177 (quoting Coggings, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D.L. Rev. 315, 321 (1975))

⁷¹ *Hill*, at. 187 - 88

⁷² *Id.* at 173

⁷³ *Id.*

After this Supreme Court case, Congress rejected the *Hill's* Court interpretation by amending ESA⁷⁴. Consequently, Congress introduced the exception process⁷⁵ and a balancing test, making ESA more flexible.⁷⁶

iii) Consultation Process. ESA contains a three-step process that should be followed by Federal agencies to ensure that their actions fulfill the jeopardy standard.⁷⁷ First, prior to undertaking any activity, Federal agencies should request information from the Secretary whether any endangered or threatened species “may be present” in the area where the proposed activity is going to take place.⁷⁸ Second, if there is found to be any of the listed species that “may be present” in the area, the agency should prepare a biological assessment.⁷⁹ The biological assessment identifies the endangered or threatened species, already listed or proposed to be listed, that are likely to be affected by the federal activity, as well as their critical habitat and the potential effects of the action over the species.⁸⁰ Federal agencies must prepare the biological assessment for actions qualified as “major construction activities”.⁸¹ Third, if the biological assessment concludes that the Federal action is likely to affect the endangered or threatened

⁷⁴ ESA Amendments of 1978, Pub L. No. 95-632, s.1, 92 Stat. 3751 (1978)

⁷⁵ See analysis in chapter II, section 4 of this dissertation.

⁷⁶ *Id.*

⁷⁷ *Thomas v. Peterson*, 753 F. 2d. 754, 763 (1988).

⁷⁸ 16 U.S.C. s 1536 (c) (1). See also, 50 C.F.R. s. 402.12 (c) (1994).

⁷⁹ *Id.*

⁸⁰ 16 U.S.C. s. 1536 (c) (1). Although the contents of the biological assessment are discretionary, the Federal agencies may consider the following: On- site inspections of the affected area; expert opinions; relevant information; analysis of the effects and cumulative effects of the proposed action over the listed species or its critical habitat; analysis of the alternative actions considered by the agency. 50 C.F.R. s 402.12 (a) (1994).

⁸¹ Major construction activities is defined as “a major federal action significantly affecting the quality of the human environment” according to the National Environmental Policy Act (NEPA). 50 C.F.R. s 402.12.

species, a formal consultation to the Secretary is required.⁸² The Secretary, then, resolves the consultation by issuing a biological opinion.⁸³ If the biological opinion does not find a likelihood of species in jeopardy, the agency's proposed activity may continue. However, the Secretary may require the agency to take some measures to reduce the impact of the action.⁸⁴

In contrast, if the biological opinion determines that the proposed activity would jeopardize the listed species or its habitat, the Secretary may recommend "reasonable and prudent alternatives"⁸⁵ to avoid jeopardizing or adversely affecting the habitat of the species.⁸⁶ The Secretary's recommendations are not a mandatory requirement upon these agencies.⁸⁷ Consequently, the agencies may disregard the Secretary's alternatives. The agencies, though, must develop and implement their own reasonable and adequate alternatives to insure the continued existence of the listed species.⁸⁸

A consultation process must be reinitiated by the agency in cases where (a) new effects of the action might affect the listed species or its critical habitat;⁸⁹

⁸² 16 U.S.C. s 1536 (a) (2).

⁸³ 16 U.S.C. s. 1536 (b).

⁸⁴ *Thomas v. Peterson*, at 763.

⁸⁵ Reasonable and prudent alternatives "refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction that is economically and technologically feasible and that the Director [of the FWS or NMFS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat."

"Reasonable and prudent measures" refer to those actions the Director [of the FWS or NMFS] believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take. 50 C.F.R. s 402.02 (1994).

⁸⁶ 16 U.S.C. s 1536 (b) (3) (A)

⁸⁷ *Idaho Department of Fish and Game v. NMFS*, at 895.

⁸⁸ *Id.* at 896. See, *Tribal Village of Akutan v. Hodel*, 859 F. 2d 651,660 (1988). See also, 50 C.F.R. s 402.14 (g) (6).

⁸⁹ 50 C.F.R. s 402.16 (b).

(b) the proposed action is modified;⁹⁰ (c) a new species that might be affected by the action is listed or its critical habitat designated;⁹¹ (d) or the incidental taking permit is exceeded.⁹²

iv) The Exemption Process. If the biological opinion finds a likelihood of jeopardy, the federal agency or the Governor of the State involved, or a permit or licensee applicant⁹³ may seek an exemption from the Endangered Species Committee.⁹⁴

The exemption process begins with the submission of an application⁹⁵ to the Secretary, who may either deny or accept the petition. The ESA sets forth some requirements for a petition to be accepted. These requirements include (a) the applicant's fulfillment of the consultation responsibilities which are completed in a good faith effort; (b) reasonable efforts to develop and consider reasonable and prudent alternatives; (c) existence of a biological opinion and avoidance from making an irreversible or irretrievable commitment of resources.⁹⁶ Once determined that the application contains the above-mentioned requirements, the

⁹⁰ 50 C.F.R. s 402.02 (c).

⁹¹ 50 C.F.R. s 402.02 (d). *See also, Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (1994).

⁹² 50 C.F.R. s 402.16 (a).

⁹³ Permit or licensee applicant refers to any person who applied to an agency for a permit or a license, but the issuance of these documents were denied mainly on the basis of the ESA s 1536 (a) (2). 50 C.F.R. s 450.01 (1989).

⁹⁴ 16 U.S.C. s 1536 (g) (1). This Committee is known also as "God Squad" or "God Committee." The Committee is formed by seven members: The Secretary of Agriculture, the Secretary of Army, the Chairman of the Council of Economic Advisors, the Administrator of Environmental Protection Agency, the Secretary of Interior, the Administrator of the National Oceanic and Atmospheric Administration and one person appointed by the President, from each state affected.

⁹⁵ The application should contain the following data: a summary of the consultation process (16 U.S.C. s 1536 (f) (1)); reasons to not modify the proposed action as to fulfill the consultation provision ((16 U.S.C. s 1536 (f) (2)); identification of the applicant (50 C.F.R. s 451.02 (e) (1)); explanation of the benefits of the action and its importance over the alternatives available; reasons why the alternatives are not reasonable and prudent; explanation about whether the action comports regional or national significance or public interest, and possible measures to mitigate the negative effects of the action. 50 C.F.R. s 451.02 (e) (5).

⁹⁶ 16 U.S.C. s 1536 (g) (3) (i) - (iii).

Secretary prepares a report to the Endangered Species Committee, summarizing the evidence and findings regarding the petition.⁹⁷ The Committee decides, then, whether to grant the requested exemption or not.⁹⁸ The exemption is granted upon the following findings:

- “ (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
- (iii) the action is of regional or national significance; and
- (iv) neither the federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources [which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures].”⁹⁹

In addition, the Committee must determine reasonable measures to mitigate the negative effects of the action upon the listed species or its critical habitat.¹⁰⁰

The ESA allows the Secretary of Defense as well as the President to grant exemptions. Thus, the Secretary of Defense may exempt an action because of national security reasons.¹⁰¹ The President, in turn, may grant the exemption in case of natural disasters or emergency situations.¹⁰² In contrast, the Secretary of

⁹⁷ *Id.*

⁹⁸ 16 U.S.C. s 1536 (h) (1).

⁹⁹ 16 U.S.C. s 1536 (h) (1) (A).

¹⁰⁰ 16 U.S.C. s 1536 (h) (1) (B).

¹⁰¹ 16 U.S.C. s 1536 (j).

¹⁰² 16 U.S.C. s 1536 (p).

State may revoke an exemption whenever it violates an international treaty or obligation.¹⁰³

4. Take Prohibition

The ESA forbids any person,¹⁰⁴ not only Federal agencies, to take any endangered species within the U.S territory.¹⁰⁵ The term “take” is defined in the ESA as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”.¹⁰⁶ There are two frequently challenged issues regarding the ESA’s “take” regulation. The first issue is whether the concept of “harm”, as stated by the Secretary’s regulatory definition, is valid under the “take” provision. The second issue is whether or not ESA allows citizen suits alleging only future injury to listed species.

i) Concept of “harm” challenges. Prior to 1978, the courts protected listed species critical habitat through the ESA’s consultation provision and its jeopardy standard.¹⁰⁷ In 1978, the Court in *Palila v. Hawaii Department of Land and Natural Resources*¹⁰⁸ began to protect listed species critical habitat through the take provision.

Palila is a small bird that was declared endangered in 1967. Palila habits resides exclusively in Hawaii and its existence depends solely upon the mamane

¹⁰³ 16 U.S.C. s 1536 (i).

¹⁰⁴ The term “person” is defined as an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government; of any State, municipality, or political subdivision, of a State, or of any foreign government; any State, municipality or political subdivision, of a State; or any other entity subject to the jurisdiction of the United States”. 16 U.S.C. s 1532 (13) .

¹⁰⁵ 16 U.S.C. s 1538 (a) (1) (B).

¹⁰⁶ 16 U.S.C. s 1532 (a).

¹⁰⁷ See, e.g. *Froehlke*, supra notes 48, 50 -53; *Coleman* supra notes 49, 54-56; *Hill* supra notes 57 - 67.

¹⁰⁸ 471 F. Supp 985 (1979), aff’d 639 F. 2d 495 (1981).

and naio trees, which provide food and nest sites to the species. These trees were being destroyed by herds of feral sheep. These herds were maintained by the State of Hawaii for sport hunting purposes.¹⁰⁹ *Palila*'s district court as well as its court of appeals concluded that the term "take" includes "harm" and this term, according to the Secretary's regulatory definition, includes "significant environmental modification or degradation which [actually injures or kills wildlife]." ¹¹⁰ The courts relying on the extensive findings of fact held that the herds of sheep were producing "the relentless decline of the *Palila*'s habitat" ¹¹¹ and as a result fall within the meaning of "harm". Therefore, maintaining herds of sheep in *Palila*'s critical habitat, constitutes an unlawful taking under the ESA. ¹¹² The nexus between habitat degradation and the reduction in *Palila*'s population was enough for the courts to grant declaratory and injunctive relief for the plaintiffs. ¹¹³

Shortly after *Palila*'s decision, the term "harm" was redefined as " an act, which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering". ¹¹⁴ Thereby, habitat degradation per se does not constitute an unlawful taking. Therefore, that habitat modification must actually kill or injure the species. ¹¹⁵

¹⁰⁹ *Id.*

¹¹⁰ 50 C.F.R. s 17.3 (1978), amended 46 Fed. Reg. 54, 748 (1971)

¹¹¹ *Palila*, 471 F. Supp at 990.

¹¹² *Id.* at 995.

¹¹³ *Id.*

¹¹⁴ 46 Fed. Reg. 54, 748 (1981), codified 50 C.F.R. s 17.3 (1994).

¹¹⁵ *Id.* at 749.

The scope of this “harm” new definition was the issue in another *Palila* case.¹¹⁶ This time, *Palila*’s population was being threatened by mouflon sheep. The district court held that the new definition of harm was not substantially different than the former definition.¹¹⁷ For the court, the new definition does not encompass the death or injury of individual members of the endangered species.¹¹⁸ In fact, “a finding of ‘harm’ does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under [the ESA].¹¹⁹

From the courts holdings in the two *Palila*’s cases, it can be concluded there is an unlawful ‘taking’ of an endangered species whenever the species critical habitat is modified or degraded in a significant manner, so as to adversely affect the species.¹²⁰

Nevertheless, the Secretary’s new regulatory definition of ‘harm’ continued to be challenged in *Sweet Home Chapter of Communities for a Great Oregon v. Lujan (Sweet Home I)*¹²¹ and its subsequent cases, *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt (Sweet Home II)*¹²²; *Sweet Home*

¹¹⁶ *Palila v. Hawaii Department of Land and Natural Resources*, 649 F. Supp 1070, 1175 (1986); 852 F. 2d. 1106 (1988).

¹¹⁷ *Palila*, 649 at 1075.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Palila*, 471 F. Supp at 990. *See also, Sierra Club v. Lyng*, 694 F. Supp. 1260 (1988), aff’d in part, rev’d in part by *Sierra Club v. Yeutter*, 926 F. 2d (1991) where the court based on evidence concluded that the even-aged timber harvesting method used in East Texas National Forest has modified the woodpecker critical habitat and has produced a reduction in the species population thus violating the taking prohibition.

¹²¹ 806 F. Supp. 279 (1992).

¹²² 1 F.3d 1463 (1994).

*Chapter of Communities for a Great Oregon v. Babbitt (Sweet Home III)*¹²³; *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt (Sweet Home IV)*¹²⁴.

In the Sweet Home set of cases, the plaintiffs argued that the Secretary's "harm" definition was contrary to the ESA and void for vagueness under the Fifth Amendment's due process guarantee.¹²⁵ The courts in *Sweet Home I* and *Sweet Home II* upheld the validity of the Secretary's "harm" definition under the ESA.¹²⁶ In addition, the court held the notice provision of the act as unlawful conduct under the Fifth Amendment to the Constitution.¹²⁷ Nevertheless, the court in *Sweet Home III* reached a different conclusion. For this court, the Secretary's redefinition of harm was held invalid.¹²⁸ According to this court, the concept of "take" involves the application of physical force upon the endangered species. In fact, "with the single exception of the word 'harm', the words of the definition contemplate the perpetrator's direct application of force against the animal taken [...]. The forbidden acts [harass, pursue, hunt, shoot, wound, kill, trap, capture or collect] fit, in ordinary language, the basic model 'A hit B'."¹²⁹ Habitat modification, in the context of the Secretary's definition, lacks the notion of the

¹²³ 17 F. 3d 1463 (1994).

¹²⁴ 115 S. Ct. 2407 (1995).

¹²⁵ *Sweet Home I*, at 282. The court cited the void for vagueness doctrine contented in the *Kolender* case. In the latter case, the court required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what a conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352,357 (1993)

¹²⁶ *Id.* at 283 aff'd *Sweet Home II*, 1 F.3d at 2.

¹²⁷ *Id.* at 286 aff'd *Sweet Home II*, 1 F.3d at 3.

¹²⁸ *Sweet Home III*, 17 F. 3d at 1464.

¹²⁹ *Id.* at 1465.

application of force upon the endangered species.¹³⁰ Therefore, the “harm” definition violates the ESA.¹³¹

Sweet Home III was in direct contradiction with *Palila*. As a consequence, the Supreme Court of the United States granted certiorari to unify the differences in criteria among the lower courts regarding the concepts of “take” and “harm”. The Court determined that the Secretary’s definition of “harm” was a reasonable interpretation under the ESA’s taking regulation.¹³² The Court asserted its holding upon three grounds. The first ground is the common meaning of the word “harm”. With the help of the dictionary, the Court asserted the common meaning of the word at issue. Thus, “harm” means “to cause hurt or damage or to injure.”¹³³ This definition does not suggest that the Court held that “harm” only refers to direct and deliberate actions that causes injury.¹³⁴ Indirect activities, such as habitat modification are included as well within the “harm” notion.¹³⁵ The second ground of the Court’s holding is ESA’s legislative history. The purpose of Congress in enacting ESA ‘was to halt and reverse the trend toward species extinction, whatever the cost.’¹³⁶ Furthermore, Congress expressed its intention to define “take” “in the broadest possible manner to include every conceivable way, in which a person could ‘take’ or attempt to ‘take’ any fish or wildlife”.¹³⁷ The third ground of the Court’s holding is the 1982 amendments to the ESA. One of the modifications introduced by Congress to the ESA in 1982 was the ‘incidental

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Sweet Home IV*, at 2416.

¹³³ *Id.* at 2414 (quoting *Webster’s Third New International Dictionary* 1034 (1966)).

¹³⁴ *Id.* at 2412 – 13.

¹³⁵ *Id.*

¹³⁶ *Id.* at 2413 (quoting *Hill*, 437 U.S. at 184).

taking’.¹³⁸ This allowed the Secretary to authorize certain “takings” whenever the “taking” is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity”.¹³⁹ This amendment to the ESA, proved to the Court that Congress recognized that the taking prohibition includes indirect as well as willful takings.¹⁴⁰ Thereby, habitat modification or degradation, although not being deliberate, may constitute a “taking” under ESA.¹⁴¹

ii) Future Injury Challenges. There is a difference among lower courts on allowing citizens suits¹⁴² arguing future injury to listed species. On one hand, some courts have held that future injury is actionable under ESA. For instance, the court in *Forest Conservation Council v. Rosboro Lumber Co.*¹⁴³ stated that “it is clearly conceivable that one can inflict great harm on a protected species by creating an imminent threat of harm to that species. Such a threat therefore falls easily within the broad scope of Congress’ definition of ‘take’.”¹⁴⁴ So long as some injury to wildlife occurs, “either in the past, present or future, the injury requirement laid out in the Secretary’s [“harm”] definition would be satisfied [...]. The showing of an imminent threat of injury to wildlife is sufficient.”¹⁴⁵ The *Rosboro* court differentiated “imminent threat” from “potential threat”. The former term means “ready to take place; near at hand”.¹⁴⁶ The latter term, means

¹³⁷ *Id.* at 2416 (quoting S. Rep. No. 93-307, 93 Cong. 1st Session, 7 (1993)).

¹³⁸ See comments Chapter II, section D of this Dissertation.

¹³⁹ 16 U.S.C. s 1537 (a) (1) (B)

¹⁴⁰ *Id.* at 2414.

¹⁴¹ *Id.*

¹⁴² 16 U.S.C. s 1540 (a) (1) (A).

¹⁴³ *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d. 781 (1995)

¹⁴⁴ *Id.* at 784.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 784 – 85.

“existing in possibility”.¹⁴⁷ Based upon the different meaning of the above terms, the court concluded that “imminent threat” is enjoinable, but “potential threat” is not.¹⁴⁸

In addition, some other courts have held that to enjoin an action, the parties “need not show with certainty that the action will cause some type of harm [...] but ‘mere speculation’ will not suffice”.¹⁴⁹ Therefore, what it is needed is evidence that shows that future harm is “sufficiently likely”.¹⁵⁰ On the other hand, some courts have concluded that future injury does not constitute “harm” and, therefore, is not actionable under the ESA. These courts require evidence of actual injury to the protected species.¹⁵¹ In *American Bald Eagle v. Bhatti*,¹⁵² for example, the first circuit dismissed the plaintiff’s claim to enjoin deer hunting. The plaintiff’s theory was that the bald eagle would die as a result of the eagle eating left over carcasses that have the potential of being laden with lead bullets. This court held that there was not enough evidence to prove that the ammunition used by the hunters to kill deer would lead to the death bald eagle. The term “take” for this court, is “unequivocally defined as showing of ‘actual harm’”.¹⁵³ Other courts, in addition, have made clear that potential or imminent risk does not constitute a “taking”.¹⁵⁴

¹⁴⁷ *Id.* (quoting *Webster’s New international Dictionary* (2 ed. 1939).

¹⁴⁸ *Id.*

¹⁴⁹ *National Wildlife Federation v. Burlington Northern Railroad Inc.*, 23 F. 3d. 1508, 1512 (1994). See also, *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1367 (1995).

¹⁵⁰ *Burlington*, 23 F. 3d at 1512.

¹⁵¹ *Pyramid Lake Paiute tribe of Indians v. United States Department of Navy*, 898 F. 2d 1410 (1990); *Morrill v. Lujan*, 802 F. Supp. 424 (1992).

¹⁵² 9 F. 3d 163 (1993).

¹⁵³ *Id.* at 165.

¹⁵⁴ *North Slope Borough v. Andrus*, 486 F. Supp 332 (1979); *Pacific Northwest Generating Coop. v. Brown*, 25 F. 3d 1443 (1994).

5. Incidental Taking

The 1982 Congressional amendment to the ESA introduced the incidental taking process to provide more flexibility to the rigid “take” prohibition,¹⁵⁵ by conciliating economic growth and development with endangered species protection.¹⁵⁶ Thus, the incidental taking provision allows the Secretary to permit “any taking otherwise prohibited by the [taking clause] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity”¹⁵⁷

The incidental taking authorization is complex. Those interested in obtaining the incidental taking permit, either the states or private parties whose activities do not require Federal funds,¹⁵⁸ must submit a conservation plan¹⁵⁹ to the Secretary. This plan should describe the proposed activity,¹⁶⁰ include an impact study on whether the action is likely to produce over the protected species,¹⁶¹ their proposal for mitigating the damages,¹⁶² the funds available to implement the mitigation measures,¹⁶³ the consideration of alternative actions that do not constitute a “taking”,¹⁶⁴ and the relevant biological information of the species involved.¹⁶⁵ Once the application for incidental take permit is received along with the related conservation plan, the Secretary publishes a notice in the Federal

¹⁵⁵ H. R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 29 (1982), reprinted in 1912 U.S.C.C.A.N. 2860, 2870.

¹⁵⁶ See, H. R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9462.

¹⁵⁷ 16 U.S.C. s 1539 (a) (1) (B).

¹⁵⁸ Christopher H.M. Carter, *Comment: A Dual Track for Incidental Takings: Reexamining sections 7 and 10 of the Endangered Species Act*, 19 B.C. Envtl. Aff. L. Rev. 135, 136 (1991).

¹⁵⁹ 16 U.S.C. s 1539 (a) (2) (A).

¹⁶⁰ 50 C.F.R. s 17.22 (b) (1) (i) (1989).

¹⁶¹ 16 U.S.C. s 1539 (a) (2) (A) (i).

¹⁶² *Id.* at (ii).

¹⁶³ 50 C.F.R. s 17.22 (b) (1) (iii) (B).

¹⁶⁴ 16 U.S.C. s 1539 (a) (2) (A) (iii).

¹⁶⁵ 50 C.F.R. s 17.22 (b) (1) (ii).

Register, inviting interested parties to make a public comment on the project.¹⁶⁶

Subsequently, the Secretary decides whether to issue the permit or not. The Secretary should issue the permit if he finds that the following circumstances are met:

- “(i) the taking will be incidental;
- (ii) applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required [by the Secretary as necessary or appropriate for purposes of the plan] will be met...”¹⁶⁷

The incidental taking permit is not the only exception provided by the ESA with respect to the “taking” prohibition. The ESA includes, also, an undue economic hardship exemption.¹⁶⁸ According to this provision, the Secretary may exempt any person from violating the “take” prohibition under three basic circumstances. First, whenever a person is engaged in a contract with respect to a species, which later becomes illegal to perform because the species involved in the contract are subsequently listed as endangered or threatened.¹⁶⁹ The result is that the person suffers no substantial economic loss.¹⁷⁰

The second exemption is whenever a person derives substantial portion of their income from a lawful activity, which turns unlawful due to the decision to list the species.¹⁷¹

¹⁶⁶ 16 U.S.C. s 1539 (c).

¹⁶⁷ 16 U.S.C. s 1539 (a) (1) (B).

¹⁶⁸ 16 U.S.C. s 1539 (b) (1).

¹⁶⁹ *Id.*

¹⁷⁰ 16 U.S.C. s 1539 (b) (1) (A).

¹⁷¹ 16 U.S.C. s 1539 (b) (1) (B).

The final and third exemption is whenever there is a curtailment of the subsistence taking, which was made unlawful by the listing decision, by a person “(i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.”¹⁷²

6. Requirements to Trade Protected Species

ESA prohibits to trade or possess specimens in violation of CITES.”¹⁷³ For the purpose of implementing this prohibition, Federal Regulations have established the requirements to trade the protected species.¹⁷⁴ Thus, prior to importing an Appendix I species, a U.S. import permit is required as well as a valid foreign export or re-export certificate.¹⁷⁵ Also, when importing Appendix II or III species, a valid foreign export or re-export certificates is required before the import transaction.¹⁷⁶ The validity of the aforementioned permits has been an issue in the courts of United States. For instance, in *United States v. 2,502 Canary Winged Parakeets*¹⁷⁷ the validity of a Peruvian export permit was challenged. The court based its holding on the recognition that the purpose of CITES is to assist other countries in the enforcement of their regulations protecting the wildlife.¹⁷⁸ Thus, CITES requires its’ parties to assure the validity

¹⁷² 16 U.S.C. s 1539 (b) (1) (C).

¹⁷³ 16 U.S.C. s 1538 (c) (1): “[I]t is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the Provisions of [CITES] or to possess any specimens traded contrary to the provisions of the Convention...”. *Id.*

¹⁷⁴ 50 C.F.R. s 23.11 (1996).

¹⁷⁵ 50 C.F.R. s 23.12 (a) (1) (i).

¹⁷⁶ 50 C.F.R. s 23.12 (b) (1) - (2).

¹⁷⁷ 689 F. Supp. 1106 (1988).

¹⁷⁸ *Id.* at 1120.

of the exportation for the benefit of the other countries.¹⁷⁹ The “validity of a CITES permit depends upon its compliance with the wildlife laws of the issuing nation [...]. Therefore, for a permit to be valid within the meaning of the [ESA] , it must be issued by an agent of the exporting country with authority to do so under the laws of his country.”¹⁸⁰ The court in this case found that CITES was violated because the birds’ export permit was invalid under Peruvian Law.

Section 1538 of the ESA further states that prior to engaging in the trade of wildlife, a person must obtain a permit from the Secretary of Interior.¹⁸¹ The person interested in trading protected species should be the one to apply to obtain this permit. The application must include the reason to request such a permit,¹⁸² the identification¹⁸³ and description of the species,¹⁸⁴ as well as the evidence showing the accordance of the proposed trade with CITES.¹⁸⁵

Once the application is received, the Director of the FWS decides to issue or deny the requested permit, based upon the following criteria:

- “(1) Whether the proposed import, export or re-export would be detrimental to the survival of the species;
- (2) Whether the wildlife or plant was acquired lawfully;
- (3) Whether any living wildlife or plant to be exported or re-exported will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment;
- (4) Whether any living wildlife or plant to be imported directly into the United States from the sea beyond the jurisdiction of any country will be so handled as to minimize the risk of injury, damage to health or cruel treatment;

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 50 C.F.R. s 23.15.

¹⁸² 50 C.F.R. s 23.15 (c)

¹⁸³ 50 C.F.R. s 23.15 (c) (1)

¹⁸⁴ 50 C.F.R. s 23.15 (c) (3) - (4)

¹⁸⁵ 50 C.F.R. s 23.15 (c) (8).

(5) Whether an import permit has been granted by a foreign country, in the case of proposed export or re-export from the United States of any wildlife or plant listed in Appendix I;

(6) Whether the proposed recipient of any living wildlife or plant listed in Appendix I to be imported into the United States is suitably equipped to house and care for such wildlife or plant;

(7) Whether any wildlife or plant listed in Appendix I to be imported into the United States is to be used for primarily commercial activities; and

(8) Whether the evidence submitted is sufficient to justify an exception, in the case of (i) wildlife or plants that were acquired prior to the date the Convention applied to them; (ii) wildlife or plants that were bred in captivity or artificially propagated, or were part of or derived there from; or (iii) wildlife or plants that are herbarium specimens; other preserved, dried or embedded museum specimens, or live plant material to be imported, exported or re-exported as a noncommercial loan, donation or exchange between scientists or scientific institutions.

(9) Whether in the case of wildlife or plants listed in Appendix II, they are the subject of a large volume of trade and are not necessarily threatened with extinction.”¹⁸⁶

Upon the issuance of the permit, the ESA provides for monitoring of transactions in relation to the permits. For that purpose, the traders of species are required to keep records of all transactions completed,¹⁸⁷ as well as to allow inspections of inventory and records.¹⁸⁸

7. Penalties and Enforcement

ESA provides for civil and criminal punishment for any person engaged in the trade of protected species in violation of the ESA.¹⁸⁹ The Act imposes strict liability on importers and exporters of the endangered species, unless there is a clear evidence that the trader acted in a good faith belief that the action was

¹⁸⁶ 50 C.F.R. s 23.15 (d).

¹⁸⁷ 16 U.S.C. s 1538 (d) (2) (A).

¹⁸⁸ 16 U.S.C. s 1538 (d) (2) (B) - (C).

¹⁸⁹ 16 U.S.C. s 1540 (a) (1) - (b) (1).

needed to protect a person from a bodily harm, from a protected species.¹⁹⁰ The criminal violations are misdemeanors, with more severe consequences for violations involving endangered rather than threatened species.¹⁹¹

The ESA authorizes the Secretary, the U.S. Department of Justice, the Attorney General and private parties to seek enforcement of its provisions. The Secretary may assess civil penalties, ranging from \$12,000 up to \$25,000 according to the type of violation, against any person who “knowingly” violates the ESA.¹⁹² Nevertheless, any person engaged in the trade of the protected species is subject to the above-mentioned fine whether the violation to ESA where knowing or not.¹⁹³

Before any penalty is assessed, a notice is given and a hearing is held for the person allegedly in violation of the ESA, pursuant to the Administrative Procedure Act (APA).¹⁹⁴ However, if the defendant asserts that the acts committed were based “on a good faith belief that he or she was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species” no civil penalty should follow.¹⁹⁵

¹⁹⁰ 16 U.S.C. s 1540 (a) (3) - (b) (3).

¹⁹¹ 16 U.S.C. s 1540 (b) (1).

¹⁹² 16 U.S.C. s 1540 (a).

¹⁹³ *Id.* The person engaged in the endangered species trade is subject, therefore, to strict liability.

¹⁹⁴ 16 U.S.C. s 1540 (a) (1); APA, 5 U.S.C. s 554 (1994). The FWS or the NMFS institutes a proceeding when a violation of the ESA occurs. An administrative law judge presides the hearings. The decision rendered by this judge is considered a final administrative action. However, appeal procedures are available to the non-prevailing party. The decision of the Board of Appeals is then subject to judicial review. APA, 5 U.S.C. s 556 (1994).

¹⁹⁵ 16 U.S.C. s 1540 (a) (3).

The Secretary may institute, also, forfeiture proceedings and confiscation¹⁹⁶. The forfeiture¹⁹⁷ proceeds against “[a]ll fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported or imported contrary to the provisions of this chapter, or any regulation made pursuant thereto, or any permit or certificate issued hereunder...”¹⁹⁸ Also, any equipment, tools and property used for the above stated purposes are subject to seizure or forfeiture as well.¹⁹⁹

The forfeiture action involves a three-step burden of proof procedure. First, the claimant has the burden of proving judicial standing.²⁰⁰ Second, upon showing standing, the government has to probe the existence of a probable cause of action.²⁰¹ An alleged violation of the provision of the ESA, CITES or the Lacey Act is enough to constitute probable cause to initiate a forfeiture action.²⁰² Third, if the probable cause of action is successfully proven, the claimant must demonstrate by a “preponderance evidence” standard that the property is not subject to seizure.²⁰³

¹⁹⁶ 50 C.F.R. s 12.23.

¹⁹⁷ A forfeiture action “is a proceeding in rem, in which the property is considered to be the offender.” *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, 636 F. Supp. 1281, 1286 (1986)

¹⁹⁸ 16 U.S.C. s 1540 (e) (4) (A).

¹⁹⁹ 16 U.S.C. s 1540 (e) (4) (B).

²⁰⁰ See, *Caiman Crocodilus Yacare*, 636 F. Supp. at 1283: “a claimant must first demonstrate an interest in the seized item sufficient to satisfy the court of its standing to contest the forfeiture.” *Id.* (quoting *United States v. \$364,960.00 in United States Currency*, 661 F. 2d 442,446 (5th Cir. Unit B 1981))

²⁰¹ *Id.* A probable cause of action means a “reasonable ground for belief or guilt, supported by less than prima facie proof, but more than mere suspicion.” *Id.* (quoting *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980)).

²⁰² *Id.* at 1284.

²⁰³ *Id.* (quoting *United States v. \$22,287.00 in United States Currency*, 709 F.2d 442, 446 (6th Cir. 1983))

Second, the U.S. Department of Justice may prosecute any person who “knowingly” violates the ESA as well as impose criminal penalties in accordance with the specific type of violation. The fines can range from \$25,000 up to \$50,000 and/or imprisonment from six months to a year.²⁰⁴ The courts have held that the ESA’s provision violations are general intent crimes.²⁰⁵ In other words, it is not necessary to show a specific intent to violate the ESA but to show a general aim to “take” a listed species. It is not necessary to prove “either knowledge of illegality, or even of the nature of the species in question as one protected under the Act.”²⁰⁶ A self-defense or a third person defense allegation is allowed, as stated in the case of civil penalties.²⁰⁷

Third, the Attorney General may enjoin any person, who supposedly is in violation of the ESA.²⁰⁸ Furthermore, the Attorney General assists the Secretary in collecting civil penalties already assessed but not paid, by instituting civil actions in the U.S. Districts Courts.²⁰⁹

Finally, any person through the citizen suit mechanism may seek the injunction of an action alleged to be in violation of the ESA.²¹⁰ The issue has turned on whether the person has standing to sue. The standing to sue doctrine requires that to commence a suit the plaintiff must show “a sufficient stake in an otherwise justifiable controversy to obtain judicial resolution of that

²⁰⁴ 16 U.S.C. s 1540 (b) (1).

²⁰⁵ See, e.g., *United States v. Clark*, 986 F.2d 65 (1993); *United States v. Oanh Vu Nguyen* 916 F.2d 1016 (1990); *United States v. Kepler*, 531 F.2d 796 (1976); *United States v. Doyle* 786 F.2d 1440 (1986); *United States v. Billie*, 676 F. Supp. 1044 (1986); *United States v. Ivey*, 949 F.2d 759 (1991); *United States v. St. Onge*, 676 F.Supp. 1044 (1988).

²⁰⁶ 128 A.L.R. Fed. 271 (1995).

²⁰⁷ 16 U.S.C. s 1540 (b) (3).

²⁰⁸ 16 U.S.C. s 1540 (e) (6).

²⁰⁹ 16 U.S.C. s 1540 (a) (1).

controversy”.²¹¹ To determine whether a party has “sufficient stake”, the claim must meet three Constitutional requirements, known as the injury in fact test ²¹². First, the plaintiff must have suffered a personal, concrete and actual or imminent injury.²¹³ Second, there must be a “fairly traceably” causation link between the injury and the action of the defendant.²¹⁴ Third, the injury must be redressable by a favorable decision.²¹⁵

Under the ESA, litigants arguing injury to non-economic as well as economic interests may have standing to sue.²¹⁶ First of all, litigants that have an “aesthetic, conservational, and recreational”²¹⁷ interest in preserving the endangered species or its critical habitat may proceed with litigation measures. In fact, the litigant is not required to suffer an economic harm to meet the personal injury test. The injury caused to his non-economic interests is enough to afford judicial review.²¹⁸

It should be noted that there are some provisions by which Congress has excluded economic interest considerations. For instance, Congress has mentioned that the listing determinations must rely “solely” on the best scientific data. Therefore, economic considerations are not relevant. As a consequence, parties alleging economic harm derived from the listing decision generally have no

²¹⁰ 16 U.S.C. s 1540 (a) (1) (A).

²¹¹ *Sierra Club v. Morton*, 405 U.S. 727, 730 -31 (1972).

²¹² *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

²¹³ *Id.*

²¹⁴ *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S.26, 41 -42 (1976)).

²¹⁵ *Id.*

²¹⁶ Monica Reimer, *Comment: Competitive Injury as a basis for Standing in Endangered Species Act Cases*, 9 Tul. Envtl. L.J. 109, 143 (1995).

²¹⁷ *Morton*, 405 U.S. at 154.

²¹⁸ *Morton*, 405 U.S. at 154.

standing to sue.²¹⁹ The same occurs with the ESA's consultation provision. In fact, the legislative history indicates that the consultation decision is made "irrespective of the economic importance of the activity".²²⁰ Secondly, litigants who allege economic injury under the ESA's statute can only sue under the provisions that protect economic interests, specifically, the exemption process and the critical habitat designation.²²¹ Under these two provisions, however, litigants may only argue the federal agency's failure to consider economic impacts during either the exemption process or the critical habitat designation.²²²

Thirdly, litigants that challenge an action on the basis that it will harm a species at some future date have standing to initiate litigation.²²³ However, in the latter case, the litigant will not have standing to argue about an economic injury because there is no indication that Congress intended to create a cause of action in such respect.²²⁴

8. ESA'S PREEMPTION

The second provision of the ESA that implements CITES is section 1535 (f), which refers to the scope of the Act's preemption. Indeed, this section says: "Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or

²¹⁹ *Supra* note 190 at 141 - 42 (citing H. R. Con. Rep. No. 835, 97th Cong., 2nd Sess. 19 (1982), reprinted in 1982 U.S.C.C.A.N. 2907, 2860).

²²⁰ *Id.* at 139 (citing H. R. Rep. No. 1625, 95th Cong., 2nd Sess. 11 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9461).

²²¹ *Id.* at 143- 44.

²²² *Supra* note 190 at 140.

(2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. [...]. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.”²²⁵

As a consequence of this provision, states are free to regulate and implement CITES in a more restrictive way than ESA.²²⁶ However, Federal regulations preempts state law when the former establishes specific permits or bans the “importation, exploitation or interstate commerce...”²²⁷

9. General Statistics for Endangered Species

Currently, there are 735 U.S. species of plants and 496 species of animals listed as threatened or endangered.²²⁸ A 120 of these species have a designated critical habitat and 8 species have proposed critical habitat designations.²²⁹ 940 of the listed species have approved recovery plans.²³⁰ 266 of the species have recovery plans under development. 291 of the listed species habitat conservation plans have been approved.²³¹

²²³ *Id.* at 144.

²²⁴ *Id.* at 144.

²²⁵ 16 U.S.C. s 1535 (f).

²²⁶ *Man Hing Ivory and Imports, inc., v. Deukmejian*, 702 F. 2d. 760, 763 (1983) (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 7 -8 (1973)).

²²⁷ *Id.*

²²⁸ U.S. Fish and Wildlife Service, Division of Endangered species. Data current as of May 31, 2000. <http://endangered.fws.gov/stats/genstats.html>.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

B. The Lacey Act

The Lacey Act was enacted in 1900 with the purpose of protecting wildlife²³² species, “ ‘whose continued existence is presently threatened’ by ‘gradually drying up the international market for endangered species,’ thus ‘reducing the poaching of any such species in the country where it is found.’ ”²³³ To accomplish its purpose, the Lacey Act allows U.S attorneys to enforce foreign wildlife protection laws in the United States.²³⁴ The Act, therefore, makes it a federal law violation for any person “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law, or regulation of any State or in violation of any foreign law...”²³⁵ With respect to this provision, the U.S courts have further clarified two issues. The first issue is the meaning of “any foreign law”. According to the courts, the term encompasses a “wide range of laws passed by the world’s regimes [...] A narrow interpretation that [does] not include, at least, foreign regulations as grounds for violations would only serve to gut [...] the statute.”²³⁶

The second issue is the application of the foreign law in the United States. In particular, the courts have held that the United States authorities relies in a

²³² Wildlife is defined by this Act as “any wild animal whether alive or dead, [...] whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof.” 16 U.S.C. s. 3371 (a). Through the 1981 Amendment to the Act, Congress included also plants under the Protection of the Lacey Act. *Id.* at (a) (1).

²³³ *United States v. Bernal*, 90 F.3d 465, 467 (1996). (quoting S.Rep. No. 91-526, 91st Cong., 1st Sess., reprinted in 1969 U.S.C.C.A.N. 1413, 1415- 16.

²³⁴ *Id.*

²³⁵ 16 U.S.C. s 3372 (a) (2) (A)

²³⁶ *United States v. Lee*, 937 F.2d 1388, 1391 (1991) (quoting *United States v. 594,464 pounds of Salmon*, 871 F.2d 824, 828 (1989))

foreign law to determine whether the Lacey Act has been triggered or not.²³⁷ If the answer is in the affirmative, the U.S government will apply the Lacey Act and not the foreign regulation.²³⁸

The Lacey Act provides for civil²³⁹ and criminal sanctions for violations of the provisions of the Act. Civil penalties are assessed on the basis of whether the offender knew,²⁴⁰ or should have known, in exercising due care, in violating the law.²⁴¹ In essence, criminal penalties are imposed on the basis of the knowledge of the person violating the statute.²⁴²

The Lacey Act also establishes for forfeiture of all the protected species traded in violation of the Act. This is in spite of the existence of “culpability requirements” to assess civil or criminal sanctions.²⁴³

In addition, the Act provides for forfeiture of the property used to commit a criminal violation of the Act.²⁴⁴ The forfeiture is imposed on a strict liability basis.²⁴⁵ However, a claimant could argue the defense of an “innocent owner” only by preponderance of the

²³⁷ *Id.* at 1393

²³⁸ *Id.*

²³⁹ 16 U.S.C s 3373 (a) (1) - (6)

²⁴⁰ 16 U.S.C s 3373 (a) (1)

²⁴¹ *Id.* See also, *United States v. Proceeds from Sale Approx. 15,538 Panulirus Argus Lobster Tail*, 834 F. Supp. 385 (1993).

²⁴² 16 U.S.C. s 3373 (d) (1) - (3). See also, *United States v. Grigsby*, 11 F.3d. 806, 819 (1997). It is interesting to note that in *Lee* case, supra note 138, the court hold that in “imposing criminal punishment for wildlife takings in violation of any underlying foreign law, the Act draws no distinction based on the type of sanction imposed by the underlying law [...] [N]o reason exists to suppose that Congress intended civil penalties to be imposed for violations of either criminal or civil regulations, while intending that criminal penalties only result from criminal regulation violations.” *Lee*, 937 F.2d at 1392.

²⁴³ 16 U.S.C s 3374 (a) (1)

²⁴⁴ 16 U.S.C s 3374 (a) (2)

²⁴⁵ 2,507 Live Canary Winged Parakeets, 689 F.Supp. at 1117.

evidence standard. This means they must show that it did all that was reasonable possible to prevent the unlawful activity.²⁴⁶

²⁴⁶ Id. at 1118 (Citing *United States v. M/V Christy Lee*, 640 F. Supp. 667, 672 (1986)). See also *Panulirus Argus Lobster Tail*, 834 F. Supp. at 385

CHAPTER 4

COLOMBIAN IMPLEMENTATION OF CITES

Although Colombia occupies just 0.7% of the earth's territory, it has approximately 10% of the living species of animals and plants in the world¹. Colombia has reported the existence of approximately 75,000 species of food and industrial-use plants,² 454 species of mammals, 1,752 bird species, 475 species of reptiles, 583 kinds of amphibious and 4,500 fish species³. These numbers render Colombia as the world's second largest country in biological diversity per unit of territory⁴. The numbers also show that Colombia is the largest country in bird species, the second largest in amphibious species and the third largest in reptiles, primates and butterflies population.⁵ The biological diversity in Colombia, therefore, is the wealth of the country and should be protected and preserved. However, the number of endangered animal and plant species in Colombia has been increasing exponentially over the years as a result of inadequate environmental protection policies and their implementation.⁶ The drafting of a new Constitution in 1991 gave Congress the perfect opportunity to include in the

¹ REGIMEN LEGAL DEL MEDIO AMBIENTE, section 0047-2. Legis Editores, (1st ed. 1997)

² RAMIREZ YESID, EL DERECHO AMBIENTAL 158. Antares Editores S.A, (2nd ed. 1988).

³ Ministerio del Medio Ambiente, *Gestion Ambiental para la Fauna Silvestre en Colombia*, Marco Politico 20, 1988. [Hereinafter Marco Politico de la Gestion Ambiental, (visited Jul.14, 2000) <<http://www.minambiente.gov.co/ppoliticasyfauna.htm>.

⁴ RAMIREZ YESID, *supra* note 2 at 37.

⁵ Marco Politico de la Gestion Ambiental, *supra* note 3 at 20.

⁶ Constitutional Court, Judgement C-305, July 13, 1995. Justice Alejandro Martinez Caballero. Reprinted in *Regimen Legal del Medio Ambiente*, *supra* note 1 at section 1116.

document the needed legal frame to protect the environment¹ in the country. As a result of the effort undertaken by Congress, the Colombian current Constitution includes almost 45 articles devoted to protecting the environment. The protection of the environment occupies therefore, the foremost position in the Colombian legal regimen². In fact, the Colombian Constitution is qualified as an ecological Constitution.³

A. Constitution

The hierarchy of the different legal norms existing in Colombia follows a pyramid structure.⁴ On the top of this pyramid there is the National Constitution,⁵ which is known as the supreme norm. All regulations below the supreme norm have to be construed in accordance with the Constitution.⁶ The Constitution is followed in rank by the laws and, in consecutive order, by the decree-laws, the decrees and Codes, the Ministry Resolutions, the States Agreements and finally by the Municipal Ordinances.

The concept of legal pyramid does not mention the hierarchy of the international treaties. However, the Constitution expressly recognizes

¹ RAMIREZ YESID, *Supra* note 2, at 84. The notion of environment includes the atmosphere as well as the renewable natural resources (Law No. 23, 1973. art. 2). In turn, the notion of natural resources includes: Fauna (CODIGO DE RECURSOS NATURALES RENOVABLES. art. 242); Forest (CODIGO DE RECURSOS NATURALES RENOVABLES. art. 199); Mine resources (Laws Nos. 13 of 1937, 85 of 1945, 145 of 1959, 60 of 1957 and 20 of 1969 as well as Law-Decrees 2223 of 1932, 1557 of 1940, 2514 of 1952, 1275 of 1970 and 2181 of 1972); Hydro Resources (Law-Decree 2811 of 1974).

² Constitutional Court, Judgement C-305, *supra* note 6.

³ *Id.*

⁴ The legal regimen in Colombia follows the concept of “legal pyramid” that was introduced by Hans Kelsen. For a complete explanation of the “legal Pyramid” concept, see KELSEN HANS, *TEORIA GENERAL DEL DERECHO* 202, Editorial Porrua, (ed. 1991).

⁵ CONSTITUCION NACIONAL DE COLOMBIA [CONST] art. 4. The constitution is the superior norm. In the event of conflict between the Constitution, the law or any other legal regulation, the Constitution shall prevail.

⁶ *Id.*

international treaties and conventions ratified by the laws of the nation⁷ as part of the internal legal regimen.

The environmental protection legal frame contained in the Constitution relies over three bases. The first base refers to the obligations of the Government and the authorities. The second base contains regulations regarding the environmental rights and obligations of the citizens. The third base relates to the role of the controlling agencies of the State.

1. Obligations imposed on the State and the Authorities

The first base of the Constitution regarding the environment protection contains the obligations imposed on the State and authorities in the country. These obligations rely on the concept of sustainable use⁸ of the natural resources. In fact according to the Supreme Court of Justice, the Constitution cannot be interpreted in a purely conservative manner so as to ban the use of natural resources to satisfy human needs.⁹ Rather, the Constitution shall be interpreted as to establish the obligation to follow a sustainable use. In other words, such use of natural resources is allowed to satisfy human needs without compromising the needs of the future generation.¹⁰ The sustainable use, therefore, tries to reconcile the human needs with the restrictions needed to protect the environment.

⁷ *Id.* at art. 93.

⁸ The term sustainable use has been defined as the use of the components of the biodiversity in a manner that does not reduce the biodiversity in the long term and, therefore, maintain its possibilities of to satisfy the needs and aspirations of current and future generations. Rio Convention on Biologic Diversity, June 5, 1992, art. 2. Approved in Colombia by Law No. 10, 1994.

⁹ *Supra* note 6.

¹⁰ *Id.*

The Constitution grants to the State the responsibility of protecting the natural resources of the Nation.¹¹ Furthermore, the supreme law of the nation requires the State to plan the use of the natural resources to guarantee their sustainable use, preservation, restoration and restitution.¹² The Constitution states also that the State has the authority to manage the use of natural resources with the ultimate goal of improving the economy, the society's quality of life and protecting the environment.¹³

The Constitution also establishes that State has to prepare the country's Annual Development Plan.¹⁴ This development plan contains the Government's objectives, priorities, goals, and general strategies concerning the economy, society and environment as well as an investment plan in such areas. The investments in public health, quality of life improvement, education and environment preservation are considered to be a social expenditure and therefore, have priority over any other kind of expenditure.¹⁵ Economy, Society and Ecology are thus the key issues of the Annual Development Plan. Again, the Constitution mandates that there must be a balancing of ecology, society and economy issues, in light of the sustainable use philosophy.

The State is also in charge of preventing and controlling environmental deterioration by imposing legal sanctions and requesting repairs for the environmental damage caused.¹⁶ This provision does not require any kind of

¹¹ CONST. arts. 8, 79.

¹² *Id.* art. 80.

¹³ *Id.* art. 334.

¹⁴ *Id.* art. 340.

¹⁵ *Id.* art. 366.

¹⁶ *Id.* art. 80 (2). See also, LLERAS DE LA FUENTE CARLOS, *INTERPRETACION Y GENESIS DE LA CONSTITUCION DE COLOMBIA*, 184. Camara de Comercio de Bogota, (1992 ed.)

monetary remuneration to the State such as fees, all that is required is that the responsible person reinstates the harmed ecological balance.¹⁷

The Constitution bestows on the President the power of declaring the State of Emergency whenever there are serious or imminent acts that disturbs or threatens the ecological regimen in the country.¹⁸ During the State of Emergency, the President with the acquiescence of all the Government Ministers, may issue Decrees- Laws. The objective of these Decrees-Laws is to solve the crisis and to prevent the spread of negative effects. Congress does not intervene during the issuance of these Decrees-Laws but after the fact. In fact, during the year following the declaration of State of Emergency, Congress may derogate, modify, or add to the Decrees-Laws.¹⁹

At the regional level, the Constitution grants to authorities the power to issue regulations relating with the economic and environmental development of that state.²⁰ The Governor, the head of the state, is responsible for promoting and enforcing such regulations.²¹

At the local level, the Constitution empowers the municipalities to issue regulations to control, protect and preserve the ecological and cultural heritage.²² The Mayor as the prime authority in the municipalities, is responsible to manage and preserve the environment.²³

¹⁷ LLERAS DE LA FUENTE CARLOS, *supra* note 22 at 184.

¹⁸ CONST. arts. 212, 213, 215.

¹⁹ *Id.*

²⁰ *Id.* art 300 (2).

²¹ *Id.* art. 305 (6).

²² *Id.* art. 313 (9).

²³ *Id.* art. 315 (2), (3), (5).

In the International area, the Constitution gives power to the Government in promoting ecological affairs.²⁴

2. Environmental Rights and obligations of the Citizens

The second basis of the Constitution in regard to the environment protection contains the rights granted and the obligations imposed on the citizens. One of the most remarkable characteristics of the Constitution is that not only requires the people to protect the environment,²⁵ but creates the right for them, as a community, to enjoy a safe environment.²⁶ Commonly known as a “collective right”, the right to a safe environment is characterized as not being granted to individuals per se but to the society as a whole.²⁷ This right is protected by the Constitution by allowing the community to participate during the decision making process concerning environmental actions and decisions.²⁸ The Constitution also grants legal actions to the community and the individual person to protect the environment whenever it is at risk.

The legal actions granted by the Constitution to the community are called the Community Actions²⁹ and the Class Actions³⁰. The Community Actions protects collective rights and interests related with, among others, the

²⁴ CONST. art. 226.

²⁵ *Id.* arts. 8 and 95 (8).

²⁶ *Id.* art.79.

²⁷ Regimen Legal del Medio Ambiente, *supra* note 1 at section 0035-1.

²⁸ CONST. arts. 23, 45 and 83. See also, Law No. 99, 1993, art. 69. This provision allows the citizens to participate during the administrative processes initiated to issue, modify, cancel permits or licenses, or to impose or revoke penalties related with environmental protection issues. See also CONST. arts. 79, 103 and Law No. 99, 1993, art. 74, in conjunction with Resolution 33 of 1996 from the Ministry of Environment, art. 2, which entitles every citizen to request from the authority information related with environmental concern actions and decisions.

²⁹ CONST. art. 88 (1). This article also specifies that the law shall regulate this type of Actions. Thus, the Civil Code regulates the Community Action in arts. 1005 and 2359. The Civil Code provisions apply to environmental related disputes by express authority of the Law No. 9, 1989, art.8 and Decree No. 2400, 1989, art. 6.

environment. This action is preventive in nature. Consequently, this legal action requires the existence of a threat of harm to the environment but not the existence of an actual harm.³¹ In contrast, Class Actions are directed to repair actual environmental damages caused by the actions or omissions of the authority or individual people.³²

The legal actions granted by the Constitution to individual citizens to protect their right of a safe environment are called the Observance³³ and the Protection Actions.³⁴ The Observance Action allows any person to obtain a judgement that demands the authorities or particular individuals³⁵ to enforce any law or administrative act otherwise ignored by them. The “Protection Action”³⁶ in turn, allows any person to request from judges, through a summary legal procedure, the immediate protection of the rights recognized by the Constitution as fundamental.³⁷ This occurs whenever these rights are harmed or threatened

³⁰ CONST. art. 88 (2).

³¹ Constitutional Court, Judgement T-067, February 24, 1993. Justices Fabio Moron Diaz and Ciro Angarita Baron. *See also*, Constitutional Court, Judgement T-528, September 18, 1992. Justice Fabio Moron Diaz. *Reprinted in Regimen Legal del Medio Ambiente, supra* note 1 at sections 0205 and 0304, respectively.

³² *Id.* 14

³³ CONST. art. 87. *See also*, Law No. 393, 1997, which establishes the procedure to exercise the Observance Action in the environmental protection arena.

³⁴ Known respectively as “ Accion de cumplimiento” , “Accion de Clase” , “Accion de Tutela” and “Acciones Populares”. Translation made by the author for illustrative purposes only.

³⁵ Law No. 393, 1997, art. 8.

³⁶ CONST. art. 86. Every person has a protection action to request from the judges, through a summary judgement, by itself or through representatives, the immediate protection of its constitutional fundamental rights, whenever these rights are harmed or threatened by actions or omissions from any public authority. The protection consists in an order to the person accused to act or stop acting. The judgement is of immediate applicability and can be contested before the competent judge. This protection action can be exercised by the affected only whenever there is not available any different legal mechanism to protect its fundamental rights. However, this action can be also exercised as a temporal mechanism to avoid imminent harm... The law will established the events where the protection action can be exercised against individuals that perform public services, or whose behavior negatively affects the public interest, or are the superiors of the affected. (This translation is made by the author for illustrative purposes only).

³⁷ The Constitution in its first Chapter expressly enumerates the rights considered as fundamental (i.e. Freedom, Due Process, Peace, etc).

by either the actions or the omissions of the public authority. The right to a safe environment is not given the status as a fundamental right by the Constitution. Nevertheless, the Constitutional Court has further developed the notion of safe environment as a fundamental right. In fact, the Constitutional Court has held that a safe environment allows the survival of the human being. This survival guarantees the normal and integral development of the society. As a result, a safe environment is considered a fundamental right. Furthermore, the violation of this right may result in the violation of additional fundamental rights, as for example the right to live. Therefore, the right to a safe environment is protected through the Protection Action provision.³⁸

Another important constitutional regulation that affects the citizens relates to their private property. According to the constitution, private property has a social burden.³⁹ This means that a private interest concern has to yield to public interest concern. Therefore, public concerns or social interest reasons, i.e.

³⁸ Constitutional Court Judgement SU-442, September 16, 1997, Justice Hernando Herrera Vergara. *Reprinted in Regimen Legal del Medio Ambiente, supra* note 1 at section 0269-1. *See also*, Decree No. 2591 of 1991, which contains the procedural rules to use the Protection Action.

³⁹ CONST. art. 58: Private property and correlated rights acquired according to law, are protected by the nation. Whenever there is a conflict between public concern or social interest laws and particular individual rights, the public interest shall prevail over the private one. Private property is a social function. Therefore, private property has an ecological function. Due to public concerns or social interest, determined by the legislator, judicial expropriation may occur. Prior any expropriation, the nation has to indemnify the affected person. The amount of indemnity will be determined taking into consideration the interest of the society and the affected person. However, based on equity reasons, the Congress can determine by majority vote, the events where there is not indemnification involved. The equity reasons as well as the public concerns and social interest reasons cannot be debated during any legal process. (This translation was made by the author for illustrative purposes only). *See also*, Law No. 70, 1993 art. 20.

ecological reasons, are grounds for a competent judge to expropriate private property.⁴⁰

3. Role of the State Controlling Agencies

The third basis of the Constitution regarding the environment protection contains the rules of the State Controlling Organizations. The Constitution mandates the Controller of the Nation to submit to Congress an annual report regarding the status of natural resources.⁴¹ In addition, the Constitution requires the Attorney General to protect and defend the environment.⁴² The Attorney General also shall request from Congress the issuance of laws tending to protect the environment, and request from the authorities the observance of the laws of the nation.⁴³ Finally, the Constitution directs the Nation Defender to promote and protect, through Community Actions, the right to a safe environment.⁴⁴

B. Law -Decree 2811 of 1974

The main purpose of this Law-Decree is to regulate the preservation and rational use of wild animals.⁴⁵ In particular, this Decree focuses on regulating wild animals hunting activities.⁴⁶

The term “hunting” encompasses all activities related to raise, capture, transform, transport or trade of wild animals.⁴⁷ This Decree details the

⁴⁰ *Id. See also*, Law No. 99, 1993, art. 107. According to this provision, the civil works required to protect and manage the environment and renewable natural resources are considered as of public concern and social interest for expropriation purposes.

⁴¹ CONST. art. 268

⁴² *Id.* art. 277 (4) and (7)

⁴³ *Id.* art. 278 (4)

⁴⁴ *Id.* art. 282 (2) and (5)

⁴⁵ Law-Decree No. 2811 of 1974, art. 247.

⁴⁶ *Id.* art. 249. The term wild animals includes all the animals that are non domesticated or genetically modified, and excludes all animals which its live cycle is developed in the water.

⁴⁷ *Id.* art. 251.

obligations hunters are subject to, establishes the procedures to obtain hunting permits as well as the areas where hunting is prohibited. According to this Law-Decree, all hunting activities, except in the event of subsistence hunting,⁴⁸ requires permits issued by the Environmental Ministry. However, hunting or trading endangered or threatened species is strictly prohibited.⁴⁹

C. Decree 1608 of 1978

This Decree regulates the international trade of wild animals. There are four requirements to trade such species. First, Colombia must follow the rules and requirements of international treaties it has previously ratified.⁵⁰ Second, the species should not be prohibited from being trade.⁵¹ Third, animal sanity rules shall be followed.⁵² Fourth, a permit to trade should be issued in accordance with this law.⁵³

In addition, this Decree declares that all people in the country have a duty to protect the environment and the critical habitat of the native and endangered species.⁵⁴ If there is evidence that a person has violated this Decree, a penalty is assessed. Penalties considered in this Decree range from fines to the definitive close of the business or facility responsible of causing harm to the protected

⁴⁸ *Id.* art.252 (a). Subsistence hunting is the activity exclusively performed to feed the hunter and has no lucrative purposes.

⁴⁹ *Id.* art.265 (e).

⁵⁰ Law- Decree No. 1608, 1978, art. 202 (1).

⁵¹ *Id.* art.202 (2).

⁵² *Id.* art.202 (3).

⁵³ *Id.* art.202 (4).

⁵⁴ *Id.* art.219 (15).

species.⁵⁵ These penalties maybe added to those already established in the Civil and Criminal Codes.⁵⁶

D. Criminal Code

The criminal code qualifies as a felony four different acts that cause harm to natural resources. Interesting enough, these felonies are located in the section of the criminal code that protects the social and economic order. This means that the legislator tries to control the use of the natural resources, not because of the importance of the preservation of these resources for the humanity, but because of the eventually negative impact that the destruction of the natural resources has over the development of the national economy.⁵⁷

The first felony listed in the Criminal Code is the illegal use of natural resources.⁵⁸ It is a felony that any person derives an economic benefit greater than \$ 100,000 Colombian Pesos (approximately \$47 U.S. Dollars)⁵⁹ from the exploitation, transport or trade of the natural resources. The punishment for this felony is prison from six months to three years and a fine ranging from \$100,000 to \$2,000,000 Colombian Pesos (approximately \$47 to \$935 U.S Dollars)⁶⁰. This punishment is increased if endangered species are involved in the activity.⁶¹

⁵⁵ *Id.* arts. 223 to 229.

⁵⁶ *Id.* art.230.

⁵⁷ RAMIREZ YESID, Supra note 2 at 82.

⁵⁸ CRIMINAL CODE, art. 242.

⁵⁹ The exchange rate Peso – U.S Dollar on June 30, 2000 is \$2,139.11 pesos per dollar. Banco de la Republica, <http://www.banrep.gov.co:80/estadcam/trm/trm2000-1.htm> (Visited September 4, 2000)

⁶⁰ *Id.*

⁶¹ CRIMINAL CODE, art. 242.

The second felony is the destruction of natural resources.⁶² The person who destroys or exterminates natural resources is subject from one to six years of imprisonment and fines from \$20,000 to 2,000,000 Colombian Pesos (approximately \$9 to \$935 U.S. Dollars)⁶³.

The third felony listed in the criminal code is the propagation of illness to the natural resources.⁶⁴ A person who inflicts a virus or spreads bacteria that can affect natural resources will be imprisoned from two to eight years and additionally have to pay a fine between \$50,000 to 5,000,000 Colombian Pesos (approximately \$23 to \$2,338 U.S. Dollars).⁶⁵

Finally, the fourth felony states that a person who contaminates the environment will be prosecuted. Once again, the punishment is imprisonment from one to six years and fine from \$50,000 to 2,000,000 Colombian Pesos.⁶⁶

E. CITES regulations

Colombia approved CITES through Law 17 on January 22, 1981 and later ratified by Law 17 on August 31, 1981. It finally became effective on November 29, 1981. However, it was not until 1993 through Law 99 that the Colombian legislator started to create institutions and developed a legal infrastructure to apply CITES in the Country.

⁶² *Id.* art.246.

⁶³ *See supra* note 65

⁶⁴ CRIMINAL CODE, art.245.

⁶⁵ *See supra* note 65

⁶⁶ CRIMINAL CODE, art.245. This felony has been classified as “felony of danger” as opposed to “felony of result”. This means that for the judges when determining the existence of a felony, it is enough that the conduct of the prosecuted person threatens the natural resources. It is not required, consequently, that the natural resources are effectively harmed. REYES ECHANDIA ALFONSO, *DERECHO PENAL PARTE GENERAL*, 156. Universidad Externado de Colombia (ed. 1981).

1. Law 99 of 1993

Law 99 of 1993 created the Ministry of Environment as the highest institution in charge of establishing the policies to regulate the use and protection of the natural resources.⁶⁷ In particular, this Ministry has to take the necessary measures to protect the endangered species and to issue the certificates required by CITES to trade species.⁶⁸

Law 99 also created some other entities to give support to the Ministry of Environment. First, the Technical Advisory Counsel was created to give the Minister advice regarding the formulation of environmental related policies, regulations and projects.⁶⁹ Second, the National Environmental Council was created to coordinate and assure that all the policies, plans and programs undertaken by the different governmental bodies follow an environmental plan established by the Government.⁷⁰ Third, the Regional Independent Corporations⁷¹ were created to execute at the local level all the policies, programs and projects related with the environment and natural resources.⁷²

Additionally, Law 99 establishes as well the National Environmental System.⁷³ This system gathers all the legal rules, activities, resources, programs and institutions that allow the execution of the environmental guidelines contained in the Law 99.⁷⁴

⁶⁷ Ley No. 99, 1993, arts. 2 and 5.

⁶⁸ *Id.* art.5 (23).

⁶⁹ *Id.* art.11 (1). Known as “Consejo Tecnico Asesor de Politica Ambiental”.

⁷⁰ *Id.* arts.13 and 14. Known as “Consejo Nacional Ambiental”.

⁷¹ Known as “Corporaciones Autonomas Regionales”

⁷² Law No. 99, 1993, art.23.

⁷³ *Id.* art.4. This system is known as “Sistema Nacional Ambiental, SINA”.

⁷⁴ *Id.*

Additionally, Law 99 of 1993 regulates the Annulment Action. Through this action, any person, even when having not legal cause, is entitled to ask competent judges to annul environmental related acts⁷⁵. In particular, the annulment action proceeds against acts that either violate the law, are issued by personnel not authorized, are issued in an irregular manner, are based on false motivations, the defense right was not observed, or there is deviation of attributions.⁷⁶

One of the most important aspects of this Law is that it develops the concept as stated in the Constitution that private property has a social burden.⁷⁷ In particular, this Law regulates the ecological burden of the private property.

Law 99 enables Congress, the Department Assembly, Municipal and District Counsels to acquire by means of direct negotiation or expropriation, impose zoning regulations and easements over private property, when there is a need to develop public works in order to protect the environment and the natural resources.⁷⁸

This Law also, regulates the sanctions and preventive measures that both the Environmental Ministry and the Regional Independent Corporations are able to assess to the person that violates the regulations concerning environmental protection and use of the natural resources. On one hand, the mentioned entities may assess daily fines up to the equivalent of a 300 times monthly minimum wage, suspend the environmental licenses, permits or authorizations, close the

⁷⁵ Environmental related acts are those that require the issuance, modification or generates the cancellation of an environmental permit, authorization, concession or license. Law No. 99, 1993, art. 73.

⁷⁶ CODIGO DE PROCEDIMIENTO ADMINISTRATIVO, art. 84.

project, demolish the project and seize the animal or plant species involved in the activities violating the legal norms.⁷⁹ These sanctions may be applied in addition to the sanctions regulated by the Civil and Criminal Code.⁸⁰ Also, the same authorities may take preventive measures in the form of written warnings, proceed with preventive seizures of species and suspend the project or activity that threatens the species.⁸¹

Finally, Law 99 of 1993 regulates the procedure pertaining to the environmental licenses.⁸² The environmental license is required to develop projects, activities or industries that may cause serious deterioration to the natural resources, the environment or the landscape.⁸³ The person interested in obtaining an environmental license should file a petition before the designated authorities to issue the environmental licenses.⁸⁴ After reviewing the petition, the authority should establish guidelines for the petitioner to develop an environmental impact analysis. This analysis should contain the plans to prevent, mitigate and correct the negative impact of the proposed project over the environment.⁸⁵ Additionally, the authority should mention whether or not the

⁷⁷ *Id.* art. 58

⁷⁸ Law No. 99, 1993, art. 107 (1) and (3)

⁷⁹ *Id.* at Article 85 (1) (a) through (e).

⁸⁰ *Id.* at art. 85 (1).

⁸¹ *Id.* at art. 85 (2) (a) through (d).

⁸² Environmental License is the authorization granted by the competent authority to a person in order to develop a project or activity that may cause serious deterioration to the natural resources, environment or landscape. The environmental license contains the requisites, obligations and conditions that should be followed to prevent, reduce, correct and compensate and manage the consequences of the project or activity over the environment. Decree No. 1753, 1994, art. 2.

⁸³ Law No.99, 1993, art. 49

⁸⁴ *Id.* art. 58. The Ministry of Environment, the Regional Independent Corporations, some districts or municipalities are the designated authorities to issue environmental licenses.

See also the division of competencies established in Law No. 99, 1993, arts. 52, 55: Decree No. 1753, 1994, arts. 6, 12 and Law No.128, 1994, art. 14.

⁸⁵ *Id.* at art. 57.

proposed project requires a study of different measures to prevent or control environmental damage during the project.⁸⁶

Once the study of alternatives as well as the environmental impact analysis is submitted, the authority has 30 days to request the petitioner additional information. Thereafter, the authority has 15 extra days to request other authorities to submit technical pinions concerning the proposed activity. These technical opinions should be rendered in no more than 60 days. The authority then has 60 more days to approve or deny the petition.⁸⁷ An environmental license can be revoked or suspended by the authorities in the case that the obligations established in the environmental license are not fulfilled.⁸⁸

2. Decree 1401 of 1997

This Decree designates the Ministry of Environment as the Administrative Authority for the purposes of CITES. The Ministry as such has the following responsibilities:

- “1-. To establish the procedure to issue CITES permits and certificates.
- 2-. To grant the CITES permits and certificates, once the requirements established by CITES article IV are fulfilled.
- 3-. To denied, suspend and revoke through a substantiated administrative act, the CITES permits and certificates.
- 4-. To keep communication with CITES secretariat to assure the correct application of the CITES convention in Colombia.
- 5-. To represent Colombia during the Parties Conferences, committees and meetings of CITES. For this purpose, the Ministry has to obtain the respective credentials from the International Affairs Ministry.

⁸⁶ *Id.* art.56. See also Decree No. 1753, 1994, art. 17 which includes a list of all the activities that require this particular study.

⁸⁷ *Id.* art. 58. See also Decreto 1752, 1994, art. 30 (3) through (6).

⁸⁸ *Id.* art..62.

- 6-. To use human and technical resources as well as budget required to guarantee the correct application of the CITES provision in Colombia.
- 7-. To establish circulation and information mechanisms with all the governmental entities that control the international trade in Colombia to assure the correct application of CITES throughout the national territory.
- 8-. To train the personnel in the governmental entities, which give support to the CITES administrative authority and are also in charge of the international trade, in the correct application of CITES.
- 9-. To promulgate Cites in Colombia.
- 10-. To keep statistics related with the international movement of native species, which are included in CITES Appendixes.
- 11-. Establish and Maintain effective mechanisms with the Red Traffic, the World Center to Monitor the Preservation and the Parties to the CITES Convention to adopt the required measures to prevent illegal trade of the animal and flora species.
- 12-. To prepare and submit before the CITES Secretariat the status regarding the application of CITES in Colombia.
- 13-. To follow IATA and CITES regulations regarding the transportation of live animals.
- 13-. (sic) To determine in conjunction with the CITES Scientific Authority whether or not the international trade of any species mentioned in the CITES Appendixes threatens the existence of such species.
- 14.- To prepare in conjunction with the CITES Scientific Authority, proposals to submit to the CITES authorities regarding the inclusion, exclusion or transfer of species within the CITES Appendixes.
- 15-. To include or eliminate from the register that holds the CITES Secretariat, the entities that grow species in captivity and that are listed in Appendix 1...⁸⁹

3. Decree 1420 of 1999

This Decree designates five institutions of the Government as scientific authority for the purposes of CITES. Each one of these institutions has its particular field of specialty. First, the Instituto de Hidrologia, Meteorología y Estudios Ambientales -IDEAM- is the entity in charge of managing the

ecosystem and preventing its degradation. This entity is also responsible for zoning the different areas of the national territory for specific environmental purposes.⁹⁰ Second, the “Instituto de Investigaciones Marinas y Costeras – Invemar-” is in charge of managing marine resources, its preservation and sustainable use.⁹¹ Third, the “Instituto de Investigaciones de Recursos Biológicos –Alexander Von Humboldt-” performs the scientific investigations related with the flora and fauna resources. In addition, this institution handles the statistic for the biodiversity in the country.⁹² Fourth, the “Instituto Amazonico de Investigaciones Cientificas –Sinchi-” has the objective of promoting scientific investigations and studies related with the biological, social and ecological status of the Amazon region.⁹³ Fifth, the “Instituto de Investigaciones Ambientales del Pacifico –John Von Neuman-” performs environmental investigations on the Pacific Coast of the country.⁹⁴

The Scientific Authority has the following responsibilities:

- “1-. To determine the viability to export species listed in CITES Appendixes and establish if such activity threatens the species.
- 2-. To evaluate the import of species listed in CITES Appendixes and determine if such activity threatens the species and the natural systems equilibrium in the country.
- 3-. To evaluate the possibility to introduce or reintroduce species and its sub-products when listed in CITES Appendixes and establish if such activities threatens the species.
- 4-. To render concepts regarding authorizations to collect species, perform listed species population studies.
- 5-. To render concepts regarding the distribution of the species, their geographical location, tendencies, collection, trade.

⁸⁹ Decree No. 1401, May 27, 1997, art. 2. This translation has been made by the author for illustrative purposes only.

⁹⁰ Law No. 99 of 1993, art.17.

⁹¹ *Id.* art.18.

⁹² *Id.* art.19.

⁹³ *Id.* art.20.

⁹⁴ *Id.* art.21.

- Recommend corrective measures that allow the preservation of the species in their habitat and avoid in such manner that the species are included in CITES Appendix I or, eventually, II.
- 6-. To render concepts regarding the capacity of the person who is going to receive the species listed in Appendix I to protect and take care of them.
- 7-. To Analyze and inform the Ministry of Environment, the administrative authority before CITES, that the establishments that grow listed species in captivity or artificially reproduce them, fulfill the established requirements to do so.
- 8-. To prepare in conjunction with the Ministry of Environment the proposals to modify CITES Appendixes I, II and III...”⁹⁵

4. CITES Permits

The Vice-Minister of Environment, the Director of Forest and Wildlife and the Sub-Director of Fauna are the authorities allowed to issue CITES permits in the country.⁹⁶

Legal regulations establish the procedure to obtain a CITES permit to export or re-export listed species.⁹⁷ This procedure has to be initiated by the legal representative of the person interest in trading the species.⁹⁸ This representative has to complete and sign the application required by the Ministry of Environment⁹⁹ and the parties to CITES.¹⁰⁰ The application shall contain a brief description of the species involved.¹⁰¹ The authorities have to check the quantity of species involved in the trading against the data from the Ministry of

⁹⁵ Decree No. 1420, May 29, 1997, art. 2. This translation has been made by the author for illustrative purposes only.

⁹⁶ Ministry of Environment, Resolution No. 604, December 23 of 1994, art. 1. Through this Resolution, the Ministry of environment delegates the responsibility of issuance CITES permits to three authorities: Vice Minister of Environment, the Director of Forest and Wildlife and the Sub-Director of Fauna.

⁹⁷ Vice Ministry of Environment, Resolution No. 573, June 26, 1994, art. 2.

⁹⁸ *Id.* art.2 (1).

⁹⁹ *Id.*

¹⁰⁰ *Id.* art.3. This Article specifically makes reference to the permit established by the “Resolution Conf. 9.3.” of the Parties Conference.

¹⁰¹ *Id.* art.2 (3).

Environment to determine whether or not the species can be exported or re-exported.¹⁰² The authorities will check the size of the species “when possible”.¹⁰³ Thereafter, the authorities will issue the respective permit. The original and first copy of the permits have to be delivered to the environmental authority with jurisdiction in the exporting port. This authority has to check the species prior to export, attach the original permit to the cargo and return the copy to the exporter.¹⁰⁴

The procedure to import listed species is similar to that mentioned in the event of exporting listed species. That is, the application for importing has to be completed and submitted by the legal representative of the importer.¹⁰⁵ Also, the application form has to be the one requested by the Ministry of Environment and CITES.¹⁰⁶ The difference with the exporting procedure is that the authorities have to give to the importer the original and first copy of the permit. Then, the importer has to deliver these permits to the exporting country, which has to attach them to the shipment.¹⁰⁷ Once the cargo arrives, the authorities have to check the imported species at the port¹⁰⁸ and collect the CITES permits attached to the cargo.¹⁰⁹

An application to obtain a CITES permit can be denied if there is a court order that prevents the permit to be issued, the legal origin of the species cannot

¹⁰² *Id.* art.2 (5).

¹⁰³ Vice Ministry of Environment, Resolution No. 573, *supra* note 100

¹⁰⁴ *Id.* art.2 (8) and (9).

¹⁰⁵ *Id.* art.2(1).

¹⁰⁶ *Id.* arts. 2 (5) and 3.

¹⁰⁷ *Id.* art.2 (10).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* art.2 (11).

be established, and the Ministry of Environment considers the issuance of the permit not necessary.¹¹⁰

Finally, the CITES permit is valid for three months. However, the interested party can extend it another three months through a written and substantiated request.¹¹¹

5. Other Authorities Enforcing CITES

Law 99 Of 1993 creates the Environmental Police as a special subdivision within the National Police organization. This environmental police give support to the authorities that protect the environment and the natural resources.¹¹²

Furthermore, the before mentioned law stipulates that 20% of people who have a duty to render military service, may fulfill their obligation by performing an environmental service. This service, however, has to be regulated in further detail by future laws.

6. General Statistics for Endangered Species and Illegal trade

The International Union for the Preservation (UICN) publishes a “Red Book” listing the endangered and threatened species. This Red Book in its 1996 version contains the following data for Colombia: 89 mammal species, 133 species of birds, 20 species of reptiles and 8 species of fish are endangered or threatened.¹¹³ There is no data available as to the number of endangered or

¹¹⁰ *Id.* art.4.

¹¹¹ *Id.* art.8.

¹¹² Law No. 99, 1993, art. 101.

¹¹³ Instituto de Investigaciones de Recursos Biologicos -Alexander Von Humboldt- (visited Jul.14, 2000) <<http://www.humboldt.org.co/cons.htm>.

threatened amphibious creatures. Finally, the Red Book lists approximately 1,000 species of endangered or threatened plant species.¹¹⁴

The Ministry of Environment has reported that there has been the following seizures of animals product of illegal trade: 386 seizures of birds, which corresponds to a 1,540 live bird species and byproducts, 268 seizures of mammals, which correspond to a total of 434 live animal and processed products from mammals, 145 seizures of reptiles, which correspond to 28,174 eggs and 5,781 live animal as well as sub-products, 4 seizures of fishes, corresponding to 40 animals and processed products, 1 seizure of crustaceans, which correspond to a total of 36 live animals. Finally there have been 61 seizures of undetermined species, which includes 1,791 live and dead specimens.¹¹⁵

¹¹⁴ *Id.*

¹¹⁵ Ministerio del Medio Ambiente (visited Jul.14, 2000)
<http://www.minambiente.gov.co/biogeo/me...especies/florayfauna/trafico_ilegal.htm.

CHAPTER 5

CONCLUSION: PROPOSAL TO MODIFY THE ENDANGERED SPECIES PROTECTION LEGISLATION IN COLOMBIA

The following analysis will compare the existing U.S. and Colombian legal regimens that protect endangered species and enforce CITES treaty. The strengths and shortcomings of each regimen are identified to make a viable and successful proposal to help improve the current system in Colombia.

The work of the legislators during the process of drafting the environmental protection articles of the 1991 National Constitution is admirable. Indeed, the legislators for the first time in the Colombian history recognized the environment and its importance. It is also laudable that the legislator created a number of actions that citizens may exercise to protect their right to a safe and clean environment. Furthermore, the introduction of the idea of sustainable use of the species in a less developed country like Colombia seems to be a positive approach. Several reasons support this assertion. First, some sustainable use programs have been able to bear their own conservation costs.¹ In contrast, preservation programs are usually very expensive.²

¹ Remer Tyson, Herds Pay Highest price, Det. Free Press, Mar 8, 1993 at 1A *cited by* Catharine L. Kriepps, 17 U. Pa. J. Intl'l Econ. L. at 464., referring to examples of successful sustainable use programs in Africa

² *Id.* providing an example of the cost of the Zimbabwean rhinos conservation programs.

If countries can legally trade limited amount of endangered species, the income generated from the trading will provide an incentive for the country to protect and conserve the species from extinction.¹ Second, the level of poverty of the population of a country is considered to be one of the major factors involved in illegal trade. Illegal traders of species dedicate their lives to the illegal trade because with the income generated from that activity they can easily support their families.² As long as the illegal trade of the endangered species produces high economic rewards to the traders, the illegal trade is virtually unstoppable. The legal and controlled trade of species would reduce the profit obtained of the trade making it less attractive. There is a popular old saying, which states that if you cannot defeat your enemy, you should join him. Applying this old saying to the particular case, the enemy is the illegal trade of protected species. Therefore, lets join the enemy in allowing the trade of the species. However, by the same token, lets regulate such trade in a way that the conservation and preservation of the species is guaranteed.

This theory of sustainable use of the natural resources followed by the Constitution may theoretically provide an adequate protection to the species and their environment. However, in practice it has shown not to be perfect. The reason is simple. Any theory needs a plan of action. Currently, in Colombia there are no plans to implement the sustainable use of the species.³

¹ Marla Cone, Conflict Marks Endangered Species Treaty, L.A. Times, Nov. 20 1994 at A26, *cited by* Catharine L. Kriebs, 17 U. Pa. J. Intl'l Econ. L. at 464.

² See Tyson, *supra* note 1.

³ Ministerio del Medio Ambiente, Gestion Ambiental para la Fauna Silvestre en Colombia, Marco Politico 7, 1988 [Hereinafter Marco Politico de la Gestion Ambiental]
<<http://www.minambiente.gov.co/politicas/fauna..htm>. (Visited Jul. 14, 2,000)

Taking advantage of the model of endangered species protection set under the ESA and adapting it to the Colombian particular scenario, the following sustainable use of endangered species program is suggested.

A. Priority to the endangered species

A plan for the sustainable use of endangered species in Colombia should start from giving priority to endangered species over any other wild species. A conclusion can be drawn from the Colombian statutes regarding the fauna and flora protection. As a general rule, the laws tend to protect the wildlife. However, there is not any distinction between wild fauna and flora and threatened or endangered species. Consequently, the latter are not entitled to receive special protection. An exception to the general rule can be found in Law 99 of 1993 and related, which implement CITES in the country. In this case, however, the special protection to the endangered species is only granted when related to the trade of such species.

Colombia, therefore, should pay close attention to the lead established by ESA regarding endangered or threatened species protection. ESA not only take the steps to achieve CITES goals in combating illegal trade of the species, but also offers a comprehensive set of rules to preserve the endangered species.

B. Listing Process

A plan for the sustainable use of endangered species in Colombia should establish criteria to determine which species are endangered and therefore, are in greater need of prompt protection and preservation. Colombian statutes are short in offering adequate protection to all the species in need because the statutes go so

far as to only regulate the trade of the species mentioned in the CITES Appendixes. If a species is not listed in these Appendixes, there simply will not be any protection afforded. In addition, the Administrative and Scientific authorities in Colombia have the right, not the obligation, to suggest to CITES authorities the inclusion of a new species in the Appendixes. This is clearly not enough. Species depletion is rapidly increasing in Colombia and at high rates.⁴ It could be concluded then, that by the time the country's Scientific or Administrative Authority suggest to CITES authorities the inclusion of certain species in the Appendixes, the species could be nearly extinction, or even worse, already extinct, before its effective inclusion. To prevent the occurrence of this type of situation in Colombia, a listing process could be adopted, similar to the one established in the ESA. The ESA offers protection not only to the endangered species contained in the CITES Appendixes, but also to the species that have been listed in the Federal Register by the Secretary as threatened or endangered. Additionally, ESA provides criteria and a regulated process to determine when a species deserves the endangered or threatened status. Once a species is listed, it is automatically entitled to receive the protection provided by the Act. Applying this figure to the Colombian case, once the Administrative and Scientific authorities complete the process to determine when a species is in danger of extinction, the species can start receiving legal protection immediately, even before being listed by CITES Appendixes. The next step is then for the authorities to suggest the inclusion of the species in danger in one of the CITES Appendixes.

⁴ *Id.* at 20.

C. Habitat preservation

The sustainable use of the species program in Colombia should also pay special attention to protecting the species habitat. Colombia is experiencing an accelerated process of habitat degradation mainly caused by inadequate zoning policies as well as the development of infrastructure civil works and the increase of illegal plantations.⁵ Although the country has 46 fauna and flora protected areas, there are many other areas that are in need of being protected. However, so far there is little action to preserve the protected areas and no concrete action to protect these areas in need.⁶ To solve the habitat loss problem, the ESA model to protect listed species can be used as a model. The ESA contains a sophisticated program that not only regulates the trade of the listed species but also actually protects the species thorough the development of habitat conservation plans. The conservation plans under ESA have shown to be very successful in overcoming the challenge of economic growth versus endangered species protection.⁷

Additionally, Colombia should implement the idea of the recovery planing section in the ESA. The recovery plans are the ultimate goal of the endangered species programs. In fact, these plans are intended to increase the survival of the listed species, eliminate the threats to the species, recover the species and, thus

⁵ Ministerio del Medio Ambiente, *Politica Nacional de Biodiversidad*, Marzo de 1997. Pages 7 to 9 [Hereinafter, *Politica de la Biodiversidad*] (visited Jul.14, 2000) <<http://www.minambiente.gov.co/biodiversidad..htm>.

⁶ Marco Politico de la Gestion Ambiental, *supra* note 5 at 6.

⁷ See for example the Balcones Canyonlands and Plum Creek Timber Company Habitat Conservation Plans. <<http://www.endangered.fws.gov/hcp/quiet/10-15.pdf>. (visited Jul.14, 2000)

allow delisting.⁸ A report from the USFWS to the Congress in 1996 shows the big success of recovery plans. From all the species listed by the time of the report was written, 99% still survive and many of the species are in the process of being recovered.⁹ By adopting and implementing the idea of recovery plans in Colombia, the legislation will provide for more than merely protecting the species. It would increase the population of the protected species for the long term and bring the species back from the edge of extinction.

The Colombian legal regimen provides protection and recovery for species and the environment through the environmental licenses. However, this protection is far from being complete. On one hand, only the projects that result in severe deterioration of the environment and the natural resources require an environmental license. Unfortunately, this provision contains a loophole by not explicitly defining the meaning of what is considered “severe deterioration of the environment”. This loophole certainly may eliminate the legal obligation to obtain the permit.

On the other hand, traditionally the protection of the wildlife in Colombia has had a secondary role compared with the protection of the forest.¹⁰ As a result, a project that jeopardizes the existence of endangered species without seriously affecting the forest or the landscape in the area is not considered as severely deteriorating the natural resources. Finally, for the environmental license purposes, there are no distinctions made between endangered and not endangered

⁸ 4th Report to Congress on the Status of the Recovery Program under the Secretary’s of interior Jurisdiction. <<http://www.endangered.fws.gov/recovery> (visited Jul.14, 2000)

⁹ *Id.* at 5

¹⁰ Marco Politico de la Gestion Ambiental, *supra* note 5 at 6.

species. As a consequence, no special protection is afforded to the species in more need, the endangered species. A comprehensive review is needed to determine the effectiveness of the environmental license in relation to the protection that should be afforded to the endangered species. Thus, a new regulation should be introduced in the Colombian legal regimen by virtue of which a person interested in developing any activity, should request information from the environmental authorities whether an endangered species is present in the area. If so, an environmental permit should be obtained no matter the magnitude of the project. During the process of studying the petition for an environmental license, the environmental authorities will have an opportunity to issue guidelines and select the best alternatives to reduce the impact of the action or, in the worst case scenario, deny the license.

D. Enforcement and Penalties

A plan for the sustainable use of the species program should contain an effective enforcement program. Enforcement of the existing laws is a key issue to the success of any environmental protection program. It is only when there is a rigid enforcement of sanctions that the endangered species protection rules will be observed by smugglers. Also, enforcement is critical to ensure that Colombia meets the objectives of CITES.

On one hand, there is a low institutional capacity to apply the environmental protection rules and enforce their violations. This institutional

weakness has caused a high percentage of violations with regard to the environmental protection rules.¹¹

On the other hand, Colombian penalty provisions for illegal trade of protected species are inadequate to deter illegal activity. For example, in the event smuggler is captured, their punishment, according to the Criminal Code, will be a fine ranging from \$ 100,000 to \$2,000,000 Colombian pesos (approximately \$47 to \$935 U.S Dollars)¹² or prison from sixth months to three years. First, the fine is so insignificant compared with the profits generated by the illegal trade that the smugglers can easily pay the fine and still continue with the business. Second, due to the criminal institutional capacities, prison sentences are rarely imposed.

A stronger system that effectively enforces the laws and sanctions the offenders is highly desirable in Colombia as well as harsher penalties. Although it should be recognized that stronger penalties probably would not completely eradicate the problem, at least they will contribute in reducing the rates of the crime.

Finally, two suggestions can be made to the text of the Criminal provisions regarding penalties related to the protection of endangered species. First, Colombian law should identify penalties for the possession of species obtained by illegal trade, their sale or display. Second, taking a concept from the ESA, the Colombian criminal law should punish the protected species habitat destruction or degradation.

¹¹ Política de la Biodiversidad, *supra* note 7 at 11.

¹² The exchange rate Peso – U.S Dollar on June 30, 2000 is \$2,139.11 pesos per dollar. Banco de la Republica. <http://www.banrep.gov.co:80/estadcam/trm/trm2000-1.htm> (Visited September 4, 2000).

E. Education

A plan for the sustainable use of the species in Colombia should contain measures directed to educate people about the importance of preserving the endangered species. There are four main reasons that explain the need of the education. First, currently in Colombia, there are not long-term programs to educate the people that perform the research and administer the protection species programs.¹³ This lack of education has made it very difficult to develop studies and gather information about endangered species and their ability to be part of a sustainable use program.¹⁴

Second, there is a direct correlation between the authorities lack of education and the increase of illegal trade. The less aware the authorities are about the endangered species and their role to protect them, the easier will be for the smugglers to trade illegally the species. For example, the import and export permits are the basic mechanism designated by CITES to protect the species. It is essential therefore that authorities in Colombia are well versed how to detect forged documents. Assigning ports of entry where the authorities are well educated could improve the ability of detecting illegal documents.

Third, by increasing public awareness about the importance of protecting endangered species, private and public investments in such area might be easier to raise. Due to low value recognition of the wild flora and fauna in Colombia, there are low investments in the species protection programs. The lack of funds

¹³ Política de la Biodiversidad, *supra* note 7 at 11.

available has consequently produced scarcity in human resources available to work with wild fauna and flora and to implement policies in that arena.¹⁵

Colombia should provide more public funding to enforce the endangered species protection programs. This way, more human resources can be hired and trained. It is crucial not only to recognize the importance of protecting the species but to devote resources accordingly. Colombians are generally proud to have an “ecological” Constitution. However, the budget assigned to protect the environment seems to be proportional inverse to the importance recognized to the ecology.

Fourth, by educating the people, the demand of endangered species might be lowered and consequently the illegal trade of the species might be reduced as well.

F. Proof of sustainable use

A sustainable use of the species program should guarantee that any use of the species under the program is in fact sustainable. Colombia needs therefore a comprehensive program that monitors compliance and the effectiveness of the conservation efforts. A mechanism is needed to report progress on the implementation and effectiveness of the program. The importance of an accurate monitoring and reporting of the effectiveness of the sustainable use program cannot be overestimated. Both of these actions are vital to obtain real data on the species under a sustainable use program and to ascertain the measures that should be taken to improve their status. Absence of close monitoring and accurate

¹⁴ *Id.*

¹⁵ *Id.*

reporting may lead the government to wrongly conclude that the use of certain species does not exceed their productive capacities.

G. Compilation of all norms in a single statute

Colombian legal rules regarding wild fauna and flora are dispersed thorough out the legal system and cannot be easily modify to respond to scientific and technological changes. This situation makes it difficult to apply such rules. Consequently, the plans for protection and control of the wild flora and fauna species are either not implemented or implemented very late.¹⁶ One suggestion can be made to help solve this problem. The sustainable use of the species program in Colombia should compile all regulations regarding the species protection and recovery in one single statute. This way, it would be easier for all the people to have access to the rules. Equally, it would be easier for the government agencies to apply such rules. Finally, the activity of the different agencies can be coordinated in an effective manner as to avoid effort duplicity.

Colombia has the fortune of having a vast biodiversity to preserve as much as it has the responsibility to preserve this unique biological heritage. By adopting CITES and issuing regulations to implement this treaty, Colombia made the first of the many steps that are need to be taken to effectively accomplish the endangered species preservation mission. However, if we are to be effective in protecting the fauna and flora, Colombian regulations implementing CITES has to be strengthened and enforced more effectively. The objective of this dissertation has been to suggest, several ways in which the Colombian legal rules can be

¹⁶ *Id.* at 7

amended, in light of the one of the most sophisticated CITES implementation program, the ESA regulation.