

RECENT DEVELOPMENTS

WHALE FOR SALE?: NEW DEVELOPMENTS IN THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

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I. INTRODUCTION

Do not let the size of the North Atlantic minke whale fool you. Despite being one of the smallest whales,¹ it is making a big splash in international waters. The minke whale is riding a wave of change within the international environmental community, stemming from growing acceptance of “sustainable use”² and its application to wildlife resources.

Because of new evidence that limited hunting of minke whales would not jeopardize the species’ existence, Norwegian fishers resumed commercial minke whale hunting in the northeast Atlantic Ocean in 1993, following a six

* J.D., 1996.

¹ While worldwide populations have declined for most whale species, the minke whale—which at 10 meters is the smallest of the great whales—has been the exception. Linda Kanamine, *Whaling Panel Faces 30-foot, 10-ton Topic*, USA TODAY, May 23, 1994, at 6A. When comparing whale populations before the beginning of commercial whaling operations to current population levels, the minke whale is the only species to show an increase, from approximately 490,000 to 880,000 worldwide. *Id.* In comparison, the population of sperm, fin, sei, blue, humpback, right, brydes, bowhead, and grey whales have all declined. The minke are a migrating, krill feeder found most commonly in Arctic and Antarctic waters. *Morning Edition: Minke Whaling Ban Reconsidered by Commission* (NPR radio broadcast, June 29, 1992).

² Sustainable use is defined as “the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.” Patty F. Storey, Note, *Development vs. Conservation: The Future of the African Elephant*, 18 WM. & MARY J. ENVTL. L. 375, 392 (1994) (quoting United Nations Convention on Environment and Development—Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822, 824 (1992)).

year self-imposed moratorium.³ The international criticism resulting from Norway's practices make the minke whale, like the African elephant before it,⁴ a centerpiece in the debate between sustainable use and the traditional view of environmental protectionism.⁵

The ninth biennial meeting of the member nations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁶ provided the most recent victory for supporters of sustainable use in the area of wildlife resources. For the first time in its twenty year history, CITES changed the criteria it uses to determine which species warrant international trade protection.⁷ Its proponents claim that the new numerical-based criteria will provide an objective means to make such determina-

³ Mari Skare, *Whaling: A Sustainable Use of Natural Resources Or a Violation of Animal Rights?*, ENV'T, Sept. 1994, at 12, 13.

⁴ Sustainability is distinguished from protectionism insofar as sustainability accepts the use—even the exploitation—of environmental resources to meet human consumptive needs. Konrad Von Moltke, *Must Environmental Policy be Protectionist?*, 25 N.Y. U. J. INT'L L. & POL. 323, 329 (1993). While many environmentalists and pro-preservationist countries accept sustainable use as a reality of global economics, they have steadfastly refused to apply the concept to whales and other high profile species. "We, of course, agree on the principle of sustainable development. Everyone agrees," says Gilbert Simon, director of the French Ministry of Environment's Department of Conservation. "But for this century, real sustainable development means strong and strict preservation . . ." Marla Cone, *Conflict Marks Endangered Species Treaty*, L.A. TIMES, Nov. 20, 1994, at A1.

⁵ See generally Susan J. Keller, *Is the International Ban on the Importation of Ivory Saving the African Elephant?*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 381 (1992) (discussing conservation measures taken in the face of strong African dissent); Storey, *supra* note 2 (explaining recent developments regarding the ivory ban, the African elephant, and sustainable development).

⁶ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. The two-week meeting was held in Fort Lauderdale, Florida, ending on November 18, 1994. With 118 of the 126 member states represented, this ninth meeting set a record attendance mark. Jim Loney, *CITES Meeting Ends with Successes, Questions*, Reuters World Service, Nov. 18, 1994, available in LEXIS, News Library, Curnws File. Nongovernmental organizations were also represented during the meetings. Such groups are allowed to participate in the debates but are not allowed to vote on issues affecting the Convention. CITES, *supra*, at art. XI(7).

⁷ See Draft Resolution of the Conference of the Parties, Criteria for Amendment of Appendices I and II, Com. 9.17 (Rev.) [hereinafter Fort Lauderdale Criteria]. This document, the result of unanimous approval by the member parties, was generated at the Fort Lauderdale Conference. The official resolution will be issued by the CITES Secretariat.

tions, eliminating unnecessary politicking formerly involved in the process.⁸ Its opponents complain that imposing a single set of numerical criteria, given the diversity of species on earth, is simply not practical.⁹ Norwegian whalers hope that CITES will ultimately allow the minke whale to be downlisted, making limited commercial whale trading possible.

The purpose of this Recent Development is to explore the ramifications of the new criteria on the protection of species. Using Norway's attempts to downlist the minke whale as an illustration, this paper will demonstrate how the new standards in environmental protectionism could have a titanic impact on a formerly well-protected species. First, the author will provide a factual background of Norwegian whaling, a practice that has remained largely unhindered for thousands of years, despite international efforts to regulate it. An overview of CITES, including both the Berne Criteria and the new Fort Lauderdale Criteria for listing will follow. Finally, this Recent Development will analyze the effects of CITES and the new criteria on protected species, using the minke whale as a case study.

II. NORWEGIAN WHALING

Scientific evidence indicates that Norwegians have been actively involved in whaling for some 10,000 years.¹⁰ For most of that time, Norway dominated the international hunt.¹¹ As late as 1930, Norway accounted for

⁸ The parties to CITES, motivated by politics, have often overruled or simply overlooked scientific judgement concerning the viability of a given species. The CITES treatment of the African elephant and the minke whale provide a prime example of what many complain to be unwarranted protection. See generally Mark Jaffe, *Endangered Species Protection a Global Political Challenge*, THE TIMES UNION (Albany, N.Y.), Dec. 13, 1994, at C1 (stating that downlisting of the African elephant and minke whale was "quashed by political opposition"). See also *infra* notes 32-34 and accompanying text. The political forces surrounding CITES, however, may also prevent the listing of appropriate restrictions. Despite scientific evidence demanding a reduction in bluefin tuna harvesting due to its diminishing numbers, CITES, under pressure from Japan and other tuna-fishing member states, has not been amended to restrict bluefin tuna trade. See Loney, *supra* note 6, at 1.

⁹ See Robert McClure, *Nations Engage in Tug of War Over How to Regulate International Trade in Endangered Species*, SUN-SENTINEL (Fort Lauderdale), Nov. 13, 1994, at 1G.

¹⁰ Skare, *supra* note 3, at 14.

¹¹ Norwegians have been pioneers in the development of the whaling industry. Norwegian Suend Foyen, in 1868, revolutionized whaling with his invention of the harpoon gun, a cannon-like device, which enabled whalers to kill larger, faster whales from farther distances. Larry Leonard, *Recent Negotiations Toward the International Regulation of Whaling*, 35 AM. J.

more than 60 percent of the highly profitable Antarctic whaling.¹² Soon after World War II, with a growing number of countries hunting for their share of the whaling profits,¹³ Norway's control of the industry lessened and international whaling operations intensified.¹⁴

With the dramatic increase in the number of whales killed, most nations with an economic stake in the whaling industry sought some form of international arrangement for controlling the exploitation of whales.¹⁵ In 1946, fifteen nations, including Norway, entered into the International

INT'L L. 90, 91 (1941). Once the harpoon was embedded in the flesh of the whale, "the barbs at the end opened and entrenched themselves in the fleshy wall while at the same time releasing a bomb which killed the animal." *Id.* As a result the killing process became much more efficient.

For decades, Norway's skilled whaling crews were in high demand around the world by countries eager to enter the whaling industry. J.N. TONNESSEN & A.O. JOHNSEN, *THE HISTORY OF MODERN WHALING* 521 (R.I. Christophersen trans., 1982). The demand for Norwegian crews eventually became so high that shortly after World War II, in an attempt to restore Norway's fleet, the Norwegian legislature forbid Norwegian companies, citizens, and residents from promoting or assisting whaling efforts under the control of foreign countries. *Id.*

¹² Skare, *supra* note 3, at 15. By 1931, more than 90 percent of all the world's whaling took place in the Antarctic. *Id.*

¹³ While whales were hunted to some extent for their value as food for human consumption, their true worth was found mainly in their oil. Whale oil was originally used for lighting, lubrication, and soap, and in recent times in the production of a number of commercial goods, perhaps the most notable being margarine. TONNESSEN, *supra* note 11, at 7. Currently the only commercial reason whales are caught is so that they can be eaten. Jeremy Cherfas, *In Whaling, It Pays to Kill as Fast as You Can But Now Its Time to Stop*, *NEWSDAY*, Feb. 10, 1989, at 85.

¹⁴ Richard Ellis, *MEN AND WHALERS* 403 (1991). Prominent players in the world trade following World War II included: Argentina, Australia, Brazil, Canada, Denmark, Finland, Germany, Italy, Japan, the Netherlands, the Soviet Union, Sweden, and the United States. Skare, *supra* note 3, at 15. Japan and the former Soviet Union eventually emerged as the leading whaling nations, with Norway still close behind. Ellis, *supra*, at 403-04.

The backlash of the explosive growth in whaling struck during the 1960s, when the whaling industry recoiled from overexploitation of whale stocks and the use of substitute products, such as mineral oils and oils from other animals. Skare, *supra* note 3, at 15. However, Norway's whaling operations were not drastically affected by changes in the market for whale oil. Norwegian production of whale oil was always relatively small, and the Norwegians continued to catch whales in the North Atlantic for food. *Id.* at 16.

¹⁵ Leonard, *supra* note 11, at 93-94.

Convention for the Regulation of Whaling (ICRW).¹⁶ The ICRW created the International Whaling Commission (IWC) to establish regulations and oversee the implementation of the Convention's goals.¹⁷

Initially the IWC and ICRW did not succeed in preventing the continued depletion of many whale species.¹⁸ By the 1970s, however, international environmental concerns and protectionist interests began to overshadow the once dominant commercial interests involved in the whaling industry.¹⁹ The warnings of scientists and concerned environmentalists led the IWC to adopt more conservationist goals than it previously had been willing to accept.²⁰ Following its 1982 meeting, the IWC adopted a commercial whaling moratorium effective in 1986.²¹ Norway, however, objected to the moratorium and was therefore not bound by it.²² In 1986, mirroring concern of the IWC and environmental protectionists, the parties to CITES voted to halt the international trade of the minke whale, among others, by listing it as a protected species.²³

Despite this, Norwegian whaling continued unhindered and uninterrupted until 1987, when international political pressure and growing scientific uncertainty over whale populations finally led the government to issue a

¹⁶ International Convention for the Regulation of Whaling, Dec. 2, 1946, 10 U.S.T. 952, 161 U.N.T.S. 74 [hereinafter ICRW]. The ICRW was intended to safeguard whale stocks and provide for proper conservation to ensure an orderly development of the whaling industry. *Id.* at pmb1.

¹⁷ *Id.* at art. III(1).

¹⁸ Skare, *supra* note 3, at 15.

¹⁹ *Id.*

²⁰ In its formative years, the IWC restricted whaling operations solely to control whale oil prices and to allow whale stocks to regenerate for future harvesting. John A. Gephart, Recent Development, *United States Enforcement of World Whaling Programs*, 26 VA. J. INT'L L. 515, 519 (1986). However, since these early years the IWC has evolved from a small collection of nations interested in strengthening the whaling industry into a large global organization primarily devoted to whale protection. *Id.* This transformation began in 1976 with the implementation of a new management procedure to maintain whale stocks above their maximum sustainable yield, ensuring a sustainable harvest. Skare, *supra* note 3, at 18.

²¹ Gephart, *supra* note 20, at 520.

²² Article V, section 3(c) of the ICRW states that a member nation that has filed a timely objection to a Schedule amendment is not bound by that provision unless it withdraws its objection. ICRW, *supra* note 16, at art. V(3)(c).

²³ See 50 C.F.R. § 23.23 (1994). The Code of Federal Regulations provides a list of all species protected by CITES. For an explanation of the CITES Appendices and the effect a listing has on international trade see *infra* notes 42-49 and accompanying text.

temporary ban on all whaling.²⁴ However, by 1992 strong scientific evidence emerged that the minke whale population in the northeast Atlantic was again healthy.²⁵ As a result, and in the face of the IWC moratorium which was extended in 1990,²⁶ Norway decided in 1993 to resume sustainable minke whaling in the northeast Atlantic.²⁷

Norway's decision to begin sustainable hunting of the minke whale corresponded with the acceptance of "sustainable use" as the principle underlying modern environmental discussion.²⁸ While the concept first appeared on the international scene in 1972,²⁹ the 1992 United Nations Conference on Environment and Development established the concept of sustainability as a fundamental principle of international environmental

²⁴ *Norway to End Its Commercial Whale Hunting*, L.A. TIMES, July 4, 1986, at A20.

²⁵ The IWC's own Scientific Committee unanimously concluded that the northeast Atlantic minke whale stock consisted of approximately 86,700 animals. This was an increase from an estimated 20,000 whales in 1985, when the minke was first protected. Skare, *supra* note 3, at 18. For an explanation of the role of the IWC Scientific Committee see *infra* note 32.

²⁶ Skare, *supra* note 3, at 18.

²⁷ Based on an estimated population of 86,700 minke whales in the northeast Atlantic, Norwegian officials estimated that between 300 and 800 animals could be harvested without endangering the species. Alister Doyle, *Norway Defends Whaling Policy*, Reuter Library Report, Feb. 4, 1993, available in LEXIS, News Library, Arcnws File. In its first year of commercial whaling, Norway caught 160 minke whales. *Norway Wants Ban on Trade in Minke Whale Meat Lifted*, Japan Transportation Scan, July 25, 1994, available in LEXIS, News Library, Curnws File. The following year Norway's haul increased to 279. Stella Bugge, *IWC Group Fails to Agree on Whale Hunt Monitoring*, Reuters World Service, Jan. 13, 1995, available in LEXIS, News Library, Curnws File.

²⁸ David Favre, *Debate Within the CITES Community: What Direction for the Future*, 33 NAT. RESOURCES J. 875, 882 (1993).

²⁹ In June 1972 the United Nations Conference on the Human Environment examined ways to preserve and enhance the human environment. *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1 (1972), reprinted in 11 I.L.M. 1416 (1972). At its close, the Conference issued the Stockholm Declaration. Although the term "sustainable use" is not found within its text, the Declaration clearly adopted this concept. *Id.* See also Rebecca A. Hoelting, *Recent Development, After Rio: The Sustainable Development Concept Following the United Nations Conference on Environment and Development*, 24 GA. J. INT'L & COMP. L. 117, 122-25 (1994). By 1980 the World Conservation Union (IUCN) also adopted the concept of sustainable use in its World Conservation Strategy, which sought to establish a plan through which ecosystem preservation and human consumption could coexist. The plan promoted sustainable use of natural resources, including wildlife. Favre, *supra* note 28, at 882.

policy.³⁰ The resulting Rio Declaration assumed its goal to be sustainable development and focused its concern on how to achieve this policy.³¹

On the heels of this new push for sustainable use, and in an effort to put the ambiguous principle into action, the IWC Scientific Research Committee in 1992 began a struggle to persuade the IWC to lift its moratorium and implement revised management procedures allowing for limited whaling quotas.³² The fight continued for over two years.³³ At the 1994 IWC meeting in Mexico, the IWC finally adopted a resolution accepting the Scientific Committee's proposal for a revised management procedure, but cautioned that a surveillance arrangement must be adopted before any quota scheme could be implemented.³⁴

With an apparent victory over the IWC, Norway's advocates for sustainable whaling turned their attention to CITES. In July 1994, despite

³⁰ See *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874.

³¹ Favre, *supra* note 28, at 882. Norwegian environmental policies on renewable resources, a category which encompasses the minke whale, build on the principles endorsed by the Earth Summit: sustainability, the right to exploit natural resources, biodiversity, integration, and monitoring and control. Skare, *supra* note 3, at 19.

³² The IWC Scientific Research Committee is authorized to conduct comprehensive studies on whales, whale stocks, and whaling practices. SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 28 (1985). The committee makes recommendations to the IWC based on its research so that the IWC can adopt adequate regulations. *Id.* Article V of the ICRW requires that regulations concerning the conservation of whale resources be "based on scientific findings." ICRW, *supra* note 16, at art. V(2)(b).

³³ In 1992 the IWC Scientific Committee recommended a revised management program allowing for limited catch quotas based on sustainable use. Skare, *supra* note 3, at 18. The IWC rejected the revised procedure, refusing to establish any time limits as to when a new management procedure might be implemented. The IWC's refusal to implement the revised plan prompted the resignation of Phillip Hammond, chairman and long-time member of the Scientific Committee. *Id.* In his resignation statement Hammond blasted the IWC's decision as having "nothing to do with science." *Id.* The 1992 meeting ended with a condemnation of Norway's resumption of commercial whaling. At the 1993 IWC meeting, the Scientific Committee again submitted a unanimous recommendation that would have led to quotas for commercial minke whaling in the waters of the North Atlantic and Antarctic. The IWC, holding on to its protectionist view of whale stocks, again refused to change management procedures and again condemned Norwegian whaling. *Id.*

³⁴ *Id.* See generally Bugge, *supra* note 27, at 1 (discussing a recent IWC meeting concerning the requirement of "international observers" onboard whaling vessels).

strong opposition,³⁵ Norwegian officials stated that they would enter the November Conference of the Parties to CITES with a recommendation that the minke whale be reclassified as an Appendix II species.³⁶ A downlisting of the minke whale would allow for the possibility of international commercial trade in whale meat. Although the proposal was eventually voted down, changes made to CITES at the Conference in November of 1994 may eventually lead to resumed whale trade.³⁷

III. CITES - THE LEGAL BACKGROUND

CITES is "perhaps the most successful of all international treaties concerned with the conservation of wildlife."³⁸ Membership in CITES has

³⁵ The United States and Britain entered the CITES conference opposing the Norwegian proposal. Barry Kent Mackay, *Why are We Backing Norway in Fight Over Whaling Ban?*, TORONTO STAR, Oct. 30, 1994, at B8.

³⁶ *Norway Wants Minke Whale Off U.N. Endangered List*, Reuters, Limited (BC cycle), July 21, 1994 available in LEXIS, News Library, Curnws File. Norway's Foreign Ministry spokesman Arthur Baste Knudsen stated that the minke whale should be "classified in line with reality." *Id.* Although he contested the idea that his country planned to resume exports, there has been some debate concerning Norway's true intentions. See *infra* note 61. Most vocal in its skepticism has been Greenpeace. See *Norway Wants Ban on Trade in Minke Whale Meat lifted*, *supra* note 27, at 1; Jeremy Armstrong, *Whale Meat from Norway to be Sold in British Shops*, DAILY MIRROR, Nov. 16, 1994, at 19.

For a discussion of the Appendices and the requirements associated with each of them see *infra* notes 42-49 and accompanying text. In analyzing whale protection under CITES, Article XIV requires special attention. This article recognizes the independence of other treaties protecting marine species and does not interfere with them. CITES, *supra* note 6, at art. XIV. If any member nation is a member of another treaty in force at the signing of CITES, which protects marine species listed in Appendix II, Article XIV(4) relieves that nation of the requirements under CITES, provided the species are taken in compliance with the other marine species treaty. *Id.* at art. XIV(4). This would make the listing of the minke on Appendix II meaningless because the ICRW, to which Norway is a member, would supersede any restrictions on trade. Cynthia Taliaferro Bright, Note, *The Future of the International Whaling Commission: Can We Save the Whales?*, 5 GEO. INT'L ENVTL. L. REV. 815, 825 (1993). In other words, a downlisting of the minke whale would remove any additional protection CITES may offer, leaving the fate of the minke whale solely in the hands of the IWC.

³⁷ See *infra* text accompanying notes 75-81.

³⁸ John B. Hepps & Eric J. McFadden, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Improving the Prospects for Preserving Our Biological Heritage*, 5 B.U. INT'L L.J. 229 (1987) (quoting S. Lyster, INTERNATIONAL WILDLIFE LAW 240 (1985)).

grown exponentially since its inception, from ten nations in 1975³⁹ to 124 nations in 1994.⁴⁰ The Convention governs the international trade of approximately 34,000 species of animals and plants,⁴¹ all of which are listed in one of three appendices to CITES, reflecting the different levels of protection required to maintain their existence.

Appendix I is reserved for those species "threatened with extinction which are or may be affected by trade,"⁴² and provides the most protection CITES can offer. An Appendix I species may not be traded without both a valid export and import permit.⁴³ In essence, a listing on Appendix I forbids all commercial trade in a species.

Appendix II lists species that "although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with

³⁹ DAVID S. FAVRE, *INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES* at XVII (1989).

⁴⁰ *South Africa Withdraws Request to Reopen Trade in Elephant Parts*, BNA Int'l Env'tl. Daily, Nov. 22, 1994, available in LEXIS, News Library, Curnws File.

⁴¹ *Id.*

⁴² CITES, *supra* note 6, at art. II(1).

⁴³ *Id.* at art. III(2)(a)-(d). An export permit will be issued only when the following conditions are met:

- (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
- (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State . . . ;
- (c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and
- (d) a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

Id. at art. III(3)(a)-(c). An import permit will not be granted unless the following conditions are met:

- (a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
- (b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
- (c) a Management Authority of the State of import is satisfied that the specimen is not to be used primarily for commercial purposes.

The "commercial purposes" restriction virtually kills all international trade in an Appendix I species.

their survival."⁴⁴ Trade in an Appendix II species is less regulated than that in an Appendix I species, and requires only the acquisition of an export permit.⁴⁵ In practice, trade in an Appendix II species is restricted only when the trade is detrimental to the survival of the species.⁴⁶

Appendix III includes all species that are protected by the domestic laws of a member nation, yet require international cooperation for their full protection.⁴⁷ International trade in a species listed on Appendix III requires a permit from the exporting country.⁴⁸ In most cases, a permit will be granted provided the specimen was legally obtained.⁴⁹

The success of CITES, assuming the permitting requirements are enforced,⁵⁰ depends upon the proper listing of individual species. The standards for categorizing a species within CITES play a huge role in the treaty's effectiveness. Unfortunately, the language of CITES is not very helpful in making specific decisions on how to list a species or when a species should be downlisted.⁵¹ In response to the ambiguous wording of CITES, the member nations at the first Conference of the Parties in 1977

⁴⁴ *Id.* at art. II(2)(a).

⁴⁵ *Id.* at art. IV(2). The three conditions for an Appendix II export permit, listed in Article IV(2)(a)-(c), are identical to the first three conditions listed for an Appendix I export permit. For a list of these see *supra* note 43.

⁴⁶ See CITES, *supra* note 6, at art. IV(2)(a).

⁴⁷ *Id.* at art. II(3).

⁴⁸ The permit must specify that the specimen was not illegally obtained and that living specimens are being shipped in a manner that will minimize the risk of injury or cruelty to the species. *Id.* at art. V(2)(a)-(b).

⁴⁹ See note 48.

⁵⁰ Unfortunately, many key member nations are ignoring this duty, particularly in regards to flora species. See generally 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 (1990) (discussing the lack of U.S. and Japanese enforcement of CITES with respect to flora); *EU a "Black Hole" for Endangered Species, British Ecologist Claim*, Agence France Presse, Dec. 29, 1994, available in LEXIS, News Library, Curmws File (discussing lack of CITES enforcement within European Union).

⁵¹ For example see CITES, Art II. For listing on Appendix I, CITES requires only that a species be threatened with extinction and possibly affected by trade. CITES, *supra* note 6, at art. II(1). However, it provides no definition nor sets any guidelines for determining when a species is actually threatened or affected by trade. See generally Favre, *supra* note 28, at 896-98 (discussing the CITES listing process and its vagueness).

developed what would become known as the Berne Criteria.⁵² This rough set of guidelines laid out the factors that were to be considered when deciding to list a species.⁵³ Still, even the Berne Criteria provided only a list of acceptable methods for gathering pertinent scientific evidence, providing no indication as to how this data should be interpreted.

Several African nations disturbed by the vagueness of the Berne Criteria and the lack of scientific bases for some of CITES listing decisions, commenced a battle in 1992 to create and pass new criteria.⁵⁴ Finally, in

⁵² See CITES, *supra* note 6, at Conf. 1.1 (1976); see generally FAVRE, *supra* note 39, at 32-46 (describing the use of the Berne Criteria). The Criteria derived its name from the host city to the First Conference of the Parties, where it was adopted. *Id.*

⁵³ For example, with respect to a listing on Appendix I, the Berne Criteria states:

1. Biological status. To qualify for Appendix I, a species must be currently threatened with extinction. Information of any of the following types should be required, in order of preference: (a) scientific reports on the population size or geographic range of the species over a number of years, (b) scientific reports on the population size or geographic range of the species based on single surveys, (c) reports by reliable observers other than scientists on the population size or geographic range of the species over a number of years, or (d) reports from various sources on habitat destruction, heavy trade or other potential causes of extinction. . . .

2. Trade status. Species meeting the biological criteria should be listed in Appendix I if they are or may be affected by international trade. This should include any species that might be expected to be traded for any purpose, scientific or otherwise. Particular attention should be given to any species for which such trade might, over a period of time, involve numbers of specimens constituting a significant portion of the total population size necessary for the continued survival of the species. . . .
When biological data show a species to be declining seriously, there need be only a probability of trade. . . .

CITES, *supra* note 6, at Conf. 1.1.

⁵⁴ Because of their strong disapproval over the initial listing of the elephant on Appendix I in 1989 under the Berne Criteria, the nations of Botswana, Malawi, Zambia and Zimbabwe (and to a lesser extent South Africa) began a movement for the changing of the listing criteria. For a detailed analysis of the their rejected 1992 "Kyoto Criteria" see Favre, *supra* note 28, at 899-902. The rejected criteria would have required the party requesting that a species be listed on Appendix I to show that the species faced at least a twenty percent probability of extinction within ten years or ten generations and that once on Appendix I commercial trade would still be allowed under a quota system when it is shown that such trade is beneficial to the species. *Id.* at 899-900. The African nations were prepared to show that resumed elephant trade would benefit the species through a program where part of the proceeds from the trade would be spent on the protection of elephant habitat. Storey, *supra* note 2, at 387. Some observers outside of Africa still agree with this position. See Ike C.

November of 1994, during the Conference of the Parties in Fort Lauderdale, member nations voted to replace the Berne Criteria with a new set of numerical guidelines.⁵⁵

Annex 1 and Annex 2a and 2b of the new Fort Lauderdale Criteria provide the general biological criteria for listing on Appendix I and Appendix II.⁵⁶ Standing alone, these added guidelines probably would not substantially alter the current listing process. However, when read in conjunction with Annex 5 as the document requires,⁵⁷ the process becomes considerably clearer. Annex 5 lists textual definitions establishing firmer guidelines for when a species should be listed on a given Appendix.⁵⁸ Supporters claimed that the new guidelines infused the listing process with greater objectivity.⁵⁹ In practice, the Fort Lauderdale Criteria marks a decisive change in the approach of CITES and a victory for nations supporting sustainable use.

IV. ANALYSIS OF THE NEW CRITERION

A. *The New Criteria and CITES in general*

The new criteria is certain to be criticized by traditional environmentalists as overly permissive. Considering that many of the new criteria's supporters

Sugg, *Protecting Endangered Species to Death*, WASH. TIMES, Nov. 9, 1994, at A27.

⁵⁵ See Fort Lauderdale Criteria, *supra* note 7.

⁵⁶ *Id.* at Annex 1-2a.

⁵⁷ *Id.*

⁵⁸ See *id.* at Annex 5. For example, the guidelines indicate that a species should be placed on Appendix I when one of the following requirements is met or is likely to be met within five years: (a) a species' area of distribution is less than 10,000 square kilometers; (b) the population of a species is less than 5,000 mature individuals, or when a geographically distinct group in the population (a sub-population) drops below 500 mature individuals; or (c) a species' population decreases by at least 50% within five years or two generations, whichever is longer. *Id.*

The Criteria do caution that "since it is impossible to give numerical values that are applicable to all taxa," there will be many cases where these numerical guidelines do not apply. *Id.* The document also makes clear that these numbers are to be used only as guidelines, not as thresholds for determination. *Id.* However, the mere existence of such numerical guidelines provides for more objectivity in the listing process than was previously available.

⁵⁹ *Cooperation Marks International Conference to Conserve World's Wild Animals, Plants*, U.S. Newswire, Nov. 18, 1994, available in LEXIS, News Library, Curnws File.

during the conference were nations such as South Africa who have legitimate economic interests in the continued trade in threatened species,⁶⁰ those hoping for further strong protection of the environment through CITES may be disappointed.⁶¹

The ultimate issue surrounding the new criteria is whether the principles of population biology can be translated to some diplomatic rule of thumb. Certainly, the goal of the numerical approach was to make the decision more objective.⁶² This new objectivity comforts those nations that had in the past complained bitterly about the sympathetic overprotection of certain endangered species. Given proper scientific data on a species, one can simply enter the species' population and range into the formula to determine what protection, if any, is warranted. However, the precision of these numbers raise questions concerning their effectiveness.⁶³

Further, many claim that through this new criteria, the parties to CITES

⁶⁰ See Cone, *supra* note 4, at A1 (discussing South Africa's contribution to the Conference). The movement behind the new criteria can be traced back to the 1992 meeting, where many south African nations, in an ill-fated effort to renew the ivory trade, proposed a similar list of criteria. See *supra* note 54. While the 1992 criteria was ultimately rejected, identical interests likely motivate the new 1994 criteria.

⁶¹ Norway's motives have also been questioned. In the fall of 1993, several tons of whale meat, concealed in boxes labeled "shrimp" and headed for markets in Japan, were intercepted by customs agents in Oslo. The illegal operation was allegedly orchestrated by a man closely linked to the Norwegian whaling association. Langdon Winner, *Kill the Whales?*, TECH. REV., Nov. 1994, at 74. Critics claim that this provides evidence that the new criteria are "less a new regime of science and sustainability than a continuation of the indiscriminate ocean plunder that long typified the history of whaling." *Id.* at 75.

⁶² Proponents claim that the blatantly political debates that characterized the 1992 Conference highlighted the need for more objective measures. If there is to be objectivity, they argue, at some level a numerically based approach is needed. McClure, *supra* note 9, at 1G. Opponents to the change argued that objective measures do not always mean scientific measures. "Using a single numerical criterion to be applied across species is neither objective nor flexible," stated U.S. Fish and Wildlife Service Director Mollie Beattie. "Conservation biology cannot be one-size-fits-all." *Id.*

⁶³ There is a lack of consensus among biologists as to whether the specific numbers given in the new criteria are adequate for determining the risk of extinction of a species. See generally Jaffe, *supra* note 8, at C1 (commenting on reaction to new criteria from biologists and environmental groups); McClure, *supra* note 9, at 1G (explaining that scientists debate merits of uniform numerical criteria for determining viability of a species). The criteria "[recommend] that the text and the annexes . . . be fully reviewed before the twelfth meeting of the Conference of the Parties with regard to the scientific validity of the criteria, definitions and guidelines and their applicability to different groups of organisms." Ft. Lauderdale Criteria, *supra* note 7, at Preamble.

are attempting to treat what should be a policy question with a scientific answer.⁶⁴ Supporters of this viewpoint urge that while the influence of science should always be considered, the ultimate decision to list a species is one of international policy and should therefore not be made solely by scientists.⁶⁵ In addition, reliable scientific information concerning the populations of species is difficult and expensive to acquire.⁶⁶

The history of whaling regulations based on "scientific findings"⁶⁷ warns of the potential outcome of the new criteria. Despite more than fifty years of cooperative efforts to set sustainable levels of whale harvesting, international diplomacy and law have failed to adequately protect whale stocks.⁶⁸ The problem is simple enough: whales are extremely difficult to count in the open ocean. In the past, nearly every attempt to set sustainable whaling quotas ended in error and unsustainable harvests.⁶⁹ The uncertainties of science raise concerns over the potential ecological effects of the new criteria.

⁶⁴ Favre, *supra* note 28, at 901.

⁶⁵ *Id.*

⁶⁶ It is important to understand the limitations surrounding the use of science in the way the new criteria demand. Science, while it may accurately compute current population levels, is limited regarding its predictions of a given population in the near or distant future. Due to the vast number of non-biological variables that come into play, such as governmental policies, international market demand (legal and illegal) for a particular species, and even human populations and migrations, there is some level of uncertainty. *See id.* at 880 (discussing use of science in CITES). *See also* Benjamin van Drimmelen, Comment, *The International Mismanagement of Whaling*, 10 UCLA PAC. BASIN L.J. 240 (1991).

⁶⁷ The ICRW requires that whale harvesting limits be set in accordance with "scientific findings." ICRW, *supra* note 16, at art. V(2)(b).

⁶⁸ *See generally* Van Drimmelen, *supra* note 66, at 240 (discussing history of international cooperative efforts to control whaling and their failings).

⁶⁹ Favre, *supra* note 28, at 913. The history of Soviet Union whaling provides a chilling example. Current Russian officials admit that between the late 1940s and 70s, the Soviet Union killed not only permitted whales in an unbelievable quantity but also violated whaling dates in agreed whaling regions and vastly under-reported the number of whales harvested. Paul Pivcevic, *Japan Fights to Stop Whale "Safe Haven"*, Inter Press Service, May 24, 1994, available in LEXIS, News Library, Curnws File. In 1962, for example, Soviet officials reported to the IWC that 270 humpback whales had been killed by four Soviet fleets, when in fact almost 1,600 humpbacks were killed by just one of the fleets. *Id.* In all, from 1948 to 1973, four Soviet ships killed 48,477 humpbacks and reported only 2,710. C.S. Baker, *Which Whales are Hunted?*, 265 SCIENCE 1538 (1994). Mismanagement such as this lead to the slaughter of the entire population of right whales off the coast of Argentina by Soviet fleets. Pivcevic, *supra* at 2.

Apart from their effectiveness, the new criteria represent a new direction for CITES and its member nations. It has been said that there has been a "softening of extremes."⁷⁰ Nations that once demanded to be left alone have agreed to manage their natural resources in a way that will ensure their future existence, while those that supported inflexible bans on trade now realize that countries with healthy economies have more money to spend on improving the environment.⁷¹

The change in criteria signifies a change in the design of CITES and an acceptance by its member nations of the concept of sustainable development and sustainable use of wildlife. This new movement towards sustainable use is demonstrated in the Criteria itself. For instance, the new approach restricts listing on Appendix II to those species which are not hunted at a level ensuring their continued existence.⁷² In other words, unless a species falls within the strict population or range restrictions associated with Appendix I,⁷³ international trade will not be impeded. Critics have argued that with changes such as this, CITES is shifting its focus from being a conservation pact made to preserve species, to a mere vehicle for regulating commerce in them.⁷⁴

B. The New Criteria and the Minke Whale

Subsequent to the rejection of its initial proposal to downlist the minke whale, Norway joined in the push to change CITES' Berne Criteria.⁷⁵ With a new CITES listing decision process based on objective scientific evidence and an increased emphasis on sustainable use, Norway finds itself in a more tenable position to downlist the minke whale than it faced before.

Any move by Norway to downlist the minke whale now need only follow the new downlisting guidelines approved at the recent Conference.⁷⁶ According to the new guidelines, the Appendix I minke whale may be

⁷⁰ Cone, *supra* note 4, at A1.

⁷¹ *Id.*

⁷² Ft. Lauderdale Criteria, *supra* note 7, at Annex 2a(B)(i).

⁷³ *See supra* note 58.

⁷⁴ McClure, *supra* note 9, at 1G.

⁷⁵ Cone, *supra* note 4, at A1. For a discussion of the Berne Criteria see *supra* notes 52-53 and accompanying text.

⁷⁶ In addition to the new listing criteria, the member nations approved a new set of guidelines to accompany the downlisting of a species from Appendix I to Appendix II. *See* The Ft. Lauderdale Criteria, *supra* note 7, at Annex 4(B)(1)-(4).

downlisted to Appendix II if it does not meet the criterion set for Appendix I⁷⁷ and if it satisfies one of a separate list of criteria.⁷⁸ Any problems Norway may incur in the downlisting process⁷⁹ could feasibly be dealt with through the country's ties with the IWC. In compliance with its plan to allow for limited minke whale harvesting, the IWC is expected to require the presence of international observers onboard all whaling vessels to ensure compliance with hunting regulations.⁸⁰ IWC supervision may eventually work to sway the member nations of CITES to accept a downlisting of the minke whale.⁸¹

⁷⁷ Given the growing population of the minke whale and the size of its ocean range, it is almost certain that it would not fit the new criteria for a listing on Appendix I. For a list of these criteria see *supra* note 58.

⁷⁸ The Ft. Lauderdale Criteria with respect to the downlisting process add the following qualifications:

Species included in Appendix I should only be considered for transferring to Appendix II if they do not satisfy the relevant criteria in Annex I [*see supra* note 58]. Even if such species do not satisfy the relevant criteria in Annex I, they should be retained in Appendix I unless they satisfy one of the following criteria: (a) the species is not in demand for international trade, nor is its transfer to Appendix II likely to stimulate trade in, or cause enforcement problems for, any other species included in Appendix I; or (b) the species is likely to be in demand for trade, but its management is such that the Conference of the Parties is satisfied with: (i) implementation of the range State(s) of the requirements of the Convention . . . ; and (ii) appropriate enforcement controls and compliance with the requirements of the Convention; or (c) an integral part of the amendment proposal is an export quota which is approved by the Conference of the Parties

Ft. Lauderdale Criteria, *supra* note 7, at Annex 4 (B)(2)(a)-(c).

⁷⁹ Concerns surrounding downlisting the minke whale include how the downlisting might affect other species of whale still protected under Appendix I. If an Appendix I species is put at risk by another's downlisting, the downlisting is prohibited. *See id.* at Annex 4(B)(2)(a). If member nations to CITES feel that due to the resumption of minke whale trade other species of whales are put at risk either because of ignorant or negligent whalers killing the wrong species or by deliberate killing and mislabeling by opportunists, the minke whale will be placed back on Appendix I.

⁸⁰ Bugge, *supra* note 27, at 1.

⁸¹ Generally CITES has played only a supportive role in protecting whales. The major push for whale conservation has been left to the IWC. Ever since the 1977 Conference in Geneva, the CITES Secretariat has sought to work with the IWC and has invited observers from the Commission to attend CITES meetings and consult in trade issues its dealings with whales. FAVRE, *supra* note 39, at 91. Historically the two have shown remarkable cooperation. For instance since 1979 the parties to CITES have aided the IWC in enforcing

V. CONCLUSION

The new criteria which Norway would need to meet in order to downlist the minke whale presents few significant legal roadblocks. The population and dispersion of the species makes it a clear target for lessened protection under the new standards. However, the seas are still rough. Any move to open international whale trade would still be politically unpopular. The public sympathy that has protected the minke whale for decades will not yield to the new standards and may ultimately help determine the influence that politics and emotions will have in the amended CITES listing process. This case study, once it is finally played out, will truly test the objectivity of the Fort Lauderdale criteria.

its own regulations. *Id.* at 92. Furthermore, where CITES, in its permitting requirements, requires a finding from a "scientific authority" concerning whaling issues, such as under Article IV(6)(a) or Article IV(2)(a), the judgement of the IWC has been accepted in its place. *Id.* With such a history of cooperation and with the likelihood that the IWC will again allow limited commercial whaling under strict supervision, it is not unlikely that CITES too may follow the IWC's lead.

