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# Poachers with PCs: The United States' Potential Obligations and Ability to Enforce Endangered Wildlife Trading Prohibitions against Foreign Traders Who Advertise on eBay

*Elizabeth R. Beardsley\**

## ABSTRACT

The Internet has become a dangerous tool in the illegal trading of wildlife; a recent one-week survey found over 9,000 wildlife products for sale. As the Convention on International Trade in Endangered Species (CITES) and the United States' implementing legislation, the Endangered Species Act (ESA), address the movement of wildlife across national boundaries, the use of the Internet in such trade poses significant new legal questions, implicating basic principles of international law and jurisdiction.

This paper explores applicable law when a foreigner, in a foreign country, places an illegal wildlife item for sale on a U.S.-based Internet auction service, such as eBay. While U.S. law authorizes the government to prosecute the hypothetical foreigner, it is unlikely that the United States could successfully assert jurisdiction to prescribe without the agreement of the foreign country.

First, the Internet posting comprises an offer for sale prohibited by the ESA. Second, while the ESA has ambiguities as to extraterritorial application, interpretive methods on balance suggest that it is so intended. Third, evolving jurisprudence in the Internet context provides support for personal jurisdiction (e.g., if "something more" is present, likely with a repeat seller).

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While the hypothetical is untested on some aspect of each of these issues, sources of law have been identified that support the claim. Jurisdiction to prescribe over the hypothetical, however, is not supported in the law. The hypothetical does not convincingly fit the effects principle, and universality would likely fail on state sovereignty concerns. Thus, the United States cannot assert jurisdiction.

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Enforcement efforts . . . are only in their infancy, enabling illegal Internet traders to remain several steps ahead. . . . [T]ime is running out for those highly endangered species threatened by continued illegal trade. . . . Th[e] body of law will have to adapt quickly to new technologies if it is to be effective in saving species.<sup>1</sup>

I.

CITES AND THE PROBLEM OF INTERNET TRADING IN ENDANGERED SPECIES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”)<sup>2</sup> entered into force in 1975 and now boasts 169 parties,<sup>3</sup> making it one of the largest environmental treaties and the most important wildlife treaty.<sup>4</sup> CITES establishes a system to regulate the international trade of listed species of flora and fauna, formed around three appendices. Appendix I includes all species threatened with extinction which are or may be threatened by trade.<sup>5</sup> Commercial trade in specimens of threatened species is all but prohibited. Trade of threatened species for non-commercial uses require export and import permits which may only be granted subject to certain findings by the

1. Int’l Fund for Animal Welfare, Caught in the Web 33 (2005), available at [http://www.ifaw.org/ifaw/dimages/custom/2\\_Publications/Wildlife/CaughtInTheWeb.pdf](http://www.ifaw.org/ifaw/dimages/custom/2_Publications/Wildlife/CaughtInTheWeb.pdf) [hereinafter IFAW Report].

2. 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, available at <http://www.cites.org/eng/disc/text.shtml> [hereinafter CITES Convention].

3. CITES, What is CITES?, <http://www.cites.org/eng/disc/what.shtml> (last visited December 4, 2005).

4. LAKSHMAN GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL 156 (West Publishing Co. 2003); see also Randi E. Alarcón, *The Convention on International Trade in Endangered Species: The Difficulty in Enforcing CITES and the United States Solution to Hindering the Illegal Trade of Endangered Species*, 14 N.Y. INT’L L. REV. 105, 107 (2001); Carlo A. Balisterieri, *International Aspects of the Endangered Species Act*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 486, 498 (Donald C. Baur and Wm. Robert Irvin eds., 2002) (“The high level of participation in CITES makes it one of the world’s most widely accepted international treaties and, arguably, the most successful of all international treaties concerned with the conservation of wildlife.”); STANFORD ENVIRONMENTAL LAW SOCIETY, THE ENDANGERED SPECIES ACT 178 (2001) (“CITES is the most significant international agreement regulating trade in wildlife.”).

5. CITES Convention, *supra* note 2, at art. II.

exporting and importing countries, including that the transaction will not be detrimental to the survival of that species.<sup>6</sup> Appendix II includes all species which may become threatened with extinction unless trade is subject to strict regulation and related species.<sup>7</sup> Trade in these species may be allowed with an export permit, subject to certain findings by the exporting country, including that the export will not be detrimental to the survival of that species.<sup>8</sup> Appendix III includes all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exportation; these species may be traded with an export permit, requiring only a certificate of origin and the primary finding that the specimen was not obtained in violation of domestic laws.<sup>9</sup> Thus, CITES sets out to nearly prohibit the international trade in the most threatened species, and to allow, but regulate, the international trade of potentially threatened species.

CITES has been widely viewed as a success, particularly in halting or slowing extinctions forecasted prior to its enactment.<sup>10</sup> Moreover, CITES has largely accomplished the goal of international cooperation. The regime created by CITES also has demonstrated adaptability to respond to changing conditions, whether with respect to a particular species or global pressures.<sup>11</sup> This adaptability is evidenced by the significant activity at each biannual Conference of Parties (COP), such as proposals for new or modified species listings, programs to provide financial and/or technical assistance to Parties or prospective Parties, and cooper-

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6. *Id.* at art. III. Note: specimen refers to a specimen, either alive or dead, and any recognizable part or derivative thereof. *Id.* at art I(b).

7. Appendix II also includes species which must be regulated in order that trade in the former species may be effectively controlled (e.g., closely related species). *Id.* at art. II.

8. *Id.* at art. IV.

9. *Id.* at art. V.

10. Press Release, CITES, Wildlife Treaty Comes of Age, June 30, 2005, [http://www.cites.org/eng/news/press/2005/050630\\_30cites.shtml](http://www.cites.org/eng/news/press/2005/050630_30cites.shtml) (press release celebrating the 30th anniversary of CITES); Alarcón, *supra* note 4, at 113 (“CITES has been praised over the years for protecting dozens of near-extinct species, including wild crocodiles, African elephants, rhinoceroses and Asian tigers.”).

11. CITES, Strategic Vision, Introduction, 2004, *available at* <http://www.cites.org/eng/dec/valid13/annex1.shtml> (“During [the past 25 years] the COP has shown itself to be capable of adapting to changing circumstances and, through the adoption of Resolutions, has demonstrated an ability to construct practical solutions to increasingly complex wildlife trade problems. For example, the Parties have adopted ‘ranching’ and other control techniques.”).

ation on enforcement.<sup>12</sup> An example of how CITES has responded to changes in global pressure is its elephant program, in which the COP creatively provided for an ivory quota to facilitate sustainable development where there are healthy populations.<sup>13</sup>

Despite CITES' successes, many species remain endangered: CITES currently lists approximately 5,000 species of animals and 28,000 species of plants, with CITES Appendix I comprising 827 of these species.<sup>14</sup> International trade plays an ongoing role in the endangered status of these species.<sup>15</sup> According to the CITES Secretariat, the central challenges it faces include: "Expanding human populations, economic development, poverty and war are testing the ability of many kinds of animals and plants to survive the modern world. Globalization is also adding to the pressure as *higher levels of international trade and income expand the demand for wildlife and wildlife products.*"<sup>16</sup> Interpol estimates illicit trade in endangered wildlife species as the second largest global black market with a volume of roughly \$6 billion per year.<sup>17</sup> "As the COP acknowledges . . . illegal trade in the most sought after species still continues at an alarming rate."<sup>18</sup> Unfortunately, "[t]he United States is one of the world's largest markets for wildlife and wildlife products."<sup>19</sup> The United States

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12. See, e.g., CITES, Thirteenth Meeting of the Conference of the Parties: Agenda and Working Documents, 2004, available at <http://www.cites.org/eng/cop/13/doc/index.shtml>; CITES, Thirteenth Meeting of the Conference of the Parties: Information Documents (2004), available at <http://www.cites.org/eng/cop/13/inf/index.shtml>.

13. GURUSWAMY, *supra* note 4, at 161; see also STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 186-87 ("[T]he limited reopening of the African elephant ivory trade, with its many restrictions, demonstrates how far CITES has evolved as a trade monitoring tool and an international conservation mechanism.").

14. CITES, The CITES Species, <http://www.cites.org/eng/disc/species.shtml> (last visited Dec. 4, 2005).

15. A species is eligible for listing on CITES only if the species is or may be adversely affected by trade. CITES Convention, *supra* note 2, at art. II.

16. CITES, *supra* note 10 (emphasis added).

17. Greg L. Warchol, *The Transnational Illegal Wildlife Trade*, 17(1) CRIM. JUST. STUD. 57 (2004) (citing J. Speart, *War within*, 5(4) *Buzzworm* 36, 36-45 (1993)). See generally STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 179 ("The international wildlife trade is worth billions each year.").

18. GURUSWAMY, *supra* note 4, at 162.

19. Office of Law Enforcement, U.S. Fish & Wildlife Service, Annual Report FY 2004 10 (2005), available at <http://www.fws.gov/le/pdf/AnnualReportFY2004.pdf#page=1>. See also Brad L. Bacon, *Enforcement Mechanisms in International Wildlife Agreements and the United States: Wading Through the Murk*, 12 GEO. INT'L ENVTL. L. REV. 331, 334 (1999) (noting that the United States "is the world's largest importer of wildlife and wildlife products"); Laura H. Kosloff & Mark C. Trexler,

is the world's largest importer of wildlife and wildlife products, and "protected plants and animals are second only to drugs among illegal items smuggled into the country."<sup>20</sup>

Technological advancements facilitate illicit trade in endangered species. For example, the internet is now a major tool in the illegal trading of wildlife. In August 2005, the International Fund for Animal Welfare (IFAW) issued a study finding that:

[T]he Internet is coming to play a central role in the activities of illegal traders . . . [In monitoring] the nature and scale of wildlife trade on the Internet over several months . . . IFAW found a shocking array of species for sale in which all commercial trade is legally prohibited or strictly regulated. Within an intensive one week survey, we found over 9,000 wild animal products and specimens and live wild animals for sale, predominantly from species protected by law.<sup>21</sup>

The U.K. House of Commons published a report on wildlife crime noting "the significant switch to the Internet as the preferred method for trading in protected and endangered species."<sup>22</sup> Additionally, a recent criminal justice study of the illegal wildlife market in South Africa and Namibia reported that "[t]raffickers relied on modern communications technology of email and Internet web sites to trade their stolen goods."<sup>23</sup> As a further sign of the significance of the Internet to endangered species trading, a CITES Party seeking to demonstrate the substantial international trade in Great White Sharks relied solely on Internet listings.<sup>24</sup> The U.S. Fish and Wildlife Service ("USFWS"), Office of Law Enforcement, has an undercover

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*The Convention on International Trade in Endangered Species: No Carrot, But Where's the Stick?*, 17 ENVTL. L. REP. 10, 222, 223 n.9 (1987) (stating that "the U.S. market accounts for up to one third of the five billion dollar business").

20. Joonmoo Lee, *Poachers, Tigers and Bears . . . Oh My! Asia's Illegal Wildlife Trade*, 16 J. INT'L L. BUS. 497, 502 (1996).

21. IFAW Report, *supra* note 1, at ii.

22. IFAW Report, *supra* note 1, at 5 (citing Env'tl. Audit Comm., House of Commons, *Environmental Crime: Wildlife Crime*, Twelfth Report of Session 2003-04, HC605 para. 17).

23. Warchol, *supra* note 17.

24. Government of Australia, October 2, 2004: A Single Day Snapshot of the Trade in Great White Shark (*Carcharodon carcharias*) Proposal 32 – CoP13 at 2, 4 (CITES CoP13 Inf. 51, 2004), available at <http://www.cites.org/common/cop/13/inf/E13i-51.pdf>. Based on a small sampling of great white shark teeth and jaws for sale on the internet on the afternoon of October 2, 2004, several jaws and hundreds of great white shark teeth were available. "In most instances, the offering Parties indicate a willingness to ship their products internationally." "Prices on many sites are indicated in both Euros and US dollars, indicating that products are intended for international trade." *Id.*

wildlife cyber crime team; one agent reportedly stated he has noticed an increase in the last five years of illegal products and animals being sold online, although the agency does not keep track of how many cases it works on each year.<sup>25</sup>

While in one view it is a merely a new medium for the commission of an old crime,<sup>26</sup> the Internet significantly threatens the success of CITES in halting illegal trades in wildlife. The Internet's combination of anonymity and global reach could easily facilitate expansion of international trade and further frustrate the CITES mission. The vast scale of Internet commerce is a further obstacle to enforcing international trade laws.<sup>27</sup>

Since CITES and its implementing national legislation focus on the movement of wildlife across national boundaries, the use of the Internet in such trade may pose new legal questions.<sup>28</sup> As one practice guide notes, the Internet complicates even the most fundamental legal matters:

[T]he typical facts of a . . . transaction conducted through the Internet support competing inferences regarding the place and time of the transaction. (Where is a web page located/Where it is viewed . . . or where server transmitting [it] is located?) . . . [This leads to dispute over which law should be applied] – the law of the place of origin or the law of the place where the consumer is located.<sup>29</sup>

These complexities are exacerbated by international transactions. “[B]ecause of cyberspace’s lack of physicality, fundamental legal concepts . . . are crumbling. . . . [T]he one causing the most difficulty within the criminal justice system is the decreased importance of a nation’s borders.”<sup>30</sup> In explaining its recent Cyber-

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25. Maryann Mott, *Protected Species, Animal Products for Sale Online*, NAT'L GEOGRAPHIC NEWS, Aug. 26, 2005, [http://news.nationalgeographic.com/news/2005/08/0826\\_050826\\_online\\_species.html](http://news.nationalgeographic.com/news/2005/08/0826_050826_online_species.html).

26. See, e.g., *CYBERCRIME: THE INVESTIGATION, PROSECUTION, AND DEFENSE OF A COMPUTER-RELATED CRIME 2-3* (Ralph D. Clifford ed., Carolina Academic Press. 2001) (defining “computer crime” as where computer technology was a tool used to commit a traditionally recognized crime, whereas cybercrime includes “new forms of potentially criminal behavior that would not have been possible without the use of computer technology.”).

27. IFAW Report, *supra* note 1, at 7 (“For example, eBay has over 50 million items on its site, with around 5 million added each day”) *citing* Devin Comiskey, *Live from San Jose: eBay and Paypal aim to Boost SMBs*, E-commerce Guide, June 22, 2005, [www.ecommerceguide.com/essentials/eBay/article.php/3514556](http://www.ecommerceguide.com/essentials/eBay/article.php/3514556).

28. IFAW Report, *supra* note 1, at ii.

29. Internet Law for the Business Lawyer 515-16 (David Reiter ed., A.B.A. 2001).

30. Cybercrime, *supra* note 26, at 7-8 (“Most importantly, because of cyberspace’s lack of physicality, fundamental legal concepts that have been used throughout his-



crime Convention, the Council of Europe noted: "The new technologies challenge existing legal concepts. Criminals are increasingly located in places other than where their acts produce their effects. However, domestic laws are generally confined to a specific territory. Thus, solutions to the problems posed must be addressed by international law."<sup>31</sup>

In the context of illegal wildlife trade, the legal questions posed by Internet use are significant, implicating basic principles of international law and jurisdiction. Consider the questions raised when, in a foreign country, a regular dealer in illegal wildlife items posts an illegal item for sale on a U.S.-based Internet auction site such as eBay<sup>TM</sup><sup>32</sup> available for purchase anywhere in the world:<sup>33</sup>

- Does CITES compel action by any Party?
- Do any countries have the necessary jurisdiction and national laws to effectively police this first step towards an illegal trade?
- Can another country reach the foreign seller if a contract for an illegal sale is made by Internet or does jurisdiction fail prior to the physical import of the item into the asserting country?
- If the foreign country is not a Party to CITES, and does not have national laws prohibiting the sale of the item, do other countries have any legal recourse to the posting of a contract formed via Internet, short of conducting an undercover sale resulting in the delivery into that other country?

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tory are crumbling. Of these concepts, the one causing the most difficulty within the criminal justice system is the decreased importance of a nation's borders. . . . Although the edges of a country are of great significance in the physical society, in cyberspace they are practically invisible.").

31. Council of Europe, Convention on Cybercrime Explanatory Report, <http://conventions.coe.int/Treaty/en/Reports/Html/185.htm> (last visited Dec. 4, 2005). Aiming to increase international cooperation in investigation and enforcement of Internet crime, the Cybercrime Convention establishes common procedures and principles of cooperation for such activities as extradition and seizure of electronic evidence, as well as defining several common offenses.

32. eBay is used because it is the biggest general Internet auction site; however, there are other general and specialized sites (e.g., [www.gotpetsonline.com](http://www.gotpetsonline.com)) that may be used in wildlife trade.

33. eBay.com allows the public to search globally. Note, however, that for users in U.S., the Search and Listings pages default to show all items located on English sites (U.S., Canada, U.K., and Australia) that the seller is willing to ship to the United States. These items will automatically appear. By using Advanced Search and clicking a button, a user can find items in specific countries or regions or listed in other languages.

The combination of the Internet's growing role in illegal trading and the magnitude of the U.S. market for illegal wildlife imports suggest that reducing or stopping such global Internet advertising is essential to the successful enforcement of CITES. Resolving these legal questions is therefore critical. Negative answers would highlight gaps in the international legal scheme that are being exploited by criminals, gaps which must be addressed by international and national law if the success of CITES is to continue.<sup>34</sup>

This paper explores the United States' obligations and the law applicable to a scenario in which a non-citizen located in a foreign country makes an item available for purchase on a U.S.-based Internet auction service. The analysis presumes that the item is one that is easily identifiable as an endangered wildlife species specimen or product that is prohibited from trade (that is, a species listed in both CITES Appendix I and under the ESA).<sup>35</sup> While this paper refers to the scenario as the "hypothetical," in fact it is a regular occurrence.<sup>36</sup>

## II.

### UNITED STATES' OBLIGATIONS UNDER CITES

The first question is what obligations CITES may place on the United States with respect to the abovementioned scenario. The United States was an original signatory to the treaty and was thus a party when the treaty entered into force.<sup>37</sup> Under the terms of CITES, the discretion given Parties regarding the scope of national legislation, and the specific criteria developed concerning national legislation, it is clear that CITES does not compel any action in response to the hypothetical. CITES Parties, however, could bring pressure on the United States to address the problem.

CITES approaches international trade in endangered species based on the territorial principle, and with reference to state sovereignty. The preamble, for example, recognizes that "people and States are and should be the best protectors of their own

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34. See, e.g., IFAW Report, *supra* note 1, at 32 ("Being able to identify a trader through the use of subscription data, for example, can at least enable some follow-up [enforcement] work to be undertaken. Access to known criminals'/reasonably suspected individuals' trading records could assist effective enforcement.").

35. This assumption avoids any complexities of closely related species that are difficult to visually identify.

36. See, e.g., IFAW Report, *supra* note 1.

37. CITES Convention, *supra* note 2, at 27 U.S.T. 1087.

wild fauna and flora.”<sup>38</sup> Article VIII of the Convention specifies the measures to be taken by each Party. The key paragraph<sup>39</sup> requires each Party:

to take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the state of export of such specimens.<sup>40</sup>

The Parties implement this key obligation by enacting and enforcing national legislation. The details of the national legislation necessary to implement the CITES regulatory scheme are largely left to each Party. As summarized by CITES:

The Parties have *some guidance* on what to include in their legislation. Articles III to VII of the Convention set forth the conditions under which trade should take place. Article IX requires that Parties designate a Management Authority and a Scientific Authority. Article VIII requires that Parties prohibit trade in specimens in violation of the Convention, and penalize such trade and allow for confiscation of specimens illegally traded or possessed.<sup>41</sup>

The COP has developed specific criteria for use in evaluating whether a Party’s national legislation complies with CITES. Resolution Conf. 8.4 directs the Secretariat to identify those Parties whose domestic legislation does not provide them with the authority to: “i) designate at least one Management Authority and one Scientific Authority; ii) prohibit trade in specimens in violation of the Convention; iii) penalize such trade; or iv) confiscate specimens illegally traded or possessed.”<sup>42</sup>

While CITES thus obligates Party nations to comply with the permit system for imports and exports, the Party, importantly, determines the scope and reach of the national legislation. In particular, CITES has no requirements that a Party be able to prosecute attempts, conspiracies, or complicity in uncompleted illegal trades. The lack of ability to police these activities is of

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38. CITES Convention, *supra* note 2, at Preamble, available at <http://www.cites.org/eng/disc/text.shtml>.

39. Interpretation and Implementation of the Convention, National Laws for Implementation of the Convention, CoP11 Doc. 11.21.1 (CITES 2000), available at [http://www.cite.org/eng/cop/11/doc/21\\_01.pdf](http://www.cite.org/eng/cop/11/doc/21_01.pdf).

40. CITES Convention, *supra* note 2, at art. VIII(1).

41. CITES World, July 2005, at 1, available at <http://www.cites.org/eng/news/world/15.pdf> (emphasis added).

42. CITES, Resolution Conf. 8.4, National laws for implementation of the convention (1992), available at <http://www.cites.org/eng/res/08/08-04.shtml>.

obvious significance to enforcement generally, as well as against Internet-facilitated transactions. In the instant hypothetical, the CITES treaty does not impose an obligation on either the foreign country or the United States to prevent or to terminate the posting of the advertisement, because no trade, defined as the export and import, has yet occurred.

CITES explicitly recognizes limitations on Parties and acknowledges that national legislation will vary among them. For example, a recent newsletter stated “[e]nforceable legislation is that which is realistic in terms of what can be achieved within a country’s particular context and its human or financial resources.”<sup>43</sup> Thus, not only do CITES and the national legislation criteria not mandate prosecution of an attempt such as the advertisement, but there is leeway in holding a Party to the criteria.

The COP has formally adopted the determination by the Secretariat of each Party’s compliance with national legislation. The United States has implemented CITES by passage and enforcement of the Endangered Species Act and the Lacey Act.<sup>44</sup> The COP has determined that the United States’ legislation meets the criteria, and thus complies with this key obligation under CITES.<sup>45</sup>

Finding that the U.S. national legislation has been accepted as compliant with CITES obligations, the question remains whether the present level of enforcement resources are sufficient to meet the goals of the CITES regime. Conceivably, as the COP relies disproportionately on support from the wealthier countries, implicitly reflecting the concept of differentiated responsibility, the United States may be held to a higher standard of enforcement, politically if not legally. This higher standard may warrant enforcement measures that reach the use of U.S.-based instrumentalities (e.g., Internet auction services) in attempted illegal trades, as in the hypothetical. This argument would be particularly compelling for illegal wildlife products, such as ivory, for which the United States is a major market and may therefore be viewed as having a special responsibility.<sup>46</sup> The CITES Treaty, however, simply does not specify required elements of a Party’s

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43. CITES World, *supra* note 41.

44. Endangered Species Act §§ 1-18, 16 U.S.C.A. §§ 1531-1544 (West 2005).

45. CITES, SC53 Doc. 31: National Laws for Implementation of the Convention (2005), available at <http://www.cites.org/eng/com/SC/53/E53-31.pdf>.

46. Humane Society of the U.S., An Investigation of Ivory Markets in the United States (2002), available at [http://www.hsus.org/web-files/PDF/Ivory\\_Trade\\_Report.pdf](http://www.hsus.org/web-files/PDF/Ivory_Trade_Report.pdf).

enforcement program.<sup>47</sup> Further, the United States “is known to have one of the most sophisticated CITES implementation programs of all Parties to the treaty.”<sup>48</sup>

Nonetheless, some commentators appear to take a broader view of obligations under CITES – at least with respect to the wealthier, developed countries.<sup>49</sup> As one commentator asserts, “In order for the international arena to move closer towards resolution of international environmental problems, member nations must be prepared to enforce the provisions of CITES as a commitment extending beyond their territorial borders.”<sup>50</sup> The view that the Parties are bound to do what they can to further CITES goals may find support in the present *extra jus* activities of the United States, which extend well beyond the treaty’s obligations to encompass a range of programs.<sup>51</sup> These activities<sup>52</sup> include, for example, providing financial support, technical assistance,<sup>53</sup> training, professional assistance, and scientific support to the CITES Secretariat and directly to other Parties.<sup>54</sup> Such activities do not originate in a specific obligation of the treaty, but are aimed at supporting the success of the treaty.

Even the broadest language of the treaty, however, undermines this minority view of additional obligations. The Convention’s fundamental principles assert: “The Parties *shall not allow*

47. CITES Convention, *supra* note 2, at art. VIII. See generally Alarcón, *supra* note 4, at 114.

48. Alarcon, *supra* note 4, at 119.

49. See generally Alarcon, *supra* note 4; GURUSWAMY, *supra* note 4.

50. Alarcon, *supra* note 4, at 117.

51. See, e.g., CITES, Strategic Vision, *supra* note 11. The Decisions are recommendations of the Conference of Parties as adopted at one of their meetings, in consideration of problems of implementation of the Convention and its effectiveness. The Decisions are to be implemented, and are directed at Parties, the Secretariat, or committees.

52. Authorized under section 8 of the Endangered Species Act.

53. Via the assignment of personnel to cooperate with foreign countries in developing programs.

54. See, e.g., USFWS, Endangered Species International Activities, <http://www.fws.gov/endangered/international/index.html> (last visited Nov. 20, 2005); Office of Law Enforcement, *supra* note 19 (highlighting training provided by the US in other countries); Endangered Species Act § 8, 16 U.S.C.A. § 1537 (West 2005). See generally Alarcón, *supra* note 4, at 119 (“Furthermore, the United States contributes 20 percent of CITES’ annual funding, prompting the question of how large a role the United States may have in species protection on an international level.”); Charlene D. Daniel, *Evaluating U.S. Endangered Species Legislation – The Endangered Species Act as an International Example: Can This Be Pulled Off? The Case of the Rhinoceros and Tiger*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 683, 683-84 (1999) (noting that the United States is responsible for one-fifth of the wildlife trade market); STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 174-78.

trade in specimens of species included in Appendices I, II, and III except in accordance with the provisions of the present Convention.”<sup>55</sup> As the meaning of the word “allow” is “to permit,”<sup>56</sup> the plainest meaning of this fundamental principle is that a Party will not issue permits nor legally authorize trades that do not comply with treaty provisions, so in essence the fundamental principle merges with, rather than goes beyond, the more specific Party obligations for national legislation.

Thus, to the extent that some commentators hint at additional obligations, such assertions are based in the idea of moral obligations and no coherent legal theory has been proposed, much less accepted.<sup>57</sup> Any ongoing expectation for the existing *extra jus* activities is based solely on the past voluntary provision of such support, and, even where continuous or consistent, such voluntary actions do not give rise to an obligation under principles of international law. Moreover, past voluntary activities cannot give rise to a new and different specific obligation as contemplated by the hypothetical. Additionally, whereas providing financial and technical assistance to a cooperating recipient government is fully consistent with CITES’ underlying principle of state sovereignty, pursuing enforcement responses to the hypothetical trade attempt raises state sovereignty concerns, since doing so would impose U.S. law on a foreign actor.

The CITES treaty, by its language and current COP interpretation, does not require a specific enforcement response by the United States to the hypothetical trade attempt; the broader terms of the treaty, in combination with voluntary supportive activities, also fail to give rise to such obligations.

### III.

#### POTENTIAL APPLICATION OF THE ESA TO FOREIGN-POSTED INTERNET ADVERTISEMENTS IN THE UNITED STATES

The second question is whether the U.S. government *can* reach the hypothetical foreigner posting an advertisement for an illegal wildlife item on a U.S.-based Internet auction service, though the ability to do so is not required by CITES. The United States largely implements its obligations under CITES through the En-

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55. CITES Convention, *supra* note 2, at art. II(4) (emphasis added).

56. Compact Oxford English Dictionary of Current English, [http://www.askoxford.com/dictionaries/compact\\_oed/?view=uk](http://www.askoxford.com/dictionaries/compact_oed/?view=uk) (search for “allow”) (last visited Nov. 30, 2005) (to “admit as legal or acceptable” or “permit to do something”).

57. See generally Alarcon, *supra* note 4.

dangered Species Act (“ESA” or “the Act”). For the ESA to reach the hypothetical foreigner, the conduct (advertisement) must comprise a violation of the Act; and the Act must be capable of extraterritorial application, considering prescriptive and personal jurisdiction.

### A. *The Endangered Species Act and Its Prohibitions*

In 1973, the United States enacted the ESA, largely to implement the nation’s responsibilities under the newly signed CITES treaty. The ESA reaches any activity, subject to jurisdictional limits, that is illegal under CITES.<sup>58</sup> CITES does not make illegal, nor obligate Parties to regulate, activity short of an actual trade, such as the hypothetical. The ESA, however, extends CITES obligations, prohibiting offers of sale, possession, and attempts, and applies to illegal trades in foreign commerce and interstate commerce.

#### 1. Violation of Prohibition on Offer for Sale

Section 9(a) of the ESA specifies the main prohibited acts:

- (1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to –
  - (A) import any such species into, or export any such species from the United States;
  - (B) take any such species within the United States or the territorial sea of the United States;
  - (C) take any such species upon the high seas;
  - (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
  - (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
  - (F) sell or offer for sale in interstate or foreign commerce any such species; or

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58. Endangered Species Act § 9(c)(1), 16 U.S.C.A. § 1538(c)(1) (West 2005) (providing, under title “Violation of Convention” that “[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 the Convention, or to possess any specimens traded contrary to the provisions of the Convention”). See also *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, 636 F. Supp. 1281, 1285 (S.D. Fla. 1986) (evaluating separately whether probable cause existed under the ESA and under CITES as incorporated into the ESA).

- (G) violate any regulation . . . promulgated by the Secretary pursuant to authority provided by this Act.<sup>59</sup>

Further, section 9(g) makes it unlawful “for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.”<sup>60</sup> With respect to the hypothetical posting on eBay, the key prohibition would be under section 9(a)(1)(f), which makes it unlawful to sell or offer for sale such item in foreign commerce.<sup>61</sup> The ESA defines foreign commerce broadly:

- (9) The term ‘foreign commerce’ includes, among other things, any transaction –
- (A) between persons within one foreign country;
  - (B) between persons in two or more foreign countries;
  - (C) between a person within the United States and a person in a foreign country; or
  - (D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.<sup>62</sup>

Notably, “foreign commerce” is not limited to transactions involving at least one U.S.-based Party (e.g., buyer or seller), but extends to transactions purely in foreign countries.

Regulations promulgated under the ESA provide identical language with regards to jurisdiction, prohibited acts, and attempt and solicitation, but provide one additional condition with respect to offer for sale:

*“Sale or offer for sale.* (1) It is unlawful to sell or to offer for sale in interstate or foreign commerce any endangered wildlife. (2) An advertisement for the sale of endangered wildlife which carries a warning to the effect that no sale may be consummated until a permit has been obtained from the U.S. Fish and Wildlife Service shall not be considered an offer for sale within the meaning of this section.<sup>63</sup>

Case law interpreting “offer for sale” under the ESA is limited. In *United States v. Clark*, the Fourth Circuit held that evidence that the defendant advertised a Siberian tiger skin rug for sale in

59. Endangered Species Act § 9(a).

60. *Id.* at § 9(g).

61. The ESA’s inclusion of “offer for sale” in its prohibited acts is significant. The Lacey Act, which preexisted the ESA, prohibits “import, export, transport, sell, receive, acquire, or purchase” fish or wildlife taken in violation of any foreign law, but does not reach attempts such as an offer to sell. 16 U.S.C.A. § 3372(a)(2)(A) (West 2005).

62. Endangered Species Act § 3(9).

63. 50 C.F.R. § 17.21(a), (f) (2005).



an out-of-state newspaper and made statements to undercover government agent about potential foreign buyers was sufficient to establish that defendant offered the tiger skin in interstate or foreign commerce, in violation of the ESA.<sup>64</sup> The court described the language of § 9(a)(1)(F) as speaking “in clear and precise terms.”<sup>65</sup> Though the court did not analyze the newspaper advertisements and statements separately, it can be inferred that advertisements alone could satisfy an offer for sale in interstate commerce – since the advertisement was relevant to interstate commerce and the statements relevant to foreign commerce.

Subject to proper jurisdiction, addressed below, the language of the ESA and its regulations appear to make unlawful as an offer advertising the sale of an illegal wildlife item where the offer is between persons in foreign countries, as long as the advertisement does not contain the warning that a USFWS permit is required prior to any sale. While the hypothetical appears to be an issue of first impression, the language of the statute, supported by *Clark*, suggests that posting of an advertisement on an Internet auction site would be enough to satisfy an “offer for sale” in violation of the ESA.

## 2. Whether the Offer for Sale Is Extraterritorial

An initial inquiry relevant to the analysis of prescriptive and personal jurisdiction is whether the offer for sale is extraterritorial conduct. The most natural view of the conduct would be that it is extraterritorial, as the hypothetical foreigner is located in a foreign country when he uses his computer to access the Internet auction site and post the advertisement. Alternately, the “offer for sale” could be characterized as conduct in the United States, on the theory that the conduct of advertising inherently may involve more than one location (e.g., something is an “advertisement” only if other people see it, and other people may be located elsewhere), and in the hypothetical, potential buyers would receive the offer for sale in the United States.

As with “offer for sale” generally, there is limited case law on the issue. In the context of copyright infringement, a court considered whether an offer for sale made outside the United States satisfied being “on sale” in the United States.<sup>66</sup> The *Aguayo v.*

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64. 986 F.2d 65, 68 (4th Cir. 1993).

65. *Id.*

66. *Aguayo v. Universal Instruments Corp.*, 356 F. Supp. 2d 699 (S.D. Tex. 2005).

*Universal Instruments Corp.* court held “[a]n offer for sale originating in a foreign country, directed to a consumer in the United States, can establish an on-sale bar.”<sup>67</sup> That case is of limited significance to the interpretation of the ESA’s “offer for sale” language in an international context, however, because the term’s use in each statute has different underlying policy bases. Moreover, the statutory provision at issue in *Aguayo* related to the effect of a person’s conduct, rather than the conduct itself, as here.

Other potential sources of law are equally unhelpful. Contract law provides a background rule for where a contract is formed, but does not illuminate the issue of where the offer occurs when no contract is made.<sup>68</sup> The courts’ state long-arm statute jurisprudence addresses the related issue of where a defendant using a website is “conducting business,” with mixed results; these interpretations are distinguishable by the particular context of jurisdiction, and do not directly bear on the issue of where the conduct of an offer occurs as an element of an unlawful act.<sup>69</sup>

Finding no legal support for the alternative proposition, the hypothetical offer for sale must be treated as extraterritorial.

#### B. *Extraterritorial Application of ESA Section 9(a)(1)(F)*

The USFWS has taken the position that section 9 prohibits conduct within the United States and conduct of a U.S. citizen acting overseas, but not of a foreigner acting overseas.<sup>70</sup> The agency’s position is thus that section 9 can reach extraterritorial conduct, but that “person subject to the jurisdiction of the United States” does not reach a foreigner (non-citizen) acting overseas, as posed in the hypothetical.

Under *Chevron*, an agency interpretation of a statute is afforded deference if Congress has delegated policy-making authority to the agency, if Congress has not directly spoken to the

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67. *Id.* at 743 (citing *In re Caveney*, 761 F.2d 671, 676 (Fed. Cir. 1985)).

68. IFAW Report, *supra* note 1, at 13 (providing that when “an offer is accepted, forming a contract, the contract is usually considered to be formed where it is accepted, unless the Internet auction site’s terms indicate governing law for the contract”).

69. Courts interpreting the doing business prong are split over whether it is where the defendant operates, or where the plaintiff accessed the website. *Cyberspace Regulation and the Discourse of State Sovereignty*, 112 HARV. L. REV. 1680, 1698-99 (1999) [hereinafter *Cyberspace Regulation*].

70. Telephone Interview with Kevin Garlick, Special Agent in Charge – Investigations, USFWS (Nov. 15, 2005).

precise question at issue, and if the agency interpretation is permissible under the language of the statute. In the context of whether a statute has extraterritorial effect, *Chevron* essentially gives way to the traditional inquiry into Congressional intent and U.S. jurisdiction.

A presumption exists that a nation's laws "are intended to apply only within its territorial boundaries."<sup>71</sup> While some commentators have noted the difficulty in applying the presumption against extraterritoriality in the Internet context, the doctrinal inquiry remains the same.<sup>72</sup> In determining whether a federal statute has extraterritorial effect, the courts apply a two part test. First, did Congress intend the statute to apply extraterritorially? Second, does application of the statute comport with international law; in other words, is there jurisdiction to prescribe?<sup>73</sup>

### 1. Language and Structure of the ESA

As to the first part, the starting point is the statute itself.<sup>74</sup> Originating in large part from several international treaties, the ESA is widely regarded as having international features,<sup>75</sup> and some sections of the statute clearly involve international actions (e.g., section 8 authorizes international cooperation). Under section 4, the USFWS lists species, even those not occurring in the United States, as endangered or threatened, but does not identify critical habitat outside of the United States or prepare recovery plans for foreign species.<sup>76</sup> The scope of these provisions makes sense, failing to list species not occurring in the United States would mean such species would not be banned from import, thus frustrating the intent to implement CITES. It could be difficult,

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71. Brian L. Porto, Annotation, *Extraterritorial Criminal Jurisdiction of Federal Courts*, 1 A.L.R. Fed. 2d 415 (2005).

72. SCOTT W. PINK, *THE INTERNET & E-COMMERCE LEGAL HANDBOOK* 53 (2001) ("Th[e] presumption against extraterritoriality becomes increasingly difficult to apply in cases involving the Internet because of the transnational aspects of such activities. In a number of cases, U.S. law has been applied to acts that originate outside the United States if there is some substantial impact in the United States or some aspect of the illegal activity occurred in the United States.").

73. Porto, *supra* note 71.

74. *See, e.g., Earth Island Institute v. Christopher*, 913 F. Supp. 559, 575 (Ct. Int'l Trade 1995).

75. Balisterieri, *supra* note 4; TONY A. SULLINS, *ESA ENDANGERED SPECIES ACT 121-22* (A.B.A. 2001) (noting that flowing from Congress' recognition of its international commitments in the Act's findings, "the ESA contains several provisions specifically addressing international concerns. . . In addition, some, but not all, of the Act's general provisions apply outside United States boundaries.").

76. STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 197-98.

however, for the United States to assume responsibilities for habitat protection and species recovery outside its territory.<sup>77</sup> Whether or not section 7, requiring federal agency consultation, is intended to include agency's extraterritorial actions is addressed in USFWS regulations and has been hotly debated.<sup>78</sup> Current regulations provide that section 7 does not apply extraterritorially, and a lawsuit challenging the regulations was dismissed on lack of standing.<sup>79</sup>

Regarding section 9, one commentator has noted that while the ESA "broadly prohibits certain types of import, export, and 'foreign commerce' in listed species . . . with respect to any of these prohibited activities, the ESA applies only to 'persons subject to the jurisdiction of the United States,'" and thus "jurisdictional realities limit the extent to which the Act's prohibitions apply."<sup>80</sup> Another commentator notes, "The ESA restricts prohibited conduct by persons subject to the jurisdiction of the United States even if the activity occurs outside U.S. borders . . . section 10 contains numerous exceptions but does not include one for activities occurring outside of the United States."<sup>81</sup>

The key provision here, section 9(a)(1)(F), appears untested as to its intended reach. The language of section 9 is ambiguous in two ways.

*a. Persons Subject to the Jurisdiction of the United States*

First, section 9(a)(1) applies to "any person subject to the jurisdiction of the United States." This term is not defined in the act, and arguably could mean personal jurisdiction, prescriptive jurisdiction, or both; moreover, the term could have a particular "term of art" meaning. The term is not globally defined in the U.S. Code or Code of Federal Regulations, but is found within several federal statutes and regulations. These statutes and regulations include, for example, those addressing foreign assets and financial transactions, several relating to migratory species and trade (e.g., marine mammals, whaling, tuna, and migratory birds), and other miscellaneous topics, all generally involving the

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77. *Id.* at 198.

78. *See, e.g.*, Balisterieri, *supra* note 4, at 486 ("[T]here is rancorous debate over whether the requirements of section 7 apply to federal agency activities in other countries.").

79. 50 C.F.R. § 402.01 (2005); *Lujan v Defenders of Wildlife*, 504 U.S. 555 (1992); *see also* Balisterieri, *supra* note 4, at 492.

80. SULLINS, *supra* note 75, at 125-26.

81. Balisterieri, *supra* note 4, at 491.

potential for extraterritorial conduct.<sup>82</sup> The foreign asset regulations provide this consistent definition: “The term person subject to the jurisdiction of the United States includes: (a) Any individual, wherever located, who is a citizen or resident of the United States; (b) Any person within the United States as defined in § 500.330” and certain corporations, partnerships, and associations.<sup>83</sup> This definition would reach extraterritorial conduct by a U.S. citizen or resident, but would not reach a non-resident foreigner acting in a foreign country.

Among the statutes and regulations that use the term, the closest in nature to the ESA is the Commerce Department’s regulation concerning the effect of National Marine Sanctuary designation:

The designation of a National Marine Sanctuary, and the regulations implementing it, are binding on any *person subject to the jurisdiction of the United States*. . . . No regulation shall apply to a person who is not a citizen, national, or resident alien of the United States, unless in accordance with:

- (a) Generally recognized principles of international law;
- (b) An agreement between the United States and the foreign state of which the person is a citizen; or
- (c) An agreement between the United States and the flag state of the foreign vessel, if the person is a crew member of the vessel.<sup>84</sup>

The Marine Sanctuary Regulations thus provide for a broader jurisdictional reach, confined only to any person that can be reached “in accordance with generally recognized principles of international law,”<sup>85</sup> such that it essentially extends to the limits of jurisdiction to prescribe. The language of this provision shows it to limit, rather than expand, the term “person subject to the jurisdiction of the United States,” thus inferring a wide definition of the term not precluding a person who is a non-citizen and non-resident (e.g., as would be a foreigner in a foreign country). This regulation and its underlying statute section were adopted *after* the ESA, however, and thus have diminished persuasive value

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82. See, e.g., 16 U.S.C.A. § 916(d) (West 2005), 16 U.S.C.A. § 955 (West 2005), 31 C.F.R. § 515.204 (2005).

83. 31 C.F.R. § 500.329 (2005). Note that the referenced definition of “Person within the United States” in § 500.330 is nearly identical and any difference is not relevant to this analysis.

84. National Marine Sanctuary Program Regulations, 15 C.F.R. § 922.4 (2005) (emphasis added; promulgated 1992 based on authorizing 1984 statutory section).

85. *Id.*

(e.g., it cannot be argued that the Congress enacting the ESA relied upon this definition).

Although case law interpreting the term “person subject to the jurisdiction of the United States” is lacking, it is notable that in analyzing a statute’s extraterritorial reach, the *Mitchell* court failed to comment on a particular provision that makes it illegal “for any person subject to the jurisdiction of the United States . . . to take any marine mammal on the high seas.”<sup>86</sup> Because this provision clearly extends extraterritorially (the high seas are those “beyond the jurisdiction of any country”<sup>87</sup>), it supports reading of “person subject to the jurisdiction of the United States” in that statute as *not* limited to those within territorial jurisdiction.

The definitions of “person subject to the jurisdiction of the United States” therefore vary among these other statutes and regulations. The definitions contemplate, at a minimum, jurisdiction on a U.S. citizen who is in a foreign country (e.g., “wheresoever he is”) and acting extraterritorially; at a maximum, “the jurisdiction of the United States” may reach the outer bounds of jurisdiction to prescribe. Moreover, the use of this term has a positive association with statutes in which extraterritorial conduct may be at issue. The foregoing analysis supports the reading of “person subject to the jurisdiction of the United States” as permissive or even supportive of extraterritorial effect, but it cannot be discerned from the bare language or borrowed definitions whether the use of the term in ESA section 9 is so broad as to include a foreigner acting in a foreign country.

The USFWS construction of the term as excluding application to a foreigner acting abroad is likely permissible, but whether Congress has delegated the power to make this decision to the agency is less clear; the ESA lacks a definition, while Congress may or may not have had in mind some particular definition. Because the second prong of the extraterritorial analysis is jurisdiction to prescribe, this analysis initially sets aside the agency interpretation, notwithstanding *Chevron*, to discern the outer limits of possible jurisdiction.

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86. *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977); 16 U.S.C.A. § 1372(a)(1) (West 2005).

87. *Blacks Law Dictionary* (8th ed. 2004).

*b. Language and Structure of Section 9*

Second, analysis of the language within section 9 suggests an intent not to limit the entirety of the section to the territory of the United States. Of the seven acts prohibited under section 9(a)(1), only the first three contain a geographical limit: section 9(a)(1)(A) “into . . . or from the United States,” section 9(a)(1)(B) “within the United States or the territorial sea of the United States,” and section 9(a)(1)(C) “upon the high seas.” The remaining four acts, including section 9(a)(1)(F), do not contain any geographical limit. If section 9 is not intended to have extra-territorial effect, then the geographical limits stated under sections (A)-(B) are unnecessary, and that under (C) is in conflict (e.g., the high seas are extraterritorial).

Application of the presumption against superfluities supports an intent for extraterritorial application of section 9(a)(1)(F). This canon of statutory interpretation suggests that if there are two possible interpretations, the preferred is that which does not make other sections of the statute superfluous. Foreign commerce as defined in section 3(9) clearly includes extraterritorial acts: but sections 9(a)(1)(A) and (B) do not involve any act within the United States.<sup>88</sup> The term “foreign commerce” is used in sparingly in the ESA.<sup>89</sup> In section 9(a)(1), foreign commerce appears as part of the definition of two of the seven prohibited acts: “(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce . . . (F) sell or offer for sale in interstate or foreign commerce any such species.”<sup>90</sup> By its language, the prohibition would include a person in a foreign country selling an endangered species to a buyer in another foreign country, provided the person is subject to the jurisdiction of the United States.

There is no other possible reading, given the definition of “foreign commerce.” If read as not reaching extraterritorial conduct, section 9(a)(1) would conflict with parts (A) and (B) of the definition of the term “foreign commerce” and make them superfluous. “Foreign commerce” is used elsewhere in the Act only for a

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88. Endangered Species Act § 3(9), 16 U.S.C.A. § 1532(9) (West 2005); *Id.* at §§ 9(a)(1)(A)-(B), 16 U.S.C.A. §§ 1538(a)(1)(A)-(B).

89. The term “foreign commerce” appears in § 6(f) addressing conflicts between federal and state law, and § 10(f)(7)(D), limiting the exception for pre-Act items with respect to scrimshaw.

90. Foreign commerce is similarly used in the parallel § 9(a)(2) dealing with endangered plants.

conflict of law provision and an exception, and its use therein only makes sense if the term is part of a prohibited act; in other words, the term “foreign commerce” would not be needed elsewhere in the act if it were not used in section 9. Thus, the term’s presence in section 9 is presumed to be meaningful, and to read section 9(a)(1) as having no extraterritorial effect would negate half of the definition of “foreign commerce.” Reading section 9(a)(1) as having extraterritorial effect avoids this conflict and gives meaning to the definition of “foreign commerce.”

Bearing in mind that courts have tended to construe section 9 broadly,<sup>91</sup> the language of the statute itself tends to show an intent for extraterritorial application of section 9(a)(1)(F).

## 2. Congressional Intent as to Section 9

The next source for determining Congressional intent is the legislative history. Though brief, the Conference Report on the final bill, dated just nine days prior to its signature, includes the following statement with respect to section 9:

While the House bill extended the prohibitions of the Act to actions of persons subject to U.S. jurisdiction whenever [sic] they might occur, the Senate bill did not reach quite so far, since it did not make illegal such actions if performed entirely with one or more foreign countries. The House accepted the Senate bill in the absence of a demonstrated need for such extensive coverage.<sup>92</sup>

The word “whenever” does not fit the context of the sentence, and it appears the word “wherever” was meant. If this assumption is correct, the Conference Committee statement has two permissible meanings. The word “with” in the phrase “actions if performed entirely with one or more foreign countries” also seems an imperfect fit, and it is conceivable that the word “within” was meant. If “within” was meant, then the statement seems to indicate that Congress intended to limit section 9 to actions where some part of the transaction occurs in the territory of the United States (e.g., not reaching “actions if performed entirely [within] . . . foreign countries”). If “with” was meant, then the statement seems to indicate that Congress intended to limit section 9 to actions not involving a foreign country (e.g., not

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91. STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 113 (“Just as with the take prohibition, courts have interpreted other section 9 prohibitions broadly.”).

92. H.R. Conf. Rep. No. 93-740 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3001, 3005.



reaching “actions if performed entirely with . . . foreign countries”). While the former may be a more natural and thus more plausible reading because the word “entirely” is awkward in the second reading, it is impossible to discern from the legislative history which meaning Congress intended, thus leaving the statute ambiguous as to these two possible constructions.

### 3. Purpose of the Whole Statute

As the language and legislative history of the provision are ambiguous, the context of the entire statute must be considered. According to this rule, when trying to determine the meaning of certain provisions of a statute, the whole statute should be considered. If possible, the provisions should be interpreted so as to fit within the overall structure and purpose of the statute. The policies of the ESA and its most famous judicial interpretation generally recommend statutory construction that favors the protection of species.<sup>93</sup> The declared policy is “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”<sup>94</sup> The Act defines the term “conserve” as “to use and the use of *all* methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”<sup>95</sup> Also, the U.S. Supreme Court’s interpretation of the ESA in *TVA v. Hill* emphasized Congress’ intent to preserve species over other competing considerations.<sup>96</sup>

Nonetheless, the ESA’s policy does not specifically address extraterritoriality, and the TVA interpretation was made in an entirely different context.<sup>97</sup> Generally, a statute should not be interpreted using general provisions if more specific provisions target the issue. The policy of the Act and its prior judicial inter-

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93. Endangered Species Act § 2(c), 16 U.S.C.A. § 1531(c) (West 2005); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

94. Endangered Species Act § 2(c).

95. *Id.* at § 3(3) (emphasis added).

96. *Tenn. Valley Auth.*, 437 U.S. at 184 (“The plain intent of Congress in enacting this statute [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”).

97. The U.S. Supreme Court’s most famous interpretation of the ESA, emphasizing Congress’ intent to preserve species over other competing considerations, was made in the context of federal action in the United States and in which the competing considerations were costs and public infrastructure needs. *Id.*

pretation tend to favor an interpretation that provides greater protection of species, but is of limited help in interpreting section 9's intended reach.

#### 4. Interpretation of Similar Statutes

As a final matter, the courts' holdings on the extraterritorial application of related statutes may be instructive. In *Earth Island Institute v. Christopher*, the U.S. Court of International Trade considered the geographical reach of a law authorizing trade restrictions on shrimp imported from countries providing less protection of sea turtles than the U.S.<sup>98</sup> The statute at issue, known as section 609, was added as a Note to section 8 of the ESA by a 1989 appropriations bill.<sup>99</sup> The *Earth Island* court disagreed with the State Department's determination limiting the geographical scope of the import restrictions to the western Caribbean, rejected the argument that Congress had acquiesced in the interpretation, and held that section 609 was intended to have broader reach (*e.g.*, to any oceans where shrimping endangered sea turtles). The court found the statute to be clear and unambiguous in its scope as "[n]o language of section 609 restricts its geographical purview, nor can the court accept the premise that the statute is simply silent on the matter."<sup>100</sup> Although the court concluded that section 609 "supplements [the] ESA and can, if not should, be read in *pari material*,"<sup>101</sup> the holding is not significant to the determination of the potential extraterritorial effect of section 9. Section 609 is a supplement to section 8, not section 9. As we have seen, different ESA sections – and even provisions within a section – encompass different geographical scopes. Additionally, section 609 can be distinguished from section 9 because section 609 authorizes State Department action (regulation) which affects foreigners, while section 9 prohibits acts which affect the United States.

The Fifth Circuit's approach in *United States v. Mitchell* to determining whether the Marine Mammal Protection Act of 1972

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98. 913 F. Supp. 559 (Ct. Int'l Trade 1995).

99. Act of Nov. 21, 1989, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037-38.

100. 913 F. Supp. at 575 (citing, for example, statutory language including "all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which . . . may affect adversely species of sea turtles" (emphasis added)).

101. 913 F. Supp. at 576 (citing the court's prior slip opinion, 890 F. Supp. at 1092).

(“MMPA”)<sup>102</sup> should be applied extraterritorially *may* further inform the analysis of ESA section 9, although there are significant differences between the MMPA and the ESA. Additionally, *Mitchell* concerned an American citizen, not a foreigner.<sup>103</sup> To determine Congress’ intent, the court first examined the nature of the law, as required by *United States v. Bowman*:

Some laws are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home.<sup>104</sup>

The court reasoned that “the MMPA is a conservation statute, and the nature of such legislation is based on the control that a sovereign such as the United States has over the natural resources within its territory, and when Congress considers environmental legislation it presumably recognizes the authority of other sovereigns to protect and exploit their own resources.”<sup>105</sup> The court’s finding that the nature of the law did not mandate its application in foreign territories gave rise to a presumption against such application.<sup>106</sup> Lastly, the court failed to find the requisite clear Congressional intent for extraterritorial application to overcome the presumption.<sup>107</sup>

## 5. Conclusion

The language of section 9 suggests intent for extraterritorial application of section 9, subject to the jurisdictional requirement. However, the direct legislative history on section 9 is ambiguous, with one possible construction reaching an action that is partly in a foreign country as our hypothetical. The policy of the entire statute and its prior judicial interpretation tend to favor constructions providing greater protection of endangered species, but are of limited value because they do not directly speak to territoriality or jurisdiction. *Mitchell* held that in the context of a conserva-

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102. 553 F.2d 996 (5th Cir. 1977); 16 U.S.C.A. §§ 1361-1374 (West 2005).

103. *Mitchell*, 553 F.2d at 997 (stating the appeal “turns on whether the [MMPA] and related regulations . . . apply to an American citizen taking dolphins within the territorial waters of a foreign sovereign state”).

104. *Id.* at 1002 (citing *United States v. Bowman*, 260 U.S. 94 (1922)).

105. John A. Bourdeau, Annotation, *Validity, Construction, and Application of Marine Mammal Protection Act of 1972* (16 U.S.C.A. §§ 1361 et seq.), 124 A.L.R. Fed. 593, § 21 (2005).

106. *Mitchell*, 553 F.2d at 1005.

107. *Id.* at 1003.

tion statute with some extraterritorial application (e.g., the high seas), Congress “presumably recognizes the authority of other sovereigns to protect and exploit their own resources,”<sup>108</sup> giving rise to a presumption against application on foreign soil absent clear Congressional intent. Application of *Mitchell* could suggest finding against extraterritorial application, because the Congressional intent is less than clear, if not ambiguous. *Mitchell* can be distinguished, however, as the MMPA was solely an American scheme for conservation of resources, whereas the ESA represents a common international regime under CITES, under which parties have relinquished some sovereign authority to exploit their own resources. Further, the ESA specifically contemplates a high degree of international cooperation (e.g., section 8), such that Congress may have considered some extraterritorial application of the Act consistent with its purposes. On balance, the sources of law tend to support the extraterritorial application of ESA section 9, subject to the jurisdictional requirement. Applying the language of the statute itself, a court could find intent for extraterritorial application clear enough to overcome the presumption against it. Whether a foreigner can be reached depends upon the second prong of extraterritorial inquiry, jurisdiction.

### C. *Jurisdiction to Prescribe*

While territoriality and nationality remain the principal bases of jurisdiction to prescribe,<sup>109</sup> that is, the jurisdiction upon which nations have asserted their authority, other theories include: (1) the effects upon the territory by outside activity, (2) protection from outside activity, (3) universality, and (4) the passive personality principle.<sup>110</sup> In the subject hypothetical, the relevant theories of prescription could include effects and universality.

The effects principle has been very controversial. It refers to jurisdiction based on the effect outside conduct has within a nation. The controversies have arisen when a government has sued a foreign company for conduct that is legal in its home country, particularly on the basis of economic effects.<sup>111</sup> According to the Restatement of Foreign Relations, “[t]he effects principle is not

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108. *Id.* at 1002.

109. Restatement (Third) of Foreign Relations Law IV, 1, A, introductory note (1987).

110. ROY J. GIRASA, *CYBERLAW: NATIONAL AND INTERNATIONAL PERSPECTIVES* 41 (2002); Restatement (Third) of Foreign Relations Law § 402(d) (1987).

111. *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

controversial with respect to acts such as shooting or even sending libelous publications across a boundary. The Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under § 403."<sup>112</sup> The United States has successfully asserted the effects principle, but only with regard to narrow circumstances typically involving drugs on ships on the high seas where the ship is heading to U.S. territory.<sup>113</sup>

Several aspects of the hypothetical situation may fit within the effects principle. The smuggling of illegal wildlife products into the United States could be likened to the smuggling of illegal drugs into the country. The offer for sale directed to the United States could be viewed as analogous to a libelous publication directed at the United States. The converse argument, however, is stronger. The effects principle focuses on the substantiality of effects on the country seeking to assert jurisdiction. In contrast to effects of illegal drugs directly on Americans, the ill effects of illegal wildlife products do not impinge directly on Americans, but on the species' population and ecosystem in the exporting country. Similarly, the analogy of an offer of sale to a libelous publication breaks down when focusing on the nature and substance of each action's effect; the offer of sale may be offensive and/or may facilitate unlawful purchases by some Americans, but it does not involve the direct kind of harm that libel inflicts. The effects principle is thus unable to provide a source of U.S. jurisdiction on the foreigner in the hypothetical.

The universality principle permits a country to assert jurisdiction over conduct such as piracy, the slave trade, trafficking in prostitution, trafficking in narcotics, war crimes, and crimes against humanity. This conduct is universally condemned and may be tried by any nation.<sup>114</sup> An argument could be mounted that trafficking in illegal wildlife products is akin to other types of illegal drug or prostitution trafficking. The large number of CITES parties could be viewed as evidence of the universal condemnation of trafficking in illegal wildlife products.

Conversely, CITES also embraces the principle of state sovereignty. Because each party is bound by national implementing legislation, the treaty could be viewed as essentially preempting

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112. Restatement (Third) of Foreign Relations Law § 402 (1987).

113. Porto, *supra* note 71, at 427-31.

114. GIRASA, *supra* note 110, at 42.

extraterritorial action by one party in another's territory. Also, the hypothetical foreigner has not effected a trade, but only offered for sale; thus, he has not violated CITES. Even if, *arguendo*, a case could be made for acceptance of CITES principles as universal, a case would fail as to the hypothetical Internet advertisement. The universality principle thus appears a better fit to the hypothetical than the effects principle, but it would be a tenuous, new theory.

An attempted assertion of jurisdiction under universality would still be subject to the limitations on jurisdiction to prescribe – reasonableness and comity. The Restatement of Foreign Relations section 403 declares that even when one of the bases for jurisdiction is present, a state may not exercise jurisdiction when doing so is unreasonable.<sup>115</sup> The Restatement then lists seven factors to consider in determining reasonableness. Generally, the factors address the connections and links between the activity and the state considering jurisdiction, its importance and consistency of the regulation with the international system, and the extent to which another state may regulate the activity.<sup>116</sup> The U.N. Manual on the Prevention and Control of Computer-Related Crime asserts that the universality principle “should apply only in cases where the crime is serious, where the State country that would have jurisdiction over the offense . . . is unable or unwilling to prosecute.”<sup>117</sup>

In the hypothetical, the importance and consistency of international regulation of wildlife trades under CITES supports reasonableness, and the connections and links could possibly support reasonableness depending on the facts. Whether the United States' assertion of jurisdiction over a foreigner acting in a foreign country is reasonable, however, would likely hinge on the view of the foreign country. If the other country is a party to CITES, but unable to vigorously enforce CITES or to pursue illegal trades at the advertising stage, the country may acquiesce to U.S. enforcement. Concern that the United States would offend Rio Principle 12 would also diminish because the foreign country would presumably share the underlying CITES principles.

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115. Restatement (Third) of Foreign Relations Law § 403 (1987).

116. *Id.* at § 403(1)-(2).

117. International Review of Criminal Policy, U.N. Manual on the Prevention and Control of Computer-Related Crime, ST/ESA/SER.M/43-44, 96.IV.5, para. 255, available at <http://www.uncjin.org/Documents/EighthCongress.html> (cited in Pink, *supra* note 72).

Should the foreign country not agree to U.S. enforcement, it would be difficult to claim reasonableness. If the other country is a CITES party, presumably it can pursue some form of enforcement or crime prevention measures with respect to the actor. Many policy reasons exist to explain why a foreign country would prefer to control enforcement with respect to its own citizens or residents. These include different penalties (amount of fines and/or length of sentences) and protecting its citizens from possible discriminatory treatment in a foreign legal system. If the other country is not a party to CITES, the potential for conflict with Rio Principle 12 would increase, although the U.N. Manual suggests jurisdiction may be appropriate if that country is unwilling to enforce a universal crime.

It is therefore unlikely that the United States could successfully assert jurisdiction to prescribe over the hypothetical foreigner, without the agreement of the foreign country. While the universality principle may in time encompass illegal trafficking of wildlife, at present it has been confined to the most morally outrageous crimes. Additionally, assertion of jurisdiction is problematic with respect to reasonableness, whether the other country is a CITES party that may have its own capability to address the issue, or is a non-CITES party by which jurisdiction may offend Rio Principle 12.

Failing jurisdiction to prescribe, the United States could yet reach the hypothetical foreigner with the consent of the foreign country in which he is located. Given the ongoing problems in the Internet context, the United Nations has recommended that nations involved in an international computer-related crime negotiate agreements as to jurisdiction under the territoriality principle.<sup>118</sup>

#### D. *Personal Jurisdiction*

Courts apply traditional concepts of personal jurisdiction, illuminated by newly developing Internet activity doctrines, to determine whether a forum may exercise jurisdiction over a non-resident defendant:

A court generally will apply a two-step analysis. First . . . whether the forum state's long-arm statute applies . . . [then] that the assertion of jurisdiction comports with Due Process requirements. The [latter] analysis requires two findings, namely, that the defendant

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118. *Id.*

has sufficient minimum contacts with the forum state, and that subjecting him to jurisdiction will not offend traditional notions of fair play and substantial justice.<sup>119</sup>

For purposes of this analysis, it is assumed that the forum state has a long-arm statute that asserts jurisdiction over nonresidents to the full extent allowed by the Due Process Clause; thus, the analysis collapses.<sup>120</sup>

### 1. Personal Jurisdiction in Internet Cases

“The likelihood that personal jurisdiction can be constitutionally exercised is generally proportionate to the nature and quality of the Internet activity.”<sup>121</sup> Courts and comments frequently discuss a spectrum of Internet activity:<sup>122</sup>

At one end of the spectrum, there are situations in which a defendant transacts business over the Internet, whether a contract results or not, where personal jurisdiction clearly attaches. At the other end of the spectrum, passive Web sites that provide advertising or other information, with nothing more, usually do not warrant [another state] court’s exercise of personal jurisdiction. In the middle ground, the exercise of jurisdiction depends upon . . . the level of interactivity and the commercial nature of the exchange of information that occurs on the Web site.<sup>123</sup>

Courts have not reached clear a consensus on “what factors are relevant or how they should be weighed.”<sup>124</sup> Courts have considered whether the contacts are continuous in nature or isolated incidents, with mixed results as to whether e-mail is enough.<sup>125</sup> “Notably, the courts have focused on whether the

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119. KENT D. STUCKEY, *INTERNET AND ONLINE LAW* § 10.02(1) (ALM 2005).

120. Jason H. Eaton, Annotation, *Effect of Use, or Alleged Use, of Internet on Personal Jurisdiction in, or Venue of, Federal Court Case*, 155 A.L.R. Fed. 535 at § 2(a) (2004). Also, a federal court may exercise personal jurisdiction over a party who is otherwise not subject to the jurisdiction of any state. *Id.*; Fed. R. Civ. P. 4(k)(2) (if a summons or waiver of service is filed and if the jurisdiction is consistent with the Constitution and laws of the United States.).

121. STUCKEY, *supra* note 119, at § 10.02(1)(a).

122. *Id.*

123. *Id.* (internal cites omitted); see also JEFFREY A. HELEWITZ, *CYBERLAW: LEGAL PRINCIPLES OF EMERGING TECHNOLOGIES* (2005); *VP Intellectual Properties LLC v. Imtec Corp.*, 1999 U.S. Dist. LEXIS 19700 (1999); *Cyberspace Regulation*, *supra* note 69.

124. STUCKEY, *supra* note 119, at § 10.02(1)(c).

125. *Id.*; Am. Jur. 2d *Computers and the Internet* § 25 (2005); see, e.g., *Cody v. Ward*, 954 F. Supp. 43 (D. Conn. 1997) (telephone calls and 15 e-mails sufficient to find personal jurisdiction over non-resident in securities fraud action); cf. *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999) (two e-mails were insufficient to impose personal jurisdiction in a defamation case).



communications were interactive, like a telephone, or merely passive, like a newspaper advertisement.”<sup>126</sup> Courts have been more likely to exercise personal jurisdiction when the defendant derives profit.<sup>127</sup> Lastly, even when contacts with the forum are sufficient, courts have looked to the burden on the nonresident, sovereignty conflicts, and the forum state’s interest in adjudicating the matter.<sup>128</sup> In international cases, the courts may consider factors such as:

- a) the extent of the defendant’s activity in the forum state, b) the cost to the defendant to defend the action, c) the conflict that may exist with the law of the defendants’ own country, d) the forums’ interest in deciding the merits, e) the most practical manner to settle the dispute, [and] f) the availability of an alternative forum.<sup>129</sup>

Many of the cases addressing Internet activity involve defendant businesses who operate a web site.<sup>130</sup> In the subject hypothetical, an initial distinction is that the foreigner posting the illegal item for sale is not a website operator per se, but is using an Internet auction service.

In *Winfield Collection, Ltd. v. McCauley*, a federal district court concluded that a Texas defendant did not purposefully avail herself of doing business in the forum when she sold an allegedly infringing item utilizing an internet auction.<sup>131</sup> In so deciding, “The court took judicial notice that the function of an auction is to permit the highest bidder to purchase the property offered for sale, ‘and the choice of that highest bidder is therefore beyond the control of the seller.’”<sup>132</sup> In *United Cutlery Corp. v. NFZ Inc.*, another federal district court followed *Winfield* to hold that an Internet retailer’s sale of goods through third-party auction websites did not support personal jurisdiction.<sup>133</sup>

Subsequently, another district court found grounds for personal jurisdiction in the forum of the buyer from an Internet auction (eBay), finding that the seller had control of the jurisdiction based on his stopping the auction to make the sale to the particu-

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126. Eaton, *supra* note 120.

127. STUCKEY, *supra* note 119.

128. Eaton, *supra* note 120.

129. HELEWITZ, *supra* note 123, at 32-33.

130. See generally STUCKEY, *supra* note 119.

131. 105 F. Supp. 2d 746 (E.D. Mich. 2000).

132. JAMES P. DONOHUE ET. AL., INTERNET LAW AND PRACTICE, § 9.31 (2005).

133. Eaton, *supra* note 120, at § 4(b) (citing *United Cutlery Corp. v. NFZ Inc.*, 2003 WL 22851946 (D. Md. 2003)).

lar buyer; his ability to exclude jurisdictions from participation in the auction; based on the seller's prior dealings with the buyer and knowledge of his residency.<sup>134</sup> Noting that "the *Zippo* test does not address a case involving a series of transactions which occurred via both the internet and conventional means such as here . . . the Court determine[d] whether it has personal jurisdiction over the Defendant utilizing the traditional jurisdictional analysis."<sup>135</sup>

Outside of the auction context, courts have evaluated when Internet advertising is enough to establish minimum contacts. In *Vitullo v. Velocity Powerboats, Inc.*, a district court found personal jurisdiction over an out-of-state boat manufacturer who operated a website which advertised its products, but was not used to transact business.<sup>136</sup> The court stated that "an Internet advertisement alone is insufficient to establish personal jurisdiction without 'something more' to indicate that the defendant purposefully directed its activity in a substantial way to the forum state."<sup>137</sup> The court found that the website's event page, which featured a boat show in the forum state, was enough to satisfy the "something more" requirement.<sup>138</sup>

Several courts exercising personal jurisdiction have weighed the number of "hits" on a website as indication of the substantiality of the contacts of an Internet advertisement with a forum.<sup>139</sup> Courts not exercising personal jurisdiction have focused on the passive nature of an Internet advertisement; the courts have distinguished those cases, finding that no business was conducted.<sup>140</sup>

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134. *McGuire v. Lavoie*, 2003 WL 23174753, at \*3 (N.D. Tex. 2003).

135. *Id.* at \*4.

136. 1998 WL 246152 (N.D. Ill. 1998).

137. *Eaton*, *supra* note 120, at § 4(a).

138. *Id.*

139. *See, e.g., id.* (citing *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (131 hits merited exercise of personal jurisdiction); *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997) (at least 248 computers had accessed the wagering advertisements)).

140. *See, e.g., id.* at § 4(b) (citing *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D. N.J. 1997) (web site analogous to advertising in national publications; only contained a description of the hotel and a telephone number)); *Osteotech, Inc. v. GenSci Regeneration Sciences, Inc.*, 6 F. Supp. 2d 349 (D. N.J. 1998) (company's website amounted to only advertising, falling "under the same rubric as advertising in a national magazine, which does not constitute purposefully availing oneself of a particular forum"); *Desktop Technologies Inc. v. Colorworks Reproduction & Design Inc.* 1999 WL 98572 (E.D. Pa. 1999) (website with email link was used merely to advertise and not to conduct business)).

The few cases addressing personal jurisdiction over foreigners based on Internet activity have been mixed.<sup>141</sup> In *Stewart v. Vista Point Verlag*, the district court held that “mere maintenance of a Web site by German defendants, even though accessible from New York, was not sufficient basis for personal jurisdiction.”<sup>142</sup> Conversely, in *Nutrisystem.com, Inc. v. Easthaven, Ltd.*, the district court found personal jurisdiction over Canadian and Barbadian corporations that registered well-known trademarks and offered to sell them to plaintiff in e-mails and telephone calls to the forum state.<sup>143</sup> These limited international cases suggest that courts will determine whether to exercise personal jurisdiction over a foreigner using the same factors as courts use in domestic analyses: the transaction of business, and the need for “something more.”

## 2. Minimum Contacts

As to the hypothetical, the first issue is whether the foreigner has had minimum contacts with the United States by virtue of his communications with the website. The foreigner is listing an illegal item for sale on eBay, which reaches the United States. eBay’s service includes the capability for the general public to search and view listings of items for sale, including photographs, description, price, item location, and where it can be shipped; all information is provided by the seller.<sup>144</sup> Anyone can register on eBay at no cost. Once registered, a person can ask the seller questions and submit a bid. In addition, eBay provides a service to allow sellers to accept credit card and checking account payments.

The foreigner’s use of the website is inherently interactive and commercial in nature; he is using the auction service in commerce - to sell something. Moreover, the site is designed for the specific purpose of transaction of business between its user buyers and sellers. As an initial point, these facts suggest the foreigner would be closer to the clear jurisdiction end of the spectrum.

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141. PINK, *supra* note 72.

142. *Id.* at 75 (citing *Stewart v. Vista Point Verlag*, 56 U.S.P.Q. 2d 1842 (S.D.N.Y. 2000)).

143. *Id.* (citing *Nutrisystem.com, Inc. v. Easthaven, Ltd.*, 2000 U.S. Dist. Lexis 17528 (E.D. Pa. 2000)).

144. [www.ebay.com](http://www.ebay.com).

Courts, however, have looked for “something more” than mere advertisement. The courts seem to agree that something more can be met by a website used to transact business (as is the hypothetical); one court found that information in the advertisement targeting potential customers in the forum was sufficient. These cases would seem to put the hypothetical squarely in the finding of personal jurisdiction; however, those cases tend to involve website operators, not users. The three Internet auction cases suggest that the law is unsettled on whether the features of an auction site – the ability to make contacts, to make a contract, and to transact business and derive profit – are enough. Of those, the two cases not finding personal jurisdiction were influenced by the fact the Internet auction site operator, and not the user, controlled the potential audience for the advertisement.

Additional possible facts not defined in the hypothetical will thus be critical to the determination of whether personal jurisdiction should be exercised. Most importantly, facts about any additional related conduct, such as e-mails or telephone calls, may be necessary to find jurisdiction, given the state of law concerning Internet auction sites. Facts about the listing that may influence to a court’s analysis include whether a price is given in U.S. currency, whether the listing states geographical limitations or conditions (e.g., “may not be sold to the U.S.”), and not only whether the listing failed to exclude the United States from the auction (which is assumed), but whether the description includes any additional affirmative statements about where the item may be shipped (e.g., “can ship anywhere” or “can ship to U.S.”). The number of hits that the listing receives from the United States may also be important.<sup>145</sup> Facts about the foreigner that would tend to support personal jurisdiction in the hypothetical may include if the foreigner is a repeat seller or dealer and whether it can be shown that the foreigner has previously derived money from the forum.

A final matter is whether the analysis is affected by the presence of eBay’s mainframe computer systems in the United States.<sup>146</sup> Several courts have held that the access of a main-

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145. Author’s personal review of eBay. eBay publicly lists the number of bids for each item, rather than the number of times it has been viewed. The number of views is tracked and provided to the seller.

146. It appears, but has not been ascertained, whether all global users’ information necessarily is stored on eBay’s United States computers. The User Agreement appears to be intended for use by persons outside the United States (“If you reside outside of the United States, the party you are contracting with is eBay International

frame computer or database in another state is sufficient to trigger personal jurisdiction.<sup>147</sup> The Internet auction cases have not yet considered this factor in evaluating personal jurisdiction. As these cases are both limited and have not arisen in the context of a foreign defendant, it is difficult to analogize further.

### 3. Fair Play

Assuming minimum contacts are found, the second issue is whether exercising jurisdiction over the foreigner offends traditional notions of fair play. Weighing against a grant of jurisdiction are the location of the foreigner, the costs and burden she would face during a trial in the United States, and whether the foreigner's own country has laws in conflict or can offer an alternative forum. Weighing in favor of jurisdiction are the extent of the defendant's activity in the United States, if the foreigner is a repeat seller, and the United States' interest in deciding the merits. This could be high if the government chose to take on such cases in an attempt to shut down this avenue of illegal trade. Thus, some of the facts affecting the minimum contacts analysis also come into play in the fairness analysis. If minimum contacts are found, it will likely be viewed as fair to subject to punish a foreigner who is using an Internet auction to make offers for sale of illegal items in the United States, given the government's interest in global conservation.

### 4. Venue, Notice, and Service

Assertion of jurisdiction in U.S. courts also requires venue and service of notice of the suit to the defendant. In federal courts, venue is proper where a substantial part of the claim arose.<sup>148</sup> In the hypothetical, the claim is focused on the offer for sale. Assuming a court finds the claim valid, venue could probably be asserted either where the offer is received, or where the claim arose. A court might also choose to exercise *forum non conveniens*, under which the claim would be dismissed despite find-

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AG.”), and asserts, “Your information is stored on computers eBay Inc.’s servers located in the United States.” <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Nov. 29, 2006).

147. Eaton, *supra* note 120, at § 6 (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (defendant placed his software on the plaintiff’s website system based in the forum); *Plus Systems, Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992) (defendant regularly accessed the plaintiff’s central computer in the forum via a data processor in another state)).

148. 28 U.S.C.A. § 1391(2) (West 2005).

ing personal jurisdiction and a claim, if the U.S. forum is less convenient than an alternate forum (e.g., the foreign country at issue) considering the burdens on the defendant and the court.<sup>149</sup>

As to notice, the general requirement is service on the person, but notice may be made by other means such as advertising, depending on the situation. Service may also be waived. Service upon an individual in a foreign country may be made by any internationally-agreed means reasonably calculated to give notice. These methods may consist of those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents,<sup>150</sup> the manner prescribed by the law of the foreign country, or even by any form of mail or personal delivery that provides a signed receipt, unless prohibited by the law of the foreign country. As the hypothetical is not grounded in a particular country, the relative difficulty in effecting service would depend on whether the foreign country is a party to the Hague Convention on Service, the nature of travel in that country, and the ease of locating the foreign actor. While use of the mails could make service easier, there is a practical difficulty in the U.S. government effecting service in a foreign country, should the foreigner desire to evade it. As with other aspects of international jurisdiction, the cooperation of the foreign country can greatly influence the outcome.

## 5. Conclusion

In conclusion, the hypothetical foreigner may be subject to personal jurisdiction in the United States, if both the “something more” is present (which could possibly be met by the language of the listing and its availability for shipment to the United States) and service of notice can be accomplished.

Even after successful assertion of jurisdiction, a final element necessary to prosecute an action against the hypothetical foreigner is his appearance in court. If served in the foreign country, the foreigner can default and thus escape trial and punishment in the United States. In this situation, the United States would need to rely on international extradition treaties and/or the cooperation of the foreign country to ensure the actor actually appears and answers to the U.S. court.

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149. See, e.g., *Piper Aircraft v Reyno*, 455 U.S. 928 (1982).

150. Fed. R. Civ. P. 4(f).

## IV.

## CONCLUSIONS

A. *U.S. Laws Are Adequate to Implement CITES Obligations*

Under the current formal standards adopted by the CITES COP, the U.S. laws have been determined to be adequate to implement its CITES obligations. As CITES recognizes the limitations of countries' resources and continues to work cooperatively with non-complying countries toward basic compliance of national legislation, these standards appear unlikely to change.

B. *U.S. Laws May Reach an Offer for Sale by a Foreign Trader Using eBay, but the U.S. Still Lacks Jurisdiction to Prescribe*

The U.S. laws likely allow the U.S. government to enforce the ESA against a foreigner who posts an illegal wildlife item for sale on a U.S.-based Internet auction, yet no U.S. court would uphold jurisdiction. First, the hypothetical Internet posting seems to comprise an offer for sale as prohibited by the ESA. Second, the balance of interpretive methods suggests that, despite ambiguities, the ESA is intended for extraterritorial application. Third, the evolving jurisprudence of personal jurisdiction in the Internet context may provide support for personal jurisdiction over the hypothetical foreigner, especially if "something more" is present, which would be likely with a repeat seller. While the hypothetical is untested with respect to at least some aspects of each of these issues, sources of law have been identified that support the claim.

With respect to jurisdiction to prescribe, however, the analysis is not supported by law. The hypothetical does not convincingly fit the effects principle; universality would likely fail on state sovereignty concerns. Without jurisdiction to prescribe, the United States cannot assert jurisdiction over the hypothetical foreigner.

C. *Any Law Enforcement Response to the Problem of International Internet Auctions in Global Wildlife Trade Must Originate in the International Community*

The analysis of the hypothetical highlights gaps and uncertainties in current law. First, that CITES does not require parties to reach attempted transactions allows countries to ignore open advertising for illegal wildlife items, and thus likely facilitates the

functioning of the market for these items. Second, the fatal flaw in U.S. assertion of jurisdiction was found to be jurisdiction to prescribe, the likelihood of offending state sovereignty in the absence of a cooperating foreign government. Third, the interplay of Internet use with jurisdiction in both U.S. and international law adds complexity and uncertainty to the hypothetical claim. While the Council of Europe's Cybercrime Convention aids cooperation among its parties, it may be difficult for any country to assert jurisdiction in Internet-originated crimes. Lastly, to actually prosecute the hypothetical foreigner in a U.S. court likely requires the foreign country's cooperation to in extradition and perhaps service.

Because state sovereignty is implicated, as well as the virtual necessity of voluntary cooperation by the foreign country involved, any response to this problem must come from the international community under CITES or another framework. A unilateral response by the United States targeting foreign actors is likely to fail legally. The impropriety of a unilateral U.S. response nonetheless leaves room for the possibility that the international community will desire or even expect farther-reaching enforcement by wealthier countries in the future. Just as Germany's CompuServe suit demonstrated that country's frustration with U.S.-based computer services used there to violate its obscenity laws, it is conceivable that CITES parties could become frustrated with U.S.-based Internet auction sites and desire response by the United States, either against the foreign sellers, or against eBay.<sup>151</sup>

Enforcement against foreigners posting offers for sale on eBay (assuming that they are deemed or made illegal) could offer both deterrent and punitive benefits. The significance of this benefit depends on how many additional illegal transactions and/or actors would be captured. By reducing the open flaunting of the law, this enforcement activity would reinforce the seriousness of U.S. law enforcement with respect to illegal wildlife trading. Even selective use of this theory of enforcement could be used strategically to complement other efforts.

Counseling against such enforcement, however, is the concern that charging Internet sit actors will not reduce illegal trades but merely drive these criminals away from sites known to law en-

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151. Stuart Biegel, *Indictment of CompuServe Official in Germany Brings Volatile Issues of CyberJurisdiction into Focus*, The UCLA Online Institute for Cyberspace Law and Policy (1997), <http://www.gseis.ucla.edu/iclp/apr97.html>.



forcement – making it more difficult to detect future crimes. Additionally, even the United States has limited resources,<sup>152</sup> and taking on this new area for enforcement could take resources away from other areas of enforcement which may be strategically more effective (e.g., focusing enforcement on illegal imports at the border may result in more severe penalties and thus have a greater deterrent and punitive effect).

Whether this gap will be filled remains to be seen. CITES is the logical source of response, not only as the largest and most significant wildlife treaty, but because it has the proven ability to adapt to changing global conditions that affect its mission. Agreements or other legal mechanisms to provide conditional jurisdiction over certain Internet activities to the wealthier nations such as the United States could fit in with the treaty's emphasis on international cooperation and more recent recognition of differentiated responsibility.<sup>153</sup> Such agreements would need to provide jurisdiction and address practical issues such as collection of computer evidence, service, and extradition, all while respecting state sovereignty.

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152. Mott, *supra* note 25 (“Because of the agency’s small staff size, the [U.S. Fish and Wildlife Service’s Office of Law Enforcement wildlife cyber crimes] team gives priority focus to people using the Internet to conduct repeated large scale transactions.”).

153. *See, e.g.*, CITES, Resolution Conf. 13.1: Financing and Budgeting of the Secretariat and of Meetings of the Conference of the Parties (2004), available at <http://www.cites.org/eng/res/13/13-01.shtml> (“Noting also the serious economic difficulties being experienced by certain Parties and stressing the need to allow for flexibility in application of the UN scale of assessment to the Parties concerned”); CITES, Resolution Conf. 13.2: Sustainable Use of Biodiversity: Addis Ababa Principles and Guidelines (2004), available at <http://www.cites.org/eng/res/13/13-02.shtml>.