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David Farve

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DAVID FARVE

Good afternoon. I have been teaching for almost twenty years now and I wrote my first law review article on wildlife issues back in 1979. I have been dealing with international issues for wildlife now for just over ten years. This past summer, I spent two weeks in Zimbabwe at the Convention on the International Trade of Endangered Species (CITES)[1] at which we discussed elephants, sharks, sheep, all kinds of things. I will come back to that a little later. It is a marvelous area to focus on. You get to do some pretty fascinating things. But you could probably only do it as a law professor because you will never make any money doing it. This afternoon I want to focus on a couple of things. First of all, I want to give you my thumbnail sketch of what international law is because it is often quite confusing. Secondly, I want to look at some treaties and specific provisions just to give you a flavor of how the international wildlife law works through the treaty process. Finally, I want to focus on the cultural, legal and economic difficulties of international wildlife law by looking at the elephant and the ivory trade issue. That issue was dealt with in Zimbabwe and the result made almost nobody happy which probably means it is a good compromise.

Now, the federal government in the United States (U.S.) limits how many ducks you can shoot. It restrains the export of black bears. The federal government disallows the import of big cats for fur coats and the federal government pursues a policy of not hunting whales across the oceans of the Earth with the exception of our own Alaska. Under what authority does the federal government do this? A lot of people tend to think of the federal government as the omnipotent government and it is not. One of the first things you learn in constitutional law is that our federal government is a government

1. Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

of limited power. The state government is the sovereign power. We have sort of twisted that around a little so it seems that the federal government is the one almighty power, but it is not. When you add to that the long-standing tradition in the United States that the state government controls wildlife issues, we have what is called the state ownership doctrine. It is well settled in the legal system that the ownership, control and management of wildlife are in the hands of state governments.

That raises the issue of how the federal government regulates wildlife. It hooks itself in primarily under the treaty power. The treaty power of the U.S. Constitution says that the federal government is representative of this landmass and has the power to engage in treaty negotiations with other sovereign states. When it does engage in negotiations, there is no limitation on the topic that those treaties can be about. They can be about human rights. They can be about wildlife. They can be about trade. They can be about toxic chemicals or nuclear power. Whatever it is, if it is a topic between sovereigns, the federal government has the authority to regulate it.

The federal government has regularly exercised this power over time and the result is a series of treaties that deal with wildlife issues. One of the first treaties that was engaged by the federal government was one with Britain, when Britain still controlled Canada, over the issue of migratory birds. There was also a Supreme Court case that dealt specifically with the point, "can the federal government control hunting of migratory birds in the state of Missouri through the treaty power?"[2] The U.S. Supreme Court said, "yes." With that, the federal government moved ahead into the wildlife area. Now, you might also be interested to think about the Endangered Species Act (ESA).[3] What is the federal government's assertion of authority to adopt, promulgate and support the Endangered Species Act? There you have to look to commerce authority. Since the federal government

2. Holland v. Missouri, 341 U.S. 908 (1951).
3. Endangered Species Act of 1973, 16 U.S.C.A. §§ 1531 to 1534 (1994).

reserves the right to control commerce between the states and endangered species can be products of interstate trade, it has the constitutional authority to assert the Endangered Species Act but it does not have a general public policy capability.

The black bear issues, the conventional trade and endangered species of fauna and flora, and the big cat fur coat issue are all results of CITES. Live bird trade controls at the federal level have also occurred because of CITES. New York has its own fur control act that has stopped the importation of foreign birds and is based upon its own sovereign powers. There the worry was whether there was a conflict of law between the state and the federal government but they worked that out. The whaling issue is under the International Whaling Convention (IWC),[4] of which we are a member and have been a member since the beginning. Now, as that would suggest, the treaty or to document the treaty is sort of your legislation, your starting point for international law. There are other sources of international law, what we call soft law and custom and practice between the parties, which are longstanding relationships that become so constant they become the equivalent of law. However, we must recognize how different law is at the international level than it is at the national level. There is no legislature. We have the United Nations (U.N.) but the U.N. is not a legislature. The U.N. cannot adopt a resolution and have it imposed upon the United States. There is also no executive branch at the international level. What happens is what we call treaty regimes. All the activity under that treaty, the human activity under that treaty, is called the regime of the treaty and as part of most treaty regimes you normally have some administrator, called the Secretary-General. Secretary-Generals living in Toronto, Geneva or Washington, D.C. have no authority like the President of the United States. Rather, they are there to facilitate and make the paper work happen and make recommendations to the parties. The only thing that is similar to a

4. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

legislature is that each treaty regime has meetings. Those meetings are the signatories to the treaty and those representatives meet as a group and can vote on things. That is the quasi-legislature that exists at the international level. Perhaps what is most frustrating and missing is any judicial equivalent. There is no judicial enforcement of international law. I know there is the world court and they have limited jurisdiction over various things, but for the most part that is only if states agree to be bound by the jurisdiction of the world court, and even then they can wave their hand and walk away from it.

We, in the United States, have a cultural perception of obeisance of the law. That is not to say everybody obeys every law but our culture is one in which we do try to obey our laws. The law is not something we just ignore. Because of this culture of legalism, when you look at all 180 countries, we are somewhat unique in the world. Thus, the way people view the law is one of the difficulties in dealing with international law since people will look at things and just walk away from it. If that happens, what can be done about it? If you are in the United States and you do not like what just happened somewhere in the world, there is nothing you can do about it because you do not have any leverage. In the United States we are used to having those three functions, the legislature, executive and judicial branches independent of each other. It is one of the balances of power that makes our system work. The powers exist in many, if not most countries but they are not always independent. China has courts; it has the legislative and executive branches but to say they are equivalent to ours, would be totally to ignore reality. Rather than being independent, they are all centrally controlled.

We have Interpole-international relations among the police enforcement agencies-which is a very important tool given the nature of international trade and the legality of both drug and international wildlife trade. Illegal wildlife trade is second only to drug trade and perhaps arms trade. It is a major issue involving billions of dollars a year. We have Interpole but it has no enforcement power. It cannot arrest

people. It is only a coordination process that exists between various agencies but possibly a very important one.

The key concept that keeps the international level so difficult to deal with sometimes is this idea of sovereignty. That country is sovereign. What does that mean? That means basically stay out. Within this territorial regime, whatever political regime is there, sovereignty says that another country does not have the right to interfere with the regime. So you can have Iran, Iraq or China exercising power, doing things internal to its country that we would find abhorrent and there is nothing we can formally do about that regime. Obviously, we can protest and write letters and take other actions but you cannot use that as a justification to invade a country because you do not like what is happening inside. Part of that concept, when you move away from the level of war which changes everything, of course, is that if a country decides it wants to kill all the sea turtles within its jurisdiction, we cannot stop them. But, what has happened over time is the realization, particularly with the growing economy, that to operate as a country within this world and with the economic system that we have now around the world, you have to have relations with other countries, you have to agree to some limitations.

The success of CITES arises out of the fact that countries including the United States and most of Europe have stated that you cannot import into the United States unless you agree to be bound by the provisions of this treaty. So all the importers from Thailand, Guyana and Brazil had a reason to make their governments sign on to this treaty because they wanted the economics to work. The only way they could do that was to get the governments to talk and come to an agreement with each other. The issue of the inability to impose sanctions because of the concept of sovereignty is what makes this whole area very frustrating. You think you have a regime, a country has signed a treaty and said we are going to do "X." We have signed a treaty and this makes us obligated to do "X." Then, they do not do "X." What can you do about the fact that they did not do "X"? Not very much. In almost all the regimes you are very frustrated at this point in time so

you have to bring more persuasion. You have to bring reason. You have to bring economic pressure and consumer reports. There is a plethora of things that happen in the United States to make things move politically and a lot of that can be transformed to other countries. However, the development of non-governmental organizations (NGO) and lobbying as we understand it has risen to a very high art form in the United States but it is at a very primitive level in most other countries. NGOs have a very difficult time working across the regimes. They just cannot seem to get going. This concept of sovereignty that has been with us now for 150 to 200 years is the force of international law and that may be changing. I will give you three sentences on the side here that do not have anything to do with wildlife: Bill Gates is going to change things; technology is changing it because a crystal clear part of sovereignty in the past was the right to control information; you can control people by controlling information. Once the satellite system to the Internet becomes operative in the next three to four years there will be information available to people around the world with the most limited investment of energy. But over time I think that is going to change what the concept of sovereignty means with the idea of commerce also changing. I think the world is changing but that is not going to help us in the near term. We have this problem of sovereignty and international law.

Do we have any international law? You could all walk out of here and say there is not such a thing as international law. It is just whether or not you can get someone to agree with something. I would give a slightly broader definition of international law. That is: it is law if it is a regime that restrains or redirects conduct of both states and citizens of the states. Does international law work to do that? Yes, but not all the time, not with 100% accuracy but this network or interconnections that we engage in does change the conduct of states and does make things happen. It is like a spiderweb. No one strand is that strong but if you get all of these connections, commitments and personal contacts between all these different points, over time the web itself can be very strong. That was my nutshell on international law.

Let us move to something that is more focused on wildlife issues. I am going to ignore everything but treaties at this point. There are two basic kinds of treaties. There are bilateral treaties and multilateral treaties. Bilateral treaties used to be the way people accomplished things but in today's world of infinite complexity multilateral has become the standard. The migratory bird treaty represents a bilateral treaty signed by two countries in the wildlife issue. We signed another bilateral treaty with Mexico and one with Japan also dealing with migratory birds. Examples of multilateral treaties are the IWC, CITES and the Polar Bear Treaty[5]-which is not a very publicized but interesting treaty that deals with the five countries that have habitat around the North Pole and all have polar bears in them. Those three treaties represent traditional treaties as well. They are multinational treaties in that the negotiated treaty has in it the substantive requirements of the signators to the treaty.

Just in the last decade we have developed a new approach called an umbrella treaty, where you agree to agree. The Biodiversity Convention,[6] adopted in 1992, is a classic example of an umbrella treaty. It states that we all adopt these principles and areas of concern such as the preservation of genetic selection, transfer of technology between states and the need for money to help preserve biological diversity in developed countries. We put these principles and concerns in an umbrella and we say that we are going to work towards these things. It does not identify any one species, country or thing that has to be done, per se. It is a "good feeling" document. That is about all you can get people to agree to under the timeframe of getting the treaty finished at the time that it was needed for public relations and meeting purposes, as opposed to, actually hammering out provisions. So, there are some problems with the Biodiversity Treaty and it may not represent, in fact, the best perspective available.

5. Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918, T.I.A.S. No. 8409.

6. UN. Convention on Biological Diversity, June 5, 1992, S. TREATY DOC No. 20 (1993), reprinted in 31 I.L.M. 818, 824.

Now, after five years, what has the Biodiversity Treaty done? What do you point to that shows its accomplishments? You are pretty hard-pressed to point to any actual physical, programmatic consequences. For example, with the CITES Treaty, the treaty requires the drafting and signing of permits. Countries are required to have permits in order to allow imports and exports. The IWC adopts a list of species and quotas for killing whales. That is what the treaty provision states it must do. There is nothing like that in the Biodiversity Treaty. There is nothing that says, you must do "X."

One other caveat to be aware of, is that treaties govern the conduct of states. That is all they do. No treaty is immediately transposable into a criminal law that would impact you or me. Treaties only govern between states. Then, if that state has an obligation under the treaty, it may have to adopt a local law. Thus, it is a two-step process. First, there is the adoption of the treaty and then there is a domestic implementation of the treaty.

I wanted to read a couple of sentences from the various treaties just to give you a sense of how they work. In the IWC, dealing with whales, Article 5 states, "the amendments of schedule," which is a list of whales and quotas, "(a) shall be such as are necessary to carry out the objectives and purposes of the Convention and to provide for the conservation, development and optimum utilization of the whale resources, (b) shall be based upon scientific findings, (c) shall not involve restrictions on the number or nationality of factory ships or land stations, nor allocate specific quotas to any factory ship or land station or to any group or factory ships or land stations, and (d) shall take into consideration the interests of the consumers of oil products and the whaling industry."

In these two sentences, you can see the political compromise that was necessary to make this happen. Also inherent in those sentences is the destruction of the operation of the treaty. It says that you are to impose quotas on whales and that you are supposed to use scientific information to do this in order to create an optimum sustainable yield, which means you are supposed to maximize the population not minimize it.

Yet, these quotas cannot be imposed on individual countries or whaling ships. So, what does that mean? That means that, for example, they have a list of Bluehead Whales back in the fifties when these whales were still around. There are, say, 5000 whales and you have a quota of 300 whales, which means you can kill that many. How would you know when 300 were killed? Who gets the 300? Well, inherent in this language is that the first one to kill them gets them. How do you count Bluehead Whales in the middle of the ocean? You cannot. So, the treaty has within it a contradiction and it is a flawed treaty from the beginning.

Now, there is the problem that some scientists are saying that some whale populations are no longer endangered, in particular, the Minke Whale. There are hundreds of thousands of Minke Whales and nobody can really say with a straight face that if you kill 3000 Minke Whales that you would in any way danger the population of Minke Whales. It is just not scientifically credible to say that. But we are still fighting about it because in the United States there is a moral perspective of whether or not you ought to be killing whales. However, the Japanese do no accept a moral position on whales. You are either scientifically justified in killing them or not. Every time I raise the issue of a moral perspective, the Japanese say I am emotional and if I am emotional that means they can discount it. In my mind, ethics is not the same thing as emotion. Not all Japanese people feel this way, but most of the Japanese government officials and professors that I have met do.

What the IWC did was track the decline of each whale population. They would focus on a whale population, track it to near extinction and then do the same with another population. About a year ago we found out one of the reasons which would help explain why this was such an entire failure. Clearly, one of the factors was Russia, back when it was the U.S.S.R. It had a state mandate to ignore all quotas. It would kill any whale it found in the ocean with its ships. This was a state secret to kill all the whales and use the whales for their protein. The U.S.S.R. did not sell the whales

so much-rather they used them for internal consumption and use. This was in blatant disregard for the treaty.

The other question is what should you do when a country like Japan takes in 800 whales when the quota is 600? Do you confiscate the whale meat? The answer is nothing. There is no enforcement mechanism other than fingerpointing. Although, that sometimes can help.

We do have in the United States an interesting twist called the Pell Amendment. It states that if countries engage in conduct that is in contradiction to the policies and purposes of international wildlife treaties, the federal government can impose a moratorium of trade of those species. We used that argument against Thailand and against Singapore for endangered species trade and it was very effective. We threatened them by saying that they would not be able to bring anything of that nature to the United States unless they cleaned up their act.

The Polar Bear Treaty is a good treaty to learn from because it is very short and it has all the necessary parts in it. So, let me just point out a few sentences here. Article 1 starts right out by stating, "the taking of Polar Bears shall be prohibited except as provided in Article 3." Thus, it starts out with a clear factual mandate that the taking of Polar Bears is prohibited. So, you cannot do it unless you find a specific justification under this treaty. That is a good way to deal with wildlife control issues then it continues by defining the word taking. It states, "for purposes of this agreement, taking includes hunting, killing or capturing." Since they differentiate killing from hunting; that means that the act of hunting would be illegal whether or not you actually killed it. Understand that this is not a criminal law rather this is just a treaty. The United States has to take this obligation and transform this into domestic law in order to be binding upon you and me. However, there is a problem. The Marine Mammal Protection Act[7] which is what covers Polar Bears, was

7. Marine Mammal Protection Act of 1972, Pub. L. No. 95-552, 86 Stat. 1027 (codified with amendment at 16 U.S.C. §§ 1361-62, 1371-84, 1401-07 (1994)).

adopted a year before this treaty was signed. We have never adopted any legislation to specifically carry out our obligations under here. So we do not fully enforce our treaty obligations in the United States. In particular, Article 4 states, "the use of aircraft and large motorized vessels for the purposes of taking Polar Bear shall be prohibited." However, we do not have any such prohibition in our domestic law that prohibits the use of aircraft in the taking of polar bears.

The Polar Bear Treaty is also interesting because it points out one of the other good things about treaties-even treaties that do not necessarily have a lot of teeth. That is the process of having people talk to each other. In the early 70s, and we must remember what the state of relations was with the U.S.S.R. at that point in time, this Treaty allowed the polar bear people to get together and deal with this issue. What happens is that the state department has the power to negotiate a treaty. So, the lawyers get together with the help of the scientists and hammer out language that protects their sovereignty to the extent that they feel like they have to. Then they bring the treaty back to the state department and leave it alone, because the state department seldom has anything to so with the implementation or management of the treaty obligation. Now, the existence of the treaty allows the scientists from the various countries to talk to each other. It has created that little thread of contact between the countries and at least information can flow where there was no information before. Because of this, you might actually get a world established on the population of polar bears, their habitat and what their risks are. So, treaties have this secondary consequence, which allow for a network and flow of information that did not exist before.

Probably, the premier treaty for wildlife issues is CITES, if only because no species is excluded from consideration. It includes all endangered species-both plant and animal. What animals are protected or potentially protected under CITES? CITES has an appendix one and an appendix two, which is roughly the equivalent of endangered versus threatened. Appendix one, the endangered list "shall include all species threatened with extinction which are or maybe effected by

trade. Trade and specimens of these species must be subject to particularly strict regime in order to not endanger further their survival and may only be authorized in exceptional circumstances." The real crux of appendix one is that there can be no commercial trade in those species. There can be trade, which means the movement of one country to another. For example, the zoos of United States can still get appendix one species into their zoo collection even though they pay for it because that is not considered commercial.

So, we have a listing process that happens at each conference of the parties about every two and one-half years. It started with only fifteen to twenty countries and in Zimbabwe we had 130 countries. Just about every major country in the world is now a member of CITES, except for North Korea, Thailand and some of the break-off countries of the U.S.S.R. Now, CITES works through the region and if you have an appendix one species, its movement across your borders requires a permit-a permit issued by the country of export and a permit issued by the country of import. So if someone wants to send a leopard to the United States, he or she not only needs to have the permission of the country from which the leopard is located, he or she needs the permission of the United States Fish and Wildlife Service, as well.

That is the international obligation and the question is how do countries implement that obligation in their domestic law, because ultimately CITES is dependent on this. Where CITES does and does not work is at customs-the point of import and export. If those customs agents are not authorized, trained and capable of identifying the permits that are involved in wildlife trade then all the rules do not make any difference.

In the United States, we use the ESA in part, to implement our international obligation under CITES. However, it is a curious one. Many countries have adopted a law on the import and export of endangered species. Canada has an import and export law to implement CITES. Canada does not have an ESA but because of CITES it will be forced to adopt, on a national level, a law that deals strictly with the import and export of CITES.

Our ESA has a provision that says that you cannot import and export, except in accordance with the provisions of CITES. If I were doing an analysis of our law versus our obligation, then I would say that we come out pretty poor. However, the United States has made the commitment to implement the law and has put some resources to work doing that. We, the management and scientific authority, do deal with these issues. We also do have a functional permit system that does a pretty good job. My latest information tells me that the ESA has reached a stalemate in the sense that republicans do not have enough votes to radically change the ESA and the democrats do not have enough votes to reauthorize the ESA. So, we have reached the point where real political compromise is necessary to do anything with the ESA.

I would like to read a couple of sentences from the umbrella treaty of the Biodiversity Convention, specifically, Article 15, access to genetic resources. "Recognizing that sovereign rights of states over their natural resources, the authority to determine access to genetic resources rests with the national government and is subject to national legislation." That is suggesting that a country has a sovereign right to say that nobody can come in and take out information about genetic resources. How are they going to stop that? How can you prevent someone from taking a leaf out of the country? It is not very likely that this can be prevented. "Each contracting party shall endeavor to create conditions to facilitate access to genetic resources for environmentally sound use by other contracting parties and not impose restrictions that run counter to the objectives to this convention." No country is suggesting that it wants to cut off access to genetic material, it just wants to set up a regime that allows it to get money for itself. This runs counter to the western perception of patents and copyrights of material of economically commercial value. One of the reasons that the Biodiversity Treaty has not gone very far forward is because nobody has developed solutions that everybody is happy with.

I would like to discuss how the ESA interacts with bears under the CITES obligations. In the United States, we have

three lists that govern the activities of its citizens. One is the state list of endangered species and whatever arises out of criminal activity there is controlled by the state. There is also the United States endangered species list. Finally, there is the international endangered list in the CITES list. They are not identical. There are some things listed on the CITES list that are not listed on the endangered species list. In any case, we have an obligation to deal with those as well.

For example, the black bear is not listed as endangered in the endangered species list, but it is on Appendix two of CITES. The United States vigorously opposed the listing of the black bears on Appendix two because all the United States' agencies did not want anymore control over bears, since bears are not endangered in the United States. The problem was that internationally, bear populations in Europe or Asia were declining very rapidly because of the international sale of bear gallbladders for medicinal purposes to Far Eastern countries. The bear was listed worldwide so that any transboundary movement would have to have some permit. The United States objected to this strenuously but it passed anyway. Although the United States could have made a written reservation on the black bear issue, it did not. This is because the United States wanted to set an example that it would abide by the two-thirds vote of the CITES provisions and that would allow the United States to call upon other countries to accept the votes especially when those countries do not agree with the votes.

So now the black bear is listed. What does that mean? That means that if somebody shoots a black bear in the Adirondacks and wants to take the gallbladder to China, he or she would have to have a permit to do so. The permit would be issued only if it could be shown that it was taken lawfully in the United States in accordance with New York law, and that doing so will not cause any endangerment to the species in New York. Presumably, these permits are all obtainable from the Fish and Wildlife Service.

Under the ESA, if you do not have that permit then the taking, selling, shipping, transporting and receiving of that material could all be illegal. The federal law does not arise

until you take it across the state border. The rest of the world had a reason to impose these "look alike" provisions on the United States under the CITES Treaty. These are where one geographic population can be put on the list even though it is not endangered because it looks like a lot of things in international trade that you do need to control. Another example of this is the bobcat. All the big cats are controlled in international trade. The bobcat is controlled in the United States not because it is endangered in the United States but because of the look alike status of the other cat skins that you have around the world.

That is the introduction to several treaties, now I would like to move to a discussion of elephants. Elephants, unlike wolves, have a human emotional component to them. In the United States we relate a lot of humanistic elements to these animals. Ivory is the curse of the elephant because people like to kill the elephant to get the ivory. The ivory trade is what drives the killing of the elephants. Habitat reduction is a factor, but during the 1980s hundreds of thousands of elephants were shot to get their ivory. Is there anything wrong with ivory as a commercial product? Absolutely not. Ideally you should let the animal live a full life and when it dies then you take the ivory. By waiting until its death, you will end up with the maximum commercial use of ivory because it will be the biggest tusk you ever saw. So I do not have any problem with ivory being used as a commercial product, it is how it is obtained at this point in time. Many African government officials are corrupt. They can be bribed and will do things for money that are clearly illegal. Not all Africans, but enough that you cannot have confidence in any permit system that you put in place there. African countries have an extraordinary need for hard currency to do things to protect wildlife. One of the things you do to protect elephants is to put up electric fences that are sixteen feet high and those are very expensive. They do not have the money to do this but we tell them that they need to protect the elephants.

We, in the United States, give a fair amount of money to wildlife protection but other countries do not have the resources to do this, and this is a problem. CITES is just begin-

ning to try to deal with this problem, but there still needs to be a great deal of compromise.