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The Enforcement of CITES

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INTRODUCTION

There are a number of factors pushing wildlife species toward extinction. The main ones are: (1) destruction of habitat, (2) introduction of exotic species into natural ecosystems, and (3) over-exploitation of species.¹ A study by the World Conservation Union showed that among the fauna extinct since 1600, 39% were due to introduction of exotic species, 36% to habitat destruction, and 23% to over-exploitation.² Narrowing the focus to wildlife extinction caused by over-exploitation, another study indicated that this was the primary cause of extinction for 23% of the mammals, 32% of the reptiles, 11% of the birds, and 4% of the fish that had gone extinct.³ What is more, over-exploitation continues to threaten wildlife, especially mammals and reptiles.⁴

The exploitation of wildlife is carried out on a broad scale to supply both domestic and international markets. Exploitation for international trade is lesser than that for domestic trade, and so in comparison with habitat destruction and the introduction of exotic species, it cannot be considered a main factor driving wildlife species to extinction.⁵ But international trade is indeed a threat to a number of wildlife species. Certain species are over-exploited and driven to extinction in order to satisfy demand from other countries and in response to economic motives. Innumerable species have been led to extinction through over-exploitation for the foreign consumers who seek things like furs and ivory. Demand for wildlife and their products is also linked to the rise in income levels, so that in addition to Western countries and Japan, which have heretofore been major importers, imports in the economically growing Asian region are also increasing. This creates ever-increasing pressure for more exploitation. This paper will therefore conduct an overview of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), whose purpose is controlling international trade in endangered wildlife species, and examine the problems in its implementation, especially its domestic enforcement.

1. BACKGROUND

It was at the seventh General Assembly of the International Union for Conservation of Nature and Natural Resources (IUCN) in 1960 that the danger to wildlife species posed by

international trade was first discussed. The following IUCN General Assembly in 1963 passed a resolution calling for an international convention to regulate the export, transit, and import of rare or threatened wildlife species, or their skins and other forms of trophies, and this marked the beginning of drafting a convention to control such international trade.⁶ The 1972 United Nations Conference on the Human Environment held in Stockholm also took up this matter and recommended that "a plenipotentiary conference be convened as soon as possible, under appropriate governmental or intergovernmental auspices, to prepare and adopt a convention on export, import, and transit of certain species of wild animals and plants" (Recommendation 99.3). In response to this, a meeting of plenipotentiaries from 88 countries was held in Washington, D.C. in 1973. Here CITES was proposed, and the attending representatives adopted this convention to control international trade in wild animal and plants so that the continued existence of these species would not be threatened by commercial trade.

2. OVERVIEW OF CITES

CITES took effect in 1975 with its ratification by the tenth country, and as of June 1996 there were 131 parties to the convention. Owing to the awareness that unrestricted commercial trading presents a major threat to wildlife species, the convention's direct purpose is to control international trade in endangered wildlife species and their products.

2.1 Controls on International Trade

Species subject to CITES controls are classified into Appendices I through III depending on the degree of protection, which differs according to species.

Appendix I includes species threatened with extinction which are or may be affected by international trade. It lists about 700 species including gorillas, tigers, elephants, rhinoceroses, sea turtles, and giant salamanders.⁷ Controls on trade in these specimens are especially strict so as to prevent it from further endangering their survival, and international trade is generally prohibited (Art. II Para. 1). Trade is permitted in exceptional cases such as for academic research, but this requires the prior issuance of an import permit and either an export permit or a re-export certificate. Permits are granted only when the scientific authority is satisfied that the specimen will not be used for commercial purposes (Art. III).

Appendix II includes species that are not necessarily threatened with extinction now but may be threatened if trade is not strictly regulated, and other species that must be regulated for effective enforcement of the convention. It lists over 34,000 species including primates, cetaceans, members of the cat family, Falconiformes, cacti, and orchids (Art. II Para. 2).⁸ Commercial trade in specimens of these species is permitted but to prevent unrestricted trade, it requires an export permit or re-export certificate (Art. IV).

Appendix III includes wildlife species which any party identifies as being subject to domestic regulations for the purpose of protecting its wildlife resources, and thus needs the cooperation of other parties (Art. II Para. 3). Trade controls are roughly the same as those on Appendix II species. A certificate of origin and an export permit are required.

Of important note here, "specimen" means not only living individuals, but also dead individuals, parts, and derivatives (Art. I). "Part" means ivory, horns, tortoise shells, feathers, furs, skins, and the like, while "derivative" means their products, such as handbags,

shoes, and clothing accessories. Parts and derivatives make up the greater proportion of trade in wildlife species, so it is important to control them.

CITES also provides for exceptions to these controls. For example, the provisions of Articles III-V do not apply to specimens that are "personal or household effects" (Art. VII Para. 3). And when a specimen has been "bred in captivity" or is "artificially propagated," the usual permits are not required (Art. VII Para. 5). Further, although parties may not make general reservations, they can make specific reservations on species listed in Appendices I-III when they become parties or when an appendix is amended (Arts. XV, XVI, and XXIII).

2.2 Domestic Measures

In addition to classifying wildlife species to be protected and defining international rules to control trade according to each appendix, CITES sets forth a number of measures that parties are to enact domestically. For instance, CITES requires states to enforce the convention and take appropriate measures to prevent trade in specimens that violate it (Art. VIII Para. 1). These measures must include the following two. First, to penalize the trade in or possession of specimens in violation; second, to provide for the confiscation of such specimens or their return to the exporting state. And when necessary, parties must provide for the reimbursement of expenses incurred by confiscation (Art. VIII Para. 2).

Parties must also keep records of trade in the specimens of species listed in Appendices I-III (Art. VIII Para. 6), and must, in addition to other information pertaining to CITES implementation, incorporate this information into periodic reports and transmit them to the secretariat (Art. VIII Para. 7). Parties must also designate management authorities and scientific authorities who are responsible for enforcement of the treaties within their countries (Art. IX).

3. ENFORCEMENT PROBLEMS

It is thought that CITES is very strictly enforced, and is highly regarded as one of the most successful international treaties for wildlife protection. It also has some problems, however, which are well illustrated by the violations reported at conferences of the parties. This means that international trade does not conform to the convention, and that the parties are not taking effective measures. For example, the scope of wildlife species to which CITES applies is specified as an individual or any readily recognizable part or derivative of a species listed in Appendices I-III (Art. I), but it is possible for parties to interpret this definition in a way that suits the purposes of their own countries. And even if specimens are Appendix I species, which would be subject to especially strict control, there are special provisions for exemptions, thus making it possible to export items recognized under those provisions as "personal or household effects" (Art. VII Para. 3). The most serious matter is that parties can make reservations to listed species when becoming parties to CITES or when an appendix is amended, which allows them to legally continue trading in those species (Art. XXIII). The fact that a large quantity of listed species is continuously being legally traded is a problem in of itself, but in addition to that, criticism is being leveled on reservations, which are being used as a smoke screen which results in abetting illegal trading.⁹

Another problem is that while CITES regulates international trading, it has no direct effect on the parties' domestic wildlife protection, and for that reason the convention's controls do not directly show up in domestic controls. Let's say, for instance, that when amending the

appendices at a conference of the parties, a certain species is moved from Appendix II to Appendix I. Although international commercial trading in that species is now forbidden, this has no effect on domestic laws, so domestic commercial trading will still be allowed.¹⁰ Furthermore, even if strict controls are enacted on imports, parties would have to have domestic laws to control trading within their countries; if not, once a specimen is illegally brought into a country there would be no way to exercise control over it. Because CITES is not a self-executing treaty, each party must discharge its responsibilities pursuant to the convention by providing ways to implement it domestically. Although such domestic measures by the parties are indispensable for the convention's success, a considerable number of parties currently lack even the domestic legislation to enforce CITES, a fundamental obligation.¹¹

Even when parties have domestic laws for CITES enforcement, the laws themselves are in many cases inappropriate. Only a few parties have specific and comprehensive laws for carrying out CITES, and most of them depend on legislation such as general wildlife protection laws, or on customs laws and foreign trade laws. And when such domestic laws are those passed before parties joined CITES, they often lack provisions needed to sufficiently address the convention's purpose.¹² Even when parties have wildlife protection laws, those laws' scope of application is in some instances too narrow. Examples of such problems are: (1) fish, plants, and invertebrates are excluded from controlled species, (2) Appendix III species are not included, and (3) laws are limited to parties' endemic species. Such laws cannot therefore completely protect CITES-listed species. And some domestic laws have other problems because they lack provisions for penalties and confiscation. Foreign trade laws classify CITES-listed species as mere prohibited or restricted items that require special permits for import and export, which makes it possible their implementation will not conform to the purpose of CITES, which is to protect wildlife.¹³

4. DOMESTIC IMPLEMENTATION REQUIREMENTS

Presently the parties' legislation of domestic laws for CITES implementation is the key to the domestic enforcement which CITES calls for. This is because just ratifying the convention is not enough to assure effective enforcement unless there are also suitable domestic laws. CITES calls for the passage of domestic laws, and the conferences of the parties have repeatedly pointed out the importance of this.

4.1 Domestic Legislation

The rules of international law hold that states are bound by the treaties they become party to, but under the legal institutions of most countries, international conventions do not automatically become legally binding on their citizens. Normally, domestic implementation of conventions requires new legislation for that purpose.

Domestic legislation for CITES is especially required for Article II Paragraph 4 and Article VIII Paragraph 1. In the case of the former, parties are required to permit no trading whatsoever in listed species except when done in accordance with the provisions of CITES. Parties are thus required to take measures prohibiting trade in listed species as long as there are no conditions for such trade provided for by CITES.¹⁴

Article VIII Paragraph 1 more clearly obligates parties to pass domestic legislation. Parties must pass domestic laws that implement the convention and prevent trade in viola-

tion, and those laws must at the least prohibit all trade that violates CITES. "Trade" here is a broader concept than mere buying and selling, and includes all international transfers of specimens.

Article VIII Paragraph 1 further sets forth two conditions that must be included in domestic legislation. First, domestic laws must have provisions to penalize individuals who trade in or possess specimens in violation of CITES. Second, domestic laws must provide for the confiscation of specimens, including cases when they are returned to the state of export. These requirements can be considered the core of CITES. The absence of penalties would make it impossible to enforce laws effectively, but many legal systems can only establish penalties by parliamentary legislation or documents with the same level of force. CITES recognizes this fact and imposes a clear obligation upon parties. In consideration of the great variety of legal systems among parties, these obligations are stated in the most general terms, thereby allowing the parties to legislate in a way that accommodates their own legal systems.¹⁵

After parties have established domestic laws that include the aforesaid items, only then is a connection forged between international and domestic trade in endangered wildlife species; only then are individual citizens of the parties bound by CITES; and only then is the convention effectively enforced in accordance with its provisions.

4.2 Trends in Conferences of the Parties

Conferences of the Parties showed an early awareness of the importance of implementing CITES domestically, and have documented their intentions in the form of resolutions. Although these resolutions are not legally binding, they express Conference of the Parties decisions for heightening the effectiveness of CITES enforcement. Among them are the following recommendations, which were resolved in connection with domestic legislation.

Resolution Conf. 3.9 recommends abiding strictly by all provisions of the convention and carefully regulating trade. It also recommends that parties should immediately take appropriate measures pursuant to Article VIII Paragraph 1, to penalize the offender and take other proper actions in the event that CITES provisions are violated.

Resolution Conf. 6.3 asks parties to enhance import controls and rigorously check documentation. This request was made in consideration of the facts that parties are obligated to observe the convention, including the enactment of measures to confiscate illegally imported specimens pursuant to Article VIII Paragraph 1(b), and that it is essential for all parties to implement and abide by established restrictions in order for CITES to work effectively.

Resolution Conf. 8.4 directs the secretariat to, among other things, and within the scope of funding available to it and in accordance with the basic awareness that a considerable number of parties had not taken proper measures to enforce the provisions of the convention: (1) to identify those Parties whose domestic measures do 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; (2) to seek from each Party so identified information indicating the procedures, action and time frames that are needed in order to establish the measures necessary to properly enforce the provisions of the Convention; and (3) to report its findings, recommendations or progress to the Standing Committee and at the ninth meeting of the Conference of the Parties. As this shows, all parties that have not appropriately adopted measures for implementing CITES domestically are prodded by resolutions to enforce the convention.

At the ninth meeting of the Conference of the Parties in 1994 the secretariat delivered a report (Doc. 9.24) on "National Laws for Implementation of CITES." This report consisted of an analysis by TRAFFIC and the IUCN Environmental Law Centre (ELC) of the domestic laws of 81 parties with much trade in CITES-listed species. This analysis showed that only 15 parties had domestic laws that generally satisfied the requirements of CITES, and that 27 parties' domestic laws hardly satisfy CITES requirements at all.¹⁶

The Conference of the Parties passed a resolution asking parties without adequate domestic laws to take all measures for passing domestic legislation, improve their domestic laws to address the problems pointed out by the analysis, and report the results to the secretariat; all these actions were to be taken by the 10th meeting of the Conference of the Parties. This resolution took a stand on this problem that was more rigorous than before. For instance, it clearly stated that countries whose domestic laws had, according to the analysis, failed to generally satisfy the demands of CITES would either have to take positive action no later than the following Conference of the Parties, or sanctions would be enacted, including limitations on trade in CITES-listed species with those countries. In connection with this, the conference also passed a resolution on enforcement (Resolution Conf. 9.8).

4.3 Implementing Resolutions

As recommended in resolutions, it is essential that all parties to CITES pass domestic laws that accommodate the convention in order to effectively protect wildlife, which is the purpose of CITES. Many parties have produced domestic legislation within the framework of CITES, but the convention itself states clearly that its provisions in no way restrict parties from adopting even stricter domestic measures (Art. XIV Para. 1). There are at least three conceivable ways to create the domestic laws needed for domestic CITES implementation:¹⁷ (1) Include a clause in existing wildlife protection laws, which would prohibit the import, export, and possession of, as well as domestic trade, in all wildlife species or in all CITES-listed species unless there is a permit; (2) Include in CITES ratification laws or all related laws, such as wildlife protection laws, a basic clause that prohibits all actions in violation of CITES for all CITES-listed species; or (3) Pass individual laws aimed exclusively at controlling international trade in wildlife species.

CONCLUSION

There is indeed criticism of CITES' underlying ideas because the convention concerns itself only with wildlife species that are endangered by international trade, while it is not concerned at all with alleviating other factors driving wildlife toward extinction, or with the protection of species not traded internationally,¹⁸ but CITES has in fact performed a major role in wildlife protection. Right now, the most important task for making the convention do its job fully within its framework is the passage by the parties of the domestic laws needed to make their own government agencies and individual citizens implement the treaty's provisions.

The underlying idea of CITES is that the use of wildlife species jeopardizes their survival,¹⁹ but recently the contention that wildlife should be protected instead by encouraging its use is gaining currency. A few developing countries in particular claim that wildlife species which are also resources are unjustly controlled, and advocate their use. So, the

eighth meeting of the Conference of the Parties in 1992 adopted a resolution (Resolution Conf. 8.3) stating that the body "recognizes that commercial trade may be beneficial to the conservation of species and ecosystems and/or to the development of local people when carried out at levels that are not detrimental to the survival of the species in question." While the overall worldwide trend is toward sustainable development and use, there is also a tendency to give precedence to economic development and short shrift to preventive principles, so this cannot be accepted without criticism. It is important to continue maintaining the spirit of CITES, which is the idea of preventing excessive use that would cause the extinction of wildlife species. To achieve that purpose, it is hoped even more that all parties will pass the needed domestic laws, and cooperate internationally, especially among developed and developing countries.

Notes

1. Exploitation includes commercial trade, subsistence hunting, hunting for sport, and trade in living plants and animals for pets, zoos, and research. Joanne Burgess, "The Environmental Effects of Trade in Endangered Species," in OECD, *The Environmental Effects of Trade* (OECD, 1994), pp. 126-127.
2. The World Resources Institute, *World Resources 1994-95*, Oxford University Press, 1994, pp. 149-150.
3. Burgess, *op. cit.*, p. 126.
4. *Ibid.*, pp. 126-127.
5. *Ibid.*, p. 128.
6. Willem Wijnstekers, *The Evolution of CITES — A Reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (4th Ed.), 1995, CITES Secretariat, p. 11.
7. Yoichi Sakaguchi, *Legal Strategies for Global Environmental Protection*, Aoki Shoten, 1992, p. 42 (in Japanese).
8. *Ibid.*, p. 43.
9. OECD, *The State of the Environment*, Paris, 1991, p. 142.
10. Yoshio Kaneko, "CITES and Developing Countries' Economies," in Saburo Okita (editorial supervision), *Global Environmental Problems II*, Chuo Hoki Shuppansha, 1990, p. 161 (in Japanese).
11. *TRAFFIC (JAPAN) Newsletter*, vol. 10, no. 2, 1994, p. 10 (in Japanese).
12. Cyrille de Klemn, *Guidelines for Legislation to Implement CITES*, IUCN Environmental Policy and Law Paper No. 26 (IUCN), 1993, p. 5.
13. *Ibid.*, p. 6.
14. *Ibid.*, p. 6-7.
15. David S. Favre, *International Trade in Endangered Species — A Guide to CITES*, Martinus Nijhoff Publishers, 1989, p. 215.
16. *TRAFFIC Bulletin*, vol. 15, no. 2, 1995, p. 65.
17. de Klemn, *op. cit.*, p. 89.
18. J. Owen Saunders, "Legal Aspects of Trade and Sustainable Development," in J. Owen Saunders (ed.), *The Legal Challenge of Sustainable Development*, Canadian Institute of Resources Law, 1990, p. 383; Michael J. Glennon, "Has International Law Failed the Elephant?," *The American Journal of International Law*, vol. 84, 1990, p. 42.
19. Yoshio Kaneko, "The Decline of Wildlife," in *Economic Discourses on the Global Environment*, vol. 1, Keio Tsushin, 1994, p. 149 (in Japanese).