Legislation for Conservation and Sustainable Use: The CITES Experience

Although the abusive and indiscriminate exploitation of wild fauna and flora is no new phenomenon[1], it has become more severe as a consequence of globalization and the excessive demand for raw material. The challenge facing the international community and environmental law is to reach a balance between the satisfaction of human needs and the conservation of the world's biological heritage.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was adopted in 1973 as an answer to a central aspect of that unprecedented challenge. After two weeks of intense discussions, a Plenipotentiary Conference in Washington, DC. agreed to regulate the international trade in certain species of fauna and flora, so that this trade would not represent a threat for their survival and, in the best scenario, may generate incentives for their conservation. By December 2005, 169 States had joined CITES.

CITES includes – in three Appendices – about 32,000 species of aesthetic, scientific, cultural, recreational and economic value, including their parts and derivatives. Appendices I, II and III of the Convention are lists of species with different levels and types of protection against excessive exploitation. Any import, export, re-export or introduction from the sea of specimens of species under the Convention must be authorized through a system of permits and certificates, in accordance with the purpose of the transaction.

The system of permits as set out in the Convention is an example of a regulatory certification scheme, with government Management and Scientific Authorities acting as 'certifiers' for trade of products using 'specified requirements' as detailed in the Convention – these requirements are principally that the trade is to have a 'non-detrimental effect' on the species concerned and that the product is 'legally obtained'. For undertaking non-detriment and legal acquisition findings in a credible way it is necessary, among other things, that Management and Scientific Authorities act independently of the commercial interests of traders and consumers.

Any failure to determine legal acquisition adequately provides unscrupulous traders with the opportunity to 'launder' illegally-obtained specimens into international markets under the cover of genuine CITES permits.

To ratify a treaty is one thing, to enforce it, quite another

CITES, as most Multilateral Environmental Agreements (MEAs), is not a self-executing treaty. Although the Convention is incorporated as a law in many national legal frameworks, it needs regulation to be applicable to the citizens and not remain dead letter.

Given the absence in many countries of the necessary

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national rules or regulations to implement CITES, the Conference of the Parties to CITES agreed on a practical approach, the National Legislation Project (NLP), to review and evaluate the relevant legislation adopted by Parties.

The NLP was adopted in Kyoto in 1992 through Resolution Conf. 8.4 (National laws for implementation of the Convention). The Resolution identifies four basic domestic measures that Parties should implement[2]:

1. Designate at least one Management Authority and one Scientific Authority;
2. Prohibit trade in specimens in violation of the Convention;
3. Penalize such trade; and
4. Confiscate specimens illegally traded or possessed.

Based on these measures, three categories have been devised as follows:

Category 1: legislation that is believed generally to meet the requirements for implementation of CITES;
Category 2: legislation that is believed generally not to meet all requirements for the implementation of CITES; and
Category 3: legislation that is believed generally not to meet the requirements for the implementation of CITES.

Progress

The CITES experience in these three decades of existence has made evident that legislative progress in countries rich in biological resources has been unequal and determined by the capacity to adapt existent legal frameworks, the authorities' political will, the level of integration

between the several agencies involved in the management of wildlife, and the participation of stakeholders (authorities, scientists, private sector, NGOs, local communities, etc.).

Since the beginning of the project, thirteen years ago, the legislation of 169 Parties and of 27 territories has been analysed, or, if updated in the course of those years, been the subject of a review. In June 2005, 71 Parties and territories (36%) were included in Category 1; 56 Parties and territories (28,5%) in Category 2; and 44 Parties and territories (23%) in Category 3. The analysis of the national legislation of a further 18 countries (9%) that have recently adhered to the Convention is currently under way as well as the review of the new legislation recently adopted by seven countries (3,5%).

CITES' ability to limit commercial trade when it proves detrimental to a species has been used as a powerful incentive to promote the adoption of adequate legislation. The Conference of the Parties has recommended the suspension of trade with some of the Parties, for not adopting appropriate national legislation whilst observing significant trade of species listed in the Convention. The threat of a recommendation to suspend trade often draws high-level political attention to CITES issues and results in action being taken quickly to enact legislation, develop work plans, control legal/illegal trade, or improve the basis for government decision-making[3].

Concerning technical assistance provided to the Parties in the development of their national legislation, a package of technical support documents (guidelines, checklists, law models, questionnaires, etc.) has been prepared by the Secretariat, in collaboration with IUCN's Environmental Law Centre. According to the Parties' legal draftsmen who have received support from the Secretariat, one of the most useful tools in the law drafting process is the CITES model law.

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Despite the significant progresses made, the National Legislation Project (NLP) has revealed that approximately half of the Parties whose legislation has been reviewed still do not have in force all of the legislative and administrative measures necessary to implement the Convention's provisions in an adequate manner.

At present, most of the Parties included in Categories 2 and 3 are using general legislation on the protection of fauna and flora, and sometimes Customs or foreign trade legislation, to control trade in specimen of species included in the CITES Appendices. Nevertheless, sector-based existing legislation is rarely adequate to accomplish the four basic domestic measures set by the Convention, particularly if promulgated before the adhesion of the country to CITES (as is frequently the case).

Many countries passed from the indiscriminate use of their biological resources in the 60s and 70s to a complete ban of its use in the 80s. Most of the laws on fauna and flora of that period have a limited scope, and only cover certain categories of species, products or transactions. The challenge remains to encourage the Parties in Categories 2 and 3 to adopt appropriate domestic measures to implement the Convention and to incorporate the new paradigm of the Rio declaration (1992) regarding the sustainable use of biodiversity, including wild species of fauna and flora.

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1 According to Bernd Schunemann, this phenomenon could already be observed in the deforestation carried out in the Mediterranean countries during the antiquity as well as in the pre-Columbian America (Zur Dogmatik und Kriminalpolitik des Umweltstrafrechts, in: Festschrift für Otto Triffterer, Wien-New York 1996, S. 437 - 456).

2 For more information on the content of each basic domestic measure, see document CoP12 Doc. 28, http://www.cites.org/eng/cop/12/doc/E12-28.pdf

3 Marceil Yeater and Juan Vasquez: "Demystifying the Relationship Between CITES and the WTO", RECIEL 10 (3) 2001.