

THE RELATIONSHIP BETWEEN THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) AND THE WTO

Communication from the CITES Secretariat

This background paper is circulated to Members in preparation for the MEA Information Session on 24 October 2000.

This note sets out some of the steps that should be undertaken to achieve synergy between CITES and the WTO regime. They are a further elaboration of the "background note on CITES and WTO" submitted to the WTO Committee on Trade and Environment (CTE) held in June 1999 (WT/CTE/W/119).

I. BACKGROUND

1. "Synergy" has been defined as increased effectiveness produced by combined action. It involves both cooperation and harmonization. It is nevertheless true that the emphasis within trade and environment synergy discussions has been put, until now, on the compatibility of environmental regulations with the multilateral trading system. This perspective does not necessarily reflect MEAs' priorities.

2. It should be emphasized that MEA provisions and WTO rules, even if interconnected, are nonetheless two distinct legal regimes, each having a different scope, characteristics and content. The WTO regime and MEA provisions are, in general terms, completely compatible. The provisions of the two legal regimes can be implemented simultaneously, and then they should not conflict.

3. The CITES Secretariat considers it a priority to concentrate trade-environment coordination efforts on implementation and capacity building rather than on the "theoretical compatibility" of MEA provisions with the WTO rules and the possible "trade distortions" posed by a wide variety of trade measures set by MEAs.

4. It is also important to clarify the main interfaces between the two regimes. CITES and the WTO should, therefore, increase their mutual comprehension of the rules and goals of the two regimes. As far as CITES is concerned, there is a need to learn more about the economic dimension of environmental issues, as well as the negative effects that a deregulated trade system could have on the environment.

5. More specifically, we recommend that MEAs and relevant UNEP divisions request further information from the WTO on MEA-related subjects covered by WTO rules, as well as on how the WTO intends to support the implementation of MEAs and how it intends to develop a positive relationship with MEAs. This information could allow MEAs to further their work on using trade and economic instruments for environmental protection.

II. KEY STEPS TO ACHIEVING "PRACTICAL SYNERGIES"

6. To achieve the expected synergies between the WTO regime and MEAs, the CITES Secretariat considers it necessary to identify concrete steps that could be taken.

7. The first step would be to encourage WTO Member states that have not yet done so to join MEAs.

8. The second step could be to carry out an internal analysis of the trade measures used to achieve the objectives of MEAs (some of this has been already done by UNEP). We believe that this analysis must be carried out by the MEAs themselves, according to the environmental objectives contained in their provisions and must be a prerequisite to any study on the relationship with WTO rules.

9. As part of this "trade measures survey", the provisions of each MEA together with the decisions and other documents relating to trade measures must be reviewed. This covers not only the trade measures provided by the MEAs that are legally binding, but also all the trade measures implemented by the MEAs at the different decision levels. It requires MEAs to explain how trade measures work. In the case of CITES, the following decision levels must be taken into account:

- (a) Trade measures that are legally binding (text of the Convention);
- (b) trade measures decided by the Conference of the Parties (COP);
- (c) trade measures decided by the Standing Committee (SC);
- (d) trade measures recommended by the Animals Committee/Plants Committee;
- (e) trade measures recommended by the Secretariat to the COP and SC; and
- (f) stricter domestic trade measures adopted by the Parties.

10. Afterwards, a third step would be to ask for technical input from the WTO on the use of these trade measures and their relationship with the multilateral trading system. This consultation should examine the effectiveness of trade measures when producer and consumer states have different incentives to comply with such measures, as well as could reveal whether other options are available (for instance, it could refer to the Swiss and Canadian proposals submitted to the CTE, on harmonization of the two legal regimes)

11. As far as CITES is directly concerned, there is a role for more coordination in the collection and management of data concerning legal and illegal trade flows in wildlife species. There is also a role for development of an environmental labelling scheme (eco-labelling) to reflect that CITES documentation (permits, certificates, marking, universal tagging system, etc.) is already a kind of "green label" for specimens (mostly parts and derivatives) that are traded in compliance with the CITES requirements.

III. RELATIONSHIP BETWEEN CITES AND THE WTO

12. CITES establishes an international legal framework for the regulation and restriction of trade in a list of wild fauna and flora species that the international community decided to regulate under a special regime to ensure that international trade does not threaten their survival. Since the objective of CITES is to control trade in endangered species, trade measures are intrinsic and essential to

achieving that objective. Consequently, there is a close relationship between CITES provisions and the WTO rules.

13. The role of trade measures in achieving the CITES objectives includes: being the core regulatory system; encouraging universality of membership; preventing opportunities for illegal trade or trans-shipment through non-parties; promoting compliance with, and enforcement of, the requirements stated by the Convention; and facilitating action against non-compliance. We consider that these roles are important components of making a MEA more comprehensive and therefore more effective.

14. CITES Management Authorities have been encouraged to work with trade experts in their countries to improve mutual understanding of the objectives of both CITES and the WTO. Parties to CITES are encouraged to coordinate, at the national level, the activities of their trade and their environment agencies to ensure that consistent positions are presented in CITES and in the WTO.

15. Finally, it should be noted that the CITES Secretariat obtained, in 1997, observer status in the WTO Committee on Trade and Environment. The Secretariat is in close contact with the WTO Secretariat and is consulted regularly by the latter on issues related to wildlife trade regulations as well as on relevant documents and reports issued by trade-related agencies. The Secretariat has committed itself to a regular exchange of information and views with the CTE.

IV. POTENTIAL TENSIONS BETWEEN TRADE LIBERALIZATION VERSUS TRADE REGULATION BY CITES

16. As regards the basic conflict between trade liberalization and trade regulation by CITES, it should be noted that the identification of environmental impacts arising from trade liberalization would not necessarily result in the suspension or cessation of trade liberalization, but rather would prompt action to minimize the identified environmental impacts.

17. In this connection, the discussion on synergies should be on how the trade system intends to internalize the cost and effects of environmental degradation generated by their activities.

18. Likewise, it should be noted that, from an economic perspective, wild species of animals and plants are considered as renewable resources. They can be managed and used in a sustainable way. To achieve this, the rhythm of exploitation must not exceed the capacity of regeneration of the species. In other words, trade in these species (in the absence of any well-defined or enforceable property rights) must be regulated to avoid overexploitation. Exploitation until the point of economic extinction, that could sometimes be the strategy to maximize profits, must be recognized as a failure of the market.

V. LEGAL ASPECTS OF THE RELATIONSHIP BETWEEN CITES AND THE WTO

19. The discussion on synergies between the WTO and MEAs should raise some of the issues associated with the legal relationship among the two regimes. As far as MEAs are concerned, it is necessary to identify the relevant provisions of the WTO regime related to MEAs and to analyse these provisions for compatibility, e.g. Article XX of the General Agreement on Tariffs and Trade concerning the general exceptions. Could Article XX be interpreted as a clause foreseeing the express primacy of MEAs, or could it be considered as a declaration of compatibility (According to Article 30, paragraph 2, of the Vienna Convention)?

20. We understand that Article XX provides for a "compatibility clause", which means that the WTO rules are to be interpreted in such a way so as not to affect the rights and obligations of Parties under the MEAs. Consequently, Article XX cannot be interpreted as annulling all the trade measures prescribed by MEAs, on the pretext that they are not in conformity with WTO rules.

21. Nonetheless, as a matter of principle, any conflict between the MEAs and the WTO rules is to be avoided to the greatest extent possible. If there is a real conflict between MEA provisions and the WTO, which cannot be solved by interpretative means, then we need to find solutions (e.g. an appeal to the Law of Treaties).

22. Concerning the dispute settlement issue, CITES has never had to employ its dispute settlement mechanism during its 25-year history. Furthermore, the practice of both the trade and the multilateral environmental regimes on this issue has been to *avoid* conflicts of laws and promote informal coordination. We consider the creation of an integrated and coordinated dispute settlement mechanism for multiple treaties to be a delicate issue that is not easy to address in general terms. Consequently, the integration of such a mechanism under the WTO umbrella is not recommended.

23. An area of potential tension between the WTO and CITES relates to the "stricter domestic measures" allowed by the Convention. Article XIV, paragraph 1, of CITES acknowledges that Parties retain their sovereign power to enact stricter domestic measures. This right to enact stricter domestic legislation remains with CITES Parties, who may use this right to protect any species in the world, including those not listed in the CITES Appendices, with unilateral measures stricter than those provided by the Convention.

VI. QUOTA SYSTEM + SUSTAINABLE USE

24. While not specifically mentioned in the Convention text, a mechanism of national export quotas is the logical consequence of sustainable utilization to allow limited amounts of trade in particular national wildlife populations. The quotas are based on a scientific determination of the level of exports that can be sustained without detriment to the survival of the species. Quotas established represent the maximum number of specimens that will be authorized for export in the calendar year. Quotas refer, unless otherwise specified, to specimens of wild origin.

25. The Quota system includes quotas established by the Conference of the Parties and those resulting from recommendations of the Animals Committee in the context of Resolution Conf. 8.9, as well as the quotas established by the Parties.

26. The Secretariat recommends to the Parties that, prior to the adoption of quotas, they identify the economic and social implications. For instance, the Parties shall identify the potential impact on illegal trade of the specific quotas established for particular species. The adoption of quotas should also provide enforcement measures, including compliance controls and incentives. These incentives should be such that they generate acceptance and implementation of the quota system by all the agents involved in wildlife trade and protection. The Secretariat is conscious that restricting trade without an adequate enforcement structure could bring about an increase in illegal trading.

27. On the other hand, flexibility has been introduced through a mechanism called ranching, whereby certain Appendix I species, which have been taken from the wild but reared in a controlled environment, are transferred to Appendix II, and are thus allowed to be traded. These specific categories of wildlife are required to be marked or identified as part of the agreed quota entering into international trade.

28. Finally, the zero export quota is a preventive measure to ensure sustainability of exports of species recently down-listed or transferred from Appendix I to Appendix II.

VII. TRADE-RELATED TECHNICAL ASSISTANCE

29. The CITES Secretariat provides technical assistance to developing countries through special programmes. These programmes are in place to increase the capacity of the Parties to implement the Convention. CITES training activities are coordinated by the *Capacity Building Unit (CBU)*. Capacity building activities include workshops, seminars, training packages, dissemination of information through the Internet and Newsletter, technical assistance, etc. The *Scientific Coordination Unit (SCU)*, provides assistance to CITES Parties to enhance the scientific basis for decision-making in CITES. SCU is responsible for workshops on non-detriment findings and quota management, as well as the creation of identification manuals. Compliance and enforcement are also important focal activities of the CITES Secretariat. The *Enforcement Assistance Unit (EAU)* provides technical assistance to enforcement officers through the organization of enforcement seminars, the preparation of customs training packages and providing legal advice for the development of national legislation. The *Convention Support Unit (CSU)* assists Parties in understanding CITES provisions and provides logistic support in the organization of CITES meetings.

30. Many Parties have asked the Secretariat for advice or assistance in the development of legislation to implement CITES. The Secretariat has responded in a variety of ways, including drafting models of law, developing a legislation checklist, directing requests for assistance to the relevant UNEP regional offices (e.g. for certain Latin American countries), missions by Secretariat staff, and providing written advice and/or comments on draft legislation.

31. This assistance could be further developed to address the interaction between environmental and trade legislation as well as the necessary institutional cooperation between Ministries of Environment and Ministries of Trade.

32. Seminar activities have been organized by the Secretariat since 1989. Between 1994 and 1996, around half of the US\$4 million received by the Secretariat in external contributions was allocated to activities concerning enforcement and capacity-building. Principal donors to these activities include the European Commission, and several individual EU members, the US, Hong Kong China, Japan and Australia, as well as several NGOs.

33. The remaining external contributions received by the Secretariat were used on species-related surveys, a number of which were aimed at gathering information on a specific population's conservation status with a view to devising sustainable management programmes. Some of this financial support has also come from users of wildlife. Species covered in surveys with a sustainable use dimension include cats, parrots, pythons, crocodilians, lizards, corals and orchids.

VIII. SPECIFIC PROGRAMMES

34. Legal and Trade Policy Officer: A new post has been created in the Enforcement Assistance Unit to assist the Parties in the development of "trade and environment" policies and to prepare "trade and environment" analyses for presentation and discussion at meetings of the COP and for consideration by fora such as the WTO.

35. T.I.G.E.R.S (Trade Infraction and Global Enforcement Recording System) database: The CITES Secretariat regularly prepares a report on infractions or the types of fraud/smuggling employed. Where serious infractions exist, they are registered in the T.I.G.E.R.S database and reported to the CITES Standing Committee who may take appropriate measures to remind States of their signatory obligations.

36. National legislation project: CITES is the only multilateral environmental agreement for which the Parties have precisely defined an approach, the National Legislation Project, for reviewing

and evaluating domestic measures to implement the Convention. Three categories and four criteria are used to assess a Party's national legislation. The project, having started in 1992, is currently in its fourth phase.

37. MIKE: Monitoring of the Illegal Killing of Elephants Program.

38. ETIS: Elephant Trade Information System.

IX. PRECAUTIONARY PRINCIPLE (SCIENTIFIC UNCERTAINTY = TRADE RESTRICTIONS?)

39. In order to clarify the discussion, it would be important to adopt a definition of this principle. A common misconception is to say that the aim of the precautionary principle is to restrict trade. This interpretation could be severely constrictive and does not reflect the spirit of the principle, which is to anticipate and prevent potential harm to the environment.

40. In the context of CITES, the Convention does not include the precautionary principle in an explicit way. The principle is not mentioned by name, but it is implicitly part of the provisions of the Convention (e.g. Article IV, 3). It can be found also in CITES Resolutions such as Resolution Conf. 9.24 on the criteria for the inclusion of species in Appendices I and II of the Convention.

41. The implementation of CITES is a constant attempt to apply in a proper and consistent way the precautionary principle and the sustainable use principle. These principles are not necessarily incompatible, but are of equal importance and equally difficult to apply because of the lack of scientific and technical knowledge in many areas of wildlife conservation and management.

42. It is clear that, in view of the lack of data on the effects of trade for a great many species, the strict implementation of the precautionary principle would make a large proportion of wildlife trade impossible. It should, however, be used wherever there is a risk of irreparable damage to wildlife populations. It should be noted that the precautionary principle is a cost-allocation principle.

43. One area where the precautionary principle should be applied in the removal of species from the CITES Appendices.

X. CONCLUSION AND RECOMMENDATION

44. We consider it necessary to work closely with other MEAs, relevant UNEP divisions and the WTO to promote the formulation of common positions on international trade issues. The discussion on synergies should raise the practical questions that MEAs could have about the multilateral trade system, e.g. how it intends to internalize the cost of environmental degradation generated by their activities. The CITES Secretariat commits itself to fully and actively participate in such work.
