

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES
OF WILD FAUNA AND FLORA

Forty-sixth meeting of the Standing Committee
Geneva (Switzerland), 12-15 March 2002

Interpretation and implementation of the Convention

POSSIBLE MEASURES FOR NON-COMPLIANCE

1. This document has been prepared by the CITES Secretariat.
2. Under item 13 a) of the Summary Report of the 45th meeting of the Standing Committee on the Late or non-submission of annual reports:

The Committee instructed the Secretariat to prepare for consideration at the 46th meeting an analysis of the range of legal, technical and administrative actions that might be taken in response to problems of non-compliance with the Convention, Resolutions and Decisions, such as the late or non-submission of annual reports, taking into account the need to ensure that such actions do not have a negative conservation impact.

3. "Compliance" with a multilateral environmental agreement (MEA) has been defined as "the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement" (see draft UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, to be presented to UNEP's Governing Council for consideration and adoption at its 7th special session in February 2002).
4. A Legislation and Compliance Unit has been created in the Secretariat to address issues related to legislation, trade policy, compliance and enforcement.
5. Measures taken by CITES Parties to deal with non-compliance have their basis in the legally-binding text of the Convention, interpretative Resolutions and Decisions of the Conference of the Parties, recommendations of CITES subsidiary bodies and historical practice.
6. Although there is no Article in the Convention entitled "Compliance" or "Non-compliance" (cf. Article 8 of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer or Article 18 of the 1997 Kyoto Protocol), CITES measures to ensure compliance derive from the Convention itself and involve a set of procedures and mechanisms approved by the Parties.
7. The primary thrust of these measures is to facilitate and secure compliance with Convention obligations. To that end, the measures aim at monitoring and promoting compliance as well as identifying and addressing instances of non-compliance.
8. As CITES uses trade instruments for its implementation, one recommendation for improving the effectiveness of the Convention is a suspension of trade. In practical terms, this provides a period of time during which the relevant Party can move from non-compliance to compliance by *inter alia* enacting adequate legislation or combating and reducing illegal trade. Having identified a problem of serious non-compliance, it would be inappropriate for Parties not to respond. Recommendations for a suspension of trade may be regarded as a positive measure, whereby all other Parties assist by giving an opportunity or "breathing space" for the Party in question to address the particular problem or shortcoming. They also may be regarded as a precautionary

measure to prevent a continuing violation of the Convention that is detrimental to the survival of one or more CITES-listed species.

9. During the past two years, the legal basis for compliance measures within CITES has been a focus of extensive discussions among the Secretariat, the World Trade Organization, the United Nations Conference on Trade and Development, UNEP and the secretariats of other MEAs as they seek to enhance synergies and mutual supportiveness of MEAs and the WTO. In this process, there has been recognition that the environment and trade regimes stand on equal legal footing and that deference should be given to each in its respective field of expertise. The general acceptability of multilateral trade measures as distinct from unilateral trade measures also has been acknowledged.
10. Key Convention provisions and Resolutions related to compliance include the following:
 - Article XI on the “Conference of the Parties”, paragraph 3, requires the Parties to review regularly the implementation of the Convention and authorizes the Conference of the Parties, where appropriate, to make recommendations for improving the effectiveness of the Convention.
 - Article XII on “The Secretariat”, paragraph 2 (d), requires the Secretariat to study the reports of Parties and to request from them any further information necessary to ensure implementation of the Convention. Paragraph (h) further requires the Secretariat to make recommendations for the implementation of the aims and provisions of the Convention.
 - Article XIII on “International measures” requires the Secretariat and affected Parties to communicate, investigate and act upon potential compliance problems and authorizes the Conference of the Parties to make related recommendations. Specifically, paragraph 1 provides the legal basis for generally monitoring and addressing Parties’ ability to implement the provisions of the Convention effectively. This paragraph, together with Article VIII on “Measures to Be Taken by Parties” and Resolution Conf. 11.3 on Compliance and Enforcement and related Decisions, underpins the procedure for dealing with Parties’ capacity to enforce the Convention, that is, to reduce or prevent illegal trade.
 - Paragraph 1 of Article XIII also provides the legal basis for monitoring and addressing Parties’ ability to ensure that species included in Appendix I or II are not being adversely affected by trade. The language in paragraph 1 of Article XIII, together with Resolution Conf. 8.9 (Rev.) on Trade in specimens of Appendix-II species taken from the wild and related Decisions, underpins the process for Review of Significant Trade.
 - Article VIII on “Measures to be taken by Parties”, paragraph 1, requires Parties to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in violation thereof. This has been interpreted as the basis for requiring adequate national legislation to implement the Convention. In 1992 the CITES National Legislation Project (NLP) was launched with the aim of analysing the adequacy of Parties’ national legislation and assisting them with strengthening inadequate legislation. Under the NLP, national legislation is analysed to determine whether it meets four key requirements for the implementation of CITES – as outlined in Resolution Conf. 8.4. Specifically, legislation should designate at least one Management Authority and one Scientific Authority (Article IX, paragraph 1), prohibit trade in specimens in violation of the Convention (Article II, paragraph 4, and Article VIII, paragraph 1), penalize trade in or possession of such specimens [Article VIII, paragraph 1 (a)] and provide for the confiscation or return to the State of export of such specimens [Article VIII, paragraph 1 (b)]. Decisions of the Conference of the Parties have further structured the NLP and its application.
 - Article VIII, paragraph 7, requires Parties to prepare periodic reports on their implementation of the Convention and to transmit them to the Secretariat, including an annual report summarizing trade in specimens of CITES-listed species. This Article, together with

Resolution Conf. 11.17 and related Decisions, underpins a recent process developed by the Parties to improve compliance with the annual report requirement.

- Article XI, paragraph 3 (a), authorizes the Conference of the Parties to adopt financial provisions to enable the Secretariat to carry out its duties. Together with Resolution Conf. 11.2 on Financing and budgeting of the Secretariat and of meetings of the Conference of the Parties, this Article could be used as the basis for addressing Parties whose payments are in arrears. The Secretariat notes, however, that the amendment to Article IX, paragraph 3 (a), is still not applicable to six Parties.
11. As reflected above, Parties so far have focused CITES measures for ensuring compliance on obligations related to prohibiting trade in violation of the Convention, ensuring trade does not adversely affect CITES species, enacting adequate national legislation, reporting on implementation of the Convention and making timely payments to the Convention's Trust Fund. The Parties may wish to identify other substantive or procedural obligations that pose concern in terms of non-compliance (e.g. returning confiscated live specimens to the State of export; or preparing biennial reports on legislative, regulatory and administrative measures taken to enforce the Convention).
 12. To date, CITES has employed a range of responsive actions for dealing with non-compliance and still others could be explored in the future. The actions are consultative, non-judicial and non-adversarial in nature and include procedural safeguards for the participants involved (e.g. fair notice, opportunity to respond, opportunity to participate in relevant meetings of subsidiary bodies, etc.). In determining the appropriate compliance measure for a particular situation, Parties have taken and should continue to take into account the cause, type, degree and frequency of non-compliance. The conservation impact of compliance measures often is considered (e.g. the NLP focus on Parties with Category 3 legislation and high volumes of trade), and the Secretariat is unaware of situations in which such measures have had or might have a negative conservation impact.
 13. A range of sequential and graduated responses to non-compliance are available to CITES Parties including the following:
 - Advice and/or assistance (providing the affected Party with information, technical or financial assistance, technology transfer, exchange of expertise, training or otherwise improving its capacity to comply);
 - Issuance of an informal warning (direct communication from the Secretariat or a subsidiary body to a Party suggesting that it might be out of compliance, explaining the basis for that conclusion, urging the Party to investigate the matter and asking that the results of the investigation be shared with the Secretariat and/or the subsidiary body);
 - Additional self-reporting and/or targeted monitoring (requirement that a Party submit to the Secretariat more information than normally required or submit it sooner than normally required, requirement that the Secretariat confirm certain permits for a certain period of time);
 - Issuance of a formal caution (direct communication to a Party warning that it is in non-compliance, requesting response or action and indicating that, failing that, further measures might be taken);
 - Public notification of non-compliance (notification sent to a subsidiary body or to the Parties advising that non-compliance has been brought to the attention of a Party and that there has been no satisfactory response or action);
 - Verification (review of relevant data or information or country visits by the Secretariat and possibly one or more experts from another Party to ascertain the nature, cause and extent of non-compliance);

- Compliance action plan (agreed steps needed for a Party to comply, timetable for when those steps should be completed and means to assess satisfactory completion);
 - Suspension of rights and privileges (recommended suspension of trade in specimens of one or more CITES species or for all CITES species, restriction of the right to vote at one or more meetings of the Conference of the Parties, ineligibility of a Party to be a member of the Standing Committee, loss of the right of a Party and its experts to participate in other permanent committees, working groups, etc., ineligibility of a Party to receive documents for meetings); and
 - Financial penalty (ineligibility of a Party to have its participation in a meeting of the Conference of the Parties funded by the Convention, ineligibility of a Party to receive other financial assistance from the Convention).
14. With regard to the above possible measures for dealing with non-compliance, the Secretariat notes that a number of these measures are currently used in CITES on a regular basis, even though verification missions are limited by the absence of specific funding provided by the Conference of the Parties. It further notes that the lack of political will rather than the lack of capacity generally seems to be the most common reason for non-compliance.
15. CITES measures to ensure compliance have been developed by the Parties over a number of years and continue to evolve. They have proven to be effective in improving compliance with the Convention and have probably contributed to the absence of disputes between and among Parties to the Convention. Nevertheless, as with other aspects of the Convention, it is worth evaluating the effectiveness of these measures and incorporating any changes that are deemed necessary to enhance the operation of the Convention (e.g. the incorporation of compliance incentives, assessment of the impact of various compliance measures and means to ensure that compliance measures are applied consistently). There also could be merit in revising Resolution Conf. 11.3 to provide a set of appropriate and effective procedures and mechanisms to identify and address cases of non-compliance.

Recommendation

16. The Secretariat asks the Standing Committee to endorse the Secretariat's plan to prepare a revision of Resolution Conf. 11.3 to provide a set of procedures and mechanisms to identify and address cases of non-compliance.