

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



Seventeenth meeting of the Conference of the Parties  
Johannesburg (South Africa), 24 September – 5 October 2016

RECOMMENDATIONS ON LEGAL ACQUISITION FINDING DECISIONS  
AT THE 17TH CONFERENCE OF THE PARTIES

This document has been submitted by the United States of America<sup>\*</sup>, in relation to agenda item 10.1.1 (Rev. 1) on *Report of the Chair* and agenda item 23 on *CITES compliance matters*.

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<sup>\*</sup> *The geographical designations employed in this document do not imply the expression of any opinion whatsoever on the part of the CITES Secretariat (or the United Nations Environment Programme) concerning the legal status of any country, territory, or area, or concerning the delimitation of its frontiers or boundaries. The responsibility for the contents of the document rests exclusively with its author.*

## **Recommendations on Legal Acquisition Finding Decisions at the 17<sup>th</sup> Conference of the Parties**

### **Summary of issues and recommendations**

Parties to CITES have two opportunities at the 17<sup>th</sup> Conference of the Parties to advance coordination and coherence on Legal Acquisition Findings.

The first relates to the Draft Decisions proposed by the Secretariat in CoP17 Doc. 23 Annex 1, on Legal Acquisition Findings and other compliance matters.<sup>1</sup> These Draft Decisions direct Parties, the Standing Committee, and the Secretariat to share information and to develop further actions regarding Legal Acquisition Findings. Time to discuss these Draft Decisions is included within the Committee II agenda, and the issue is scheduled for the Plenary agenda as well.

The second relates to a recommendation from the 66<sup>th</sup> Standing Committee to amend Resolution Conf. 12.3 (Rev. CoP16) with a new section regarding permits and certificates issued under court order.<sup>2</sup> This new proposed section emphasizes the need for the Scientific and Management Authorities to make the relevant non-detriment and legal acquisition findings, regardless of whether there is also a court order to issue such permits or certificates. The recommendation from the Standing Committee to amend Resolution Conf. 12.3 is included in the Chair's report, and the Secretariat has recommended that it be considered by Committee II, but the time to discuss this matter has not yet been scheduled.

Parties should consider and approve both the Draft Decisions proposed by the Secretariat, and the Standing Committee's recommendation to amend Resolution Conf. 12.3 (Rev. CoP16).

### **Introduction**

Determining that a species has been legally obtained is the common requirement to all CITES-listed species; however, beyond a few words in the Convention there are no CITES documents that provide guidance applicable to all species, or assistance to Parties when they are making such a Finding. CIEL commends the CITES Secretariat's acknowledgment of the challenges Management Authorities face in making legality determinations, and the fact that the Convention does not provide any guidance thereon.<sup>3</sup> The Convention directs the Management Authority of each country to make a finding that the specimen was not obtained in contravention of applicable laws before issuing a CITES export permit or re-export certificate,<sup>4</sup> but many countries do not have legislation governing the legality of CITES species or regulatory procedures for the Management Authority to make such a determination—known as a Legal Acquisition Finding (LAF). As a result, exports of CITES species are occurring with government approved permits, without adequate verification of legality in some cases.

CITES does not provide guidance as to how Management Authorities should make Legal Acquisition Findings,<sup>5</sup> and procedures vary widely between countries. CIEL reviewed more than a dozen Parties' existing legal frameworks and found that clear regulations or guidelines on Legal Acquisition Findings are not codified in many countries. Management Authorities apply different procedures in assessing and determining legality before issuing CITES export permits and re-export certificates. Furthermore, the Secretariat has neither the capacity, mandate, or funding to review permits for compliance with the non-detriment finding (NDF) and LAF, which places the responsibility on the country of export or re-export to make the necessary findings before issuing a permit or certificate.<sup>6</sup>

The Secretariat has rightly identified the compliance gap related to Legal Acquisition Findings. To ensure the integrity of CITES permits and compliance with the Convention, Parties should take the steps outlined by the Secretariat to develop and clarify requirements for Legal Acquisition Findings consistent with CITES objectives. Working together

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<sup>1</sup> CITES, *CITES Compliance Matters*, CoP17 Doc. 23, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-23.pdf> [hereinafter CoP17 Doc. 23].

<sup>2</sup> CITES, *Standing Committee, Report of the Chair*, CoP17 Doc. 10.1.1 (Rev. 1), (24 September – 5 October 2016), <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-10-01-01-R1.pdf>.

<sup>3</sup> CoP17 Doc. 23, *supra* note 1.

<sup>4</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Arts. III(2)(b), IV(2)(b), V(2)(a). These provisions provide that export permits may only be issued when “a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora.” Such provisions also apply to re-export as outlined in Arts. III(4)(a), IV(5)(a), and V(4).

<sup>5</sup> CoP17 Doc. 23, *supra* note 1.

<sup>6</sup> *Id.*

on the items outlined by the Secretariat in the Draft Decision Legal acquisition findings and other Compliance Matters, and including guidelines for permits and certificates issued under court order in Resolution Conf. 12.3 (Rev. CoP16) will enable parties to develop a consistent set of practices to assess legality and, ultimately, reduce illegal trade.

### Procedures for Issuing Export Permits and Re-Export Certificates

The Secretariat noted that some Parties face particular challenges in assessing legality, where verification systems are paper-based, documents are easily forged or duplicated, adding to compliance problems.<sup>7</sup> In particular countries, weak general infrastructure and institutional frameworks make it difficult for Management Authorities to make robust Legal Acquisition Findings.<sup>8</sup>

Many countries have national laws which state that a specimen must not have been obtained in contravention of law; however, not all countries' domestic legislation contains such a provision. Based on CIEL's comparative analysis of a dozen Parties' laws and regulations, very few have comprehensive regulations for Management Authority to follow when making a Legal Acquisition Finding before issuing a permitting or certificate.<sup>9</sup>

However, the varied approaches of different countries for making the required Legal Acquisition Finding have not yet been evaluated or assessed in a systematic way within CITES. As such, the recommendations from the Secretariat in the Draft Decisions contained within CoP17 Doc. 23 Annex 1 for Parties to share information, and the Standing Committee to consider further guidance on LAF developed by the Secretariat, are ideal next steps that Parties should approve at CoP17. CIEL is also encouraged that the Secretariat has proposed an international workshop on guiding principles, methodologies, and other legal resources needed by Management Authorities. Such a workshop can aid Parties to effectively bridge the gap between CITES Legal Acquisition Finding mandates and national laws in a manner that will improve coherence and application of the Convention requirements for all CITES-listed species.<sup>10</sup> Workshops can be a key first step towards the development of guidance for parties, as the meeting in Cancun in 2008 focusing on NDFs helped to start the process for the eventual approval of NDF guidance at CoP16.<sup>11</sup>

CITES guidance to assist Management Authorities in making Legal Acquisition Findings is also needed in order to reduce the occurrence of problematic export permit issuances. In some instances, court orders have compelled a Party's Management Authority to issue export permits,<sup>12</sup> where the relevant Authorities made neither the NDF nor the LAF.

As a result of problematic court ordered export permits, Decision 14.145 was adopted at the 14<sup>th</sup> Conference of the Parties. This decision specifically addressed the issue of court ordered export permits in the context of the Action plan for the control of international trade in bigleaf mahogany (*Swietenia macrophylla*), and stressed the need for LAF to be made prior to any import or export. Although Decision 14.145 was deleted at the 15<sup>th</sup> Conference of the Parties, the Secretariat issued a Notification on January 15, 2013, which specifically addressed court ordered export permits for specimens of Appendix II species.<sup>13</sup> This notification highlighted the importance of the relevant Authorities making the NDF and LAF prior to issuing export permits, even where the export permits are court ordered. The Secretariat also noted that the recommendations from Decision 14.145 on this point were still relevant, and that Parties should consider incorporating them into an existing Resolution.<sup>14</sup>

Continuing consideration of the matter, Parties discussed timber species accompanied by CITES export permits issued under a court order at the 22<sup>nd</sup> Plants Committee, but agreed that the issue was applicable to all species and referred the matter to the 66<sup>th</sup> Standing Committee.<sup>15</sup> The Standing Committee agreed to submit to the 17<sup>th</sup> Conference of the Parties a new section to be added to Resolution Conf. 12.3 (Rev. CoP16) regarding permits and certificates issued under court

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<sup>7</sup> *Id.*

<sup>8</sup> CITES, *Application of Article XIII*, SC66 Doc. 28, p. 5, <https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-28.pdf>.

<sup>9</sup> In contrast, the United States specifically outlines "what factors are considered in making a legal acquisition finding," including, among other factors, the status of the species, the origin of the specimen, the origin of the species, the volume of illegal trade, the type of trade, the trade by range countries, occurrence of the species in a controlled environment in the United States, ability of the species to be bred or propagated readily in a controlled environment. 50 C.F.R. §23.60.

<sup>10</sup> CoP17 Doc. 23, *supra* note 1.

<sup>11</sup> CITES, *Resolution Conf. 16.7 on Non-detriment findings*, <http://www.cites.org/eng/res/16/16-07.php>.

<sup>12</sup> *Castlewood Prods. v. Norton*, 264 F. Supp. 2d 9 (D.D.C. 2003), *af/d*, 365 F.3d 1076 (D.C. Cir. 2004).

<sup>13</sup> CITES, Notification to the Parties No. 2013/002, *Court-ordered export permits for specimens of Appendix-II species*, Jan. 15, 2013, <http://cites.org/sites/default/files/eng/notif/2013/E-Notif-2013-002.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> CITES, *Executive Summary*, PC22 Sum. 4 (Rev. 1) (22/10/2015), <https://cites.org/sites/default/files/eng/com/pc/22/ExSum/E-PC22-ExSum-04-Rev1.pdf>; CITES, *Exports and Imports of CITES Specimens Subject to National Decisions*, SC66 Doc. 27, <https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-27.pdf>

order to help address ongoing issues of court ordered permits and certificates without evidence of legality or an NDF.<sup>16</sup> As this issue has been a concern of Parties and the Secretariat for several years, and the 66<sup>th</sup> Standing Committee agreed that the amendment merited consideration at CoP17, Parties should approve the amendment to Resolution Conf. 12.3 (Rev. CoP16).

### **Recommendations**

Legal Acquisition Findings are an extremely important component of the requirements for issuance of CITES export permits and re-export certificates. CITES Parties have acknowledged the need for national laws regarding complementary legislation governing the legal acquisition of CITES specimens, as well as generally applicable Legal Acquisition Finding guidance. The Secretariat's acknowledgment of the challenges associated with Legal Acquisition Findings, and the directed actions to address the gaps provide Parties with the necessary next steps to improve legality determinations for CITES-listed species. Parties should approve the Draft Decision on Legal acquisition findings and other Compliance Matters and the amendment to Resolution Conf. 12.3 (Rev. CoP16) at CoP17, to improve Parties consistent application with the objectives and provisions of CITES.

*September 19, 2016*

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<sup>16</sup> CITES, Summary Record, *SC66 SR*, p. 23, <https://cites.org/sites/default/files/eng/com/sc/66/ExSum/E-SC66-SR.pdf>.