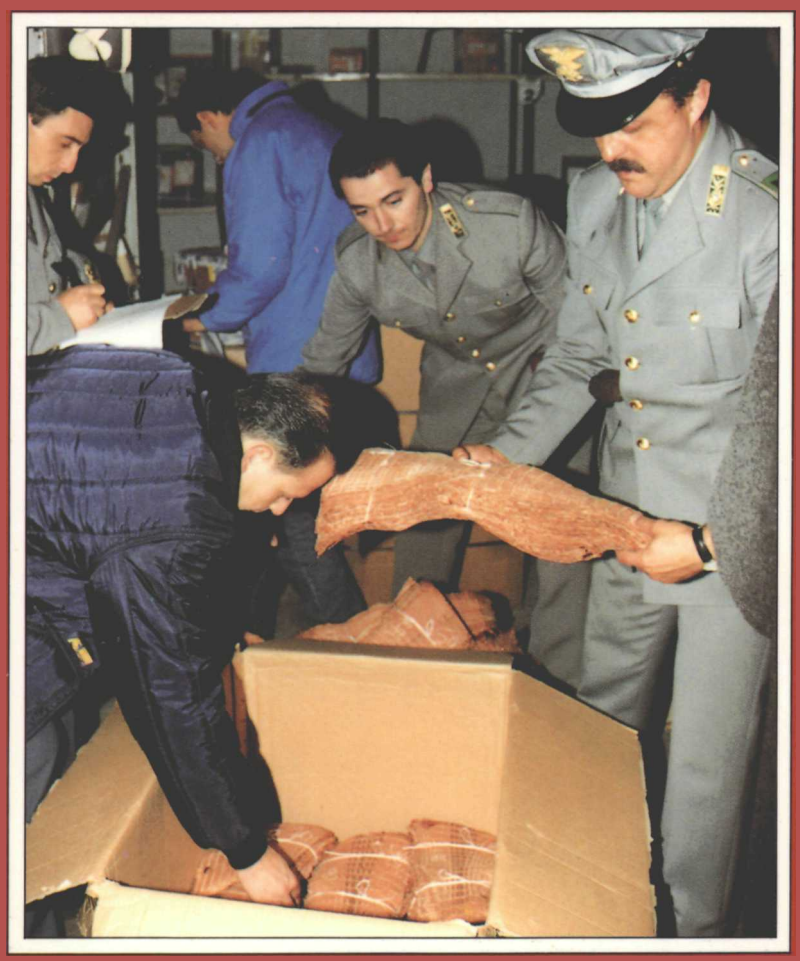
IUCN Environmental Policy and Law Paper No. 26

Guidelines for Legislation to Implement CITES

Cyrille de Klemm



IUCN - The World Conservation Union

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IUCN - The World Conservation Union

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CITES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was signed in Washington, D.C., on 3 March 1973. It entered into force on 1 July 1975, after ten countries had ratified the Convention and, by the end of 1992, 118 States had joined.

CITES establishes a worldwide system of controls on international trade in threatened animals and plants and specimens derived from them. It does this by requiring such trade to be authorized and restricted by government-issued permits or certificates. The aim is to ensure that commercial international trade in specimens of species threatened with extinction is prohibited except in special cases and that such trade in species whose survival might be threatened by it is controlled and monitored to ensure that it is sustainable.

The Conference of the Parties to CITES meets every two years, to revise the lists of species covered by the Convention and to review its implementation and enforcement. These meetings also agree on rules and procedures to be followed to ensure the effectiveness and harmonized application of the provisions of the Convention. They are attended not only by the representatives of the State Parties but also by representatives of concerned non-Party States and inter-govemmental and non-governmental organizations.

The Secretariat of the Convention is located in Switzerland and helps the Parties to implement CITES by providing interpretation of the provisions of the Convention, and advice on its practical implementation. The Secretariat also conducts a number of projects to help to improve the implementation, such as training seminars, and projects to examine the status of species in trade, to ensure that their exploitation remains within sustainable limits. Some of the Secretariat's projects, such as the one that resulted in the production of this book, are designed to provide assistance to the Parties in preparing national legislation to implement the Convention.

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Cyrille de **Klemm**

Funded by the Conservation Treaty Support Fund (USA), the W. Alton Jones Foundation, the U.S. Fish & Wildlife Service and the Royal Ministry of Foreign Affairs, Norway

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Preface

The subject matter and quality of this publication will make it an important reference for any Party that is faced with enacting legislation for the adequate implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This book should prove useful to all Parties, notwithstanding the great differences of legal systems and organizational infrastructures between them. It covers all the major aspects of CITES implementation, stresses the role of Resolutions adopted by the Conference of the Parties in the interpretation of the provisions of the Convention, and also contains recommendations for specific measures that might be taken by the Parties.

Implementation and enforcement are the most significant issues facing international treaties, and CITES is no exception. At its eighth meeting, in Kyoto in March 1992, almost 20 years after CITES was signed in Washington, D.C., the Conference of the Parties again found it necessary to urge the Parties to adopt appropriate measures to implement fully the Convention. Among such measures, an adequate national legislation is a vital prerequisite for the proper functioning of CITES and compliance with its provisions.

Unfortunately, less than 15% of the Parties currently have adequate legislation for implementing the Convention. Various reasons have been given to explain this continuing problem, with inadequate experience, insufficient staffing and lack of resources among the most often quoted.

In view of these problems, the CITES Secretariat and the IUCN Environmental Law Centre initiated a project that would focus on two main areas of concern to this subject: why legislative and regulatory measures are essential for the success of the Convention, and what elements a comprehensive legislation should include.

Funding for this project was raised by the Conservation Treaty Support Fund from the W. Alton Jones Foundation, supplemented by additional funding from the U.S. Fish & Wildlife Service. Both the CITES Secretariat and the IUCN Environmental Law Centre gratefully acknowledge this support. They also thank the Royal Ministry of Foreign Affairs, Norway, for their contribution.

It would be difficult to find an author better prepared to carry out this project than Cyrille de Klemm, a well-known lawyer whose friendship with CITES and expertise in nature conservation in general is life-long. He has already published many studies in this field and has recently received the European Prize for the Protection of Nature, given by the Foundation Johan Wolfgang von Goethe (Basle).

The drafting of national legislation for CITES implementation is a long and complex process and the first step is usually the most difficult to achieve. To assist Parties from the beginning is the goal of this publication. It is a present to all of us, for the 20th Anniversary of CITES.

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Head
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Secretary-General of
CITES

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Introduction

The purpose of this book is to make suggestions to Parties on the possible contents of their legislation to implement CITES.

Ideally, it would have been desirable to present model provisions for the development of such legislation. This is unfortunately not possible because of the considerable differences that exist between the legal systems of individual Parties. Indeed, what may be a perfectly acceptable practice in one country may well be considered as totally unacceptable in another. As an example, the law of certain States requires that the confiscation of certain specimens be ordered by a court of law whereas in others this can be done by an administrative decision.

It is therefore only possible to indicate what CITES implementation legislation must contain to enable Parties to meet their obligations under the Convention. When there are alternative solutions, the one which appears to be the most effective will, whenever possible, be recommended. It will then, of course, be up to each Party to decide how, under its constitution and other mandatory provisions of its legal system, it can best incorporate these proposals into its legislation.

In addition, this book does not aim to be a comprehensive review of all laws enacted to implement CITES. References made to provisions contained in national legislation are examples to assist in legislative drafting and do not imply that similar or related provisions do not appear in the laws of other Parties.

PART I

ANALYSIS OF LEGISLATIVE REQUIREMENTS

1 The need for CITES implementation legislation

Sixteen years after the entry into force of the Convention, only a small number of Contracting Parties have so far enacted specific and relatively comprehensive legislation to implement it. These include Australia, Austria, Belgium, Denmark, France, Germany, Malta, the Netherlands[1] , New Zealand, Switzerland, the United Kingdom (including Hong Kong), the United States and Zimbabwe. A few others, such as Canada, have legislation under development. In addition, a certain number of other Parties including Argentina, Colombia, Italy, Japan, Liberia, Nigeria, Papua New Guinea, Portugal (including Macau), Singapore, Thailand, all four South African provinces[2] and Sweden, as well as the European Community[3], have adopted legislation covering at least certain aspects of the implementation of CITES. Another Party, Tunisia, merely provides in its legislation that the import or export of specimens of CITES-listed species is to be governed by the provisions of the Convention. Likewise, but in a slightly different manner, the law of the Peoples' Republic of China provides that import or export permits must be obtained for specimens of CITES-listed species and that in the case of differences between national wildlife legislation and CITES the latter should always prevail.

A large majority of the Parties, however, have so far enacted no specific legislation to implement the Convention. They have, therefore, to rely on their general wildlife legislation and in certain cases on their Customs or foreign trade legislation to control trade in CITES specimens.

These laws are, however, generally ill-adapted to the specific purpose of implementing CITES especially, as is often the case, when they have been adopted before the entry into force of the Convention in the country concerned.

Most wildlife laws are limited in their scope and only cover certain categories of

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1. The Dutch Act on Endangered Exotic Animal Species of 8 January 1975 was enacted before the Netherlands became a Party to CITES. It is not, therefore, a piece of legislation designed to implement the Convention. Many of its provisions, however, can be, and effectively are, used for that purpose.

2. Under the national Constitution, the South African provinces have an exclusive competence in respect of wildlife, including international trade therein; as a result there is no national CITES implementation legislation.

3. The EC Regulation implementing CITES (Council Regulation No. 3626/82 of 3 December 1982) will probably be replaced by a new instrument. The new text is still, however, under discussion and it is therefore impossible to predict its final content.

species, products or operations, as they are mainly or exclusively concerned with the protection of native fauna.

There are, however, considerable differences between these laws. Some only provide for export controls (and less frequently also import controls) on indigenous protected or game species. They cannot, therefore, be used to control trade in all other CITES species. In addition, in some cases controls only apply to trade in live specimens.

In a few other countries, export and import controls generally apply to both indigenous and exotic species but only to certain groups of organisms, usually vertebrates. Invertebrates and plants are generally excluded, as are sometimes also fish. In these cases there are no legal means available to control trade in those species. Examples are the laws of Botswana, the Gambia and Zambia, which are restricted to vertebrates except fish, and the law of Tanzania, which is restricted to vertebrates. An exception is the law of Cameroon, which requires permits for the import or export of all wild animals or plants whether alive or dead.

A few countries, for example India, mostly rely on their foreign trade legislation for the implementation of CITES. CITES specimens are characterized under these laws as prohibited or restricted goods, the import or export of which require special licences. These laws are, however, generally ill-adapted to the specific purposes of CITES.

The reasons why such a large majority of CITES Parties have so far failed to enact implementation legislation, or have enacted legislation which is limited to certain aspects of the Convention, are unclear. It has sometimes been argued that such legislation was unnecessary since, once ratified, the Convention automatically became a part of the national legislation of the Party concerned and was, therefore, directly binding upon private citizens.

This may well be true, at least in some legal systems, from a purely theoretical point of view. But to implement the Convention in practice, implementation legislation is essential for the reasons outlined below.

1.1 CITES as a non-self-executing treaty

International lawyers distinguish between self-executing and non-self-executing provisions in a treaty. Self-executing provisions are those which are directly applicable by a Party without a need for any additional national legal instrument. Non-self-executing provisions, on the contrary, cannot be implemented until specific legislation has been adopted for that purpose. These include, in particular, provisions which create specific obligations for private persons, as such obligations cannot be enforced in the courts and penalties cannot be applied for non-compliance unless expressly provided for by domestic legislation.

The main non-self-executing provisions of CITES appear in Articles II. 4 and VIII. 1. Article II.4 requires that Parties do not allow trade in specimens of species included in

the Convention Appendices except in accordance with the provisions of the Convention. As a result, Parties are under the obligation to take measures prohibiting trade in CITES specimens whenever the conditions laid down by the Convention have not been complied with.

This general rule is supplemented by Article VIII. 1, which requires that Parties take appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation thereof. Therefore, Parties have to take the specific measures required to implement the Convention and make its provisions binding not only upon public agencies but upon private persons as well.

The scope of Article VIII. 1 is quite broad and allows, therefore, for a certain degree of discretion by Parties on the type of measures they must take to enforce the Convention. There are, however, two categories of measures which must be taken under that Article: firstly, measures to penalize trade in specimens in violation of the Convention, or the possession of specimens so traded, or both (Article VIII.1 (a)); and secondly, measures to confiscate such specimens or return them to the State of export (Article VIII. l(b)).

These obligations must be considered as the very keystone of the Convention since without effective penalties it is obvious that enforcement will be impossible. As, however, in most if not all legal systems, criminal penalties may only be imposed by an Act of Parliament or an equivalent instrument, the Convention provides a clear obligation for Parties to enact appropriate legislation. The failure to do so constitutes a violation of the Convention.

Thus, the mere ratification of CITES without the adoption of appropriate implementation legislation can never be sufficient to ensure an effective enforcement of the Convention, if only because penalties for violations of the provisions of CITES can only be imposed by national legislation.

1.2 Self-executing provisions require further elaboration

The self-executing provisions of the Convention only provide a broad framework, which must be supplemented by national legislation. There are many matters of detail which must be settled at national level and for which enabling legislation is in many cases required. Legislation is usually also required to set out clearly which authorities are in charge of implementing and enforcing the Convention and to specify their respective powers. In particular, the implications of the Convention on the operations of the various government agencies concerned, such as the department in charge of wildlife, the Customs, the police, etc., should be clearly stated in order to avoid overlaps, inconsistencies or gaps in implementation and enforcement. It is also necessary that the various categories of enforcement agents be clearly designated.

The need for national legislation to implement at least some of the self-executing provisions of the Convention is, therefore, clear. This was recognized by the Conference of the Parties, which by Resolution Conf. 6.6 urged Parties whose domestic legislation did not fully carry out requirements of Articles III, IV and V of the Convention to take measures necessary to conform their legislation to them and by Resolution Conf. 8.4 urged all Parties that have not adopted the appropriate measures to fully implement the Convention to do so.

1.3 Other reasons for implementation legislation

(a) The adoption of implementation legislation adapted to the specific requirements of the national legal system and institutions is also important as a way of informing all the parties concerned, i.e. government agencies, the courts, traders and the public in general, of the changes in the trade rules which have occurred as a result of the ratification of the Convention and of the penalties that are incurred if the new rules are violated. Likewise, the courts are generally much more at ease with the enforcement of national legislation than with treaties, the implications of which may not always be entirely clear, especially if there are inconsistencies between the text of a treaty and national legislation.

(b) Implementation legislation may also be necessary to clarify what are the effects of CITES on other domestic legislation relating to trade in wild species and to eliminate potential inconsistencies or contradictions between the two.

(c) Article XIV.l of the Convention provides that Parties have the right to adopt stricter domestic measures regarding the conditions for trade, taking, possession or transport of species listed on the Convention appendices. The adoption of national legislation is of course necessary for that purpose.

(d) CITES has to adapt itself to changes in circumstances, many of which could not have been foreseen by the original drafters of the treaty. As a result, the Conference of the Parties has adopted a large number of resolutions, either to provide a commonly agreed interpretation of certain terms or provisions of the Convention, or to recommend that the Parties take certain action. In addition, the Secretariat, by the means of notifications to the Parties, frequently invites Parties to take certain specific measures, particularly to assist other Parties in their conservation efforts or to advise Parties not to accept documents or shipments originating from certain countries. It is clear, however, that without adequate legislation empowering the appropriate authorities to take those recommended measures, Conference resolutions and notifications to Parties, which in themselves are not binding, cannot be implemented. They have to be incorporated into legislation if they are to be enforced. To take an example, Resolution Conf. 6.4 urges all Parties to prohibit imports of wildlife illegally exported from neighbouring countries. This implies that Parties are able either to institute a system of import

permits, which they may refuse at their discretion if they have grounds to believe that they are faced with an illegal export, or to refuse to accept apparently valid export permits accompanying specimens, the export of which is prohibited by the law of the State of export. Clearly, none of these measures can be taken without legislation empowering the competent authorities of the State of import to do so. Indeed, if these measures were taken by simple administrative decision without a firm basis in the law, there would be a serious risk that aggrieved traders would apply to the courts to have them made void. There are some examples of court decisions of that kind.

2 General considerations

It results from Chapter 1 that the implementation of CITES, including resolutions of the Conference of the Parties and notification to Parties, is impossible without a firm legislative basis covering, at a minimum, the granting of permits, the control of the validity of foreign permits and the imposition of penalties, including the confiscation of unlawfully traded specimens.

The implementation of CITES calls upon two very different aspects of government action: wildlife conservation and foreign trade, including Customs. Each has its own specific legislation, procedures and authority in charge. There are, in addition, usually a number of other laws that apply to the import or export of wild animals or plants and their products. These include wildlife legislation governing the export and sometimes the import of indigenous protected species; laws establishing controls on wildlife trade for public health, veterinary or phytosanitary purposes; and rules controlling the introduction of alien species.

As a result, there are usually several government departments which are involved in the international trade in CITES specimens: Wildlife (often now under the Minister of the Environment but still frequently under Agriculture); Foreign trade; Finance (for Customs); and Agriculture (for animal and plant health matters). Ministries of Foreign Affairs are also concerned, because at issue is the implementation of an international convention. In addition, in certain federal States (e.g. Austria and Germany), the federated States are also competent, under the Constitution, in certain matters relating to CITES implementation, such as the granting of permits or the control of possession of CITES specimens or domestic trade in them.

It is therefore of major importance that legislation sets out clearly what are the respective duties of the various authorities concerned in order to avoid duplication, discrepancies or confusion as to which is the competent authority in each case.

It is also essential to make clear that CITES implementation legislation (including regulations) is in addition to any other domestic measures relating to the import or export of specimens of wild animal or plant species under any other law relating to wildlife conservation, the introduction of alien species, customs, public health, or animal or plant health, and that, pursuant to Article XIV.2 of the Convention, nothing in that legislation affects the operation of these other laws.

An example of a legislative provision covering that point is Sec. 5 of the Australian Wildlife Protection (Regulations of Exports and Imports) Act of 1982, which states that the Act and the regulations made under it shall be read and construed as being in addition to, and not in derogation of or in substitution for, the Customs Act, the Quarantine Act and any other law of the Commonwealth whether passed or made before

or after the commencement of the Act, and that the holder of a permit to import or export a specimen is not exempt from compliance with any of those laws that applies in relation to that specimen.

Where necessary, of course, steps should be taken to avoid discrepancies between wildlife legislation regulating the import and export of CITES specimens and foreign trade or Customs regulations listing prohibited or controlled imports and exports. Such discrepancies seem to be relatively frequent and Customs officers often tend to disregard goods which are not on a list they are familiar with. This point could probably be met by refering to CITES specimens (as defined by wildlife legislation) in the list of goods subject to import and export controls.

The distribution of powers between the legislative and executive branch of government is a matter which is governed by the constitution of individual Parties and may vary from one country to another. It is therefore impossible to suggest here how to separate what should be covered by an Act from what can be left to regulations.

Clearly an Act will almost always be required to empower the competent authorities to make regulations as well as for the establishment of penalties. At the other end of the scale, matters relating to the forms of the permits, permit-granting procedures or the addition of new species, or parts or derivatives, to the lists of species or products covered by the legislation, are matters which can universally be covered by regulations. As to other matters, the situation will vary from country to country.

It must, however, be emphasized that since changes in the legislation may often be required as a result of resolutions from the Conference of the Parties (and sometimes, even possibly of notifications to Parties), there will frequently be a need to take quick decisions without having to wait for an opportunity to submit proposals to amend the Act to the legislature.

It is therefore recommended that as much as possible the detailed rules on the implementation of the Convention should be embodied in regulations, and that the Act itself should be limited to laying down general rules, prohibitions, the designation of enforcement agents, and penalties, and to granting the powers necessary for the government to make the regulations that may be required for further implementation.

There is also a need to achieve the best possible harmonization between CITES implementation legislation, national wildlife laws and other relevant legislation.

The question is of particular importance for species that are indigenous to an exporting country. For specimens taken in the wild, or otherwise originating from that country, the Convention requires that before issuing an export permit, the Management Authority must be satisfied that the specimen was not obtained in contravention of the laws of the State concerned. If the species is unprotected under national legislation, this condition will, of course, be met automatically. On the other hand, when specimens of an indigenous species have first been imported into the country and are subsequently

re-exported, before issuing a re-export certificate the Management Authority must be satisfied that the specimen was imported in accordance with the provisions of the Convention. If, however, specimens have been imported fraudulently from neighbouring countries and if the species concerned is unprotected in the importing country, it will be almost always impossible to prove that it has not been lawfully obtained in the latter country.

It is therefore essential for effective implementation of CITES that the taking and possession of and the domestic trade in indigenous species listed in the CITES appendices be prohibited or restricted by national legislation.

It is also of course essential that national legislation (whether in the CITES implementation Act or in any other Act, such as a wildlife Act) contain a general clause empowering the Government to control international trade (and also domestic trade, possession and transport) in any species of animal or plant for conservation purposes. In addition, there should also be a more specific provision prohibiting the import, export, re-export and, where applicable, introduction from the sea, of specimens of species listed in the Schedules to the Act other than in accordance with the provisions of the Act or of any regulations made for its implementation.

3 Field of application

It is essential to identify as clearly as possible the species, kinds of specimens, and transactions to which the legislation applies.

3.1 Species

Parties have an obligation to apply the controls required under the Convention to all the species listed on Appendices I, II and III except for species on which they have entered reservations. Parties have no discretion in this regard and a failure to make their legislation applicable to certain species therefore constitutes a violation of the Convention. This is the case, for example, of certain Parties whose legislation does not apply to Appendix III species. It is also the case of the many Parties that only control the export, and sometimes the import, of their indigenous CITES species. As a result, they are unable to control the import or re-export of all non-native CITES species and therefore cannot apply the Convention effectively.

3.1.1 Publication of Appendices and of amendments to them

To have force of law the lists of species covered by CITES must generally be the subject of an official publication in the Government Gazette. This is usually done when the ratification Act is published together with the text of the Convention and its appendices. As, however, the appendices are subsequently regularly amended, there is a need to develop a procedure to ensure that amendments are published as soon as possible after they have been adopted by the Conference of the Parties.

There are two possible procedures. The most commonly used is to add the three Appendices to the Convention as schedules to the CITES implementation Act, and to empower the Government or the Minister in charge of wildlife to amend the schedules by statutory instrument whenever a change to any Appendix has occurred.

The applicability of the CITES amendment will of course then depend on the diligence of the competent authority to amend the schedules. Experience shows that such updates are often made late and sometimes not at all. A possible remedy could be to include a provision in the Act to make it mandatory upon the authority concerned to update the schedules. An example of this can be found in the Nature Conservation Ordinance of the South African Province of Transvaal, which requires the Provincial Administrator to amend the schedule whenever the appendices to the Convention are amended.

The other possibility, which should be preferred, is to provide for national law to

apply automatically to any amendments that the Parties make to the CITES appendices. This can be achieved by making the legislation apply to all species listed on the CITES appendices. (As an example, the Swedish statutory order on the application of CITES of 12 June 1973 provides that amendments to the CITES appendices have legal force in Sweden as from the date they have entered into force under CITES). Alternatively, the law may require that any import or export of wildlife or wildlife products be in accordance with CITES (as, for instance, in the legislation of Colombia—Decree of 2 October 1981 on wildlife). It is clear, however, that even if from the strictly legal point of view this may be sufficient to give legal force to the amendments adopted by the Conference of the Parties, there is still a need to make an official publication of these amendments, if only because traders, the public and enforcement officers cannot be expected to be aware of the decisions taken by the Parties if nothing is done to inform them.

It is therefore recommended that CITES implementation legislation include three schedules containing respectively the species listed in Appendices I, II and III of the Convention and that these schedules be amended as soon as amendments to the Convention appendices have come into force, at the latest.

3.1.2 Reservations

Where a reservation has been entered by the Party concerned on the listing of a species on one of the Convention appendices, the species in question should not of course be included in the schedule concerned. Where, however, the reservation relates to the inclusion of a species on Appendix I, the Conference of the Parties has decided (Res. Conf. 4.25) that the reserving Party should treat that species as if it were included on Appendix II. To ensure this Resolution is implemented, national legislation should include a provision making it mandatory for the competent authority to list among the species to which the rules for Appendix II species apply any species listed on Appendix I on which their Government has entered a reservation.

3.1.3 Nomenclature

To avoid uncertainties and confusion in implementation and enforcement it is essential that the nomenclature used by the Conference of the Parties in listing species be strictly adhered to in national legislation. Parties are, of course, free to add under the name used in the CITES appendices any synonym or common name which in their opinion will assist in the identification of the species concerned and facilitate enforcement.

Many species, however, are listed in the CITES appendices under a higher taxon listing. Problems of identification of these species may arise if the names mentioned on the permits differ from those appearing in the standard nomenclatures whose use have been recommended by several resolutions of the Conference of the Parties (Resolution Conf. 4.23 for Mammals, Resolution Conf. 5.19 for Amphibians, Resolution 8.18 for Birds, Cacti and other plants, Resolution 8.19 for Orchids).

Where a species is included in a higher taxon listed on the CITES appendices, Parties should use the names listed in these standard nomenclatures on the CITES permits they issue.

Parties should also, to avoid any confusion, use these standard names when listing these species in their own national legislation, for instance in their lists of protected or game species.

3.1.4 Application of CITES controls to non-CITES species

Any Party is entitled under Article XIV.1 of the Convention to take domestic measures restricting or prohibiting trade in species not listed in the Convention appendices. Parties may therefore apply the same controls as for CITES species to any other species they see fit, whether indigenous or exotic. To do this, provision could be made to empower the competent authority to list non-CITES species in the schedules to the Act.

Several Parties have done so. It must, however, be emphasized that this may be the cause of considerable confusion as it will be difficult for all persons concerned, including enforcement officers in both the exporting and the importing countries, to make the necessary distinction between CITES and non-CITES species. This will be the case especially if non-CITES species are exported with CITES documentation (as is normally be the case if the law does not distinguish between the two categories).

A possible solution may be to list the species concerned in CITES Appendix III. This may not, however, be the best way to deal with the problem, as the listing of a large number of species on that appendix would soon make the administration and enforcement of the Convention by all Parties very difficult if not unmanageable. Appendix III listings should, therefore, be reserved to those cases where it will clearly benefit the species in question. Another solution is to list non-CITES species in a separate schedule, or in separate regulations, making it clear that the permits required shall not be CITES permits.

3.1.5 Application of stricter controls to certain CITES species

Parties may also wish to avail themselves of the possibility, as a stricter measure taken under Article XIV.1 of the Convention, to apply Appendix I controls to certain Appendix II and III species and Appendix II controls to certain Appendix III species. Thus the law of Austria empowers the federal Minister of Economic Affairs to make regulations to the effect that certain specimens of species listed on Appendix II shall be deemed to belong to Appendix I species when they are imported into the country. Another example is that of the Regulation implementing CITES within the European Community which provides that certain Appendix II and III species shall be treated by Community Member States as if they were listed on Appendix I. These species are listed in a separate Annex to the Regulation (Annex C-l).

3.2 Specimens

The Convention applies to "specimens" of the species listed on its appendices. A "specimen" is defined by Article I as meaning any animal or plant, whether alive or dead, and any readily recognizable parts or derivative thereof. For Appendix III animal species and Appendices II and III plant species, the definition of specimens covers only those parts or derivatives which have been specified in these appendices for the species concerned. As a result, however, of a number of resolutions adopted by the Conference of the Parties (in particular Conf. 1.5 and 4.24) the definition of "specimen" has now in practice been broadened to include also any readily recognizable part or derivative of Appendix III animal species as well as any such part or derivative of Appendix II or III plant species unless, in this latter case, they have been specifically excluded by the Conference.

The Convention, however, does not define "readily recognizable" parts or derivatives and the interpretation of these terms by individual Parties may, therefore, lead to considerable differences in the way the Convention is actually implemented. The Conference of the Parties has as a result, endeavoured to remove some of the uncertainties in the meaning of the words "readily recognizable" by recommending in Resolution Conf. 5.9 that "all Parties adopt a system whereby the regulation of trade shall include any specimens which appear from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants, unless such parts or derivatives are specifically exempted from the provision of the Convention". As a result, several Parties, for instance Switzerland, have amended their legislation accordingly.

Some Parties have included in their legislation comprehensive definitions of specimens, which in principle leave no room for interpretation as to what is or is not readily recognizable. Thus, Australia defines animal specimens as meaning a live or dead animal, animal reproductive material, the skin, feathers, horns, shell or any other part of an animal or any article produced by or from or otherwise wholly derived from an animal. The legislation of Zimbabwe contains a very similar provision.

Other Parties have drawn up lists of parts and derivatives to which they apply the provisions of the Convention. This is, for example, the case of Austria. The advantage of the list is that traders and enforcement officers are well informed of the parts and derivatives to which CITES controls are applicable. Its disadvantage is that many important parts and derivatives may be omitted. Furthermore, different Parties may have different lists and this may be a source of confusion and ineffectiveness. There is no easy solution to this problem. Ideally, of course, all parts and derivatives should be covered by the legislation as Australia has done. If, however, it is considered that it is impossible to implement such a provision in practice, another solution may be to make a list of at least individual animals or plants, whether alive or dead, and all parts and derivatives currently in trade. In addition, there should be a general provision reproducing the terms of Resolution Conf. 5.9 to the effect that trade controls shall also apply to any specimen which appears from an accompanying document, the packaging

or a mark or label, or from any other circumstances, to be parts or derivatives of CITES species. This solution has been adopted by Switzerland and the European Community.

In fact, the purpose of Resolution Conf. 5.9 was to generalize the system that had already been adopted by the European Community. The value of Resolution Conf. 5.9 is that it establishes a presumption that a specimen designated by a label or mark as a part or derivative of a CITES species is a part or derivative of that species even if the designation was made by mistake or with fraudulent intentions (e.g. "turtle soup" with no turtle content).

An interesting example of legislation establishing that type of presumption is the 1989 amendment to the law of Hong Kong prohibiting the import, export, possession and local sale of all products claiming to contain rhinoceros ingredients.

If a list of parts and derivatives subject to CITES controls is prepared, it should be embodied in a Statutory Instrument which the competent authority should be empowered to amend as the need arises in order to add new items (or to delete items) from the list. As far as possible, in order to facilitate enforcement by Customs officers, the list should refer to the Customs Cooperation Council tariff headings to which the parts and derivatives concerned belong. It should be made clear that the list is not exhaustive and that trade controls also apply to any specimens which appear from an accompanying document, the packaging or a mark or label, or from any other circumstances to be parts or derivatives of CITES species.

3.3 Transactions to which the legislation should apply

The Convention applies to the export, re-export, import and introduction from the sea of specimens. The terms re-export and introduction from the sea are defined in Article I and do not seem to need further clarification. These definitions may therefore be taken up by national legislation. The term export does not seem to need to be defined at all. On the other hand, as outlined below, **the term import may be interpreted in several different ways and therefore requires clarification.** In addition, although the Convention does not apply to the transit or trans-shipment of specimens, the Conference of the Parties recommended in Resolution Conf. 4.10 that Parties interpret the terms transit and trans-shipment in a restrictive way and inspect transit shipments and check the presence of valid export documentation as required under the Convention. **A definition of transit and trans-shipment should therefore be provided by national legislation.**

Finally it is also necessary to specify, to avoid all possible doubts, that the legislation is applicable to trade with any country, whether or not a Party to the Convention.

3.3.1 Imports

The Convention applies to the import of specimens but not to transit or trans-shipment. Difficulties have, however, arisen in the interpretation of the term import. It may be understood as applying only to the release of specimens for free circulation after Customs clearance. Alternatively it may mean any introduction into the national territory, whatever the Customs procedure under which the specimens have been placed, including their introduction into Customs free zones, free ports or bonded warehouses or for temporary storage, but excluding transit and trans-shipment.

The latter interpretation was endorsed by the Conference of the Parties, which in Resolution Conf. 4.10 recommended that Parties "note that the Convention does not make special provision for airport lounges (including duty-free shops), free ports or non-Customs zones because each Party is deemed to have authority over the whole of its territory, and apply the Convention accordingly". **Thus the introduction of specimens under any Customs procedure other than transit and trans-shipment (see below) should be considered as an import in the sense of the Convention and should be subject to CITES rules. This should, however, be clearly specified in national legislation so that any uncertainties are clearly removed.**

As an example, Swiss legislation, which does not otherwise consider the placing of goods in a bonded warehouse as an import, provides that no specimens of species listed in Appendices I to III of the Convention can be placed in a bonded warehouse unless the permits or certificates required under the Convention from exporting countries have been produced. For Appendix I species, it also requires that a specific permit to do so has been issued by the Swiss competent authority; this permit can only be granted if the Convention requirements for the import of such specimens have been fulfilled.

3.3.2 Transit and trans-shipment between Parties

The transit or trans-shipment of CITES specimens is excluded from the Convention under Article VII. 1. It soon became apparent, however, that the precise scope of this exclusion had to be clarified and, moreover, that some controls needed to be exercised on shipments in transit to try to eliminate illegal trade.

Resolution Conf. 4.10 contains a definition of transit and trans-shipment which makes it clear that these terms "refer only to those situations in which a specimen is in fact in the process of shipment to a named consignee and that any interruption in the movement arises only from the arrangements necessitated by this form of traffic". The Resolution states that to qualify for the exemption provided in Article VII. 1 specimens must be moving through the State of transit and must remain under Customs control while doing so. It follows that shipments that do not meet this definition, in particular shipments to no named consignee or to a consignee in the country where the goods are supposed to be in transit, should not be considered as in transit but as imports and therefore subject to the controls in the Convention.

Transit and trans-shipment having been defined, there remained a need to invite Parties, under Article XIV. 1 allowing for the taking of stricter measures, to take measures so that the conditions laid down by the Convention on the export of CITES specimens would apply to specimens in transit. This was done by Resolution Conf. 7.4, which recommends to Parties that they "inspect transit shipments, check the presence of valid export documentation as required under the Convention or satisfactory proof of its existence" and "adopt legislation allowing them to seize and confiscate transit shipments without such documentation or proof thereof.

As a result of this Resolution CITES implementation legislation should now also apply to transit and trans-shipment as defined by the Conference of the Parties.

A few Parties have already enacted legislation to this end. France, for instance, applies CITES controls to the introduction of specimens under any Customs procedure, including therefore transit and trans-shipment. Switzerland, through a 1990 amendment to its legislation, requires shipments of Appendix I or II specimens in transit under Customs control to be accompanied by an export permit or certificate issued by the country of export. Germany allows transit only upon presentation of export documents from the State of export, or if sufficient proof of their existence can be produced; furthermore, trans-shipment under Customs supervision shall be considered to be in transit only if the stay of the specimens does not exceed the time required for the transport and trans-shipment operations to be carried out. The legislation of Hong Kong requires that in order to be exempt from controls, specimens in transit must be accompanied by a valid document issued by a competent authority.

Transit, however, is generally defined, as for instance in the Kyoto Convention on the Simplification and Harmonization of Customs Procedures (1973), as a procedure under which are placed goods transported under Customs control from one Customs office to another. This leaves out the cases where goods are carried on an aircraft or a ship that only makes a stop in a country and the goods remain on board. It also leaves out those cases where specimens arrive in a country (by air, sea or road) on one conveyance and are then unloaded and transferred to another conveyance (e.g. from a ship to a lorry or from one aircraft to another). It would seem, however, important that Parties also be able to control the existence and validity of export documents for CITES specimens in those cases. A few Parties provide for this possibility in their legislation. One example is again Hong Kong, which requires the presentation of valid export documents even where the specimens remain at all times in the vessel or aircraft in which they were brought in.

Another is that of the United States, whose Endangered Species Act defines "imports" as meaning "to land on, bring into or introduce into, or attempt to land on, bring into or introduce into any place subject to the jurisdiction of the United States, whether or not such landing, bringing or introduction constitutes an importation within the meaning of the Customs laws of the United States" (16 USC § 1532(10)(1985)). This very broad definition of an import was used in a case involving the transport of caiman hides, without valid permits, in an airplane which made an unscheduled landing

at Miami Airport. The court found that the hides were imported within the meaning of the Endangered Species Act definition and ordered their confiscation. It must be noted, however, that the Endangered Species Act only applies to species which have been listed by the U.S. Fish & Wildlife Service as Endangered or Threatened. The list includes a certain number of CITES species, as for instance caimans, but not all, by far. For all the other CITES species transit and trans-shipment cannot be controlled as long as the specimens remain in Customs custody or unless it can be proved that they were exported in violation of the national legislation of the country of export.

3.3.3 Trade with non-Parties

Under Article X of the Convention, where export or re-export is to, or import is from, a non-Party State, comparable documentation issued by the competent authorities in that State may be accepted. This documentation must substantially conform with the requirements of the Convention for permits and certificates.

Resolution Conf. 3.8 recommends that documents issued by a State not a Party to the Convention should not be accepted unless they have been signed by a competent authority and contain information which is the same as that required by the Convention. The purpose of this Resolution is to provide guidance to Parties on the uniform implementation of Article X.

Resolution Conf. 8.8 goes further in that it recommends to Parties that they should only accept documentation from non-Parties if details of the competent authorities and scientific institutions are included in the most recent updated list of the Secretariat or after consultation with the Secretariat. It also recommends that, in addition to the information specified in Resolution Conf. 3.8, Parties should require from non-Parties certification that the scientific institution concerned has advised that the export will not be detrimental to the survival of the species. Resolution Conf. 8.8 further recommends that Parties authorize import from and export or re-export to non-Parties of specimens of wild origin of Appendix I species only in special cases, when it benefits the conservation of the species or provides for the welfare of the specimens, and only after consultation with the Secretariat.

Finally, that Resolution also recommends that Parties allow import from non-Parties of captive-bred and artificially propagated specimens of Appendix I species only after favourable advice from the Secretariat.

Legislation implementing CITES should make clear that it applies to trade in CITES specimens with any State, that documentation is required from non-Parties just as from Parties, and that that documentation must substantially conform with the requirements imposed on Parties.

3.3.4 Transit and trans-shipment between Parties and non-Parties, and between non-Parties

Resolution Conf. 8.8 recommends that Resolution Conf. 3.8 on the acceptance of comparable documentation from non-Parties and Resolution Conf. 7.4 on control of transit also be applied to transit shipments destined for or coming from non-Parties, including shipments in transit between such States, and that particular attention be given to the inspection of these transit shipments and of the documentation relating to them.

Legislation should therefore provide that documentation comparable to that which is required from Parties shall also be required from non-Parties for transit shipments passing through their national territory, even where the shipment is in transit between two non-party States.

4 Management and Scientific Authorities

Article IX. 1 of the Convention requires Parties to designate one or more Management Authorities competent to grant permits or certificates and one or more Scientific Authorities.

The way in which these authorities are designated is left to the discretion of the Parties. In the majority of cases they have been appointed by simple administrative decision. A few Parties, however, have established these authorities by legislation. Examples are Australia, Belgium, Denmark, New Zealand and Switzerland. This official designation has the advantage of identifying clearly the Management Authority (or Authorities) responsible for implementing the Convention and, in particular, for issuing permits and to provide it (or them) with the necessary powers to do so.

Scientific Authorities have an essential role to play as, under Articles III and IV, their advice is required before Management Authorities can issue or refuse a permit. It is therefore important that Scientific Authorities be highly qualified scientific bodies and enjoy a considerable degree of independence. This can best be achieved by a provision to that effect in the legislation.

Several Parties (e.g. Australia, Belgium, New Zealand and Switzerland) have provided in their legislation for the appointment of a Scientific Committee composed of scientists representing the various disciplines concerned (e.g. zoology, botany, conservation) to act as the Scientific Authority under the Convention.

The tasks of the Scientific Authority should also be clearly spelled out. Under the Convention, a Scientific Authority has five tasks:

1. To advise the Management Authority on whether or not a proposed export or introduction from the sea of an Appendix I or II specimen will be detrimental to the survival of the species involved (Articles III. 2, III.5, IV.2 and IV.6).

2. In the case of a proposed import of an Appendix I specimen, to advise the Management Authority on whether or not the purposes of the import are detrimental to the survival of the species involved (Article III.3).

3. In the case of a proposed import of a live Appendix I specimen, to state whether or not it is satisfied that the proposed recipient of the specimen is suitably equipped to house and care for it (Article III.3). In the case of a proposed introduction from the sea of an Appendix I specimen, the Convention (Article III.5) entrusts this same task to the Management Authority. The Parties, however, recognized that

this was an error made by the drafters and considered that this task should be given to the Scientific Authority.

4. To monitor the export permits granted for Appendix II specimens as well as the actual exports of such specimens, and to advise the Management Authority of suitable measures to be taken to limit the grant of export permits when it has determined that this is necessary to maintain that species throughout its range at a level consistent with its role in the ecosystems, and well above the level at which that species might become eligible for inclusion in Appendix I (Article IV.3).

5. To advise the Management Authority on the choice of a rescue centre or other place for the disposal of confiscated specimens (Article VIII.4).

Of course nothing prevents Parties from entrusting Scientific Authorities with other tasks including, as in the legislation of Switzerland, the general task of advising the Management Authority on any matter relating to the implementation of the Convention and of submitting any proposal to that end.

These tasks imply that the Scientific Authority has extremely important functions, which should be considered as absolutely essential for the implementation of the Convention. In Resolution Conf. 8.6, the Conference of the Parties strongly emphasized the importance of these functions.

The first of these functions is monitoring. To be able to determine whether a proposed export will be detrimental to the survival of a species or whether exports of a particular species must be limited to maintain it at a level consistent with its role in the ecosystems and well above the level at which it would be eligible for Appendix I listing, the Scientific Authority must have at its disposal the results of all relevant scientific research or field work. If the information does not exist, the Scientific Authority should be able to cause the undertaking of the necessary research or work. If it cannot do that, the Convention cannot really operate.

The second function of Scientific Authorities is to provide advice to the Management Authority on several matters. This advice does not bind the Management Authority except in one particularly important case: as the Convention clearly states, when the Scientific Authority has advised that a proposed export will be detrimental to the survival of a species, the Management Authority is bound in law by that advice. **This means that the negotiators of the Convention intended that the Scientific Authority be given a right of veto on exports of CITES species when such exports may endanger the survival of these species.**

It is, of course, extremely important that this be reflected in legislation. Some of the existing laws implementing CITES do indeed contain provisions to that effect. Example are the laws of Australia, Germany, New Zealand, Papua New Guinea, the United States and Zimbabwe. Australia goes even further than CITES requirements: the Management Authority shall not grant an import or export permit unless the Scientific Authority has advised it that it is satisfied that the import or export will not

be detrimental or contribute to trade which is detrimental to the survival of any species or subspecies. The same rule applies to import permits for all CITES Appendix I or II species.

Article IX.2 of the Convention provides that when depositing their instrument of ratification, acceptance, approval or accession, Parties must inform the Depositary of the address of the Management Authority authorized to communicate with other Parties and with the Secretariat. The Convention does not require that the Management Authority designated under Article IX.2 be the same as the one designated under Article IX.1. There are clearly obvious benefits if the Management Authority authorized to communicate with the other Parties and with the Secretariat is one of the permit-issuing authorities rather than, for instance, the Ministry of Foreign Affairs or the Ministry of Foreign Trade (when this ministry is not the permit-issuing authority, which is the case in certain countries). Where this is impossible, it would nevertheless be useful, for the sake of speed and convenience, that permit-issuing authorities be authorized also to communicate directly with the Secretariat about the issuing and validity of permits.

It should, however, be noted that nothing in the Convention prevents Parties from changing the designation of the Management Authority under Article IX.2 subsequently if they so wish.

5 Permit requirements

The conditions relating to the granting of permits or certificates for the import, export, re-export or introduction from the sea of CITES specimens are laid down in Articles III, IV and V of the Convention.

Legislation could therefore merely refer to the conditions established in these articles as those required for the issuing of permits by the national Management Authority for CITES specimens.

As, however, the Convention only provides general rules governing the granting of permits, specific legislation is necessary to lay down in more detail the conditions and procedures which must be observed by national Management Authorities including, where appropriate, the taking of stricter measures than those required by the Convention.

The Act should therefore contain basic rules on the issuing of permits for trade in specimens of all the species listed in its three schedules. These schedules, it will be recalled, should include all species listed in the Convention appendices except those on which the Party concerned has entered a reservation.

Finally, the legislation should specify that, subject to the conditions of the Convention and the Act, the Management Authority may at its discretion grant or refuse a permit, or grant a permit subject to conditions. This means that the Management Authority should always be free to deny a permit, but that in granting a permit it has to comply with the Convention and the Act.

It could be useful, however, to provide in the Act that the Management Authority must, when refusing to grant a permit, inform the applicant of the reasons for its action, such as an unfavourable advice of the Scientific Authority or the fact that it is not satisfied that the specimens were lawfully acquired.

Some of the provisions of the Convention need further elaboration in national legislation.

1. Advice of the Scientific Authority on the effect of the proposed transaction on the survival of the species concerned.

Under Articles III and IV, an export permit or an introduction from the sea certificate for Appendix I and II species shall not be granted by the Management Authority unless a Scientific Authority of the State of export, or of the State of introduction, has advised that the export or the introduction will not be detrimental to the survival of the species concerned. It also provides that an import permit for an Appendix I species cannot be granted unless a Scientific Authority of the State

of import has advised that the import will be for purposes that are not detrimental to the survival of the species.

These provisions bind Management Authorities in that, if the Scientific Authority has not advised the Management Authority accordingly, a permit or certificate cannot be issued. **This is therefore an extremely important provision which leaves no place for discretion and should be clearly included in the legislation.**

2. The Management Authority of the State of export must be satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora.

This rule applies to all Appendix I and II species and to Appendix III species in the States that have listed them. It requires that adequate links be established with national legislation relating to wildlife conservation since to be able to ascertain that a specimen has been lawfully obtained there must be a system of permits for the taking and possession of and domestic trade in protected species. It also requires that species listed on the CITES appendices be protected in their countries of origin. Clearly, if a species is unprotected, it may be difficult for a Management Authority to refuse to issue an export permit.

The formulation used in the Convention is somewhat restrictive as it does not prohibit exports of specimens which have been obtained in contravention of other laws than those relating strictly to wildlife, for instance legislation on protected areas. **It could therefore be preferable to state, as for example in the laws of Australia, New Zealand and Zimbabwe, that the specimen concerned must not have been obtained in contravention of any law.**

3. A Management Authority of the State of re-export must be satisfied that the specimen was imported into that State in accordance with the provisions of the Convention.

The importance of this provision was emphasized by the Conference of the Parties, which in Resolution Conf. 3.9 recommended that Parties do not authorize, under any circumstances or pretext, the re-export of specimens for which there is evidence that they were imported in violation of the Convention. There are, however, a few exceptions. Resolution Conf. 4.17 authorizes the re-export of confiscated specimens. Specimens for which retrospective documents have been accepted may also be re-exported.

For Appendix I specimens, evidence of the legality of the previous import will usually be possible because of the requirement for an import permit. This is not so for Appendix II and III specimens, unless, of course, the Party concerned has instituted an import permit system for these other species as well. But even that may not be enough, unless the specimens are marked at the time of import, as a means to prove that the import was lawful.

A more radical solution consists in the reversal of the onus of proof by requiring

an applicant for a re-export certificate to prove that the specimens concerned were not imported in violation of the Convention. Thus Regulation 3418/83 of the European Community provides that no re-export certificate shall be issued unless the Management Authority concerned has the proof that the specimen was lawfully imported into the Community.

To show that the origin of the re-exported specimen, and the fact that is was obtained lawfully, were known to the Management Authority of the State of re-export, Resolution Conf. 8.5 recommends that the Parties indicate on export certificates:

(a) the country of origin;

(b) the export permit number from the country of origin and its date of issue;

(c) the preceding country of re-export, if any; and

(d) the number and date of issue of the preceding export certificate.

4. The Management Authority of the State of export, or re-export, must be satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

This rule applies to the issuing of export permits for species listed in any of the three appendices.

To enable the Management Authority to make a judgement on the conditions under which live specimens will be shipped after the permit has been granted, there must be some rules that the transport companies will be obliged to observe. The need for such rules was accepted as early as 1977 when the Special Working Session of the Conference of Parties recognized in Recommendation Conf. S.S.1.1 that international guidelines were necessary to assist the Parties in making the required judgements. As a result, in 1979, the Conference adopted "Guidelines for Transport and Preparation for Shipment of Live Wild Animals and Plants". In addition, as the International Air Transport Association (IATA) had already adopted its own Live Animals Regulations, the Conference, in Resolutions Conf. 4.20 and Conf. 7.13 recommended that, as long as the CITES Secretariat and the Standing Committee agreed, the IATA Live Animals Regulations be deemed to meet the CITES Guidelines in respect of air transport.

Neither the CITES Guidelines nor the IATA Regulations, however, are binding legal instruments. To become so, they would have to be incorporated into national legislation. So far only a few Parties seem to have done this. In a Directive of 1991 on the transport of live animals, the European Community requires that CITES specimens are transported in conformity with the latest CITES Guidelines or IATA Regulations. A small number of other Parties have adopted their own regulations for the transport of live animals and in certain cases these go beyond the CITES or IATA requirements. This is the case of the United States, which has laid down detailed "Standards for the Humane and Healthful Transport of Wild Mammals

and Birds to the United States" with which the exporters of wildlife to the United States must comply (50 CFR Part 14).

5. For Appendix I species, an import permit must be issued before an export permit is granted.

This provision, which appears in Article III.2(d) of the Convention, is of major importance for implementing CITES on Appendix I species. Very few Parties, however, have provided for this requirement in their national legislation. Some, on the contrary, have provided for the opposite, namely that they will not issue import permits unless an export permit has first been granted by the State of export. But as exporting countries cannot grant export permits if they are not satisfied that an import permit has already been issued, any trade in Appendix I specimens is then impossible if the terms of the Convention and of the national legislation in question are both strictly adhered to. This type of provision indeed creates a vicious circle.

The same kind of situation arises in the few cases where the legislation requires both an import permit before an export permit can be issued and an export permit before an import permit can be issued.

Admittedly, although not required by the Convention, there are certainly cases where the importing country would be justified in ascertaining before issuing an import permit that the export of the specimen concerned is lawful. But this legitimate requirement should not result in a paralysis of one of the most important provisions of the Convention.

The solution, perhaps, lies in the legislation of Zimbabwe, which provides that no permit shall be issued for the import into the country of Appendix I specimens (and some Appendix II specimens as well) unless the Management Authority is satisfied that an export permit or re-export certificate has been or will be granted by the Management Authority of the country of export.

This makes it possible to use a three step procedure: information from the exporting country to the importing country that it intends to issue an export permit if an import permit is granted; issuing of the import permit; issuing of the export permit.

6. Import permits or introduction from the sea certificates can only be granted for Appendix I specimens if the Management Authority of the State of import or introduction from the sea is satisfied that the specimen is not to be used for primarily commercial purposes.

This is again a case where the Management Authority is bound to refuse the permit or certificate if the condition laid down by the Convention is not fulfilled. This provision, however, gives rise to considerable difficulties of interpretation. The Conference of the Parties in Resolution Conf. 5.10 did not succeed in providing an adequate definition of this situation and merely made a non-exhaustive list of

types of transactions where the non-commercial aspect may be predominant. These are imports for purely private use; scientific purposes; education or training; the biomedical industry; captive breeding programmes; and imports via professional dealers if the ultimate intended use of the specimen is clearly non-commercial.

This Resolution, however, should be considered more as providing a set of guidelines for Management Authorities rather than laying down firm rules to be embodied in legislation. As a result, Management Authorities will normally enjoy a considerable degree of discretion in the implementation of this provision. This is recognized by some of the existing CITES implementation laws, such as those of New Zealand and Zimbabwe, which merely reproduce the Convention provision. Parties may, however, decide to adopt stricter criteria. Thus, the law of Australia allows the granting of import permits for Appendix I specimens (other than those bred in captivity or artificially propagated) only where the proposed import would be a transfer from one zoo to another, or for the purposes of scientific research by an approved institution.

7. Export of Appendix III specimens

The national legislation of a Party should distinguish between Appendix III species that have been listed at the request of that Party and those which have been listed by other Parties. As provided by Article V of the Convention, the export of a specimen of a species included in Appendix III at the request of the exporting State requires an export permit and a certificate of origin. When the export is made by another country, only a certificate of origin is required. Although the Convention does not specify that this certificate must be issued by the CITES Management Authority, the Conference of the Parties in Resolution Conf. 5.8 recommended that it be issued by that Authority.

When an Appendix III specimen is re-exported, the Management Authority of the country of re-export must issue a certificate specifying that the specimen was processed in that State or is being re-exported as it was imported.

8. Quotas

Several resolutions of the Conference of the Parties have instituted quotas for the export of specimens of certain species. This is the case, for instance, of Resolution Conf. 8.10 which establishes national quotas for the export of leopard hunting trophies and skins for personal use. In addition, Parties are, of course, free to restrict their exports of specimens of any species, through the establishment of a quota system, when this can contribute to the preservation of their wildlife. Several have done so, in particular on the export of live birds.

Quotas may often be instituted by existing legislation regulating foreign trade. Alternatively, they could be established by the Management Authority provided the legislation empowers it to do so. Article IV.3 of the Convention requires the

Scientific Authority to advise the Management Authority of suitable measures to limit the grant of export permits when the export of specimens of a species should be limited in order to maintain it at a level consistent with its role in the ecosystems. The Scientific Authority may, therefore, establish a ceiling on the maximum number of animals of a species which may be taken or exported without being detrimental to the survival of that species and advise the Management Authority accordingly. The Management Authority would then establish an annual quota for the export of the specimens of the species concerned. The determination by the Scientific Authority that an export will not be detrimental to the survival of that species would then be based on whether the number of specimens for which an export application has been made is within the quotas. **The law should provide that no export permits shall be granted after the quota has been reached.**

6 Form and validity of permits and certificates

Article VI contains important provisions relating to the form, validity and modalities of use of permits, and these should be taken up by national legislation.

6.1 Form and content

Although the Convention contains a model form for permits in Appendix IV, the Conference of the Parties decided in Resolution Conf. 3.6 to recommend that Parties adopt a new form. As this may change again as new requirements arise, the best approach is for national legislation to require permits to be in any form prescribed by regulations or by the Management Authority, as provided by the law of Australia. A model of the required permit form should be appended to the regulations. Several Parties have done that, for instance Papua New Guinea.

The information that permits and certificates should contain is extensively dealt with by Resolution Conf. 8.5. The information should include:

a) the complete name and address of the Management Authority issuing the permit;

b) a control number;

c) the complete names and addresses of the exporter and importer;

d) the scientific name of the species or subspecies concerned;

e) the description of the specimens in one of the Convention's three working languages;

f) the numbers of the marks appearing on the specimens if they are marked;

g) the appendix in which the species or subspecies or population is listed;

h) the quantity of specimens and, if appropriate, the unit of measurement used;

i) the purpose of the transaction (e.g. commercial, scientific, zoos, hunting trophies);

j) the source of the specimen (e.g. specimens taken from the wild, ranching operation, specimens bred in captivity, confiscated specimens);

k) the number of the bill of lading or air way bill;

l) the quota when there is one for the species concerned, and the total number of specimens already exported under that quota;

m) the date of issue and date of expiry of the permit or certificate;

n) the name of the signatory and his/her handwritten signature; and

o) the embossed seal or ink stamp of the Management Authority.

Re-export certificates should also specify:

a) the country of origin;

b) the number of the export permit of the country of origin and its date of issue;

c) the country of last export;

d) the number of the re-export certificate of that country and its date of issue.

Pre-Convention certificates should specify that the specimens covered are pre-Convention and the date of acquisition of the specimen.

In the particular case of animals which form part of a travelling live animal exhibition and are covered by a pre-Convention or captive-breeding certificate, Resolution 8.16 recommends that the certificate should specifically mention that the specimens concerned belong to a travelling animal exhibition.

The regulations should specify in detail all the information which should be included in the permits and certificates in accordance with these Resolutions.

6.2 Period of validity

The validity of export permits is limited by the Convention to a period of six months. This should be understood as meaning that an export permit shall be valid for import purposes only if presented within a period of six months from the date on which it was granted (Resolution Conf. 5.9). The export must therefore take place during the period of validity of the permit, as indicated in the permit.

The Convention is silent on the time of validity of re-export certificates and import permits. Resolution Conf. 4.9 recommends to Parties that they adopt the same rule for re-export certificates as for export permits. Resolution Conf. 5.7 recommends to limit the validity of import permits to twelve months. These time periods should be reproduced in national legislation.

Once the validity of a permit or certificate has expired, the document should become automatically void and of no legal value, as recommended by Resolution Conf. 4.9. This should, however, be understood as meaning that the document concerned can no longer be used for the purpose of trade, not that it cannot serve as a proof of the lawful import or possession of the specimens to which it related.

There is also a need for a separate permit or certificate for each consignment of specimens. This is an obligation under Article VI.5 of the Convention and should be reflected in legislation.

6.3 Other requirements

Paragraphs 3, 4 and 6 of Article VI cover a number of administrative requirements, most of which do not need to be taken up by legislation as they can be covered by administrative procedures.

There are, however, a number of matters on which the Convention is silent but for which the inclusion of certain provisions in national legislation could be useful. As there is no guidance on these matters from the Conference of the Parties, this is left to the discretion of individual Parties.

These matters include:

(a) Procedures for permit applications and application forms.

(b) Powers of the Management Authority to require applicants to provide any information that it may need to deal with the application (a provision along those lines is included in the legislation of Australia, New Zealand and Zimbabwe).

(c) The institution of fees for processing applications and issuing permits and certificates. Several Parties have done this, for instance Australia, Germany, New Zealand and Togo.

(d) Certain security requirements. The legislation of Tanzania (The Wildlife Conservation (Dealings in Trophies) Regulations, 1974) requires that export permits for certain indigenous species listed in the CITES appendices shall be valid only if issued and signed both by the Director and the Chief Research Officer of the Game Division.

(e) Other procedural requirements. For instance, Regulation 3418/83 on the implementation of CITES in the European Community provides that permits must be surrendered to the Customs office concerned at the time of import or export and that unused permits must be returned to the issuing authority. Under the legislation of the Netherlands, any information requested on the use made of the permit must be given to the issuing authority.

Of particular importance is the requirement of Article VI.6 of the Convention, which obliges the Management Authority or the State of import to cancel and retain used export permits and re-export certificates and any corresponding import permits. This requirement should be reflected in legislation to make it a national legal obligation for the Management Authorities concerned.

(f) The non-transferability of permits. For example, under the law of Zimbabwe, a permit or certificate shall not be transferable, and any purported transfer shall be void.

(g) Retrospective permits. Articles III, IV and V of the Convention provide that trade in any specimen of a species included in its appendices requires the prior granting

and presentation of the relevant document. The Convention therefore does not allow for the issuing of retrospective permits after the specimens have been presented for import. Yet the granting of such permits, clearly in violation of the spirit and intent of the Convention, seems to be common practice by some Parties. To remedy this situation, the Conference of the Parties, in Resolution Conf. 6.6, recommended that Management Authorities of exporting or re-exporting countries do not issue CITES documents retrospectively for Appendix I specimens. For Appendix II and III specimens, they recommended that exceptions to this rule be made only when the Management Authorities of the two countries involved in the transaction, after a prompt and thorough investigation at both ends and in close consultation with each other, are satisfied that the irregularities are not attributable to the exporter or importer, and that the export/import of the specimen concerned is otherwise in compliance with the Convention and the relevant legislation of the two countries.

The terms of this Resolution should be incorporated in national legislation in order to make the issuing of retrospective permits unlawful except in specified circumstances and only after a specified procedure has been followed.

6.4 Conditions attached to permits

The Convention is silent on the matter but individual Parties are of course free to decide that permits and certificates may be issued subject to whatever conditions they see fit.

The laws of several Parties give full discretionary powers to issuing authorities to attach conditions for permits. Example are the laws of Australia, Austria, Germany, New Zealand, Singapore, Tanzania and the United Kingdom. In the United States certain general conditions automatically apply to all CITES permits and certificates. In particular, any permit is deemed to incorporate within its terms the conditions and requirements for the humane treatment of captive wild animals.

Resolution Conf. 7.13 recommends to Parties that applicants for export permits or re-export certificates be required, as a condition for the permit, to prepare and ship live specimens in accordance with IATA Live Animals Regulations for transport by air and in accordance with the CITES Guidelines for Transport of Live Specimens for marine or terrestrial shipments.

Resolution Conf. 8.5 recommends that permits or certificates covering live animals contain a statement to the effect that the document concerned is only valid if the transport conditions comply with the CITES Guidelines or the IATA Regulations.

Legislation should specify that all permits and certificates issued shall comply with these Guidelines or Regulations, as the case may be, and that any breach of this condition will automatically make the document invalid. It should, in addition, require that a statement to this effect is included on all permits and certificates.

7 Revocation, modification and suspension of permits

This matter is not dealt with by the Convention. It is, however, an essential component of any effective mechanism to enforce CITES. It is therefore of great importance that it is included in national legislation.

7.1 Revocation and modification

A few Parties have given their Management Authority discretionary powers to revoke (i.e. cancel) or modify the permits it has issued. This is the case, for instance, in Tanzania where a licensing officer may revoke any permit "if in his opinion it is in the public interest to do so". In Zimbabwe, the Management Authority may at any time amend or revoke any permit.

Other Parties list the cases where permits may be modified or revoked. These cases fall in two main categories.

The first are cases where the permittee has acted in contravention of the law or of the conditions attached to a permit. This includes cases when the permit has been obtained on the basis of false or misleading information or statements. In all these cases, the revocation of the permit must be considered not only as a means of enforcement of the Convention but also as a penalty punishing unlawful conduct. Provisions of this nature appear, for instance, in the laws of Australia, Hong Kong, the Netherlands, New Zealand, Singapore, the United Kingdom and the United States. In Singapore, the Management Authority may at any time cancel a permit "if any condition of the permit is contravened" or when it is satisfied "that the permit was issued as a result of a misleading statement or a misleading representation of a material fact". In the United Kingdom, the permit is automatically void if the permittee has made false statements or representations or has furnished a document or information which is false in a material particular. In the United States, a permit may be revoked if the permittee wilfully violates any federal or state statute or regulation which involves a violation of the conditions of the permit or of the laws or regulations governing the permitted activity. An interesting feature of the United States legislation is that this provision also applies in the case of the violation of any law or regulation of any foreign country. As a result, an import permit for a species protected in the exporting country, or an export permit for a species protected in the country of import, may be revoked under this provision.

The second group of cases where permits may be revoked or modified includes those where circumstances have changed. Thus the law of the Netherlands provides that

permits may be revoked where circumstances have arisen which, had they been known before the permit was granted, would have led to another decision, or where circumstances have changed in such a way after the permit was issued that the permit would not have been granted if these circumstances had been known at the time of issuing. The law of the United States is more specific. Under that law, permits may be revoked when a change has occurred in the statute or regulation authorizing the permit. This applies, for instance, in the case where a species has been transferred from Appendix II to Appendix I. Export permits for specimens of such a species issued before the transfer came into force can, therefore, be revoked under this provision. Another possibility of revoking permits in U.S. law is when the population of the species declines to the extent that the permitted activity would be detrimental to the maintenance or recovery of the affected population. In all these cases the revocation of a permit is, of course, not a sanction but a measure taken in the interest of the species concerned because of circumstances beyond the control of the permittee.

When a permit is amended or modified, the old permit should be withdrawn and replaced by the new version. If a modification is made on the permit itself, which could be the case if the amendment is of a minor nature, the changes should be authenticated by the stamp and signature of the permit-issuing authority as recommended by Resolution Conf. 8.5.

7.2 Suspension

A few Parties also provide for the possibility to suspend a permit. Examples are Australia, Tanzania and the United States. Australia, for instance, empowers the Management Authority to suspend a permit for an indefinite duration or for a specified period of time. The period of validity of the permit continues to run during suspension. Suspension does not preclude revocation. In the United States, a permit may be suspended if the permittee is not in compliance with the conditions of a permit or with any applicable laws or regulations governing the conduct of the permitted activity. The permit may be revoked if the permittee fails within sixty days to correct the deficiencies that were the cause of the suspension or if he becomes disqualified to obtain a permit.

7.3 Procedures for revocation, modification or suspension

The procedure to be followed for the revocation, modification or suspension of permits should be laid down in the regulations as a guarantee against arbitrary decisions. In the United States, for instance, the Code of Federal Regulations (50 CFR 13.27 and 13.28) provides that, when a permit-issuing officer believes that he has valid grounds for suspending or revoking a permit, the permittee should be notified in writing of the proposed suspension or revocation by registered mail. The notice must identify the permit to be suspended or revoked, the reasons for the suspension or revocation, the

proposed disposition of the wildlife, if any, and inform the permittee of the right to object to the proposed suspension or revocation. The issuing officer may amend any notice of suspension or revocation at any time. Upon receipt of the notice the permittee may, within 45 days, file a written objection to the proposed action. A decision on the suspension or revocation must be made within 45 days following the end of the objection period. The issuing officer must notify the permittee in writing of the decision taken and the reasons for that decision. The permittee is entitled to request a reconsideration of the decision.

7.4 Disqualification

Temporary or permanent disqualification to obtain a permit may constitute an effective deterrent to unlawful trade. The law of the United States lists a number of disqualifying factors including a conviction under certain wildlife conservation laws, the failure to pay fees or penalties, the failure to submit reports that may be required under a permit and the revocation of a permit. In this latter case no new similar permit may be issued to the person concerned for a period of five years.

As a general rule, no permit can be granted to a disqualified person and permits that have been issued are automatically revoked when a person becomes disqualified.

The law of Tanzania provides that any person who has been convicted of an offence under the Wildlife Conservation Act or under any law applicable in another country to the protection of wildlife in that country whose permit granted under Tanzanian law has been cancelled or suspended shall be disqualified from holding or being granted any permit under that law until such disqualification has been lifted.

7.5 Appeals

Persons whose interests are affected by decisions to refuse, amend, revoke or suspend permits are generally entitled to appeal to a higher authority (e.g. the Minister in charge) or to the courts against such decisions.

This is a matter which is usually governed by administrative law and administrative procedures and which, therefore, does not necessarily need to be dealt with in CITES legislation.

A few Parties, however, have included in their legislation relating to trade in wildlife specific provisions allowing appeals against the refusal, revocation or suspension of permits. Examples are Australia, Hong Kong, New Zealand and Tanzania.

Under the law of Hong Kong, any person aggrieved by a decision of the Management Authority relating to the issue of a permit, to any condition specified in a permit, or to the refusal to issue a permit, may, within 21 days after he or she has been informed of

the decision, appeal by a petition to the Governor. The Governor may confirm, vary or reverse the decision of the Management Authority. His decision is final.

The law of Australia contains a long list of decisions which can be appealed to the Administrative Appeals Tribunal, including findings made by the Scientific Authority that the export or import of a specimen will or will not be detrimental to the survival of the species concerned.

In the administrative law of many countries normally only those persons who have a personal interest affected by an administrative decision are considered to be aggrieved by the decision. Other parties, for instance conservation NGOs, have, therefore, no legal standing to appeal on decisions of Management Authorities where these are taken in contravention of CITES or of CITES legislation. Allowing these NGOs to appeal would, however, encourage better enforcement of the Convention. In the United States, there have been cases where the validity of CITES permits has been challenged in the courts (e.g. World Wildlife Fund v. Hodel, U.S. District Court, District of Columbia 17 June 1988).

An essential prerequisite, however, to appealing on the decision of a Management Authority to grant a permit is to be informed that a permit has been issued. As the granting of permits is rarely made public by issuing agencies, this may prove to be an unsurmountable obstacle to conservation NGOs even if they have been given standing to sue.

Of particular interest in this respect is the legislation of Australia (section 52 of the Wildlife Protection (Regulation of Exports and Imports) Act 1982), which requires the Minister (i.e. the Management Authority), as soon as it is practicable to do so, to publish in the Gazette particulars of: permits granted, refusals to grant permits; and specimens exported or imported in accordance with permits. Persons whose interests are affected by the granting or refusal to grant import or export permits are entitled to appeal to the Administrative Appeals Tribunal for the review of such decisions.

The Act also formerly contained a provision requiring the Minister to publish in the Gazette particulars of applications for permits. This could have been a means to enable interested persons to comment before a permit was issued or denied. This provision was repealed in 1986.

8 Exceptions to permit requirements

8.1 General considerations

Article VII contains an exhaustive list of exceptions which can be made by the Parties to the permit requirements laid down by the Convention. Any other exception constitutes a breach of the Convention. Yet there are still a number of Parties which have given their Management Authorities discretionary powers to grant any exemption they see fit.

Although the exceptions of Article VII appear to be mandatory, Parties have the right under Article XIV.1 to take stricter measures than those laid down by the Convention. This right can be exercised in respect of any of the provisions of the treaty, including therefore Article VII. Thus Parties may decide at their discretion whether or not they will avail themselves of the possibility to grant these exceptions. If they chose not to do so, this should be considered as a stricter domestic measure taken under Article XIV.1.

As an example, the law of Australia does not exempt any specimen from permit requirements and the law of Hong Kong does not waive the requirement of a permit for pre-Convention specimens, animals bred in captivity and artificially propagated plants.

The exemptions allowed by the Convention relate to: pre-Convention specimens, household or personal effects, animals bred in captivity, artificially propagated plants, scientific exchanges of specimens, and travelling zoos, circuses or exhibitions. **Each of these exceptions must be carefully defined and specified in legislation to prevent fraudulent trade.**

Before examining each of these exceptions individually, it is important to remember that they should be based on the definitions agreed by the Conference of the Parties, where such definitions exist, and that these common definitions should be incorporated in national legislation.

As, however, resolutions may be amended, revoked or replaced by the Conference, it would be better, whenever possible, to include these definitions in regulations, which may be easily amended when required, rather than in an Act of Parliament.

8.2 Pre-Convention specimens

Article VII.2 provides that where a Management Authority of the State of export or

re-export is satisfied that a specimen was acquired before the provision of the Convention applied to that specimen, the provisions of Articles III, IV and V shall not apply to that specimen where the Management Authority issues a certificate to that effect.

As this provision may constitute a considerable loophole for the effective implementation of the Convention, the Conference of the Parties, by Resolution Conf. 5.11, recommended that the Parties apply stricter domestic measures to pre-Convention specimens. Such specimens are now defined as: specimens acquired before the species involved was listed on any of the Convention appendices or at a time at which none of the countries involved (i.e. country of original export, countries of re-export, country of import) was a Party to the Convention in respect of the species concerned. The date of acquisition for live or dead animals is defined as the date on which they were initially removed from their habitat, and for parts and derivatives as the date of then* "introduction to personal possession", which presumably means the date on which the first possessor of the specimen obtained possession. If neither of those dates can be determined, the specimen should not be considered as a pre-Convention specimen unless there is evidence that the date was before the first listing in any appendix.

In order to be able to issue the pre-Convention certificate required by Article VII.2, the Management Authority concerned must, therefore, be satisfied that the specimen concerned was actually removed from the natural environment or "introduced to personal possession" under the terms of the definition, before the Convention became applicable to it.

As a result, there must be a procedure to identify pre-Convention specimens to the satisfaction of the Management Authority. The matter is of great importance because once a pre-Convention certificate has been issued it will normally have to be accepted at its face value by the importing country, unless that country has adopted stricter measures to control such imports. Yet, as the report on alleged infractions presented to the 7th meeting of the Conference in 1989 clearly shows, this exemption is frequently abused. As a consequence, specimens that do not qualify for a pre-Convention exemption under the terms of Resolution Conf. 5.11 continue to be traded.

The solution to this difficult problem lies in the registration, and possibly marking, of pre-Convention specimens. This matter is, of course, closely connected to that of the possession of CITES specimens, as only the export of lawfully possessed specimens, whether they are pre-Convention or not, should be allowed.

A certain number of Parties have instituted a system of certificates of registration for pre-Convention specimens. Belgium for instance requires all holders of Appendix I specimens, except personal effects, to register those specimens with the Management Authority. For specimens of Appendix II or III species, and for specimens of Appendix I species which are personal effects, registration is not mandatory, but the holders of those specimens may, if they so wish, register those specimens; doing so will ensure that they will be entitled to receive from the Management Authority a pre-Convention certificate should they decide to export the specimens concerned. These provisions also apply to any species subsequently included in the Convention appendices. Registration

must be effected within 30 days of the entry into force of the law or of the subsequent inclusion of a species in the Annexes to the Regulation implementing CITES in the European Community.

Legislation should therefore provide both for the requirement of a pre-Convention certificate for those specimens to which the pre-Convention exemption applies under the terms of the Convention, and for a procedure to register such specimens with the Management Authority within a certain time period after the date on which the Convention became applicable to them. In addition, provision should be made to empower the competent authority to order that registered specimens be marked to avoid possible substitutions. Finally, the authority competent to issue certificates of registration and pre-Convention certificates should have the right to revoke them where they have been abused.

A convenient method to inform interested persons of the date of entry into force of an Appendix I, II or III listing is to include that date next to the list of species concerned in the schedule to the Act, or in the regulation, as the case may be. This method is used by the United States.

Resolution Conf. 5.11 also addresses a number of problems relating to the re-export and import of pre-Convention specimens.

With regard to re-exports, it recommends to Parties that a Management Authority not issue a pre-Convention certificate unless it is satisfied that, at the date on which the specimen was acquired, the specimen concerned was a pre-Convention specimen in both the country of origin and the country into which it was imported. The effect of this Resolution is that even if a specimen qualifies as a pre-Convention specimen in the country of re-export, a pre-Convention certificate should not be issued by that country unless that specimen also qualifies as such in the country of origin.

With regard to imports, the Resolution recommends that the Management Authority of an importing country only recognize a pre-Convention certificate issued by another Party if the date of acquisition of the specimen concerned is before the date at which the Convention entered into force in the country of import for that specimen. The effect of this recommendation is that, even though a specimen qualifies as a pre-Convention specimen in the country of export, it should not be imported into another country if it does not so qualify in that other country.

To enable Parties to determine whether or not a specimen qualifies as a pre-Convention specimen in any of the countries which are parties to a transaction, the Resolution recommends that Parties either indicate on the pre-Convention certificate the precise date of acquisition of the specimens concerned, or certify that the specimen was acquired before a specific date. If neither of these dates can be determined, no pre-Convention certificate should be issued.

In addition to theses recommendations, Resolution Conf. 5.11 invites Parties not to

accept pre-Convention certificates which have not been issued in compliance with its terms.

To implement these recommendations, specific provisions need to be included in legislation. There are no difficulties in doing this with regard to the issuing of certificates. Legislation should merely instruct the Management Authority not to issue them unless the recommendations of the Resolution are complied with and to declare invalid those which may be issued in violation of its terms.

The situation is more complex in respect of the acceptance of certificates issued by other Parties. The Resolution recommends that they should not be accepted by importing countries unless they comply with the terms of the Resolution and that the specimens to which they apply qualify as pre-Convention specimens in the importing country. This requires a legal provision enabling the importing country to check that pre-Convention certificates issued by other Parties comply with the terms of the Resolution. Otherwise, the Management Authority would have no powers to refuse to accept these certificates. A solution could be to provide that non-complying certificates are invalid and to allow for the confiscation of specimens presented with such certificates. If confiscation is impossible and the specimens concerned are merely not allowed to enter the country of import, they will, of course, remain on the market and eventually be imported elsewhere.

Resolution Conf. 5.11 contains two other provisions, the implementation of which gives rise to specific legal difficulties.

It recommends that when a species is uplisted from Appendix III to II or I, or from Appendix II to I, or downlisted from Appendix I to II or III, the specimens concerned be subject to the provisions applicable to them at the time of export, re-export or import.

The effect of this provision is that, for instance, when a species is transferred from Appendix II to Appendix I, the owner or holder of specimens of that species acquired before the uplisting came into force should not be able to claim that they should continue to be treated as Appendix II specimens. This recommendation is important as it aims to avoid situations where exporters would be acquiring specimens of species transferred to Appendix I during the period of 90 days which is required before the amendment comes into force with a view to selling them subsequently as "pre-transfer" specimens.

Such a provision can, however, only be enforced after the schedules to the CITES implementation Act or the regulations listing CITES species, as the case may be, have been amended to reflect the transfer decided by the Conference. It is therefore important, as already mentioned, that these schedules be amended as soon as possible after the amendments to the Convention appendices have been adopted by the Conference of the Parties. **Nothing prevents any Party from amending its own schedules or regulations before the expiry of the 90 day period following the adoption of the amendment to a Convention appendix, and it is therefore recommended that they do so.**

The final provision of Resolution Conf. 5.11 merely calls upon Parties "to take any necessary measures in order to prevent the undue acquisition of specimens of a species between the date at which the Conference of the Parties approves the inclusion of that species in Appendix I and the date at which the inclusion takes effect".

The purpose of this part of the Resolution is to avoid the constitution of stocks as pre-Convention specimens during the 90 day time period between the adoption of an amendment and its entry into force. **Here again the solution may consist in amending the national schedules, or regulations, immediately after the adoption of an amendment to Appendix I,** provided, of course, that national legislation has been made applicable to the possession, sale and purchase of specimens listed therein.

None of these recommendations seem to have been introduced in the legislation of any Party. Parties such as Australia, which has instituted a system of import and export permits for any wildlife specimen, have, however, a legal basis enabling them to refuse to issue permits when the terms of Resolution Conf. 5.11 are not met.

8.3 Personal or household effects

Article VII.3 provides that the provisions of Articles III, IV and V shall not apply to specimens that are personal or household effects, with certain exceptions.

These terms are neither defined in the Convention nor by any resolution of the Conference of the Parties. **It is, however, necessary that the public and enforcement officers be informed as precisely as possible of what is meant by this expression. It is, therefore, up to each individual Party in its national legislation to provide a definition of personal and household effects,** provided of course it is consistent with the spirit of the Convention. The legislation of Hong Kong (Animals and Plants (Protection of Endangered Species) (Exemption) Order of 1978, as amended subsequently) contains an exhaustive list of personal effects which are exempt from permit requirements. The list includes garments, shoes, leather articles, jewellery, combs, handles, ornaments, furniture, musical instruments and some ivory pieces. Articles made of bear or rhinoceros specimens are not exempted.

The United States defines personal baggage and household effects as wildlife products or manufactured articles which are not intended for sale and are worn as clothing or contained in accompanying personal baggage or are part of a shipment of household effects of persons moving their residence to or from the United States.

Other Parties only provide a very general definition of personal or household effects. The law of New Zealand, for instance, merely defines them as articles of household or personal use or ornament and Belgian legislation as non-live specimens possessed by a natural person for non-commercial purposes.

This situation is clearly not satisfactory, as differences in definitions, or the absence

of any definition of personal or household effects, may lead to considerable differences in the way the Convention is applied by individual Parties.

The Conference recognized this in Resolution Conf. 6.8, which states that the implementation of Article VII.3 has, particularly with regard to Appendix II specimens, given rise to serious enforcement difficulties and that the current enforcement of the Convention on personal and household effects is far from effective. It did not, however, propose any solution going beyond an earlier Resolution (Conf. 4.12), which merely asked Parties to "vigorously control the export and import of Appendix I specimens, whether or not exported or imported as personal effects" and "to make their best efforts to comply fully with the purposes of the Convention with respect to Appendix II souvenir specimens

This can only be achieved by taking stricter measures under Article XIV. 1. On Appendix I specimens, these measures could consist in applying to personal effects all the permit requirements that are otherwise applicable to all other Appendix I specimens.

In the specific case of rhinoceros products, in view of the particularly precarious status of all the species concerned as a consequence of heavy poaching for their horns, the Conference asked Parties, in Resolution Conf. 6.10, to prohibit all sales and trade, internal and international, of rhinoceros parts and derivatives, in whatever form, including personal effects, but excluding non-commercial movements of legitimate hunting trophies, where appropriate full CITES documents are issued to that effect.

On Appendix II and III specimens, stricter measures could at least include the imposition of CITES permit requirements to the export of souvenir specimens of the species which are likely to be affected by heavy trade.

An interesting example of stricter measures on personal effects is the law of Australia, which lays down detailed rules governing the import of those specimens by visitors, intending residents and residents. The import of any specimen as household goods is subject to the normal permit requirements under CITES. In the absence of a permit, the specimens must be surrendered to enforcement agents. Where a specimen is in the personal effects of a visitor, that person is entitled to take the specimen with him when he leaves the country or to send it to a place outside Australia, after paying custody and, where required, shipping costs. Where the person who has arrived with the specimen is an intending resident, he or she is entitled to send it to a place outside the country, after having paid custody and shipping costs. Where the person concerned is a resident of Australia, the specimen must be confiscated.

The exemption on personal or household effects is in any event not absolute as Article VII.3 provides for several exceptions to the exemption. If no stricter measures are taken by national legislation on the import and export of these specimens, the law should nonetheless make clear in which cases the exceptions provided for by the Convention apply.

The law should also define personal or household effects as precisely as possible.

This may be achieved by means of an exhaustive list, as in Hong Kong, or by a definition along the lines of the one used by the United States. An exhaustive list would seem, however, to be preferable, as it is more restrictive and less easy to circumvent. In any event, the law should always provide for the possibility of excluding by regulation any particular kind of article or articles made of specimens of any particular species from the list of exempted items and, in particular, to exclude live specimens.

8.4 Animals bred in captivity

Article VII.4 provides that specimens of an Appendix I animal species bred in captivity for commercial purposes shall be deemed to be specimens of species included in Appendix II. This means that the permit requirements applicable to these specimens are those applicable to Appendix II specimens and, in particular, that no import permit is required from the State of import.

With regard to Appendix I specimens which have been captive-bred for non-commercial purposes, and to Appendix II and III captive-bred specimens for any purposes, Article VII.5 provides that where a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity, or is a part of such an animal or was derived therefrom, a certificate of the Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Articles III, IV and V. In other words, all captive-bred specimens, other than Appendix I specimens bred for commercial purposes, can be traded freely, with no permit requirements, provided a certificate that they were bred in captivity can be produced.

8.4.1 Definition

In Resolution Conf. 2.12 the Conference of the Parties adopted a definition of the expression "bred in captivity". This definition applies to "offspring, including eggs, born or otherwise produced in a controlled environment of parents that mated or otherwise transmitted their gametes in a controlled environment". It further provides that the parental breeding stock must be established in a manner not detrimental to the survival of the species in the wild; maintained without augmentation from the wild, except for occasional additions from wild populations to prevent deleterious inbreeding; and managed in a manner designed to maintain the breeding stock indefinitely. In addition the Resolution provides a definition of "controlled environment" and states that a parental breeding stock shall be considered to be "managed in a manner designed to maintain the breeding stock indefinitely" only if it is "managed in a manner which has been demonstrated to be capable of reliably producing second-generation offspring in a controlled environment".

Few Parties have reproduced this lengthy definition in their own legislation. One

that has is Australia in its Wildlife Protection (Regulation of Imports and Exports) Regulations of 1984.

8.4.2 Appendix I specimens bred in captivity for commercial purposes

Before a Management Authority can issue a permit for the export for commercial purposes of a captive-bred specimen of an Appendix I species, it must of course be certain that the specimen concerned was actually bred in captivity and that it meets the definition of Resolution Conf. 2.12.

Because of the high risk of fraud, the Conference of the Parties decided in Resolution Conf. 4.15 to establish a system under which the CITES Secretariat registers all operations breeding Appendix I species in captivity for commercial purposes. However, if such a system is to function adequately, it must clearly be supplemented at national level by a licensing system providing, *inter alia*, for powers to impose conditions upon licensees, to cause specimens to be marked, to inspect premises and to suspend or revoke a licence if it has been abused.

Notification to Parties No. 652 of 28 August 1991 invites Parties not to accept bred in captivity certificates for specimens of Appendix I species when these specimens do not originate from a captive breeding operation which has been registered with the Convention Secretariat and do not derive from a species declared in the register as being bred by that operation.

8.4.3 Other captive-bred specimens

As with pre-Convention specimens, there is a serious risk that specimens taken from the wild will be traded as bred in captivity unless the Management Authority is empowered to require conclusive evidence to the contrary before issuing a certificate, which in this case, as well, has normally to be accepted at face value by importing countries.

Here again the solution would seem to lie in the licensing, or at least Government approval, of commercial captive-breeding operations and the marking of captive-bred specimens.

Parties are of course free, under Article XIV. 1, to apply Appendix I controls to any captive-born specimens of Appendix I species and not only to those which are bred for commercial purposes. An interesting example of a provision of this kind can be found in the legislation of Switzerland, which provides that when the survival of an Appendix I animal species essentially depends on its maintenance in captivity, live specimens of such species born in captivity will continue to be considered as Appendix I specimens and will, therefore, remain subject to all the conditions of Article III of the Convention (Article 7.3 of the Species Conservation Regulations of 19 August 1981). By 31 August 1991 a list of 23 taxa to which this provision applies had been published. The provision

seems to apply to specimens bred in captivity for whatever purposes and not only for commercial purposes.

8.4.4 Captive-breeding certificates

Resolution Conf. 8.5, which deals with the matter of standardization of CITES permits and certificates, recommends to Parties that certificates of captive breeding indicate the source of the specimens to which they relate, that is to say whether they are Appendix I animals bred for commercial purposes, or for non-commercial purposes, captive-bred Appendix II or III animals, or Fl generation animals born in captivity but which do not fulfill the terms of the definition in Resolution Conf. 2.12. The same recommendation applies to the parts and products of any of these animals. Resolution Conf. 8.5 recommends further that any captive-breeding certificate should, as with all other CITES documents, include the scientific name of the species to which the specimens belong, a description of the specimens, and the number of the marks appearing on them, particularly for Appendix I specimens captive-bred for commercial purposes. The registration numbers, attributed by the Secretariat, of the operation practicing captive-breeding for commercial purposes should also appear on the certificate.

Legislation should:

(a) Clearly provide that specimens of Appendix I species captive-bred for commercial purposes require export permits;

(b) Require that certificates be issued for all other specimens of CITES-listed species which have been bred in captivity;

(c) Provide a licensing procedure for captive-breeding operations for commercial purposes of Appendix I species as well as marking requirements for specimens of such species;

(d) Provide some form of control of other captive-breeding operations including marking of specimens;

(e) Incorporate the criteria included in Resolution Conf. 2.12 regarding animals bred in captivity as a test for determining whether animals are indeed captive-bred.

8.5 Artificially propagated plants

Article VII.4 provides that specimens of a plant species included in Appendix I artificially propagated for commercial purposes shall be deemed to be specimens of species included in Appendix II.

Resolution Conf. 8.17 recommends, as did the relevant part of Resolution Conf.

2.12 which it replaces, that the term "artificially propagated" be interpreted to refer only to plants grown by man from seeds, cuttings, callus tissues, spores or other propagules under controlled conditions. The artificially propagated stock must be established and maintained in a manner not detrimental to the survival of the species in the wild and managed in a manner designed to maintain the artificially propagated stock indefinitely. A definition of what is meant by "controlled conditions" is also provided.

Here again, few Parties have taken up this definition in their national legislation. An exception is again Australia in its 1984 Regulations.

The problems are also, of course, the same as in the case of animals, except that controls may be even more difficult to apply because specimens taken from the wild are often mixed with artificially propagated ones in plant consignments. (See report on alleged infractions presented to the 7th meeting of the Conference of the Parties, document Doc. 7.20).

In Resolution Conf. 5.15, the Conference recommended that Parties should, where appropriate to their circumstances, register and licence individual traders of artificially propagated Appendix I, II or III plants and take adequate steps, including inspection of nursery premises whenever possible, to ensure that such traders do not also trade in wild-collected plants.

There are a number of examples of legislation providing for the licensing of commercial plant producers or nurserymen, particularly in Australia and South Africa.

Resolution Conf. 8.5 also applies to plants. It recommends that certificates of artificial propagation should include the same type of information as for captive-bred animals and that, in particular, they indicate the source of the specimens to which they relate. Certificates should, therefore, indicate whether the specimens concerned are Appendix I plants, or parts or products thereof, that have been artificially propagated for commercial purposes, or for non-commercial purposes, or are specimens of Appendix II or III species.

Legislation should provide rules similar to the ones proposed on captive-bred animals (8.4), including requirements for the licensing of commercial growers and traders.

8.6 Loans and exchanges of specimens between scientific institutions

Article VII.6 of the Convention exempts from permit requirements the non-commercial loan, donation or exchange between scientists or scientific institutions registered by a Management Authority of their State, of herbarium specimens, other preserved, dried or embedded museum specimens, and live plant material, when they carry a label issued or approved by a Management Authority.

The Conference did not adopt definitions of these various terms and it is doubtful that any are actually needed. It clarified, however, the provisions of Article VII.6 on two important points. Recommendation Conf. S.S.1.2 provides that the exemption only applies to specimens of animals and plants which are already part of a collection and not to specimens which have been taken from the wild in one State for a collection in another State. Resolution Conf. 2.14 provides that the exemption only applies to legally acquired animal and plant specimens that are under the authority of a registered scientific institution.

Legislation should incorporate these two restrictions and provide for the registration of the institutions concerned. The Scientific Authority should be empowered to advise on registration standards.

8.7 Travelling zoos, circuses and exhibitions

Under Article VII.7, a Management Authority may waive the requirements of Articles III, IV and V and allow the movement without permits or certificates of specimens which form part of a travelling zoo, circus, menagerie, plant exhibition or other travelling exhibition, provided that the specimens concerned are pre-Convention specimens or specimens that were bred in captivity or artificially propagated. The exporter or importer must register full details of such specimens with the Management Authority concerned. The Management Authority must be satisfied that any living specimen will be transported and cared for so as to minimize the risk of injury, damage to health and cruel treatment.

Resolution Conf. 8.16 recommends that pre-Convention certificates and certificates of captive-breeding issued for exhibitions be valid for a maximum period of three years to allow for multiple imports, exports or re-exports of the animals concerned, that such certificates be issued only for animals acquired before 1 July 1975 or before the date of the inclusion of the species concerned in any of the appendices to the Convention, and that they consider such certificates as proof that the animals in question have been registered with the Management Authority which has issued them.

Legislation should incorporate these provisions and recommendations.

9 Marking

Article VI.7 of the Convention provides that where appropriate and feasible a Management Authority may affix a mark upon any specimen to assist in its identification.

Legislation should therefore empower the competent authority to provide by regulations for the marking of any CITES specimens. This would, in particular, apply to pre-Convention specimens, specimens bred in captivity, ranched specimens, specimens that have been legally imported or otherwise acquired or legally taken from the wild, specimens of species subject to export quotas and specimens of travelling live-animal exhibitions.

As an example, the legislation of Zimbabwe provides that where appropriate and feasible, the Management Authority may cause any specimen which is being imported or exported to be marked with an indelible imprint or lead seal or in some other manner so as to render its imitation by unauthorized persons as difficult as possible.

The Conference of the Parties adopted a number of resolutions recommending that certain categories of specimens should be marked. Some of these resolutions relate to the marking of ivory. They have now lost most of their purpose as a result of the transfer of the African elephant to Appendix I in 1989. Hunting trophies must, however, still be marked according to these resolutions. Other resolutions on marking include Conf. 5.16 on the marking of ranched specimens, Conf. 6.21 on the marking of captive-bred specimens, Conf. 8.13 on the marking of live specimens with microchips, Conf. 8.14 on the tagging of crocodile skins and Conf. 8.16 on the marking of specimens belonging to live-animal exhibitions.

Resolution Conf. 6.21 recommends, in particular, that captive-bred Appendix I birds be ringed; that captive breeding certificates issued for specimens of Appendix I species bred in captivity for commercial purposes mention the individual marks on the specimens; and that other Parties do not accept such documents for specimens that are not marked or where the individual marks are not mentioned in the documents concerned.

Resolution Conf. 8.14 recommends the introduction of a universal tagging system to identify raw and processed crocodile skins and parts thereof, by non-reusable tags on all crocodile skins entering international trade. It also recommends that countries re-exporting skins do so with the original tags intact; that tags have a unique identification number; that the same information on the tags be given on the export permit, re-export certificate or other Convention document; and that Parties accept such documents only if they contain the information appearing on the tags and if the related skins or parts thereof are properly tagged.

Specific provisions would be needed in national legislation to make these recommendations mandatory and enforceable.

Legislation should also provide that any person who alters, defaces or erases a mark shall be guilty of an offence.

10 Border controls

It is at the moment when the specimens are presented for import or export that appropriate controls can be exercised to verify the existence and validity of the permits and certificates required under the Convention, as well to ensure that the specimens conform with the accompanying documents. It is at this time that the double-checking system instituted by CITES can really come into effect since it falls upon the competent authorities of the importing country to control the documents issued by the State of export.

10.1 Presentation of permits

Articles III, IV and V clearly provide that not only does the export of a CITES specimen require the prior presentation of the appropriate permit or certificate to the competent authority of the State of export, but that the import of that specimen also requires the prior presentation of the same export document to the competent authority of the State of import (and in addition, of course, to an import permit for Appendix I specimens).

It is essential, however, that these requirements be incorporated in national legislation so that the authority in charge of controlling shipments of specimens be empowered to control the foreign documents that accompany them. Thus, to take the example of Swiss legislation, there is a provision in the CITES implementation Act which clearly states that permits and certificates from foreign countries shall be accepted only if they conform with the prescriptions of the Convention.

It is also essential that the authority competent to check the documents and consignments be clearly designated. In many countries this authority will be the Customs Service. Certain Parties have, however, designated other authorities. In such cases the respective powers of these other authorities and of the Customs should be unambiguously defined.

Furthermore it would also seem useful to provide, again along the lines of Swiss legislation, that specimens presented for import, export or re-export must as far as possible be examined by the competent authority before clearance and that that authority must ascertain the existence of the permits or certificates required under the Convention.

There can also be, as in the Australian law, a requirement to produce permits or certificates to the Customs before importing or exporting specimens or, as in the German law, an obligation to declare animals and plants intended for import or export and, upon request, to present them at designated Customs offices.

In the United States, legislation specifically requires that importers of wildlife file a declaration with the Management Authority at the time and place where clearance is requested. Clearance may be refused when there are reasonable grounds to believe that the importer has filed an incorrect or incomplete declaration.

Finally, with regard to transit shipments, the law should also provide that the competent authority must also require the presentation of the export permits or certificates.

10.2 Control of permit validity

Clearly, however, it is not sufficient to check the existence of export documents. It is also necessary to ascertain that these documents are valid. The Convention is, however, silent on this matter as it was presumably considered that the presentation of an invalid document would be tantamount to the absence of documents. Problems have, however, arisen and the Conference of the Parties has adopted certain resolutions on the validity of permits.

Resolution Conf. 4.9 recommends that an export permit or re-export certificate be considered as void and of no legal value whatsoever after the expiry of its period of validity of six months. Resolution Conf. 3.7 recommends the use of security stamps, and in some cases security paper, for CITES permits. Resolution Conf. 7.4 invites Parties to check the presence of valid export documentation or satisfactory proof of its existence for transit shipments of CITES specimens. Finally, Resolution Conf. 8.5 observes that false documents and invalid documents are used more and more for fraudulent purposes and that appropriate measures are needed to prevent such documents from being accepted.

Thus, the legislation of the United States provides that a Management Authority officer may refuse clearance of specimens when there are reasonable grounds to believe that any permit or other documentation required for that purpose is not available, is not currently valid or has been suspended or revoked, or is not authentic.

Two questions of major importance, however, remain. For the most part, they are still unanswered.

The first is: what is an invalid permit? This is relatively simple in some cases, for instance when a permit has been forged, is not printed on security paper or has no security stamp affixed to it when this is a requirement of the issuing country, or when the security stamp is not cancelled by a signature and a seal across its face. The same is true when a permit has been altered, modified or rubbed out, unless these alterations have been authenticated by the stamp and the signature of the issuing authority, or when it has been signed by an incompetent authority (Resolution Conf. 8.5), or when its validity has expired (Resolution Conf. 4.9). A permit is also clearly invalid when the species or number of specimens in the shipment do not correspond with those indicated on the permit (Notification to Parties No. 499).

The situation is more complex for retrospective permits. The Convention requires that permits and certificates are presented prior to import or export. Retrospective permits should, therefore, be deemed to be invalid because they are in contravention of Convention requirements. Yet the practice of issuing permits retrospectively seems to have become widespread and the validity of retrospective permits is even recognized by certain national laws. Resolution Conf. 6.6, however, urges Parties to take the necessary measures so that their legislation conforms with the requirements of the Convention that documents be presented **prior** to export, import, re-export and introduction from the sea of CITES specimens. As a result, retrospective permits should be made invalid by national legislation, except in the limited cases provided for in Resolution Conf. 6.6 itself.

This is undoubtedly possible from the legal point of view since it is a requirement under the Convention that permits or certificates be presented before the specimens are cleared for import. Parties must, therefore, refuse to permit the import of specimens if the documents presented are not authentic, do not meet CITES requirements or do not correspond to the shipment.

In case of doubt, the importing Party, before authorizing the import of the specimens, is of course entitled to verify the validity of the permit or certificate, and to address the Management Authority of the exporting country, through its embassy, or the Convention Secretariat, for that purpose.

The situation is different when the specimens are presented for import with a valid permit or certificate which was issued on the basis of false statements or incorrect information or in another fraudulent way.

This leads to the second major question which remains largely unresolved: to what extent can importing States judge the validity of documents issued by exporting States when it is not their form but their very substance which may be questioned?

There is no easy solution to this problem. One possibility could be to adopt legislation empowering the competent authority to refuse to accept permits from exporting countries when they have reasonable grounds to believe that substantial irregularities have been committed. Another would be to require import permits for Appendix II and III specimens and that the Management Authority could refuse these permits at their discretion. This would enable the Management Authority to verify the validity of the export permit before it allows the specimens to enter the country.

This matter will be discussed in more detail in Chapter 13.

10.3 Control of consignments

It is of course necessary to check not only permits and certificates but also the consignments themselves in order to ascertain whether the specimens concerned are

the same as those indicated in the accompanying documents and whether CITES specimens are riot imported or exported under the name of species not covered by CITES.

These tasks are normally performed by the Customs and/or any other authority designated for that purpose by the law. Provision should, however, be made to empower the competent authority to proceed with any required investigation and to detain specimens where there are reasonable doubts on their identification, pending the results of further investigations. As an example, the legislation of Belgium provides that when there are identification difficulties, or doubts as to the conformity of the consignment with the description of the specimens appearing in the accompanying documents, the Customs shall inform the competent authority forthwith. The latter shall then proceed to examine the consignment or cause it to be examined by an expert.

In the United States, clearance of imported wildlife may be refused when there are reasonable grounds to believe that the correct identity of the wildlife has not been established. In such a case, the burden is upon the owner, importer or consignee to establish such identity.

To facilitate these controls, especially with regard to the availability of enforcement officers having the necessary expertise, the Convention provides that Parties may designate ports of exit and ports of entry at which specimens must be presented for clearance (Article VIII.3). Legislation should therefore provide for this possibility.

Finally, several Parties have taken measures to implement, in respect of live specimens, another provision of Article VIII.3, which requires Parties to ensure, as far as possible, that specimens shall pass through any formalities required for trade with a minimum of delay. Under German legislation, for instance, designated Customs offices must be informed at least 18 hours in advance of the expected time of arrival of live animals. Such information must include the name of the species and the number of individuals concerned.

Under the legislation of Hong Kong, live animals in transit will be deemed to be in transit only if the Management Authority has been notified in writing at least three working days prior to the date of the expected arrival of the vessel, aircraft, train or vehicle.

10.4 Fate of specimens after border controls

After presentation to the border authorities, specimens should, in principle, either be cleared if valid documentation is presented and there is no evidence of fraud, or seized in all other cases.

There are many cases, however, where the import is merely refused. This may happen, for instance, when no CITES permit or certificate is presented and no fraud suspected, or when invalid CITES documentation is presented in good faith. It also

seems often to occur when the goods should normally have been seized. As an example, the report of the CITES Secretariat on alleged infractions submitted to the Conference of the Parties in 1989 contains the following statement: "The Secretariat is worried to note that, generally, when it confirms to a Party that a document is false, the Party merely contents itself with refusing to import the goods" (p. 20 of Doc. 7.20).

As a result, the specimens remain on the market and the chances that they will subsequently be traded illegally are high.

Therefore legislation should make seizure mandatory whenever there are reasonable grounds to believe that a transaction is in violation of CITES.

An exception should, however, be made for live specimens when it is possible to send them back to the country of export or country of origin, as recommended by Resolution Conf. 7.6 for Appendix II and III live animal specimens.

10.5 Retention and cancellation of used permits

To comply with Article VI.6 of the Convention, provision should also be made to empower the Management Authority of the State of import to cancel and retain the export permit or re-export certificate and any corresponding import permit presented for the import of a specimen. This is an important matter because the fraudulent re-use of permits already used must be avoided. The question may, of course, be dealt with by administrative procedures. It would seem, however, that it is preferable to make it a legislative or regulatory requirement in order to dispel any possible doubt on the powers of the Management Authority to cancel and retain permits. Certain Parties have accordingly included provisions to this effect in their legislation. As an example, the law of Austria requires that permits and certificates be collected by the Customs when the specimens are cleared, and then cancelled, and handed over to the Management Authority. **It is also important, in order to comply with Resolution Conf. 8.5, that provision be made for the retention, or at least the cancellation, of permits or certificates that have been refused when the specimens are presented for import.**

11 Control of traders, possession and domestic trade

11.1 General controls

Article VIII.l requires Parties to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in violation thereof. This obligation is not limited to international trade but covers domestic trade as well. Its purpose is to ensure that illegally imported specimens are not subsequently lawfully traded on the domestic market. It is essential for an effective implementation of the Convention.

The only way to control trade in CITES specimens within the territory of a Party is to prohibit the possession, trade and transport of unlawfully imported or acquired specimens.

As an example, the law of Singapore provides that no person shall have in his possession or under his control, offer or expose for sale or display to the public any specimen that has been imported or introduced from the sea without a permit. This may, however, not be sufficient to prevent illegal possession and trade as it may be difficult to prove that specimens have been imported without a permit.

For that reason certain Parties such as Australia, France, Germany, New Zealand and the United Kingdom have reversed the onus of proof. Under the law of the United Kingdom, for instance, any person possessing or controlling a CITES specimen may be required to prove that its import or export was not unlawful. The French Customs Code contains a similar provision: any person in possession of a CITES specimen must be able to prove that it has been obtained lawfully.

Resolution Conf. 6.10 deals specifically with domestic trade in specimens of CITES-listed species. It addresses the particular problem of rhinoceros parts and derivatives, especially horns, and recommends Parties to completely prohibit all sales and internal trade in such specimens.

This Resolution was implemented in Hong Kong by completely prohibiting the display and sale of all rhinoceros parts, derivatives and products, including oriental medicines purporting to contain rhinoceros ingredients.

It is also possible to establish a general prohibition on trade in CITES specimens or in certain specimens only. This is the solution adopted in the European Community's Regulation implementing CITES, which provides that the display to the public for commercial purposes and the sale, keeping for sale, offering for sale or transporting for sale of Appendix I specimens shall be prohibited. The same prohibition applies to

Appendix II and III specimens that have been imported in violation of CITES requirements. As mentioned earlier, this may give rise to a problem of proof.

Finally, an even more far-reaching solution consists in the institution of a permit system for the possession of and trade in CITES specimens. Such permits would only be granted on production of proof that the specimens have been obtained lawfully. The advantage of such a system is that it can be made to apply to all categories of specimens, including pre-Convention specimens, captive-bred animals and artificially propagated plants.

Under the law of Hong Kong, for instance, no person shall have in his possession or under his control any specimen except under and in accordance with a permit. Exceptions to this rule may, however, be made by Government order exempting certain persons or certain categories of specimens from this permit requirement.

The EC Regulation requires that a permit be issued by the Management Authority concerned for any transportation within the Community of Appendix I specimens from the address specified in the import permit.

11.2 Control of traders

One means to seek to ensure that unlawfully imported (or obtained) specimens do not subsequently appear on the market is to control traders. Thus, Resolution Conf. 5.15 recommends that Parties consider registering individual traders of artificially propagated plants and that only authorized traders be issued licences to export any quantity of specified Appendix II or III artificially propagated plants. Resolution Conf. 6.14 recommends that Parties establish a system of registration or licensing or both, for commercial importers and exporters of raw ivory.

Certain Parties have adopted provisions to control traders in CITES specimens. As mentioned in 8.4 and 8.5, such controls may include the licensing or registration of traders in captive-bred specimens and artificially propagated plants. Some Parties require that traders, or certain traders, keep records of their transactions. Under the law of the Netherlands, for instance, professional importers of CITES plants must keep records of their stocks and of any transfer of specimens. They must also keep all relevant documents for three years after the year when the transaction has taken place.

Under Swiss law, any person importing, exporting or re-exporting Appendix I, II or III specimens must keep a register of all the movements of such specimens together with the names of all suppliers and consignees. The Management Authority may inspect the premises of those traders at any time.

German legislation requires any person who, for commercial purposes, purchases, handles, processes or sells specimens of protected species (including CITES-listed species) to keep daily records of specimens received and delivered. When parts or derivatives are sold in the retail trade, the name and addresses of the buyers must be

registered only when the price paid for the part or derivative concerned exceeds DM 500. Upon request all records must be surrendered to the competent authority. Records and documents must be kept for five years.

12 Enforcement and penalties

Under Article VIII.1, Parties have to take appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation thereof, including measures to penalize trade in, or possession of, unlawful specimens, or both, and to confiscate such specimens or return them to the State of export.

Therefore Parties have an obligation under the Convention to take any legislative or regulatory measures that may be required to ensure that the prescriptions of the Convention are adequately enforced. In particular, they must prohibit and make it an offence to import or export specimens in violation of the provisions of the Convention, that is to say without appropriate and valid permits, as well as to prohibit and make it an offence to trade in, or possess (or both), specimens that have been imported in violation of the Convention.

Criminal law is, however, a complex matter and there are considerable differences from one legal system to another in the type of penalties which can be imposed and the procedures that must be followed. It is, therefore, impossible to propose detailed and specific rules that could be adopted by all Parties. There are, however, a number of general matters which should be considered in all cases.

12.1 Enforcement agents

12.1.1 Designation

It is extremely important that the departments and agents responsible for the enforcement of the Convention and of any national implementation legislation be clearly designated in the law and that enforcement agents be appointed and given the necessary powers to carry out their tasks. This can only be achieved by adoption of legislation to that end. Where there is no specific CITES legislation, doubts on who has authority to enforce the requirements of the Convention may only lead to difficulties.

Everywhere in the world, the Customs are responsible for controlling the import and export of goods. They, therefore, necessarily have a key role in the enforcement of CITES as they are normally the only agency empowered to search consignments of goods when they are presented at a Customs office.

The Customs, however, may not always have jurisdiction to control goods elsewhere than along the borders and at Customs offices inland. In such a case they are unable to

control the possession of and domestic trade in CITES specimens, which may have been illegally imported or are intended to be illegally exported.

Moreover the Customs do not have the necessary expertise, especially on the identification of species, to exercise fully their powers of controlling specimens without the assistance of experts. Also, as they have many other duties, they may not always be able or willing to devote enough time and manpower to a task which is new to them and may not be considered as a priority.

An essential aspect of CITES enforcement is the control of the validity of CITES permits and certificates, a task for which the Customs are normally ill-equipped because it requires not only a good awareness of the Convention provisions and any implementation legislation, of Conference resolutions and notifications to Parties, but also expert knowledge in zoology and botany as well as in the different types of fraud and irregularities which are currently practiced. Finally, the Customs would not normally be competent to check whether the conditions required by the Convention on the humane treatment of live specimens during transport are actually complied with.

Clearly, the enforcement of CITES provisions, like that of any other conservation legislation, will be all the more effective where there is a specialized government agency which is entrusted with this task.

This can be achieved by the establishment within the Customs of a specialized unit operating at the ports of exit and entry designated under Article VIII.3. In such a case, there would of course be no need for a specific provision in legislation. This can also be done by assigning primary responsibility for the enforcement of CITES to the Management Authority itself.

In Switzerland, for instance, border controls are carried out by officers of the Management Authority (the federal Veterinary Service for animals and the federal Phytosanitary Service for plants) with the assistance of Customs officers. As a result, agents of the Management Authority are responsible for checking any permits or certificates that may be required and for examining any specimens before they are cleared by Customs. In the United States, officers of the Management Authority (the Fish & Wildlife Service) must first clear specimens arriving at designated ports before they are cleared by Customs and released. If a Fish and Wildlife Service Officer is not available within a reasonable time, live specimens may, however, be cleared by Customs officers subject to inspection and investigation by the Service afterwards.

It is also important to designate clearly the authority, agency or enforcement agents that are empowered to control specimens inland. These may be the Customs, the Police, other law enforcement agents or even the Management Authority itself.

Of particular interest is a provision of the law of New Zealand which requires all officers of the Postal Service to prevent the unlawful import into or export from New Zealand of CITES specimens and gives them powers to that effect.

12.1.2 Powers

The powers of enforcement officers need to be clearly established by the legislation. They should be as extended as possible while, of course, remaining compatible with constitutional requirements and established rules of criminal procedure.

Some CITES implementation laws provide detailed lists of these powers. These include powers to search persons, baggage and other property and vehicles; powers to search premises or, where the law requires the prior grant of a search warrant by a magistrate, powers to request such a warrant; powers to request information, to inspect documents and to take samples of specimens for identification purposes; and, sometimes, powers of arrest. Of particular importance for the enforcement of the Convention are the powers to seize specimens when there are grounds to believe that they are or have been illegally imported or otherwise obtained.

12.1.3 Seizure

Seizure is a provisional measure which may be taken by an authority empowered by law for that purpose pending a decision on the merits of the case. This will result either in confiscation (or forfeiture as it is also called) or in the return of the goods to their owner. There is no need to prove at that stage that the seized specimens are unlawfully traded or held. Generally, however, there must be a reasonable cause to believe that this is the case.

The powers to seize should be exercised whenever an authorized officer has reason to suspect that a specimen is being or has been imported or exported, or is possessed or traded, in contravention of the law. Provision should also be made to allow the seizure of containers and of any other items used in connection with the alleged infraction. The legislation of Australia and New Zealand provide, in addition, that any descendant of a seized animal and any propagules of a seized plant may also be seized. Legislation may also provide, as in Hong Kong and Singapore, that seized specimens will be detained at their owner's risk. The costs incurred for the custody of seized specimens should be borne by the owner or importer. This is provided, for instance, in the legislation of France and Switzerland.

Finally, seized specimens or other items which have been abandoned by their owner or the owner of which is unknown, or animals or plants which have perished while they were kept in custody, should be disposed of at the discretion of the competent authority.

The costs, including custody costs, the costs of transporting and disposing of specimens or of maintaining live animals or plants during the time of seizure, should be considered as a debt to the State and as such be recoverable from the importer and/or shipper.

12.2 Prohibitions and offences

The law should mention clearly the activities which are prohibited. These should include at a minimum the import or export of CITES specimens without a permit as well as the use of invalid or forged permits, and the possession of and trade in specimens imported without a permit or with an invalid or forged permit. In addition, where the legislation requires a permit for the possession of and domestic trade in CITES specimens, the law should also prohibit such possession or trade without the required permit.

The law should clearly mention that a violation of these prohibitions constitutes an offence. Other offences should include: any violation of the conditions attached to a permit; the making of false or misleading statements in, or in connection with, an application for a permit; the making of false or misleading statements to enforcement officers; obstructing or hindering an enforcement officer in the performance of his or her duties.

With regard, more particularly, to the forging of permits or security stamps the law applicable to forgery should of course normally apply.

Provision should also be made to characterize as an offence the shipment or holding of live specimens in contravention of any regulations made in the transport of live wild animals.

In certain countries, such as Australia, Denmark, New Zealand, Singapore and the United Kingdom, offences committed by corporations are also punishable.

The law implementing CITES in the United Kingdom, for instance, provides that where an offence which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Whenever possible offences committed by corporations on trade in CITES specimens should be made punishable by national legislation. Where it is not possible, for legal reasons, to impose criminal penalties on corporations, the law should at least provide for the possibility of inflicting administrative penalties such as the temporary, or in serious cases permanent, withdrawal of licences to trade in animal or plant species.

12.3 Other matters relating to criminal law

Attempts to commit an offence as well as aiding and abetting the committing of an offence under the legislation implementing CITES should also be punishable offences.

An important question is to decide whether only those offences which have been committed intentionally should be punishable or whether the law should apply in all cases, even when the person concerned did not know that his or her action was unlawful. The matter is a delicate one because if the need for an intentional factor is set aside for the sake of greater effectiveness and better enforcement, it may give rise to problems of fairness and acceptability by public opinion of the resulting penalties.

Several Parties have, it will be remembered, reversed the onus of proof on the possession of CITES specimens. As a result, those possessing such specimens are strictly liable, without any need to prove any criminal intent, if they cannot prove that the specimens they hold were lawfully imported or otherwise obtained.

If this system is considered, however, to be too harsh, its scope may be limited to certain offences only. For example, under the law of New Zealand, where a person is charged with an offence arising out of his or her doing any action for which a permit or certificate is required but does not have one, the onus shall be on that person to prove that at the relevant time he or she held the required permit or certificate. In other words the intentional element is not required in relation to offences concerning the import or export of CITES specimens. But as far as the possession of such specimens is concerned, for which no permit is required in New Zealand, the law considers that an offence has been committed only if the person in possession of the specimens knew that they were imported or were intended to be exported or re-exported unlawfully. Certain laws, however, such as that of Denmark, provide that gross negligence in the contravening of prohibitions laid down by the law is also punishable.

Another possibility, which may be used in the case of unintentional violations, is that the person concerned shall not be liable to criminal penalties, but that the specimens over which the violation has been committed may be confiscated. In certain countries it is possible to impose administrative (also called civil) monetary penalties in such cases.

Legislation is generally silent on the prescription (or statute of limitation) for offences committed in relation to CITES legislation. As a result, the general law of prescription is usually applicable to those offences. A small number of Parties have, however, enacted specific prescription rules for infractions relating to CITES specimens. Denmark, for instance, has established a statute of limitation of five years. Proceedings, however, must be instituted two years at the latest after the offence has been committed. In a 1988 amendment to its law, Austria extended the statute of limitation from 6 months to 3 years.

Finally, where several different laws may apply to unlawful trade in CITES specimens, in particular Customs legislation or legislation governing foreign trade, it is important to be clear as to which legislation applies to offences and penalties.

There are three possible systems. The first consists in leaving all matters relating to offences and penalties to another law. Swiss law, for instance, provides that infractions to the CITES legislation shall be punished in accordance with Customs legislation or

with the law on the protection of animals against cruel treatment. The legislation of Sweden refers to the law governing unlawful imports.

Another system would be to rely entirely on the CITES legislation for the imposition of penalties and therefore exclude the possibility of applying other laws such as Customs law. There does not seem to be any example of this system.

The most widespread system, however, consists in providing specific penalties in the CITES legislation for offences committed against that legislation, but without prejudice to the separate punishment of concurrent infractions of Customs legislation or other laws.

12.4 Penalties

A review of existing legislation shows that there are considerable differences between countries as to the nature and level of penalties which may be imposed for offences against CITES legislation.

Some countries have instituted systems of administrative penalties (also sometimes called civil penalties) empowering certain administrative authorities to impose fines, as in the United States, and to order the confiscation of unlawfully traded specimens, as in Germany. Of course this does not preclude the institution of criminal action for serious offences.

Differences may be very great on the level of penalties. In some countries only small fines and short prison terms are possible. In others, fines can be very heavy and prison terms can be as long as five years (in Australia and Zimbabwe) or seven years (in Tanzania). In China, life imprisonment and even the death penalty can be imposed for serious crimes such as illegal trade in pandas or other highly endangered species.

It would seem, however, to be desirable to achieve a certain degree of harmonization of the penalties incurred since, unlawful trade in CITES specimens being international by its very nature, traders could be more easily deterred if they knew that they will be faced with the prospect of essentially similar penalties wherever they operate.

Another important factor is that the courts will often tend to be lenient when, in their subjective judgment, they believe that unlawful trade in certain species is a less serious offence than trade in others. Thus, recently, a court in the UK inflicted only a light sentence to a person who was found in possession of hundreds of unlawfully imported Appendix I orchids for the reason that severe penalties should be reserved for those who have committed more serious offences involving animals such as elephants and rhinoceros.

A possible solution could consist in establishing a minimum penalty that the courts would have no discretion to reduce. The law of Tanzania, for instance, provides for a minimum term of imprisonment of three years. Another possibility would be to vary

the penalties according to the Appendix in which the species concerned is listed (offences involving Appendix I species would be punished by more severe penalties than for those listed in Appendices II or III) and according to the nature and magnitude of the illegal trade. Thus, unlawful commercial transactions involving large numbers of Appendix II specimens should also be punished by severe penalties. Particularly high penalties should also be imposed in the case of second or multiple offences. Finally, offences committed by corporations, in those countries where this legal concept exists, should be punished, as it is done for instance in Australia and New Zealand, by more severe monetary penalties than those applicable to natural persons.

12.5 Confiscation

In addition to the imposition of monetary or prison penalties, legislation must provide, as required by Article VIII.l of the Convention, for the confiscation or return to the State of export of illegally traded specimens.

Confiscation may be a very effective penalty when the specimens concerned have a high market value. It has the additional advantage that it may often be imposed by an administrative decision on the part of the government department responsible for the enforcement of the legislation. Furthermore, it can be carried out when there is no person who can be charged with a criminal offence in the country concerned, for instance when the specimens have been abandoned or when the recipient is unknown, has disappeared or has moved out of the country.

There are considerable differences between the laws of the Parties as to which authorities, whether administrative or judicial, can order the confiscation of specimens, the respective powers of these authorities, and the procedures that they must follow. As these matters are closely connected with basic constitutional or general criminal law requirements, which may be very different from one country to another, it is impossible to propose rules which could be universally applicable. It may, however, be of some interest to make a short, and necessarily incomplete, review of the different systems which exist.

Confiscation may be imposed by a judgment rendered by a court of law, or by an order of an administrative authority, or, in certain cases can be effected automatically when certain conditions are fulfilled. In certain countries, such as Hong Kong, confiscation must always be ordered by a court. In others, such as Switzerland, specimens are confiscated by administrative decision. Most countries however, use the two systems in combination. In Germany, for instance, where an administrative or criminal offence has been committed, the competent authority, administrative or judicial as the case may be, has the power to order confiscation. In Singapore, the powers to confiscate are normally vested in the courts but where the importer or exporter of the specimens cannot be ascertained or where he is outside jurisdiction, the CITES Management Authority is empowered to confiscate the specimens. In the United States,

administrative forfeiture is only possible when the value of the specimen does not exceed US$ 100,000.

Confiscation by court order may be either mandatory under the law or left to the discretion of the court itself. Mandatory confiscation on conviction of the offender is required by the laws of Belgium, Hong Kong, New Zealand and Singapore. Most countries, however, prefer to leave this matter to the discretion of the courts. This is the case, for instance, in Denmark, France, Italy, the Netherlands and the United Kingdom.

In some countries confiscation may also be ordered in certain cases by a court in the absence of any conviction. In Australia, for instance, confiscation must be ordered when a person has not been tried for an offence involving CITES specimens, but the court is nonetheless satisfied beyond reasonable doubt that the person concerned committed the offence. In Hong Kong and Singapore, when a person prosecuted for an offence is acquitted, the court may nonetheless order the specimens concerned to be confiscated. In Hong Kong this provision also applies to cases where no prosecution has been brought for an offence involving specimens which have been previously seized. In this case, the Management Authority may apply to the court for a confiscation order and the court may, at its discretion, make that order or order the specimen to be returned to the person from whom it was seized or to its owner.

When confiscation may be carried out by an administrative authority, the law may also make confiscation mandatory when certain conditions are met or leave it to the discretion of the authority concerned. In Switzerland, for instance, the Management Authority must confiscate the specimen concerned where no CITES documentation can be produced, a certain time period has elapsed, and it is impossible to return the specimens to the shipper. In Germany, the competent administrative authorities may, at their discretion, confiscate unlawfully traded specimens provided an administrative offence has been committed.

In New Zealand, when an officer finds, in or on any ship or aircraft or at any port or aerodrome, any CITES specimen that is being traded other than in accordance with the Trade in Endangered Species Act or is not listed on the inward or outward report in respect of that ship or aircraft, the specimen shall be mandatorily forfeited.

Finally, in a few cases confiscation is automatic when certain conditions are fulfilled. In Australia, for example, when a specimen has been seized by an enforcement officer, the owner is entitled to bring an action against the Commonwealth on the grounds that the specimen was not used or otherwise involved in committing an offence. If the court finds that the specimen was so used it must order the specimen to be confiscated. If the action is discontinued by the owner, or if the owner does not bring an action and the specimen has not been returned to the owner within 60 days after the seizure, the specimens are automatically confiscated. The law of New Zealand provides that where ownership cannot be ascertained the specimen shall be forfeit to the Crown. It also states that if a specimen may die, rot, spoil or perish, the Management Authority may dispose of it as if it was forfeit to the Crown.

As much as possible, the law should provide for the confiscation by administrative decision of specimens without permits or without valid permits or where there is clear evidence of fraud.

Provision could also be made for the confiscation of specimens voluntarily abandoned by their owner, who signs a release to that effect and thus avoids prosecution.

In addition to the confiscation of specimens, many laws also provide for the confiscation of any goods, including containers, boxes, crates and even vehicles, vessels and aircraft, used or otherwise involved in committing the offence. This is, however, a matter which is usually left to the discretion of the courts or of the competent administrative authorities. Provisions along these lines may be found, for instance, in the laws of Australia, Germany and New Zealand. In the case of this latter country only containers, packing cases, crates, boxes or other forms of receptacles can be confiscated. The confiscation of these items is, however, mandatory on conviction of the offender.

12.6 Compounding

The legislation of many countries allows the authority responsible for the enforcement of CITES legislation to propose an extra-judicial settlement, also called compounding, to an offender. This possibility is normally provided under Customs legislation for Customs infractions and would, as a result, apply to CITES specimens wherever there has been a breach of that legislation. A few countries specifically provide for the possibility of compounding offences committed in violation of their legislation on trade in CITES specimens. For example, in Denmark, extra-judicial settlements may be made whereby the specimens concerned are confiscated, if they have been transported, possessed or traded in contravention of nature conservation legislation. Another is the legislation of Singapore, whereby the Management Authority may compound any offence committed under that law by collecting a certain sum from any person reasonably suspected of having committed the offence and by confiscating the specimen concerned. In the United States, a complete or partial settlement of an administrative penalty may be effected by the transfer to the federal government of property rights in specimens that are subject to forfeiture.

12.7 Disposal of confiscated specimens

Confiscated goods become the property of the State which can dispose of them as it thinks fit. Disposal procedures generally provide for the sale of the goods, usually at public auctions. It is clear, however, that the sale by the State of Appendix I specimens would go against the very spirit of the Convention and that special disposal rules are therefore required in this case. In addition, specific provisions are also necessary for the disposal of confiscated live animal and plant specimens. In this particular case, Article VIII.4 of the Convention provides for certain specific requirements. On the

other hand, the Convention contains no provisions on the disposal of dead specimens and of their parts and derivatives. The Conference of the Parties, however, has adopted a number of resolutions on these matters.

12.7.1 Live specimens

Article VIII.4 provides that when a living specimen is confiscated it shall be entrusted to a Management Authority of the State of confiscation which shall, after consultation with the State of export, return the specimen to that State at the expense of that State, or to a rescue centre or such other place as the Management Authority deems appropriate and consistent with the purposes of the Convention. Article VIII.5 defines a rescue centre as an institution designated by a Management Authority to look after the welfare of living specimens, particularly those that have been confiscated.

Resolution Conf. 3.14, which covers, *inter alia*, the disposal of Appendix I live specimens, recommends that specimens returned to their country of origin be either returned to the wild or transferred to a rescue centre or other appropriate place provided that they be used only for non-commercial scientific or educational purposes which will promote the survival of the species.

There are no specific recommendations from the Conference on confiscated live Appendix II or III specimens except on costs. This matter is dealt with in Resolution Conf. 4.18, which recommends that Parties having not done so endeavour to make legislative provisions to require the guilty importer and/or the carrier to meet the costs of confiscation, custody and returning live Appendix II specimens to their country of origin or export.

12.7.2 Dead specimens, and parts and derivatives

For Appendix I species, the Conference adopted Resolution Conf. 3.14, which recommends that Parties transfer confiscated dead specimens of such species only for *bona fide* scientific/educational or enforcement/identification purposes, and that they save in storage or destroy those excess specimens where transfer for these purposes is not practicable.

For Appendix II specimens, the Conference merely recommended in Resolution Conf. 4.18 that, as a general rule, confiscated parts and derivatives be disposed of in the best manner possible to benefit enforcement and administration of the Convention, and that steps be taken to ensure that the person responsible for the offence does not receive financial or other gain from the disposal.

12.7.3 Export of confiscated specimens

One of the basic rules of the Convention is that a re-export certificate can only be issued if a specimen has been imported into the State of re-export in accordance with the

provision of the Convention (Article III.4(a) for Appendix I species, and IV.5(a) for Appendix II species). It was, however, realised that if these provisions were taken to the letter they would preclude the return or re-export of illegally imported confiscated specimens. As a result, the Conference of the Parties, in Resolution Conf. 4.17, recommended that in such cases the specimens concerned be deemed to have been imported in accordance with the Convention. Similarly, with regard to Appendix II specimens which have been confiscated as a result of attempts to import or export them illegally and are subsequently sold by the Management Authority concerned, the Conference recommended that these specimens be deemed to have been obtained in accordance with the provisions of the Convention for the purpose of issuing export permits.

These recommendations need to be incorporated into national legislation to provide a legal basis for the export or re-export of confiscated specimens which would otherwise be prohibited under the terms of the Convention.

12.7.4 Implementation by Parties

Where national legislation contains provisions relating to the disposal of confiscated specimens, these are usually of a very general nature and do not, therefore, provide specific guidance to the Management Authorities concerned on how the specimens should be disposed of and disposal costs recovered.

Thus, the law of Nigeria merely reproduces the provisions of Articles VIII.4 and 5, and the laws of Hong Kong and Singapore simply provide that the Management Authority may dispose of the confiscated specimens as it thinks fit. The law of Australia states that specimens forfeited become the property of the Crown and shall be dealt with and disposed of in accordance with the discretion of the Management Authority. A specimen shall, however, not be dealt with in any way that would result in the specimen being an object of trade. In the United States, regulations specify that the Management Authority shall only dispose of confiscated specimens by the following particular means: return to the wild in the country of export or within the historic range of the species in a country which is a Party to CITES, after consultation with these countries; use by the Management Authority or transfer to another government agency for official use; donation or loan; sale but not if the specimen belongs to an Appendix I species; or destruction.

12.7.5 Recovery of costs

Article VIII.2 of the Convention provides that a Party may, where it deems it necessary, provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a specimen traded in violation of the measures taken in the application of the Convention, including therefore costs resulting from the seizure of unlawfully possessed or domestically traded specimens.

Certain Parties have included in their legislation provisions empowering competent authorities to recover all such costs and expenses from the offenders. Danish legislation, for example, authorizes these authorities to require that for specimens imported in violation of the CITES legislation, expenses incurred, including expenses for the return of the specimens to the country of export, be covered by the importer and the person for whom the import has taken place. The German law is particularly detailed and far reaching as it provides that costs incurred for the care, housing, transport, return or utilization of specimens shall be paid by the importers or exporters and that when the identity of those persons cannot be established, by the carriers or recipients when they were aware or should have been aware of the circumstances which led to seizure or forfeiture. German legislation is also, it would seem, the only one which takes into consideration the interests of the innocent owner of confiscated specimens or of third parties affected by the confiscation. The law provides that when forfeited specimens are sold the proceeds shall be paid to the owners if they can prove that, through no fault of their own, they were unaware of the circumstances that led to seizure or forfeiture. Likewise, third parties whose rights are extinguished by forfeiture shall receive compensation from the proceeds of the sale of the confiscated specimens provided they can produce the same proof.

12.8 The return of live specimens to the State of export or to the exporter

Article VIII. l(b) of the Convention requires Parties to take appropriate measures for the confiscation or return to the State of export of specimens traded in violation of the Convention. It provides, however, no guidance or criteria to assist Parties to make a choice between these two possibilities. The general feeling of the Conference, although there is no specific resolution addressing the matter, is that in such cases the specimen should in any event be seized and eventually confiscated, but should only be returned to the State of export subsequently when that State has specifically requested this and is prepared to meet the cost of the return.

A particular problem arises, however, in the case of live specimens, as it may be desirable to send them back to their country of origin for return to the wild. Article VIII.4(b) provides therefore, that where a live specimen is confiscated, the Management Authority may, after consultation with the State of export, return the specimen to that State at the expense of that State.

Resolution Conf. 3.14 addresses the problem of confiscated live Appendix I specimens and recommends that Parties make arrangements in accordance with Article VIII.4 to return such specimens to their country of origin for return to the wild, when it would be practical and beneficial to the species to do so.

With regard to plants, Resolution Conf. 5.14 recommends that exporting countries accept the return of seized plant specimens, provided they can be returned to the wild or, if this is not possible, use them as a stock for artificial propagation.

Resolution Conf. 7.6 addresses the problem of live animals of Appendix II or III species. It recommends that such specimens arriving in an importing country without a proper export or re-export permit be seized and confiscated or, if possible and if appropriate, be sent to the Management Authority of the exporting or re-exporting country or—if the Management Authority of the re-exporting country is not interested—to the Management Authority of the country of origin.

Whereas Article VIII.4(b) deals only with the return of live specimens after they have been confiscated, this Resolution provides for the possibility to return live specimens to the State of export or the State of origin when no confiscation has taken place. This is of course entirely in accordance with Article VIII.l(b) which allows Parties to chose between confiscation (which does not preclude the subsequent return of the specimens) and the return of the live specimens to the State of import when they have not been confiscated. This recommendation therefore adds little to Articles VIII.l.(b) and VIII.4(b) except that it allows importing Parties to return re-exported specimens to the Management Authority of the State of origin and not only to that of the country of re-export as the Convention provides.

The Resolution, however, also addresses another problem, namely the possibility of returning the specimens not to the Management Authority of any of the States concerned but to the exporter of the specimens. Although this eventuality is not mentioned in the Convention, there is nothing in Article VIII which precludes the Management Authority of the importing Party from allowing the importer to refuse acceptance of a shipment, thus forcing the transporter to carry the shipment back to the exporter or re-exporter, as the preamble to Resolution Conf. 7.6 clearly states. This may happen, for instance, when if he accepts the consignment there will be a risk that some or all the specimens concerned will be confiscated because of formal irregularities in the export permit or when the actual number of specimens in the consignment exceeds the number mentioned on the permit, or when there are Appendix II or III specimens in respect of which no export document can be produced. In such cases, it may be difficult to send the specimens back to the Management Authority of the State of export or re-export as it will generally not be prepared to pay for the cost of transport if the return of the specimen is merely the consequence of purely formal irregularities. As an alternative to confiscation, which in addition may not always be legally possible in such cases, and may be undesirable if it implies that the animals will have to be kept and cared for in the importing country, the Resolution recommends that the specimens be returned to the exporter or re-exporter at the expense of the transporter.

The Resolution, however, also recommends that this procedure be used only when there is no evidence or suspicion of fraud. It should, therefore, not be used when the Management Authority of the importing country establishes or suspects that a proper permit could not have been obtained, for instance because the specimens were acquired in contravention of the laws of their country of origin or of the State of re-export, or if it is not convinced that the specimens were legally in the possession of the exporter or re-exporter, or that the specimens will be returned to the country of export or re-export but will be re-directed to another country. The Resolution does not say what should be done with the specimens in these cases. It is, however, clear that they should be seized

and, as far as possible, confiscated. As confiscation, however, will generally not be possible on the basis of mere suspicions of fraud, the only solution is to make confiscation mandatory when there is an irregularity in the export permit or re-export certificate, and to provide for the return to the exporter of the specimens concerned at the discretion of the Management Authority of the State of import when the importer has agreed to refuse to acknowledge the shipment and no fraud can be proved.

The crux of the problem of the return of live specimens is the question of who is going to pay to meet the shipping costs. In the case of confiscated specimens, the answer is clear. It must be the exporting State, where that State has agreed to the return of the specimens. According to Article VIII.2 of the Convention, that State may, of course, claim from the exporter the reimbursement of these expenses provided it has adopted the necessary legislative provisions empowering it to do so.

On the other hand, the Convention provides no guidance whatsoever on who is to pay for the return of specimens that have not been confiscated.

Resolution Conf. 7.6, however, recommends that, when the importer refuses to acknowledge the shipment, live specimens of Appendix II or III animal species be returned to the exporter or re-exporter at the expense of the transporter, and eventually the exporter or re-exporter, unless the Management Authority decides that the return of the specimens is not advisable in the circumstances of the case.

The translation of these recommendations into legal provisions may not be easy, as confiscation may not generally be ordered on the basis of mere suspicions, and the liability of the transporter for the carrying of specimens accompanied by improper documentation (clearly if there is no export document the transporter should be obliged to refuse the consignment) difficult to establish, if it can show that it had no possibility to determine that the document was improper.

On the other hand, the method has many advantages, which are clearly stated in Doc. 7.47. In particular, it may serve to educate airlines and other transporters not to accept to carry specimens if no proper documentation can be presented, and to educate exporters to provide the documents required under the Convention.

Legislation should therefore provide that live Appendix II and III animal and plant specimens may be returned to the exporter or re-exporter of the specimens or for their confiscation at the discretion of the importing country.

A possible legislative solution to the confiscation problem is found in the legislation of Australia which provides that, when the Minister considers that a live animal or plant specimen which has been seized should be returned to its natural habitat, destroyed or otherwise dealt with, he or she can do so without a judicial confiscation order. The owner of the specimen is, however, entitled to bring on action against the government for the recovery of the market value of the specimen, on the ground that the specimen was not used in committing an offence against the Act. The court may find that the owner committed an offence only if he or she has been convicted of the offence or if

it is satisfied beyond reasonable doubt that he or she committed the offence. This is, however, only a partial solution, as it does not take into consideration violations of the law of the country of export or re-export. Ideally, therefore, a permit which contravenes these laws, or has been issued in violation of these laws, should be considered as an invalid permit by the law of the country of import. This would then allow for the seizure and return of the specimens considered under this provision. The problem, however, would not arise in Australia since all imports of wildlife are subject to an import permit (see 13.5.1) which would probably not be granted if there are doubts on the legality of the shipment.

With regard to costs, it would seem that legislation should provide for the liability of the importer, if his guilt can be established, and of the transporter, if there is no evidence of fraud on the part of the importer, and if he or she refuses to acknowledge the shipment. Provision should also be made to allow the transporter to bring an action against the exporter for the recovery of the sums concerned and any additional damages that it has suffered as a result of the exporter's conduct.

Resolution Conf. 7.6, however, only addresses the specific matter of the return to the exporter of live specimens of Appendix II or III animal species when a proper export permit cannot be produced but when there is no evidence of fraud.

In most other cases, for instance of Appendix I specimens and parts and derivatives of Appendix II or III specimens, confiscation should, it would seem, be the rule where no valid documents can be presented or where apparently valid documents have been issued in violation of the laws of the country of export or re-export and of the provisions of CITES.

The fact that an apparently valid permit is actually a fraudulent one may, however, often be difficult to prove and confiscation be impossible on the basis of a simple suspicion. As a result, importing States are often faced with a dilemma: they either have to accept suspected unlawful shipments or refuse to accept them and, therefore, run the risk that the specimens will be subsequently admitted into a less demanding country.

The problem lies at the very heart of the difficulties encountered in the implementation of CITES. It can only be solved by the enactment by Parties of import control measures that are stricter than those required by the Convention, following Article XIV.l.

13 Acceptance and refusal of foreign permits

13.1 The general problem

National legislation relating to CITES permits or certificates normally only applies to documents issued by the national Management Authorities. With regard to foreign permits, national legislation, as well as the Convention, generally only require that they be presented at the time of import (except of course for Appendix I species for which the import permit must be presented in order to obtain the export permit). It is therefore up to the exporting State to ensure that exported specimens are accompanied by valid export permits and that any condition attached to a permit is complied with.

The basic philosophy of CITES, however, has been from the outset that the most effective way to control illegal trade was through the institution of a dual control system. It would seem, therefore, that importing States should be able not only to check the existence of foreign CITES permits but also their validity. This was recognized, as we have seen, on several occasions by the Conference of the Parties, which has adopted a number of resolutions recommending to Parties not to accept certain invalid permits such as, for instance, permits issued by a non-competent authority (Conf. 3.9) or permits that have been altered, modified or crossed out (Conf. 8.5), or retrospective permits (Conf. 6.6).

In a few cases, the Conference went much further in its recommendations. For example, Resolution Conf. 6.4 on the implementation of the Convention in Bolivia urges all Parties to prohibit the importation of wildlife illegally exported from neighbouring countries. It also urges that countries importing caiman skins from Bolivia, as an additional guarantee that the shipment was exported legally, allow only the entry of finished skins or products manufactured thereof that are accompanied by a certificate of a security company and that are shipped by one of the members of the *Asociación de Industriales de Cueros de Saurios,* a trade association of reptile skin processors. Likewise, Resolution Conf. 6.21 recommends that any document issued in relation to specimens of Appendix I species bred in captivity for commercial purposes mention the individual marks of the specimens and that such documents not be accepted by Parties for specimens which are not marked or where the individual marks are not contained in the documents concerned. There are several other resolutions containing recommendations along those lines.

All these resolutions ask Parties not only to take stricter domestic measures pursuant to Article XIV.l of the Convention but to pass a judgment on the validity of foreign permits and to refuse these permits, and therefore the imports, when in their opinion the foreign permits are invalid. This, however, cannot be done

without a firm legal basis empowering Management Authorities to do so. Where such a basis does not exist, as is most often the case, the courts have generally decided in favour of the importers.

On the other hand, an analysis of the report of the CITES Secretariat on alleged infractions submitted to the Conference of the Parties in 1989 clearly shows that there are a number of very serious problems arising from the fact that it is often impossible in law to challenge the validity of genuine permits even if they accompany specimens of illegal origin.

Neither the Convention nor the resolutions adopted by the Conference provide any real solution to these problems. A few Parties, however, have legislation going well beyond the requirements of the Convention and which go a long way towards solving at least some of the most important problems. It would be useful to review these problems and laws.

13.2 Invalid documents

Some documents are manifestly invalid. These include false and falsified documents; permits with no security stamps or with uncancelled or false security stamps; documents issued or signed by a non-competent authority or official; permits whose period of validity has expired; and permits which do not correspond to the species or the number or type of specimens actually presented for import.

In all these cases importing countries should consider that there is in fact no export permit and therefore the conditions of the Convention have not been met. They should be able to seize and confiscate specimens presented with such permits.

In order to dispel all possible doubts as to the legality of such actions, national legislation should specifically mention that only valid export permits from exporting countries shall be accepted. The legislation of the United States, it will be remembered, provides that clearance of imported specimens may be refused if there are reasonable grounds to believe that the correct identity of the specimens has not been established or if the permit or other document required for clearance is not available, is not currently valid, has been suspended or revoked, or is not authentic. In addition, only CITES permits and certificates signed by a Management Authority will be accepted as valid foreign documents from countries that are Parties to the Convention, and equivalent documents signed by officials responsible for authorizing the export of the specimens from non-Party States.

13.3 Valid documents issued in violation of the law of the exporting country

A problem which is more difficult to resolve is that of permits which have been issued

in violation of the laws of the exporting country, but are otherwise valid. This will generally happen with permits allowing the export of specimens of protected species or of species in which trade is prohibited, or when certain conditions imposed by the country of export have not been complied with (an example would be the conditions for the export of caiman skins from Bolivia mentioned earlier). It also concerns permits which do not meet the Convention requirement that the Management Authority of the exporting country must be satisfied that the specimens were not obtained in contravention of the laws of that State. In all these cases, as there is no violation of the law of the importing country, there is usually no legal basis upon which the import of the specimen can be refused.

It would seem, at a minimum, that legislation should provide that a permit issued in violation of the law of an exporting country is invalid when presented in an importing country. It should also be invalid if any condition which may be attached to it has not been complied with.

Another solution may lie in a generalization of the system used in the United States, which makes it illegal to import into the country wildlife taken, traded or exported in violation of a foreign law. As a result, illegal exports under the law of an exporting country become *ipso facto* illegal imports under United States law, and seizure and confiscation may therefore be carried out legally.

This system was instituted by an Act of Congress, called the Lacey Act. Under this Act, as amended in 1981, it is prohibited to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce, any wild animals, including animals bred in captivity, taken, possessed, transported or sold in violation of any foreign law. This provision, however, does not apply to plants. Specimens imported or otherwise traded in contravention of this provision are subject to forfeiture. This is a strict liability penalty and it is not necessary, therefore, to prove that the offender acted intentionally or that he knew he was violating a foreign law.

In addition, it will be recalled that clearance of imported specimens may be refused when a federal law or regulation has been violated. As the Lacey Act is a federal law, this means that clearance may be refused (at least for animal specimens) when there has been a violation of a foreign law.

13.4 Other problems

Another problem which often arises is that export permits are issued for species which do not occur in the wild in the country of export. In this case, of course, the proper document should be a re-export certificate since it is obvious that the specimens concerned must have been imported into that country at some time in the past. Moreover, under the terms of Resolutions Conf. 3.6 and 8.5, Parties should indicate on the re-export certificate the country of origin of the specimens, the number and date of

issue of the original export permit and the country of last re-export (if any) together with the number and date of issue of the corresponding re-export certificate.

These rules could be enforced by the means of a provision in national legislation requiring that in such cases, if no proper re-export permit is presented (i.e. a re-export permit containing the information requested by Resolutions Conf. 3.6 and 8.5 or, at least, a justification for the omission of this data), the specimen be considered as not being accompanied by a valid permit and therefore be subject to seizure and confiscation.

Admittedly, enforcement personnel at the border will generally not be familiar with the range of all CITES species. This may, however, be remedied to a considerable extent by training and by the provision of a list of Range States for the species which are the most commonly traded. In doubtful cases, clearance of the specimens could be held pending the advice of the competent Scientific Authority.

The situation is, however, more complex when large numbers of specimens are exported, with a valid export permit, from a country where the species concerned is known to exist only in small numbers. In such a case it is clear that either the export is detrimental to the survival of that species or the specimens were fraudulently imported from another country (if they had been imported legally there would be no reason not to issue a proper re-export certificate). This may, however, be difficult to prove and the importing country is generally powerless to refuse the import without appropriate legislation to do so.

A similar situation occurs when pre-Convention certificates have been issued in bad faith or on the basis of false statements. The same applies to certificates that animals or plants have been bred in captivity or artificially propagated when this is not so. Here again fraud may be difficult to prove. There have been, however, a few cases reported where scientists in importing countries were able to establish that plants declared as artificially propagated had in fact been collected in the wild[1]. In such cases seizure and confiscation could be carried out on the grounds that the specimens presented for import do not correspond to the permit or certificate, provided that the law of the importing country clearly allows it. This will, however, be possible only when the fact that animals or plants have been taken from the wild can be proved to the satisfaction of any court which may be called to decide on the matter. For specimens that are fraudulently presented for import as pre-Convention specimens, the fact that the certificate is untruthful will generally be difficult to prove.

Finally, as mentioned earlier, there will also be cases where a valid export permit has been granted in spite of the fact that the export is or may be detrimental to the survival of the species. This will happen when the Scientific Authority of the country of export has advised, perhaps on the basis of false or incomplete information, that the export will not have such a consequence, or the Management Authority has not

1 See report from the Secretariat on alleged infractions presented to the 7th meeting of the Conference of the Parties in 1989, Doc 7.20.

followed the advice of the Scientific Authority (although this is a Convention requirement, very few Parties have legislation making the advice of the Scientific Authority binding upon the Management Authority), or when this advice has not even been requested or when there is no Scientific Authority established for CITES.

In all these cases, importing countries have no legal means to challenge the legality of the export permits issued by the exporting country, without specific legal provisions to do so. The simplest of such provisions it to require an import permit at the discretion of the Management Authority when there are doubts as to the validity of the documents, the truth of their content, or the status of the species concerned.

13.5 The use of import permits

A few Parties have instituted a system of import permits for Appendix II or III species. Examples are Australia, Hong Kong, Singapore and Switzerland. New Zealand requires import permits when an export permit, or re-export certificate, is not required by the relevant authority of the State of export, that is to say, in principle, when the exporting country is not a Party to CITES. In addition, the European Community has instituted an import permit requirement for all CITES species and Germany has extended this requirement to certain other species. Austria requires an import permit for live Appendix II specimens.

A short description of the import permit systems used for Appendix II or III species in Australia and the European Community follows.

13.5.1 Australia

Under Australian law, an import permit may only be granted for specimens of Appendix II species if (a) the country of export has a Management Authority (if it is a Party to the Convention), or has a competent authority within the meaning of Article X of the Convention to issue export permits for wildlife specimens (if it is not a Party); (b) if an export permit has been issued by that authority for the specimen concerned; and (c) the specimen was taken in accordance with a management programme approved by Australia or was derived from a specimen so taken.

Approved management programmes are declared by the Minister in charge of Wildlife by statutory instrument. There are, however, a certain number of conditions which must be met for a management programme to be approved. There must be available to the Scientific Authority sufficient information concerning each species subject to the management programme, and the role of that species in the ecosystems in which it occurs, to enable the Authority to evaluate the programme. The programme must contain measures to ensure that the taking in the wild of any specimen will not be detrimental to the survival of the species, will be carried out at minimal risk to the continuing role of that species in the ecosystems in which it occurs, and is not likely

to cause irreversible changes to, or long-term deleterious effects on, the species or its habitat. Finally, the management programme must provide for adequate periodic monitoring and assessment of the effects of the taking of specimens on the species to which they belong, their habitat, and such other species as are specified by the Scientific Authority as likely to be affected by that taking. No exceptions are provided for pre-Convention specimens. With regard to captive-bred and artificially propagated specimens, the requirement for an approved management programme falls. But all the conditions relating to the breeding in captivity or artificial propagation must be met and the import permit cannot, in any event, be issued until the Scientific Authority has advised that it is satisfied that the specimen is, or is derived from, a live animal or plant that was bred in captivity or artificially propagated.

13.5.2 The European Community (EC)

The EC Regulation on the implementation of CITES in the European Community establishes a general requirement for an import permit for all CITES species.

For species included in Appendices II and III the following rules apply. Species listed in Annex C.1 to the Regulation are treated as if they were included in CITES Appendix I and the same import permit requirements as for species listed in that appendix therefore apply. For species included in Annex C.2 to the Regulation, stringent conditions apply to the granting of import permits. Import permits may only be issued where:

- It is clear, or where the applicant presents trustworthy evidence, that the capture or collection of the specimen in the wild will not have a harmful effect on the conservation of species (i.e. of species in general, not only the species for which the permit is requested) or on the extent of the territory occupied by the populations in question of the species;

- The applicant provides proof by means of documents issued by the competent authorities of the country of origin that the specimen has been obtained in accordance with the legislation on protection of the species concerned;

- In the case of the import of a living animal, the applicant provides evidence that the intended recipient possesses adequate facilities suitable for accommodating the species and suited to its behaviour and that the animal will be properly cared for;

- That there are no other requirements relating to the conservation of the species which militate against the issue of an import permit.

The permits may, if need be, contain additional stipulations to ensure compliance with these conditions.

For other Appendix II or III species, the Regulation does not establish any particular conditions for the issue of import permits. Member States may replace import permits

by import certificates, which must be endorsed by the Customs service and certify that the formalities required under the Convention have been fulfilled.

Under the Regulation, EC Member States are entitled in certain cases to take stricter measures for the conservation of species than the ones laid down in that instrument, and some of them have done so. Germany, in particular, has laid down more detailed requirements for granting import permits for certain species. These requirements are, *inter alia*, as follows: the animals or plants concerned must have been taken from the wild, bred in captivity or artificially propagated in accordance with relevant legal provisions; the taking of specimens in the wild must not be detrimental to the survival and distribution of the population of species concerned; the export from the State of origin must be carried out in accordance with relevant national provisions.

These requirements apply to the issue of import permits not only for CITES Appendix I and EC Regulation Annexes C.1 and C.2 species but to a certain number of Appendix II and III species as well (and also to many non-CITES species).

13.5.3 The advantages of an import permit system

This analysis of national legislation relating to imports of Appendix II and III species has highlighted two kinds of possible solutions.

The United States system whereby offences committed in other countries in violation of those countries' laws can be punished under American federal legislation, coupled with the requirement for a special declaration for the import of animal and plant specimens, certainly has its value. It has, however, a number of disadvantages. By its very nature, it can only apply to illegal exports, or when it can be proved that a specimen has been illegally taken or otherwise obtained. This makes it impossible to exercise any control on the import of legally obtained or exported specimens, unless the species is listed as Endangered or Threatened under the Endangered Species Act. As many Parties (and non-Parties) only regulate the export of certain of their indigenous species, it will often happen, especially in cases of re-exports, that the export will be legal and the illegality of the taking impossible to prove. In addition, the system can only operate, at the earliest, at the time the specimens are presented for import and, therefore, only result in the confiscation of the specimens or in their return to the State of export. Therefore it cannot be used to prevent proposed unlawful or undesirable exports from other countries before the specimens are effectively shipped.

On the other hand, the import permit system would seem to have many advantages. It extends the dual permit system established by CITES for Appendix I species, which works reasonably well, to other species covered by the Convention (and to any other species that an importing country may wish to bring under the system) by providing a legal basis and rules empowering the Management Authority of the State of import to refuse imports from other countries without running the risk of being accused of passing a judgment on a lawful decision taken by a sovereign State. This may be particularly useful for trade with non-Parties.

An import permit system may make it mandatory for the Management Authority to refuse to grant an export permit if certain conditions are not met. This would apply, for instance, when the specimens proposed for import have been taken from the wild or otherwise obtained, or would be exported, in contravention of the laws of the exporting country. But it may also apply when the Scientific Authority is not satisfied that the proposed import will not be detrimental to the survival of the species.

It may leave a considerable degree of discretion to the Management Authority to grant a permit in other cases, depending on scientific advice.

An import permit system may also be used to require, as a condition to the permit, that live specimens be shipped according to approved guidelines or regulations.

Finally, it may reverse the onus of proof making it a requirement for the import permit applicant to prove that the specimens were lawfully obtained or that the import will not be detrimental to the survival of the species.

It is important that the Management Authority is given adequate power by law to be able to refuse to issue permits, so that such decisions can be upheld if challenged in court and not considered arbitrary. Thus, the courts in certain EC Member countries have upheld decisions to refuse to issue import permits based on the EC Regulation and national legislation. The *Conseil d'Etat,* the highest French administrative court, ruled recently that a decision to refuse an import permit for some parrots was valid and that the Management Authority not only had the right but the duty not to issue the permit because the proof that the specimens had been legally taken could not be produced. In another case, in Germany, a court found that since the conservation status of the species in the country of origin was unknown, the decision of the Management Authority not to issue a permit was justified because it could not be certain that the import would not be detrimental to the survival of the species.

Of course the system also has some disadvantages. The most important one is that it requires, to be able to operate properly, trained staff and adequate financial means. There is also a need for Management Authorities to be well informed of the species conservation legislation of all the countries in the world in order to be able to ensure that illegally taken or traded specimens are not proposed for import. The same problem, of course, also arises in the enforcement of the American Lacey Act.

One possible solution to this problem consists in calling upon the services of consular officers abroad to certify the legality of the export. The Tariff Act of the United States of 1930 provides that if the laws of a foreign country restrict the taking or export of any wild mammal, bird, or parts or products thereof, no such specimen may be introduced into the United States without a certification from the United States Consul at the place of export that it was not acquired or exported in violation of these laws. The law of Colombia (decree of 2 October 1981 on Wildlife) requires that any export permit or certificate issued by a Management Authority of a Party to CITES (or by an equivalent authority for non-Parties) be certified by a Colombian Consul in the country of export.

Another possibility is to develop and regularly update an international database of legislation on the conservation of wild fauna and flora in force in every country, such as the one made by IUCN. In Resolution Conf. 2.19, the Parties recognized that information on current national and international legislation on species of wild fauna and flora is important for the effective implementation of the Convention, noted the work of the IUCN Environmental Law Centre in this respect and requested that the work be continued.

Finally, with an import permit system, it becomes possible to avoid situations where specimens are presented at the border for import and sent back to the shipper because the importing State does not want to accept them and they cannot be seized. This is a very unsatisfactory situation, especially for live specimens. It can be avoided by providing in the law that no specimen will be accepted for import unless accompanied by an import permit issued prior to the presentation of the specimen at the port of entry, just like a traveller needs to obtain a visa before starting his journey. The transporter could be held penally and civilly liable if this requirement is not met. Specimens presented for import without an import permit would be liable to seizure and confiscation.

Of course it is also possible, and this may well be the most practical solution, to use the import permit and declaration systems in a complementary way for the import of Appendix II and III species. It would seem that there are not yet any examples of legislation in force where these two systems are used in this way, but this may change when the present EC Regulation on CITES implementation is replaced by the new draft which has now been prepared.

If adopted in its present form, this new instrument will require import permits for the introduction into the Community of CITES Appendix II species, as well as of certain Appendix III species and non-CITES species to be selected on the basis of certain criteria, including their vulnerability to international trade. For all other Appendix III species and many non-CITES species, including all wild mammals, birds, reptiles and amphibians, and all live marine fish not listed in the other annexes to the Regulation, an import declaration will be required. This declaration will be made by the importer or his agent or representative, at the time of the introduction into the Community, on a form prescribed by the European Commission. The making of a false import declaration will constitute an offence.

14 Reports

Article VIII.6 and 7 of the Convention requires each Party to maintain records of trade in specimens of CITES-listed species and to transmit annual reports summarizing that information to the CITES Secretariat. They also require Parties to submit biennial reports on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention.

Many Parties, however, fail to comply with these requirements, as was noted by Resolution Conf. 8.7.

It would assist in the submission of these reports if their preparation, with a suitable deadline, was listed by the law as one of the duties of the Management Authority.

15 Financial matters

As the legislation and practice of the Parties differ widely as to the possibility of securing an independent source of revenue to assist Management and Scientific Authorities to carry out their functions, it is clearly not possible to make universally applicable proposals.

Parties may, however, consider the possibility of inserting into their legislation provisions whereby certain financial resources would be allocated each year to the budget of those Authorities for the specific purpose of implementing CITES.

These could include: permit and certificate application and issuing fees, licence and registration fees, the proceeds of fines paid for violation of the Act or regulations, and the proceeds of the sale of confiscated specimens.

Special wildlife conservation accounts or funds, supplied by special taxes, fines collected from wildlife legislation offenders, permit fees or other sources, have been established in a certain number of countries. Thus, in the United States, the Migratory Bird Conservation Fund is supplied by the proceeds of the sale of duck stamps to hunters; in Guatemala, fines for violation of wildlife legislation are to be paid into a special account and must be exclusively devoted to conservation; and in Sri Lanka, half of the amount of such fines may be paid, on an order of the court, to a Wildlife Preservation Fund.

None of these systems specifically addresses the implementation of CITES, although in Guatemala as in Sri Lanka, there is nothing that seems to preclude the use of the funds concerned to finance the operations of the Management and Scientific Authorities.

Under the law of Togo, the proceeds from the sale of CITES security stamps shall be paid into a special account to be used for poaching control and to control the movements of forest products.

It is of particular importance that some system be established to provide for a continuing financing of the Scientific and Management Authorities, as otherwise they may be unable to perform the very important functions required of them under the Convention.

PART II

GUIDELINES FOR THE DEVELOPMENT OF CITES IMPLEMENTATION LEGISLATION

Introduction

The implementation of CITES is very complex. Yet, if the objectives of the Convention are to be effectively achieved, appropriate and comprehensive legislation must be enacted by all Parties, and there are still many which have not yet done so. To assist these Parties, and new Parties to the Convention, in the development of such legislation, the following Guidelines summarize the most important elements that should be addressed.

1 The need for legislation

CITES implementation legislation should be enacted as soon as possible by all Parties that have not yet done so. This should be effected by means of an Act of Parliament or equivalent instrument providing for essential requirements which should then be supplemented by detailed regulations.

2 General considerations

At least three techniques can be used for the enactment of basic legislation essential for the implementation of CITES.

a) A provision may be inserted into the Wildlife Act prohibiting the import, export and, preferably also, the possession of and domestic trade in all wild species, or in any species listed by regulations, except under a permit.

   All other matters may then be left to regulations. This technique is used, for instance, by Indonesia where the export of any wildlife is subject to an export permit.

b) The CITES ratification Act, or any other relevant Act such as the Wildlife Act, may contain basic provisions prohibiting any action in contravention of the Convention provisions in relation to any of the species listed in the Convention appendices. This method has been used, for instance, by Belgium in its CITES ratification Act and by Switzerland through a provision of its Animal Welfare Act of 1978.

   This latter Act empowers the Swiss federal government to prohibit or otherwise regulate the import, export and transit of any wild animal species and lays down

special penalties for violations of the Convention provisions. All other matters are dealt with by regulations. It is also possible to use legislation regulating foreign trade when such legislation empowers the government to control the import and export of any kind of goods. In such cases, regulations made under the main Act for the specific purpose of implementing CITES may be all that is needed. This method is used by Zimbabwe where very comprehensive regulations were made under the Control of Goods Act.

c) The third possible technique consists in enacting a separate Act dealing exclusively with international trade in wild species. This is what has been done, for instance, by Australia and Singapore.

d) Any of these techniques may be adequate to implement CITES effectively, provided the basic Act contains a certain number of essential provisions prohibiting the import or export of specimens in contravention of the Convention, controlling domestic trade in CITES specimens, designating enforcement officers and specifying their powers, establishing appropriate penalties and empowering the Government or a designated authority to make regulations for the implementation of the Act.

e) It would seem, however, that to give CITES a better visibility and publicity, and because of the many aspects which are specific to international trade in wild fauna and flora, it would be better, whenever possible, to implement the Convention through a separate piece of legislation.

f) The proposals that follow, therefore, relate to the drafting of a separate Act and regulations addressing specifically the implementation of CITES.

3 Field of application

3.1 Species

a) The Act must apply to all animal and plant species listed in all three CITES appendices (except for species on which the Party concerned has entered a reservation).

b) For that purpose, the Act may merely refer to the Convention appendices themselves. In such a case it should specify that it becomes automatically applicable to any amendment to the Convention appendices as soon as that amendment has come into force. The Act should also require that all amendments to the Convention appendices be published in the Official Gazette together with the date of their entry into force.

c) Alternatively, the list of CITES species may be contained in a schedule or annex

to the Act, or in separate regulations. In such a case, separate lists should be made to correspond to each CITES appendix.

i) Whether in a schedule to the Act or in separate regulations, the lists should be capable of being amended by regulations.

ii) The Act should make it an obligation for the competent authority, as soon as an amendment to the CITES appendices has been adopted by the Conference of the Parties, to make corresponding amendments to the schedules or annexes to the Act or to the list of species contained in the regulations, as the case may be.

iii) Appendix I species on which the Party concerned has entered a reservation should be listed in the schedule or regulations as if they were listed in CITES Appendix II.

(iv) The scientific nomenclature used to list species names should be the same as in the CITES Appendices. Where changes of nomenclature are made to CITES listings, the list in the schedules or regulations should be amended accordingly.

v) The Act should empower the competent authority to list any CITES Appendix II or III species in that part of the schedule or regulation corresponding to CITES Appendix I and to list CITES Appendix III species in that part of the schedule or regulation corresponding to Appendix II.

3.2 Specimens

a) The Act should contain a definition of the term "specimen" which should include live and dead animals and plants and any readily recognizable parts or derivatives thereof.

b) The regulations should expand upon this definition to specify, according to Resolution Conf. 5.9, that such parts or derivatives include all specimens which appear from an accompanying document, the packaging or a mark or label, or from any other circumstance to be parts or derivatives of animals or plants of species listed in the CITES appendices, unless they are specifically exempted. These exemptions should be listed. In addition, the regulations could list certain specific parts or derivatives which are commonly traded, provided it is made clear that the list is not exhaustive.

3.3 Transactions

a) The Act should define export, re-export and introduction from the sea in the same terms as the Convention.

b) Import should be defined as the introduction of a specimen into the national territory under any Customs procedure other than transit and trans-shipment.

c) Transit and trans-shipment should be defined according to Resolution Conf. 4.10, as those situations in which a specimen is in the process of shipment to a named consignee in another country and that any interruption in the movement arises only from the arrangements necessitated by that form of traffic. Transit should be understood as including those cases where the specimens remain at all times in the aircraft, ship or other means of transport in which they were brought in.

4 Management and Scientific Authorities

In view of the essential role of these two bodies for the implementation of the Convention, their mode of appointment, functions and powers should be clearly specified, preferably in the Act itself.

The Management Authority should be the body designated to grant the permits and certificates required under the Convention.

The Scientific Authority should be an independent scientific body designated to advise the Management Authority in all matters for which this advice is required by the Convention.

ft should, in particular, be entrusted with the monitoring of the population status of CITES-listed species in the country concerned and it should have a clear duty, laid down in the law, to monitor the exports of such species and to advise the Management Authority of the measures which should be taken, including the establishment of quotas, to limit the grant of export permits when the population status of a species so requires.

5 Permit requirements

At a rninimum, the conditions required for the issuing of permits should be those laid down by the Convention. The Act should establish a prohibition to import, introduce from the sea, export or re-export any specimen of a listed species otherwise than under a valid permit, issued in conformity with the conditions laid down in Articles III, IV and V of CITES.

Of particular importance are a number of requirements which are often omitted from national implementation legislation, such as the need for the Management Authority of the State of export of an Appendix I specimen to be satisfied that an import permit

has been granted before it issues an export permit, and the obligation for that Management Authority not to issue an export permit for specimens of a species listed in Appendix I or II when the Scientific Authority has advised that the export will be detrimental to the survival of that species.

The law should also provide that valid CITES documentation should also be presented for specimens in transit with or without trans-shipment.

With regard to trade with States which are not Parties to CITES, the law should make it clear that comparable documentation is required and that such documentation must substantially conform with the requirements of the Convention.

6 Form and validity of permits and certificates

a) General provisions, preferably to be included in the Act, include the following:

   i) Permits and certificates must be in the form prescribed by regulations. Conditions for their issue, validity and use will also be determined by regulations.

   ii) The Management Authority is empowered to attach to any permit any condition that it may think fit.

   iii) General conditions may also be attached to permits by regulations.

   iv) Permits and certificates of foreign countries will only be recognized if they conform with the prescriptions of the Convention and with regulations made under the Act.

   v) National and foreign permits and certificates which do not conform with the prescriptions of the Convention, of the Act, or of the regulations made thereunder, or with any of the conditions attached to them, shall be considered as invalid.

b) Regulations should address the following points:

   i) Export permits and re-export certificates should be valid for import purposes only if presented within six months of their date of issue. The validity of import permits should not exceed twelve months.

   ii) A separate permit or certificate must be required for each consignment.

   iii) Permits must not be transferable.

iv) Used permits are to be surrendered to the Customs office concerned at the time of import or export and transmitted by the Customs to the Management Authority.

v) Unused permits must be returned to the issuing authority.

vi) The Management Authority must be empowered to require from permit applicants and from permit holders any information it may need.

vii) The Management Authority may charge a fee for the processing of permit applications and the issue of permits.

viii) The Management Authority should not have the right to issue retrospective permits in respect of Appendix I specimens. For Appendix II or III specimens, retrospective permits should only be issued in accordance with the terms of Resolution Conf. 6.6, that is to say that retrospective permits should only be issued when the Management Authority of the two countries involved in the transaction are satisfied that the irregularities are not attributable to the exporter or importer, and when the export and import of the specimen concerned is otherwise in compliance with the Convention and the relevant legislation of the two countries concerned.

ix) A general condition should be attached to all export permits and re-export certificates issued for the export or re-export of live specimens. The condition should be that permit holders are required to prepare and ship such specimens in accordance with the most recent provisions of the IATA Live Animals Regulations for Transport by Air, and the CITES Guidelines for Transport of Live Specimens by Marine or Terrestrial Shipments.

7 Revocation, modification and suspension of permits

a) The Management Authority must be empowered to amend or revoke permits or certificates, at least in the following cases:

i) Where the permittee has obtained the permit or certificate on the basis of false or misleading information;

ii) Where he or she has acted in contravention of the Act, the regulations or any condition, whether general or specific, attached to the permit or certificate;

iii) Where changes in circumstances have occurred which are such that the permit or certificate would not have been issued, had the circumstances been known at the time of issuing;

iv) Where a species has been transferred from Appendix II or III to Appendix I, and where the permit or certificate was issued before the transfer became effective.

b) The Management Authority should be empowered to suspend permits or certificates for an indefinite duration or for a specified period of time. It should, in particular, be empowered to suspend a permit or certificate if the permittee has not complied with the condition attached thereto, or with any law or regulations governing the permitted activity. The suspension of a permit or certificate should not preclude its revocation.

c) The Management Authority or another competent authority, including the courts, should be empowered to disqualify a person, temporarily or permanently, from obtaining a permit or certificate.

Disqualifying factors should include a conviction for violation of the Act or the regulations or of other wildlife legislation, the revocation of a permit or certificate, and non-compliance with certain permit conditions.

d) The Act should provide for the possibility for aggrieved persons to appeal against the decision of the Management Authority relating to the issue of permits or certificates, conditions attached to permits or certificates, refusal to issue permits or certificates, amendment, suspension or revocation of permits and disqualification of permittees.

8 Exceptions to permit requirements

8.1 General considerations

a) The Convention allows only a limited number of exceptions. No other exceptions can, therefore, be allowed by national legislation.

b) Parties may, if they wish, under Article XIV. 1 of the Convention, decide not to allow any or all of the exceptions authorized by the Convention, or to provide for more restrictive conditions to the use of these exceptions, if they consider that this is necessary to strengthen controls on trade in CITES specimens or to simplify administrative procedures.

c) As the way exceptions are to be interpreted and applied has been, and most likely will continue to be, the subject of resolutions of the Conference of the Parties, it would be preferable merely to mention the exceptions in the Act and to refer all matters of detail, including definitions, to the regulations, for easy amendment when new resolutions are adopted by the Conference.

8.2 Pre-Convention specimens

8.2.1 Definition

The definition of Resolution Conf. 5.11 should be used. According to that Resolution, a pre-Convention specimen is a specimen that was acquired before the Convention entered into force for the Party concerned in respect of the species concerned. The date of acquisition is defined for live and dead animals and plants taken from the wild as the date of their initial removal from their habitat, and for parts and derivatives, if the date on which the specimen from which they have been derived has been taken from the wild cannot be established, the date of their introduction to personal possession.

8.2.2 Export of pre-Convention specimens

The export of pre-Convention specimens must be prohibited except under a pre-Convention certificate issued by the Management Authority.

No pre-Convention certificate should be issued unless the Management Authority is satisfied that the specimen concerned is a pre-Convention specimen in the sense of the definition in Resolution Conf. 5.11.

For that purpose, pre-Convention specimens should be registered with the Management Authority within a certain time period after the date on which the Convention becomes applicable to the species concerned.

The competent authority should be empowered to order that registered pre-Convention specimens be marked.

The Management Authority should be empowered to revoke the registration of specimens and pre-Convention certificates when they have been obtained by false or misleading information.

8.2.3 Re-export of pre-Convention specimens

The re-export of pre-Convention specimens should be prohibited except under a pre-Convention certificate issued by the Management Authority.

No pre-Convention certificate should be issued unless the Management Authority is satisfied that the specimen is a pre-Convention specimen in the sense of the definition and, in addition, is likewise a pre-Convention specimen in respect of the country of origin of the specimen. It must, therefore, have been acquired in the country of origin before the Convention entered into force for that State in respect of the species concerned, again in the sense of the definition.

Pre-Convention specimens previously imported should be registered and be subject to the same rules as pre-Convention specimens originating from within the country.

8.2.4 Import of pre-Convention specimens

A pre-Convention certificate issued by another Party should be considered as invalid when the date of acquisition of the specimen is after the date on which the Convention entered into force for the specimen concerned for the importing Party.

Conversely, no pre-Convention certificate should be issued by the Management Authority of the exporting Party for the purpose of exporting a specimen to another Party unless it is satisfied that the date of acquisition of the specimen is before the date on which the Convention entered into force in the proposed country of import for the specimen concerned.

8.2.5 The date of acquisition

Pre-Convention certificates should either mention the date of acquisition of the specimen concerned or certify that the specimen was acquired before a certified date. The Management Authority should be prohibited from issuing pre-Convention certificates if neither of these dates can be determined.

Pre-Convention certificates presented for the import of specimens should be considered as invalid if neither of these dates is mentioned.

8.2.6 Transferred species

Where a species has been transferred from any one of the schedules to the Act, or to the regulations, as the case may be, to any other such schedules, specimens of that species should be subject to the provisions applicable to them, pursuant to the Act and the regulations, at the time of export, re-export or import.

8.3 Personal or household effects

a) A definition should be provided. Such a definition could be along the lines of the one used by the United States, namely: "personal or household effects of wildlife products or manufactured articles which are not intended for sale and are worn as clothing or contained in accompanying personal baggage or are part of a shipment of household effects of persons moving their residence to or from the country".

   Alternatively an exhaustive list of articles which are to be considered as personal or household effects could be adopted by regulations and amended if and when required.

b) The Convention lists a number of cases where the exemption does not apply (Article VII.3). It is essential that these Convention requirements be included in national legislation.

8.4 Animals bred in captivity

a) The definition provided by Resolution Conf. 2.12 should be included in the regulations.

b) The regulations should provide that captive-bred specimens of Appendix I species exported for commercial purposes require export permits.

c) They should require the issue of captive-breeding certificates by the Management Authority for all other specimens of CITES-listed species which have been bred in captivity.

d) They should establish a licensing procedure for captive-breeding operations for commercial purposes of Appendix I species and marking requirements for specimens originating from such operations.

e) They should also provide at least for the registration of other captive-breeding operations of CITES species, and for the marking of specimens originating from such operations.

f) They should require all licensed and registered captive-breeding operations to keep records of all their transactions, including the taking of live specimens or eggs from the wild for the purpose of breeding.

g) They should empower the competent authority to impose conditions upon licensees and operators of registered operations.

h) The Management Authority and any other competent authority should have the power to inspect the premises of any licensed or registered operators, to inspect records, to ask for information, and to revoke licences or cancel registrations whenever any offence has been committed by the operator or when the conditions of the licence or registration have not been fulfilled.

8.5 Artificially propagated plants

a) The definition of Resolution Conf. 8.17 should be included in the regulations.

b) The same rules as for captive-breeding operations should apply to commercial growers, nurserymen and traders of artificially propagated CITES-listed plant species.

8.6 Loans and exchanges of specimens between scientific institutions

a) The regulations should take up the terms of Article VII.6 relating to this exception. There is no need in principle for a more detailed definition.

b) They should specify that the exemption only applies to specimens of animals and plants which are already part of a collection, and not to specimens which have been taken from the wild in one State for inclusion in a collection in another State.

c) They should specify that the exception only applies to legally acquired animal and plant specimens that are under the authority of a registered scientific institution.

d) They should require the registration of the institutions concerned.

e) They should make it a duty for the Scientific Authority to advise on registration standards.

8.7 Travelling zoos, circuses and exhibitions

The regulations should take up the terms of Article VII.7 relating to this exception, as well as those of Resolution 8.16.

They should require, in particular, that pre-Convention certificates for exhibitions be issued only for specimens that have been acquired before 1 July 1975 or before the date of inclusion of the species concerned in any of the appendices to the Convention.

9 Marking

Pursuant to Article VI.7 of the Convention, the Management Authority should be empowered to mark, or cause to be marked, any specimen to assist in its identification.

This should apply, in particular, to ranched specimens and captive-bred specimens, especially for Appendix I species.

Bred in captivity certificates for Appendix I species bred for non-commercial purposes and export permits for such species bred for commercial purposes should be required to mention the individual marks, borne by the specimens to which they refer. The law should declare such certificates invalid when they relate to unmarked specimens or when the individual marks borne by the specimens concerned are not mentioned in the certificate.

The removing, alteration, defacing or erasing of a mark should constitute a punishable offence. This should be included in the Act.

10 Border controls

a) Legislation must specify that the permits and certificates required under the Act must be presented to the Customs, and/or any other competent authority which may have been designated under the Act, prior to the clearance of the specimens. It should make clear that this rule also applies to the presentation of export permits, re-export certificates and certificates of origin from foreign countries and of any other certificates required by the Convention at the time at which the specimens are presented for import.

b) The designated authorities should have the duty to control the existence and validity of all permits and certificates and the power to seize specimens where no permit or certificate is presented, when the permits and certificates presented are invalid, when they have reasonable grounds to believe that they are invalid, or when there are reasonable grounds to believe that the specimens presented for export or import do not correspond to those indicated by the permit or certificate.

c) The respective powers of the Customs and of any other authority which may have been designated under the Act to carry out border controls in respect of CITES specimens should be specified. The Customs, and any other competent authority, should be empowered to call upon experts whenever there are doubts on the identity of the specimens presented for clearance. They should also be able to proceed with any required investigation and to detain specimens when there are reasonable doubts on their identification, pending the results of further investigation.

d) Regulations must designate ports of entry and ports of exit for CITES specimens and require that such specimens be presented for clearance only at these ports.

e) Permits and certificates presented for the import of CITES specimens should be cancelled and retained by the Customs or other competent authority at the time of border control, and transmitted to the Management Authority. Permits and certificates which have been refused should be, at least, cancelled.

f) When invalid documents are presented, or where there are reasons to believe that the transaction is in violation of CITES requirements, the Customs or other competent authority should have the obligation to seize the specimens.

11 Possession and domestic trade, and control of traders

11.1 General controls

The Act should prohibit the possession, transport, sale, offering for sale, and purchasing of any specimen of CITES-listed species which have been imported, introduced from the sea, or taken from the wild, without the required permits. It should, in addition, provide that it is up to the possessor or trader to prove that the specimen was lawfully introduced into the country, or otherwise obtained.

11.2 Control of traders

This matter has already been referred to in 8.4 and 8.5. Legislation should, however, provide for controls applicable to all traders in CITES specimens.

Traders should, therefore, be defined as all persons who, for commercial purposes, purchase, handle, process, sell, breed, ranch or propagate specimens of CITES-iisted species.

The law should provide that traders so defined should be registered or licensed, that they keep records of all their transactions with the names of their suppliers and consignees (an exception can of course be made for private persons buying from retailers), that their premises and documents may be inspected, that they may be required to provide any information or document requested from them, and that they keep their records and documents for a specified period of time. In the specific case of ranching operations, any specimens removed from the wild for the purpose of those operations, as well as any specimen released into the wild as a result of such operations, should be recorded. In all cases, live specimens which have died while in the custody of the trader should also be recorded.

The competent authority should be empowered to impose any condition to the registration of traders, or to the licences issued to them, and to inspect or revoke, temporarily or permanently, any registration or licence in the case of irregularities or of violations of the Act, the regulations, any other legislation relating to wildlife or animal welfare, or the conditions attached to the registration or licence.

12 Enforcement and penalties

12.1 Enforcement agencies and officers

a) It is essential that the CITES implementation Act clearly designate all the agencies and classes of officers that are responsible for the enforcement of the Act and of any regulations made thereunder. In particular, where the Customs are involved in enforcement, which is almost universally the case, their particular duties in that respect should be specifically mentioned. The agencies empowered to control the possession of, and domestic trade in, CITES specimens must also be clearly designated.

b) The powers of enforcement officers should be clearly specified. These should include powers to search persons, vehicles and premises, subject, of course, to any general limitations provided by the law of the country concerned, as well as powers to request information, to inspect documents, to take samples of specimens and, if possible, powers of arrest.

c) Enforcement officers should also have the right to seize specimens when they have reasonable grounds to believe that they are traded or possessed in contravention of the law. The Act should provide that the costs incurred for the custody of seized specimens, including the cost of their transport and of the maintenance of live specimens, should be borne by the owner, importer or shipper. This should be considered as a debt to the State and be recoverable according to the procedures established for the recovery of such debts.

12.2 Offences

The actions or omissions which constitute offences against the Act or the regulations must be clearly spelled out in the Act.

These should include, at a minimum:

a) Violations of the prohibitions established by the Act or the regulations regarding the import, introduction from the sea, export, re-export, transit and trans-shipment, possession, sale and purchasing of specimens of CITES-listed species without the required permits or certificates, or with forged or otherwise fraudulent permits or certificates.

b) Violations of the conditions attached to a permit and violations of any regulations relating to the holding or transport of live animals.

c) Making false or misleading statements or declarations with a view to obtaining a permit or certificate, or of clearing specimens for import or export.

d) The removal, alteration, defacing or erasure of marks affixed on specimens pursuant to the regulations.

e) The failure to keep records, or the keeping of incomplete records, or the falsification of records, where the keeping of records by holders of CITES specimens is required.

f) If possible, offences by corporations should also be punishable.

g) Aiding and abetting the commission of offences should also be punishable offences.

h) Attempting to commit an offence, particularly with regard to the prohibitions laid down by the Act and the regulations, should also be a punishable offence.

i) In certain cases, particularly with regard to the possession of CITES specimens, the Act should provide that it is up to the holder of the goods to prove that they have been lawfully obtained.

12.3 Penalties

a) Adequate penalties are essential to an effective enforcement of the Convention. In addition, the setting of penalties is an obligation under Article VIII.1 (a).

It is, of course, not possible to recommend specific penalties, as this is a matter which should be clearly left to the judgement of individual Parties. Penalties should, however, be high enough to constitute an effective deterrent. They must, at the same time, be socially acceptable, as otherwise the courts may often feel bound not to apply them. Terms of imprisonment are in any event necessary in respect of offences relating to large numbers of commercially valuable specimens or to punish multiple offences.

b) In addition, administrative penalties, such as the withdrawal of licences from breeders, nurserymen or traders in CITES specimens, should be provided for.

c) The confiscation of illegally traded specimens is of major importance and should always be required by legislation. In view, however, of the considerable differences in national laws as to this particular matter, there are no universally applicable rules that can be proposed.

At a minimum, provisions should be made for the confiscation of illegally traded specimens when a person has been convicted for an offence against the Act. This should preferably be a mandatory requirement. There should also be a requirement to confiscate specimens when these have been abandoned or when the recipient is unknown, or has left the country.

In such cases, the competent administrative authorities should be empowered to order confiscation.

In those countries where confiscation may generally be ordered by an administrative authority, these authorities should have the power to confiscate specimens where no valid CITES documentation can be produced, or when there is clear evidence of fraud.

d) Legislation may also provide for the confiscation of the vehicles, vessels, aircraft, containers or other items used or otherwise involved in committing the offence. The confiscation of these goods should not necessarily be mandatory and could therefore be left to the discretion of the competent authority.

e) Penalties incurred for violation of CITES implementation legislation should be without prejudice to the imposition of penalties incurred under other applicable laws, such as Customs legislation, in the event, for instance, of false declarations, or general criminal law, in the case of forged permits.

12.4 Compounding

The Act may provide for the compounding of offences against the Act or the regulations. Compounding should, however, always provide for the confiscation of the specimens concerned or, if this is legally impossible, for the transfer to the government of property rights in respect of such specimens. This may also be made possible by providing that the specimens may be voluntarily abandoned and by empowering the Government to confiscate abandoned specimens.

12.5 Return of unconfiscated live specimens to the State of export or to the exporter

a) The Act should provide that seized live specimens of Appendix II or III species may be disposed of at the discretion of the Management Authority. The owner of such specimens should, however, be entitled to bring an action against the government for the recovery of the market value of the specimens on the ground that the specimens were not used or otherwise involved in committing an offence.

b) Without prejudice to the right of the competent authority to seize or confiscate specimens, the importer of live Appendix II or III specimens should be entitled to refuse to acknowledge a shipment of such specimens.

c) Where a live Appendix II or III specimen has been seized, or where the importer of such a specimen has refused to acknowledge it, the Management Authority should be empowered to order the transporter of the specimen to return it to the exporter.

d) Where, however, the Management Authority considers that it is inappropriate to order the return of the specimen to the exporter, the rules of (a) above should apply.

e) The costs incurred in the return of the specimen to the importer should be borne by the transporter.

f) The transporter should have an action against the exporter for the recovery of such costs together with any additional damages incurred (this covers the reverse case, when the country concerned is the exporting State).

12.6 Disposal of confiscated specimens

Legislation should provide for the following:

12.6.1 Live specimens

All confiscated live specimens of animals or plants should be entrusted to the Management Authority for disposal.

The Management Authority should be empowered, after consultation with the Scientific Authority, to order at its discretion the return of confiscated live specimens to the Management Authority of the State of export, re-export, or origin of such specimens.

Appendix I specimens should not be sold, or disposed of, in any way that would result in their being the object of trade. They should either be returned to their country of origin, or transferred to an institution, such as a zoo or a botanic garden, competent to look after the welfare of live specimens.

Appendix II and III specimens should be disposed of as the Management Authority thinks fit. This should include the return of such specimens to their country of origin at the discretion of the Management Authority.

12.6.2 Dead specimens and parts and derivatives

Confiscated dead specimens and parts and derivatives of Appendix I species should not be sold or disposed of in any way that would result in their being the object of trade. They should be transferred to an approved institution for scientific or educational purposes, or to another government agency, for official use. If this is not possible, they should be kept in storage or destroyed.

Specimens of Appendix II or III species should be disposed of in the best manner possible to benefit the administration and enforcement of the Convention.

12.6.3 Export of confiscated specimens

Confiscated specimens of any kind should be deemed to have been lawfully imported or otherwise obtained for the purpose of issuing permits for their return to their country of origin or re-export.

12.6.4 Recovery of costs

Expenses incurred as a result of seizure and confiscation, including expenses incurred for the return of specimens to their country of origin or export, should be recoverable from the importer and from the person for whom the import has taken place. In addition, at least in those cases where the identity of these persons cannot be established, costs should be recovered from the transporter. The law may provide for joint liability, and allow therefore full recovery from any of the persons concerned.

13 Refusal of foreign permits

The number of cases where export permits or re-export certificates issued for dead specimens, or parts or derivatives of Appendix II or III species, may be refused by the importing country and the specimens concerned, therefore, allowed to be returned to the country of export or re-export (or to any other country) should be as limited as possible. (For the return of live specimens see Guideline 12.5 above)

Seizure, followed by confiscation after proper procedures have been followed, should therefore be the rule even if no fraud or attempt of fraud can be proved.

This should apply at least in the following cases:

a) if no export permit or re-export certificate is presented;

b) if the export permit is invalid;

c) if the conditions attached to the export permit have not been complied with;

d) if the specimens presented for import do not correspond to those mentioned in the export permit or re-export certificate;

e) in any other circumstances where the provisions of CITES or of national legislation have not been complied with.

Consideration should be given to the possibility of providing in the Act for an import permit requirement for all specimens of Appendix II or III species and of empowering the Management Authority to refuse to grant such permits whenever it is of the opinion that the requirements laid down by the Convention, the Act, the regulations, or the

legislation of the exporting or re-exporting country, or the conditions attached to an export permit or re-export certificate, have not been fulfilled.

14 Reports

It would be useful to include in the Act a provision requiring the Management Authority to submit to the Convention Secretariat in due time, or before a set date, the reports called for by Article VIII.7 of the Convention.

15 Financial matters

It would be useful to provide in the Act for the payment to the Management Authority, preferably into a special account or fund, of the funds accruing from the following sources: application fees for permit and certificates, permit and certificate issuing fees, registration and licensing fees, fines imposed for offences against the Act or the regulations, and sales of confiscated specimens. The law should specify that these funds should be used to finance the operation of the Management and Scientific Authorities.

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