CHALLENGES OF REGULATORY FRAMEWORK ON INTERNATIONAL TRADE IN ENDANGERED SPECIES

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Abstract

Illegal trade of endangered species is a transnational crime that largely contributes to the over-exploitation of certain species. The capitalist view of wildlife as mere articles of profit has encouraged trade in endangered species, with little regard to environmental consequences. To address this and prevent further escalation of the gravity of the issue, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was drafted in 1963. CITES is an international framework that seeks to regulate and provide a sustainable system for international trade in more than 36,000 species of flora and fauna. One of its main objectives is to control the import, export and introduction of species, within this convention, to other countries, through the administration of a licensing system. This paper will delve into the history of the formulation and implementation of CITES. It will further discuss certain Articles of the convention. These Articles will be critically analysed in terms of application and effectiveness. This paper aims to establish the various challenges that are faced in implementation of what the convention seeks to rectify. The paper will further establish how the provisions of the convention are incapable of dealing with contemporary issues and how the document is prone to ambiguous interpretation owing to ill-defined phrases.. Some of the main problems are the high costs involved, rigid mechanism present, and obsolete in certain areas. The paper will outline possible solutions to strengthen the existing legal framework in a way that is more relevant to the present times, so as to reach the goals that the CITES set out to achieve.

Keywords: CITES; endangered species; flora; fauna; illegal trade; regulatory framework; wildlife; signatory States; binding; National Legislation

Introduction

Evolution is a process that is inevitable. With evolution, the famous theory of 'Survival of the Fittest' as propounded by Darwin has proven to be accurate time and again. Over the decades, humans have risen to be the top predator in the food chain due to ever improving

technology and development. The flora and fauna that prove useful to humans, in any form, are at a risk of endangerment and eventually extinction. This brought upon the need for a uniform international regulation that dealt with all the problems associated with endangered species of flora and fauna. Therefore, this led to the 'Convention on International Trade in Endangered Species of Wild Fauna and Flora' (CITES) being formed.

History of the formulation and implementation of cites

Trade in wildlife became a major exploitative mechanism due to international trade being unregulated and uncontrolled up until 1963[1]. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is one of the oldest multilateral environmental agreements[2]. It was due to the unrestricted levels of trade that provide impetus to the General Assembly of the International Union for Conservation of Nature and Natural Resources (IUCN) to initiate the making of an international convention to regulate export, transit, and import of threatened wildlife species[3]. 21 countries convened to sign CITES and the number increased to 152 states as of 2001[4].

The regulation of the trade in CITES is not restricted to whole animals and plants but also includes readily recognizable parts or derivatives. Member states are obligated to adopt CITES within their territory through domestic legislation. This is the key factor that gives CITES the 'teeth' which makes CITES one of the few conventions that is capable of enforcing its provisions through both policy guidelines and directions. This gives it a bit more binding power compared to other conventions which make it a mixture of both soft and hard law[5].

CITES' basic objective is to protect the wildlife species and extend regulations where application is necessary. It does this by ensuring that trade in 'species threatened with extinction' (Enumerated in Appendix I species)[6] and is permitted only in 'exceptional circumstances'. It provides enough flexibility to the member states to discuss and decide

[1] Philip, H.R.H.P. and Lyster, S. (no date) *International Wildlife Law*.
[2] Rosalind Reeves, "CITES regulatory framework", Center for International Forestry Research (2015).
[3] Id.
[4] Michael J. Hickey, Note, Acceptance of Sustainable Use Within the CITES Community, 23 VT. L. REV. 861 (1999).
[5] AYNE, CYMIE. "INTRODUCTORY NOTE TO CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) COMPLIANCE PROCEDURES." *International Legal Materials*, vol. 46, no. 6, American Society of International Law, 2007, pp. 1174–77, http://www.jstor.org/stable/20695775.
[6] Art. II (1), CITES.

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on the most desirable to achieve the goal of wildlife protection[7]. On an analysis of the provisions regarding the mechanisms for entering species into categories of endangerment through a voting mechanism, it is clear that there is sufficient flexibility accorded in the Convention[8].

Based on the preamble of the Convention, the main observation that can be made is that there has to be a form of recognition present about the flora and fauna and that it must be protected for generations to come. Another important point, which acts as the foundation for CITES, states that 'international cooperation' is required as well as 'States and People having the responsibility to protect the environment'. This is clearly heavily anthropocentric in nature and there is no form of ecocentrism or the promotion of Earth Jurisprudence, however the same shall not be discussed in this paper.

The significance of worldwide participation is clear, as natural life abuse is dependent on business sectors somewhere else. Poaching and carrying of flora and fauna is majority of the time determined by demand and supply in the international market. A major problem that is present is the fact that there is no actual benefit for any country to stop illegal trade and business of flora and fauna in its own nation if no other nation is willing to follow the same. Therefore, the need for international cooperation is critical, with respect to control and regulation by both customer and producer nations. The all-out anticipation of poaching and sneaking is inconceivable and measures are ill-fated to bomb except if customer nations supplement the endeavours of producer nations by likewise authorizing severe controls[9].

Important articles under the convention

Article I[10] of the Convention provides the definitions of terms such as 'species', 'specimens', 'trade', 're- export', among others. Article II[11] provides the distinction to be made between Appendixes I, II and III, and lays out the different species that are to be present in each Appendix. The question as to why this is important is because of the simple

[7] Saskia Young, Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate over Sustainable Use, 14 COLO. J. INT'l ENVTL. L. & POL'y 167 (2003).
[8] Supra 5
[9] Willem Wijnstekers, "The Evolution of CITES", International Council for Game and Wildlife Conservation, 2011.
[10] Convention on International Trade in Endangered Species of Wild Flora and Fauna, Article I, March 3, 1973, 27 U.S.T. 1087; 993 U.N.T.S. 243
[11] *Id.* At Article II

fact that, when there is a differentiation and fragmentation made, it will allow for easier tracking, resource management and most importantly care taking and non-overlapping. This ensures that species in a particular category receive the appropriate treatment required and there is no room for ambiguity, thereby preventing States from renouncing any form of liability.

Appendix I contains the list of all the species that are under a threat of extinction (or endangered species) and trade in these species affects their survival. It provides that trade in these species must be strictly regulated and authorisation should be provided only in exceptional situations. Appendix II consists of species that currently do not fall in the 'endangered species' category but if there is no strict regulation and measures taken then it is highly likely that they will fall into that category. It also includes the regulation of species that could cause another species to fall into the endangered category, i.e. predatory in nature. A common theme to be noted from the first two appendixes is that the trade in the species should not be pernicious to their survival in any way. Lastly, Appendix III[12] includes species that the party or contracting State identifies within its jurisdiction as being subject to regulation, necessitating cooperation of other States in the regulation of trade to prevent exploitation of that particular species. Article II (4) says that trade in specimens of any species mentioned in the three Appendixes shall only be according to the provisions of the Convention.

Article III[13] elaborates all the conditions and requirements for trade in species contained in Appendix I; the endangered species. Articles III (2)(a) to (d) provide for all the conditions for granting the export permit for exporting species under Appendix I. Articles III (3)(a) to (c) provide for all the conditions for grant of import permits for importing species under Appendix I. The other provisions in Article III mainly deal with re-export of species in Appendix I and introduction from the sea.

Articles IV[14] and V[15] lay down the procedure to be followed and the conditions for trade in species under Appendix II and III respectively. All the three Articles enumerate the conditions for trade, there is common usage of the terms such as "Scientific Authority" and

[12] *Id.* At Article III
[13] *Id.* At Article III
[14] *Id.* At Article V
[15] *Id.* At Article IX

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"Management Authority". These terms are defined under Article I(f)[16] and (g), they are further elaborated upon under Article IX[17]. Scientific Authority is one or more national scientific authorities designated by the contracting State. A Management Authority is a national management authority that is competent to issue and grant permits or certificates on behalf of the State designating it. The Management Authority is authorized to communicate with other parties and the Secretary. The importance of Article III, IV, and V is that there is a form of procedure which is given for countries to follow. Therefore while there is flexibility provided to States', for the purpose of Sovereignty, there is a standard that must be followed to ensure that there is no abuse, exploitation or loophole in the system.

Article X[18] talks about trade with States that are not a party to the Convention. Documents issued by competent authorities of non-party States which are relatively in line with the regulations that are present in the Convention may be acceptable. This plays a significant role in ensuring that there is some form of similarity that is present and agreements entered into are not on a completely different tangent. Article XII[19] is another important provision which deals with the functions of the Secretariat. A Secretariat is appointed or provided by the Executive Director of the United Nations Environment Programme and he may be assisted by various non-governmental, national or international agencies and bodies in protecting and conserving wild flora and fauna. Article XII(2)(a) to (i) mention the extensive functions of the Secretariat; from arranging meetings between parties to preparing annual reports on the work undertaken, the implementation of the Convention and making recommendations for the implementation of the Convention.

Article VIII[20] deals with the duties and measures party States should undertake to further the goals of the Convention and prevent illegal trade in species. Some of these measures include penalizing the trade in or possession of species, confiscation of such species (live or otherwise), returning them back to the country of export, reimbursement, handling of such confiscated live species and rehabilitation and protection in rescue centers designated by the Management Authority, among others. The significance of this is that it provides some form of action to be taken, and therefore there is a form of check and control present

[16] *Id.* At Article X
[17] *Id.* At Article XI
[18] *Id.* At Article VIII
[19] *Id.* At Article VI
[20] *Id.* At Article VI

in case of any default. Article VI[21] provides for the general rules related to permits and certificates to be issued under other Articles and provisions of the Convention. Article VII[22] contains special provisions and different situations wherein there are exceptions provided with relation to trade of certain species.

Article XV[23] contains detailed provisions for the procedure to be followed to make amendments to Appendixes I and II during meetings of the Conference of Parties. Article XVI[24] deals with amendments to Appendix III. The benefit of these two articles is that it provides modifications which is essential if we need the Convention to have adaptability and to change with the time and not become obsolete. Article XVIII[25] provides for resolution of disputes between parties through negotiation, on the failure of which, the parties can mutually consent to arbitration proceedings at the Permanent Court of Arbitration at The Hague.

Critical analysis of cites

CITES is one of the most successful International Conventions in terms of the number of signatory states. There are 183 countries that recognised the need for the safeguard and conservation of endangered and exotic species of flora and fauna that became signatories to the convention. CITES is a binding document on its signatory countries, insofar as mandating them to enact domestic legislations that are in compliance with the framework provided by it on a national level. Although CITES was successful in gaining many signatory states that promised to comply with the framework, it was unsuccessful on the implementation front. There are multiple contribution factors to the failure in implementation of CITES, few of which have been discussed in the following paragraphs.

A. General Non-binding Nature of International Laws:

The level of enforceability of the laws or provisions established in an International convention or treaty is not directly enforceable on any individual signatory Party. An international law attains the status of enforceability only upon ratification by the signatory

[21] Convention on International Trade in Endangered Species of Wild Flora and Fauna, Article VII, March 3, 1973, 27 U.S.T. 1087; 993 U.N.T.S. 243
[22] *Id.* At Article XV
[23] *Id.* At Article XVI
[24] *Id.* At Article XVII
[25] Knut Traisbach, *International Law*, E-International Relations (November, 15, 2021, 15:15) https://www.e-ir.info/2017/01/01/international-law/

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state[26]. Therefore, unless the signatory state so wishes, a convention can be said to have no binding value..

B. Insufficient Enforcement in Signatory States:

This can be read in conjunction with Point A. The lack of success of CITES can be mainly attributed to the insufficient enforcement by signatory states, while developing domestic legislations in compliance with the framework established by the Convention. The Parties to this Convention are bound to enact domestic legislations that penalize trade in, or possession of, specimens that are in violation of the provisions of CITES. They are also bound to confiscate and/or return such specimens to the States from which they were illegally exported. From the time of its inception, CITES did not mandate a specific period of time within which the signatory states had to enact domestic legislations that enforced the provisions of CITES in their respective territories. This led to a continued delay on the part of the States when it came to the implementation of important laws for the prevention of illegal trade on endangered and exotic flora and fauna.

C. The National Legislation Project[27]:

As a result of the unreasonable delay in implementation of the provisions of CITES in signatory countries through their respective domestic legislations, the National Legislation Project was initiated in 1992[28]. According to this, the Secretariat was directed to identify based on 4 main requirements, the level of compliance by signatory states. Based on this, the Secretariat had to further classify signatory parties into 3 categories:

(i) Signatories that enacted domestic legislations that sufficiently addressed the four main requirements enlisted under the National Legislation Project,

[26] National Legislation Project, Convention on International Trade in Endangered Species of Wild Flora and Fauna, 27 U.S.T. 1087; 993 U.N.T.S. 243 https://cites.org/eng/legislation/National_Legislation_Project (November, 15, 2021, 15:30)

[27] National Legislation Project, Convention on International Trade in Endangered Species of Wild Flora and Fauna, 27 U.S.T. 1087; 993 U.N.T.S. 243 https://cites.org/eng/legislation/National_Legislation_Project (November, 15, 2021, 15:30)

[28] Rosalind Reeves, *supra* note 2, at 12 *Also see: https://www.encyclopedia.com/environment/energy-government-and-defense-magazines/cites-convention-international-trade-endangered-species-wild-fauna-and-flora*

(ii) Signatories that enacted domestic legislations that sufficiently addressed one to three of the four main requirements enlisted under the National Legislation Project;

(iii) Signatories that enacted no domestic legislations that sufficiently address any of the four main requirements enlisted under the National Legislation Project.

The four main requirements that are enlisted under the National Legislation Project, as mentioned above, are:

(i) There must be at least one designated Management Authority and one Scientific Authority as provided under the text of the Convention;

(ii) The Signatory States must prohibit trade in Specimens that amount to a violation under the provisions of the Convention;

(iii) The Signatory States must penalise such trade, as explained under the (ii) requirement; and

(iv) The Signatory States must establish a procedure to confiscate the Specimen that was in illegal possession or was illegally traded.

If all of these requirements are met, the Secretariat has to categorise the State under Category 1. If any of the 4 requirements are met, then the Secretariat has to categorise the State under Category 2. And if none of the above 4 requirements are met, then the Secretariat must categorise the Signatory State under Category 3. Based on such categorisation, the standing committee established under the Convention can identify Parties as priority, and the effort to uplift the conditions in such a priority State shall be made diligently.

Even with such efforts being made, there are still 28 Signatory States that are under category 3, 40 States under Category 2 and 6 States that are categorised as Priority by the Standing Committee. This is about 40% of the total number of Signatory Countries that have failed to meet the 4 basic requirements that facilitate enforcement of CITES in their countries. After over half a century of this convention coming into force, the present scenario is not a picture of success.

D. Complex and Controversial Species and Specimens to Monitor:

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One of the major drawbacks of having a diverse landscape around the globe is the various different kinds of geographical, biological and ecological bio-diversity. Each signatory state has a certain kind of ecosystem and biodiversity[29]. CITES in a nutshell, provided flexible provisions keeping in mind all such provisions, now, the signatory states took advantage of this flexibility provided under the convention to list the endangered species and specimens up to their whims and fancies along with deciding on which illegal practices are allowed under the law of the state and which aren't. The tribes who had made the Forests and Jungles their habitat, establishing a sustainable system of living in cognizance of the natural history, was shattered by corrupt political practices and individual interest taking over collective good.

E. Low penalties for violation:

One of the main requirements for a Signatory State to be considered compliant under CITES is that they need to have a system the punished violation of the other conditions laid down by the Convention. Having said that, CITES fails to establish even a vague standard of punishment to be followed by Signatories, let alone a specific or comprehensive blueprint. Therefore, each Signatory State assigns only such a punishment as it sees fit. This clearly makes room for lack of fear of sanction on one hand and the overutilization of available power on the other. It provides an unnecessary amount of discretion to the Signatories, making the process more haphazard and which ultimately defeats the purpose of the Convention.

F. Use of Reservations:

In the context of CITES, the concept of reservation can be understood as an exemption from the provisions of CITES, to some extent. Upon ratification, acceptance, approval or accession, a signatory can request reservation with respect to any species listed under Appendices I, II and III or any parts or derivative thereof, related to a species specified under Appendix III. This implies that the trade of such species to and from the State that took reservation of the said species, is unrestricted by CITES. They are allowed to do so, provided that they surrender all the rights and protections they received under CITES, insofar as the species that was reserved. This concept is dealt with under

[29] Status of Legislative Progress for Implementing CITES, Convention on International Trade in Endangered Species of Wild Flora and Fauna, 27 U.S.T. 1087; 993 U.N.T.S. 243 https://cites.org/eng/legislation/parties (November, 15, 2021, 15:34)

Articles 15, 16 and 23 of the CITES. The problem with such a provision is that the Signatory Parties can partake in unrestricted trade with respect to the reserved species or exotic animal product with other non-signatory countries[30]. This can have but one result: the continued depletion of an already endangered or endangering species. This provision holds back the progress made by CITES, even though it is completely avoidable.

G. Persistence of global Illegal trade in Exotic or Endangered species or Animal Products:

Wildlife protection under CITES is far from perfect, since its inception in 1963, the attendees realized that unregulated trade directly threatened certain species, yet the world had no way to control that. CITES now includes 183 governments and its listings has grown to some 35,000 species. The signatory states register about a million transactions per year, ranging from a single specimen to hundreds or thousands in legal trade[31].

To ensure that these trades are sustainable, the convention categorizes Species under appendixes, decisions to uplist or downlist species or remove an existing listing are made at the CITES Conference of Parties. Proposals such as listing require a 2/3rd majority vote to pass and are supposed to have scientific data backing the proposal[32]. This process has too much of bureaucracy as for many species, experts lack even the most basic data including the population ratio, which makes it absolutely impossible to evidence what levels of trade is actually sustainable.

Legally binding rules are broken with no regard to the objectives of the convention, the rules broken include those that govern the harvesting quotas and capture methods and the rules that dictate who can sell what and where. The rules governing and regulating transport and stipulate licensing are gone around with or enforcement authorities are bought off in order to turn the other way in such matters of violations.

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[30] Velázquez Gomar, J.O. and Stringer, L.C. (2011), J. O. Velázquez Gomar and L. C. Stringer. Env. Pol. Gov., 21: 240-258. https://doi.org/10.1002/eet.577

[31] Wijnstekers, W. (2018): The Evolution of CITES - 11th edition. International Council for Game and Wildlife Conservation

[32] Pervaze A. Sheikh, M. Lynne Corn, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, Congressional Research Service, 1, 15-16 (2016) (*Also see https://core.ac.uk/download/pdf/228605061.pdf*)

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CITES' power lies in the fact that it is a binding international law, even though the non-compliance is rampant. For starters, countries regularly fail to turn in data on the number of seizures or trades they undertake per year. For example, China had reported importing 130 ivory "carvings," 40 elephant feet, 99 pounds of tusks, and zero trophies from Zimbabwe, all under the supposed label of legal "personal" items. Zimbabwe's records of exports to China over the same period, however, told a completely different story: 2,512 ivory carvings, eight elephant feet, four trophies, and 41 tusks. When trade data are even entered into the database at all, such glaring inconsistencies are often the norm.

Thus, there is a requirement for an organization such as the SEBI in India that looks into the financial transactions of the share market and regulates it to be established on a Global scale with a similar role and structure to regulate and hold people accountable for their actions and mishaps done on the part of the governments who turn the blind eye towards situations like the legal-yet- not-so-legal trade in exotic, endangered species of flora and fauna.[33]

Conclusion

After the thorough analysis and discussion, it is the opinion of the authors that CITES was a very important law and its presence made a considerable impact when it comes to curbing illegal international trade in specimens of endangered and exotic species of flora and fauna. However, the latest amendment to the CITES was in 1983[34]. And in over 3 decades since then, a lot of technological development has taken place and illegal trade in prohibited specimens is becoming less difficult with every passing year. The CITES is not up to date when it comes to tackling the new and emerging way of facilitating illegal trade with rapid growing technological advancements. The core intention behind the law is honourable and well-thought through, but due to lack of effective implementation, the goals laid down by it are far from achieved. Though the paper does not deal directly with suggestions for the improvement of CITES and its implementations, some of the additional readings mentioned under the Literature review provide a perspective of the same.

[33] Daniel W. S. Challender & Douglas C. MacMillan (2019) Investigating the Influence of Non-state Actors on Amendments to the CITES Appendices, Journal of International Wildlife Law & Policy, 22:2, 90-114, DOI: 10.1080/13880292.2019.1638549

[34] Rachel Nuwer, Poached: Inside the Dark World of Wildlife Trafficking, (DA CAPO PRESS)ISBN-13: 9780306825507, 2018.