

CITES OBLIGATIONS: IS WILDLIFE (PROTECTION) ACT, 1972 CAPABLE TO DEAL WITH IT?

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Much before the reported hunting of endangered species for a dinner attended by Andhra Pradesh bigwigs, wildlife trading has been a flourishing illegal business in India. After narcotics and underground arms running, poaching in India has become the third most lucrative business proposition.

Hunters frequently enters densely populated Indian forests and gun down endangered species whose skin, bones, tusks and sometimes even gums fetch megabucks in the international markets. It has been estimated that trade in wildlife and its derivatives brings in more than US \$20 billion annually. India, is the transit point as well as a source for wildlife trading. Because of the country's lax laws and sometimes customs officials ignorance of the finished products, these traders usually go scot free.¹

On its part, the Indian Government has banned hunting and trading in animal body parts, but there is rampant poaching not just by illegal traders but now it has become a kind of a macabre sport for the wealthy. Armed with sophisticated ammunition, flashlights and powerful binoculars, they make killing look so easy. This trade has of late also started posing a serious threat to the global biodiversity and the food chain, apart from constant threat of extinction of rare animal species especially in India.

Tigers, an endangered species worldwide, are poached for their hide and bones, rhinos for their horns, elephants for their ivory tusks, deer for their musks and butterflies and corals for decorative purposes. In fact no animal is safe from the smoking guns of the poachers. That's because one kill could translate into a fortune for game hunters as hides, skins and bones are sold at exorbitant prices in international markets. Since wildlife is found in big numbers in India, it makes the country a focal point of trade.

Trade in fur has been flourishing between India and Nepal and a few years ago fur items were openly displayed in the Kathmandu markets and

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1. *Dead Animals Walking*, NEWS TIMES, Hyderabad, November 29, 1998.

bought mainly by Europeans. Fur is converted into products like pelts, coats, jackets, hats, gloves and short and long coats. Small items like wallets, belts and walking sticks are also made out of fur. Fur and skin of wild cat is another product which is in great demand in the international market. There are at least twenty such species, whose skins are sold for millions of dollars and of these, eighteen are facing extinction.

The natural diversity is more threatened now than since the extinction of the dinosaurs, 65 million years ago. The trend is steadily downward, as more habitats are converted to human uses. While we are still uncertain about how many species now exist, some experts calculate that if the present trends continue, upto 25% of the world's species could become extinct or be reduced to tiny remnants by the middle of the next century. Many more species are losing a considerable part of their genetic variation.²

I. THE CONVENTION ON INTERNATIONAL TRADE OF ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) OBLIGATIONS

International trade in species is a huge business. High exploitation level and volume of international trade in wild animals and plants in addition to the increasing loss of suitable habitats may reduce population to such an extent that their survival becomes at risk.

The first demand for control on the international wildlife trade was made as early as 1911 when Paul Sarasin, a Swiss conservationist, called for restrictions on the import and export of bird feathers because of the effect of the vogue for plumed hats on bird population.³ In 1960, these problems were first internationally discussed at the Seventh General Assembly of the International Union for Conservation of Nature and Natural Resources (IUCN). The Assembly urged governments to restrict the import of animals in accordance with the export regulations of the countries of origin.⁴ The IUCN passed a resolution in 1963 calling for an international convention on regulations of export, transit and import of rare or threatened wildlife species or their skins and trophies.⁵ The first draft appeared in 1964. In 1969, a list of species to be controlled was presented to the General Assembly. In 1972, the United Nations Stockholm Conference on the Human Environment adopted recommendation 99.3, in response to which 88 countries discussed a draft convention at a plenipotentiary conference held in Washington D.C. in February-March 1973. CITES was originally signed by 21 countries on 3 March, 1973, which came into force after the tenth ratification on 1 July,

2. IUCN/UNEP/WWF, *Caring for the Earth: A Strategy for Survival*, 1993 at 20.

3. Simon Lyster, *INTERNATIONAL WILDLIFE LAW* (1989) at 239.

4. Willem Wijnstekers, *THE EVOLUTION OF CITES* (1995) at 11.

5. *Ibid.*

1975.⁶ From the said date the world has seen many changes in the field of wildlife conservation.

The CITES Treaty was concluded in the face of a dramatic, and largely uncontrolled, increase in the volume of international wildlife trade in the past two decades. CITES regulates commerce in more than 26,000 species of animals and plants through its system of Appendices that bans trade in endangered species and monitors illegal trade in other less endangered but potentially threatened species. The CITES framework regulates international trade in wild animals and plants through a permit system.⁷ The CITES deals specifically with only one of the various causes threatening wild species. It regulates completely and effectively international trade, a phenomenon which had been already tackled by previous treaties in a fragmentary way. The CITES does not protect the species directly, nor does it contain provisions on habitat preservation. Indirectly the species turn out to be protected because the strict regulation of their international trade makes the collecting, capturing or killing less profitable.⁸

The basic principles of CITES are quite straight forward. It regulates international trade in wild animals and plants which are listed in the three Appendices to the Convention.

The CITES also regulates the trade occurring between parties and non-parties. The CITES provides for a system of exchange of export-import permits. These documents have to meet precise conditions and certify that the trade of specimens belonging to a given species is not detrimental to its survival.⁹

CITES is perhaps the most successful of all international treaties concerned with the conservation of wildlife. Its success is explained primarily by its fundamental principles, which most States have proved willing to accept, and by the way in which it operates, which ensures that on the whole it is better enforced than many other treaties.¹⁰

II. THE FUNDAMENTAL PRINCIPLES OF CITES

The fundamental principles of CITES is to ensure international co-operation essential for the protection of certain species of wild fauna and

6. *Ibid.*

7. William C. Burns, *Asian Compliance with CITES: Problems and Prospects*, 29 INDIAN JOURNAL OF INTERNATIONAL LAW 1989 at 62-63.

8. Maria Clara Maffei, *Evolving Trends in International Protection of Species*, 36 GERMAN YEARBOOK OF INTERNATIONAL LAW, 1993 at 146.

9. *Supra* n. 8 at 146-47.

10. *Supra* n. 3 at 240.

flora against over exploitation through international trade. It establishes not only joint responsibility in the control of trade by both importing and exporting States, but also a forum and a mechanism for governments and governmental agencies to work together to identify, address, and resolve wildlife trade problems. The Convention is a protectionist treaty in the sense that it prohibits, with a few exceptions, international commercial trade in species threatened with extinction. Secondly, it is a trading treaty because it allows a controlled international trade in species whose survival is not yet threatened, but may become so. Third, it provides a mechanism whereby a party which has domestic legislations regarding the export of species not in Appendix I or II can seek the support of other parties in enforcing its own domestic legislations.

Article 1 (a) of CITES defines 'species' which includes any species, sub-species or a geographically separate population.¹¹ This allows different populations of the same species to be considered independently for listing purpose. Similarly, Article 1(b) of CITES defines specimens. The specimen may be living or dead and includes any "readily recognisable" part of derivative thereof.¹² This implies that international trade in products such as ivory, skin, horns etc. which form the bulk of wildlife trade, is covered by the Convention. Article 2 of CITES stipulates the fundamental principles of the Convention and creates three Appendices to the Convention which are enumerated below.

(i) Appendix I

Appendix I of CITES includes all species threatened with extinction which are or may be effected by trade. Non-commercial trade in specimens of such species is to be subject to strict regulation and is only to be authorized in exceptional circumstances. The export, import or re-export¹³ of specimens of such species correspondingly requires either an export permit, import permit or re-export certificate which may only be granted if the conditions pursuant to Article 3 of the Convention are met:

- (a) A Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
- (b) A 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;

11. Article 1(a) of CITES.

12. Article 1 (b), *id.*

13. Under Article 1 of the CITES "re-export" means export of any specimen that has previously been imported.

- (c) A Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel.¹⁴

Where there is a grant of an export permit, the State of export must be satisfied that an import permit has already been granted by the country of import. For a re-export permit to be granted, different conditions apply and include the Management Authority of the State of re-export being satisfied that the specimen was imported into the State in accordance with the Convention.¹⁵ A certificate must be granted for the introduction from the sea of any species included under Appendix I, once a number of different conditions are met.

The import permit can be granted only if:

- (i) the importation will not be for purposes detrimental to the species survival;
- (ii) the importation will not be primarily commercial; and
- (iii) if live wildlife is involved, the specimen be assured of a suitable home.

The export permit can be issued only if:

- (i) the wildlife was obtained legally;
- (ii) the wildlife will not be harmed during shipping; and
- (iii) an import permit has already been granted.

Initially, Appendix I contained about 450 species of majority being well known endangered animals as the tiger, cheetah, the humpback whale and peregrine falcon. Since then the number of species has become more than double and now includes a much greater variety of wildlife specially endangered plants.

(ii) Appendix II

Appendix II of CITES, as defined under Article 2 covers all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilisation incompatible with their survival. The export, import or re-export of specimens of such species correspondingly requires an export, import or re-export permit. These may only be issued if certain conditions are met as specified under Article 4. Trade in Appendix II species is only permitted if the exporting country issues an export permit, while for Appendix

14. Articles 3 (2) and (3) of CITES.

15. Article 3 (4), *id.*

I species where more stringent controls apply, an import permit is also required.

Any species whose international trade is unsustainable, thus can be listed in this Appendix according to the new criteria adopted in Conference of Parties 9 in 1994.

Article 2(2)(a) regulates international trade in species which are not sufficiently endangered for them to be included in Appendix I but which may become endangered unless their trade is controlled. Species in this category include heavily traded species whose populations are still relatively secure and those which are not yet in trade but could be vulnerable if traders suddenly switch from one target species to another. Article 2(2)(b) controls trade in species which are similar in appearance of species mentioned in Article 2(2)(a) and therefore be confused with them. A genera is to be listed wholly if some species of the genera are threatened and identification of the individual species within the genus is difficult.

The reasons for listing different species in Appendix II may alter but all species are treated equally once they are in Appendix II and trade in both categories is regulated in a similar way. CITES permits commercial trade in Appendix II species only if the country of origin has issued an export permit or a re-export certificate. The exporting country may not issue an export permit unless the proper government agency has certified that the export will not be detrimental to the species survival. Import permits are not required. Appendix II is much larger than Appendix I and contains tens of thousands of species varying from the African elephant to the entire order Cactaceae. More than 2300 animal species and over 24,000 plants are now listed in Appendix II.

For removal or downgrading of species from Appendix I or II and from Appendix I to II, CITES does not specify about the kind of information needed. However at the Berne Conference it was decided that any proposed decrease in protection for a species should be treated cautiously and that it was preferable to err on the side of protection than over-exploitation and very strict conditions were then laid down for deleting or transferring a species from (to) Appendices.

Though the *Berne Criteria* provided guidance on the types of information to be gathered on biological and trade status when trying to determine whether a species should be listed or not, it did not provide any definition of the crucial terms 'threatened and extinction' and 'affected by trade' .

The listing of species has never been very consistent and it is often not clear why particular species or populations are included in a particular

Appendix. In 1994, new criteria was set out, which is intended to make the process of listing species in the Appendices more consistent and objective.

(iii) *Appendix III*

Appendix III of CITES includes all species listed by individual parties as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade. Under Article 5, the export of a specimen of any species listed in Appendix III from the State which has listed it requires an export permit. An export permit may only be granted where a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the fauna and flora protection laws of the State, and that any living specimen will be prepared and shipped as to minimize the risk of injury. The import of such a specimen from any other State requires the presentation of a certificate of origin, to prove that the specimen does not originate from the country which has listed the specimen concerned.¹⁶

Article 2(4) sets out that it is the responsibility of Parties to the Convention not to allow trade in specimens of species included in Appendices I, II or III except in accordance with the provisions of the Convention. As a result of this, Parties are obliged to prohibit trade in CITES specimens if the provisions of the Convention have not been complied with. This provision is considered to be one of the linchpins of the Convention.¹⁷ It is important to identify it as a non-self executing provision of the Convention, meaning thereby that it cannot be implemented until specific domestic legislation has been adopted. This is in contrast to self-executing provisions, which are directly applicable to a party without the need for implementing domestic legislation. Unless expressly provided for by domestic legislation, the obligations of the Convention cannot be enforced against private persons in the courts and penalties cannot be applied for non-compliance.¹⁸ This is important as without effective domestic compliance mechanisms the enforcement of CITES is unattainable.

III. PROBLEMS IN WILDLIFE (PROTECTION) ACT, 1972

The Wildlife (Protection) Act, 1972 of India bans trade in most endangered species and their derivatives. But the problem lies in implementation of Wildlife (Protection) Act, 1972. Provisions of the Customs Act, 1962 provides for the compliance of the CITES requirement. Unfortunately, the ban on wildlife exploitation does not coincide with an equally rigorous enforcement

16. *Ibid.*

17. Cyrille de Kelm, *Guidelines for Legislation to Implement CITES*, IUCN ENVIRONMENT POLICY AND LAW IUCN, Gland, Switzerland, 1993 at 7.

18. *Id.* at 6.

effort and intelligence gathering on illegal trade thereby making legal provisions nugatory. The reason for growing wildlife trade is the absence of national-level authority for proper implementation of CITES, having enforcement or legal powers. It relies on the forest, customs and police departments to control illicit wildlife trade.

By an amendment in the Exim Policy in the very same fiscal year the Government signed the Biodiversity Convention, the Government allowed previously banned items to be freely exported. It comes directly into conflict with the Wildlife (Protection) Act as amended in 1991. The items which can now be freely exported include the highly endangered Kuth (item 3 of Schedule VI of the Wildlife (Protection) Act, 1972) and brown sea weeds.

Some of the problems are as follows:

1. CITES allows captive breeding under its provision under Article 7(4)(5) of the Convention. Therefore, there is a provision under the Indian law to provide a certificate of breeding in captivity or artificial propagation from monitoring trade specially in plant and butterflies. Trade, however, thrives because of false certificates.
2. The Wildlife (Protection) Amendment Act of 1991 empowered under section 11 the Chief Wildlife Warden to permit hunting of wild animal specified in Schedule I when such animal has become a danger to human life or is disabled or diseased beyond recovery. In respect of hunting of wild animals specified in Schedules II, III and IV, the Chief Wildlife Warden or other competent officer may issue permit of hunting such animals under certain circumstances.
3. The Amendment Act of 1991 has also provided for the conservation of plant species on the same level and extent as for the wildlife species but a member of the schedule tribe is exempted from the said rule which make easy illegal trade of wild plants for the trader and is one of the big loopholes in the protection of endangered flora in India.
4. In Wildlife (Protection) Act, 1972 there is little provision on the trade in wild flora and marine/riverine fauna, which could not protect the respective endangered species.
5. The Wildlife (Protection) Act, 1972 and the Amendment Act of 1991 contain soft penal provisions for the wildlife offenders who on conviction are punishable with imprisonment.
6. At present, there is no law to prevent the sale of animal articles or trophies and recently "classified" advertisement offering sale of "two

licensed tiger skins” has raised a larger question of ethics and morality over and above pure commercial consideration.

7. The Wildlife (Protection) Act, 1972 is not creating a deterrence it was meant to produce. This was because law was being treated like a redundant organ and lay dormant, disused, discarded and neglected. Whenever a trader was caught, the court case dragged on for years and sometime decades. Literally 10000 cases languished in lower courts. In a few cases some NGO picked up the cudgels and sought to bring the offenders to book successfully.
8. Decisions on cases brought to the court take for too long to be delivered, and offenders are often let off on technicalities. More importantly, wildlife traders receive bail within a day or two of the seizures, leaving them active in the trade till the final hearing which generally come after a decade or later.
9. Despite some provisions in the Wildlife (Protection) Act, 1972, which strictly prohibits hunting and any trade in wildlife or wildlife parts or articles, conviction is rare. The now famous Salman Khan black buck shooting case (where despite intense media attention the accused was let off the hook) amply demonstrates this fact.
10. Clearly, forest staff face formidable difficulties in enforcing wildlife protection law. Not the least among them is the interpretation of complicated legal provisions. The language in the Wildlife (Protection) Act, 1972 is difficult and incomprehensible to the layman. The application of criminal law in wildlife cases is daunting for forest staff given the archaic legal language and widespread apprehension among front line staff about court procedures.
11. Most protected areas and some reserves have an unfortunate history of park-people conflict in India.
12. In spite of the Act, what has jeopardised the very existence of the Gir lion is the unabated shooting, reduction of its natural habitat due to rapid development of agriculture, water pollution by the locals, drastic reduction in the wild population which constituted the natural prey of the lion and the spreading of infectious diseases through domestic cattles.
13. National Conservation Strategy, 1992 makes many promises in regard to conservation of natural resources especially of wildlife, but perhaps lacks conviction and betrays inaction when the question of implementation comes.

IV. SOME SUGGESTIONS

To mitigate the aforesaid problems, some measures are suggested below:

1. A separate CITES Implementation legislation should be brought covering CITES obligations.
2. A Central CITES Enforcement Cell should be set up as a statutory body for the enforcement of CITES provisions.
3. Establishment of Special Wildlife Court and if necessary Mobile Wildlife Court, too may be considered.
4. A provision need to be added in the Wildlife (Protection) Act, 1972 to respect the concept of "right to life" of wild species.
5. Implementation of citizen education programme to enhance appreciation of wildlife and to emphasize the importance of preserving wildlife species is required.
6. Organizing, on regular basis the CITES implementation training for the enforcement staff may be helpful.
7. Establishment of Central data bank to figure out the wildlife trade activities is needed.
8. Establishment of Central CITES legal cells to cover wildlife cases, including legal training to the field personnel is also required.
9. Establishment of Rehabilitation Centre or Orphan Centre to protect orphan wildlife may be useful.
10. Framing a comprehensive and coherent CITES Implementation Action Plan may be helpful.
11. Establishment of a Wildlife Forensic Science Lab is needed.

In conclusion, we have to persuade the consumers of wildlife products that their consumption will lead to the extinction of certain species. They must give up the practice or find alternatives. Wildlife (Protection) Act, 1972 needs to be thoroughly amended to meet the obligations under CITES. Finally, we have to revamp enforcement strategies, too.