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Alice Stroud

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# ESSAY: A REVIEW OF THE ROLE OF THE CITES SECRETARIAT IN THE IMPLEMENTATION OF THE NON-DETRIMENT FINDING REQUIREMENT

ALICE STROUD\*

## INTRODUCTION

The Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>1</sup> (“CITES” or “the Convention”) regulates the export, re-export, import, and introduction from the sea of specimens<sup>2</sup> of species listed in the CITES Appendices.<sup>3</sup> The Convention employs a system of permits and certificates that must be presented when specimens enter or leave a country.<sup>4</sup> Before every import of specimens listed in Appendix I and every export of

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\* Alice Stroud is a legal advocate for the Whale and Dolphin Conservation Society (“WDCS”) and the Humane Society International (“HSI”). The author received a French Masters of International Law from the University of Amiens, France, in June 1998, a French D.E.A. (diploma of advanced studies) in International and European Law from the University of Paris XI, France, in August 1999, and an LL.M. in Environmental and Natural Resources Law from the Northwestern School of Law of Lewis and Clark College of Portland, Oregon, in August 2001. She can be contacted at [alice.stroud@wdcs.org](mailto:alice.stroud@wdcs.org). The author warmly thanks the members of the CITES Secretariat and the members of the Species Survival Network who contributed their information and expertise to this paper. The author also wishes to thank Chris Wold, Associate Professor of Law and Director of the International Environmental Law Project at the Northwestern School of Law of Lewis and Clark College of Portland, Oregon, for his edits and suggestions. This paper is current through December 10, 2005.

<sup>1</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 244, *available at* <http://www.cites.org/eng/disc/text.shtml> [hereinafter CITES].

<sup>2</sup> The CITES treaty defines “specimens” to include live and dead animals and plants and their parts or derivatives. *See id.* art. I(b).

<sup>3</sup> *Id.* apps. I-III (current as of June 23, 2005), *available at* <http://www.cites.org/eng/app/appendices.pdf>.

<sup>4</sup> *See id.* arts. III-VI.

specimens listed in Appendices I and II, the Scientific Authority must determine that the export or import will not be detrimental to the survival of the species (the “non-detriment finding” or “NDF”).<sup>5</sup>

Although the Scientific Authority of each party has the responsibility of making NDFs, the Secretariat also plays an important role in assessing the adequacy of NDFs and assisting parties in improving their NDF processes.<sup>6</sup> The Secretariat undertakes these tasks pursuant to mandates of the Convention and resolutions adopted by the Parties, including the responsibility to:

- “undertake scientific and technical studies in accordance with programmes authorized by the Conference of the Parties as will contribute to the implementation of [CITES];”<sup>7</sup>
- “study the reports of Parties and . . . request from Parties such further information . . . as it deems necessary to ensure implementation of the present Convention;”<sup>8</sup>
- “make recommendations for the implementation of the aims and provisions of the [CITES] Convention, including the exchange of information of a scientific or technical nature;”<sup>9</sup>
- “invite the attention of the Parties to any matter pertaining to the aims of the present Convention;”<sup>10</sup>
- “if major problems with implementation of the Convention by particular Parties are brought to the attention of the Secretariat, the Secre-

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<sup>5</sup> *Id.*

<sup>6</sup> Email exchange between Ronald Orenstein, Humane Society International; Teresa Telecky, Species Survival Network; and Author (Nov. 2005) (on file with author) [hereinafter *Email Exchange*].

<sup>7</sup> CITES, *supra* note 1, art. XII(2)(c).

<sup>8</sup> *Id.* art. XII(2)(d).

<sup>9</sup> *Id.* art. XII(2)(h).

<sup>10</sup> *Id.* art. XII(2)(e).

- tariat [will] work together with the Party concerned to try to solve the problem and offer advice or technical assistance as required;<sup>11</sup>
- report to the Conference of the Parties (COP) and CITES subsidiary bodies, on annual reports, the Review of Significant Trade, national legislation and alleged infractions and other implementation problems;<sup>12</sup> and
  - “perform any other function as may be entrusted to it by the Parties.”<sup>13</sup>

As a result of these broad mandates, the Secretariat plays an increasing role in reviewing NDFs and assisting Scientific Authorities in making more robust NDFs. This paper describes the Secretariat’s role in more detail and explores the need for further guidance from the Conference of the Parties (“COP”) to orient the Secretariat in its tasks. Section I examines the Secretariat’s authority to review NDFs as part of its reporting duties. Section II summarizes the Secretariat’s extensive role in reviewing NDFs as part of the Review of Significant Trade. Section III describes some of the Secretariat’s NDF-related training activities. The essay concludes that, because of the complexity and subjectivity involved in making robust NDFs, the COP should provide further guidance to the Secretariat to facilitate its role in reviewing and assisting in the making of NDFs.

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<sup>11</sup> CITES 13th Conference of the Parties, Bangkok, Thailand, Oct. 2-14, 2004, *Compliance and Enforcement*, at 4, Res. Conf. 11.3 (Rev. CoP13), available at <http://www.cites.org/eng/res/all/11/E11-03R13.pdf> [hereinafter *Compliance and Enforcement*].

<sup>12</sup> See, e.g., CITES, *supra* note 1, art. XIII; CITES 13th COP, Bangkok, Thailand, Oct. 2-14, 2004, *Review of Significant Trade in Specimens of Appendix II Species*, Res. Conf. 12.8 (Rev. CoP13), available at <http://www.cites.org/eng/res/all/12/E12-08R13.pdf>.

<sup>13</sup> CITES, *supra* note 1, art. XII(2)(I).

# I. THE SECRETARIAT'S AUTHORITY TO REVIEW NDFS

The Convention and subsequent resolutions provide the Secretariat with the responsibility of monitoring the implementation of the COP.<sup>14</sup> The Convention charges the Secretariat specifically with studying reports and requesting information necessary to ensure implementation of the Convention, making recommendations for implementation of the Convention, bringing matters pertaining to the aims of the Convention to the attention of the parties, and working with individual parties when major implementation problems come to the attention of the Secretariat.<sup>15</sup>

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<sup>14</sup> To strengthen the Secretariat's capacity to address compliance issues within the Convention and provide relevant advice or assistance, a Legislation and Compliance Unit was created. CITES 46th Meeting of the Standing Committee ("SC"), Mar. 12-15, 2002, *Interpretation and Implementation of the Convention—Possible Measures for Non-Compliance*, SC46 Doc. 11.3, available at <http://www.cites.org/eng/com/SC/46/46-11-3.pdf>. It consists of a Chief, Senior Enforcement Officer, Legal and Trade Policy Officer and Unit Secretary. Marceil Yeater, INECE-OECD Workshop on Environmental Compliance and Enforcement Indicators, Nov. 3-4, 2003, *Compliance and Enforcement Indicators in CITES*, available at <http://www.inece.org/indicators/yeater.pdf>. Such a unit is relatively unique among multilateral environmental agreements ("MEAs"). See CITES 12th COP, Santiago, Chile, Nov. 3-15, 2002, *Interpretation and Implementation of the Convention—General Compliance Issues* [hereinafter CITES Compliance Doc.], para. 17, COP12 Doc. 26, available at <http://www.cites.org/eng/cop/12/doc/E12-26.pdf>. The Secretariat for the United Nations Framework Convention on Climate Change has a Special Advisor for Compliance. *Id.* Secretariats of other multilateral environmental agreements do not appear to have an equivalent position. *Id.* Governments, the Secretariats of other MEAs (including the Ozone Secretariat), and researchers have expressed interest in the CITES structure. See *id.*

<sup>15</sup> "The compliance system of CITES is established in the treaty text [Articles VIII, XI and XIII] and subsequent Resolutions and Decisions of the [COP], as well as by various notifications to the Parties, reports of the Secretariat and the activities of the Convention's subsidiary bodies." World Trade Organization Committee on Trade and Environment, June 6, 2001, *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, at 5, WT/CTE/W/191, available at <http://www.tradeobservatory.org/library.cfm?refID=25755> [hereinafter WTO Compliance Paper].

The issuance of permits with appropriate NDFs is of central importance to the effective implementation of the Convention. Indeed, the parties have noted that the issuance of CITES permits without appropriate NDFs “constitutes a lack of compliance with the provisions of the Convention and seriously undermines species conservation.”<sup>16</sup> Thus, where the Secretariat learns of problems relating to the issuance of NDFs, it has the obligation to report such matters to the parties.<sup>17</sup> In some cases, the Secretariat may be authorized to initiate a mission to a country to provide direct assistance to a party or make specific recommendations concerning NDFs.<sup>18</sup> While the Secretariat’s authority to seek information and make recommendations is broad, nothing in the Convention or other resolutions gives the Secretariat independent authority to investigate particular problems without the cooperation of the relevant party.<sup>19</sup>

#### A. *Review of NDFs Under the Authority to Monitor Implementation*

##### 1. The Secretariat’s Reporting Obligations

The Secretariat is required to inform the parties of problems with NDFs when doing so could improve the making of NDFs. The Convention requires the Secretariat to “prepare annual reports to the Parties . . . on the implementation of the present Convention.”<sup>20</sup> To facilitate reporting on the Convention’s implementation, parties must provide the Secretariat with “detailed information on

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<sup>16</sup> CITES 10th COP, Harare, Zimb., June 9-20, 1997, *Designation and Role of the Scientific Authorities*, at 1, Res. Conf. 10.3, available at <http://www.cites.org/eng/res/all/10/E10-03.pdf>.

<sup>17</sup> CITES, *supra* note 1, art. XII(2)(g); see also *supra* note 12.

<sup>18</sup> CITES, *supra* note 1, art. XIII; see also CITES Res. Conf. 12.8 (Rev. CoP13), *supra* note 12.

<sup>19</sup> CITES, *supra* note 1, art. XIII(2). (“Where the Party considers that an inquiry is desirable, such inquiry may be carried out by one or more persons *expressly authorized by the Party*.” (emphasis added)).

<sup>20</sup> *Id.* art. XII(2)(g).

significant cases of illegal trade.”<sup>21</sup> The Secretariat compiles all such information obtained from parties or from other sources, such as the World Customs Organization or Interpol, into a Report on Enforcement Matters.<sup>22</sup> This report may also include information relating to NDFs.<sup>23</sup> For example, in its last Report on Enforcement Matters,<sup>24</sup> the Secretariat reported that nine CITES parties still had not designated Scientific Authorities<sup>25</sup> and reminded the COP that permits and certificates issued by the Management Authority of such parties “are liable to be considered as issued contrary to the provisions of the Convention and invalid.”<sup>26</sup> The COP may then use this information as part of its review of the implementation of the Convention and, where appropriate, authorize “whatever recommendations it deems appropriate.”<sup>27</sup>

In addition, the Convention requires the Secretariat to communicate with relevant parties when it receives information that a species listed in Appendix I or II is suffering adverse effects from trade, or that the provisions of the Convention are not being implemented effectively.<sup>28</sup> Because the failure to make appropriate NDFs constitutes noncompliance with CITES, that failure would also be considered a failure to effectively implement CITES.<sup>29</sup> While the Secretariat is not obligated to seek such information through an investigation, when it receives such information it must engage the concerned party or parties.<sup>30</sup> The party must then inform the

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<sup>21</sup> *Compliance and Enforcement*, *supra* note 11, at 5.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> The parties have noted that the issuance of CITES permits without appropriate NDFs constitutes a “lack of compliance with the provisions of the Convention.” CITES Res. Conf. 10.3, *supra* note 16.

<sup>24</sup> CITES 13th COP, Bangkok, Thail., Oct. 2-14, 2004, *Interpretation and Implementation of the Convention—General Compliance Issues*, at 1, COP13 Doc. 23, available at <http://www.cites.org/eng/cop/13/doc/E13-23.pdf>.

<sup>25</sup> The nine parties were: Afghanistan, Belize, Dominica, Eritrea, Kuwait, Libya, São Tomé and Príncipe, Saudi Arabia, and Syria. *Id.* para. 29.

<sup>26</sup> *Id.* para. 28.

<sup>27</sup> CITES, *supra* note 1, art. XI(3)(e).

<sup>28</sup> *Id.* art. XIII(1).

<sup>29</sup> See *supra* note 23.

<sup>30</sup> *Id.*

Secretariat of any “relevant facts” and, where appropriate, propose remedial action.<sup>31</sup> An inquiry can take place if appropriate, and the information provided by the party (or resulting from the inquiry) is reviewed at the next COP for possible recommendation.<sup>32</sup> The process should improve parties’ abilities to make NDFs.<sup>33</sup>

## 2. The Secretariat’s Authority to Seek Additional Information

The “inquiry” described above can also result in the establishment of a mission to gather additional information and provide specific advice to national authorities for improving NDFs and the implementation of other convention requirements.<sup>34</sup> Article XII(2)(d) of CITES requires the Secretariat “to study the reports of Parties and to request from [them any] further information . . . necessary to ensure implementation of the present Convention.”<sup>35</sup> Missions and in-country review inquiries authorized by Article XIII(2) of CITES are important tools for receiving additional information.<sup>36</sup> Because the Secretariat does not have independent subpoena power or other investigative tools that government prosecutors have, missions and inquiries can only take place if the party concerned authorizes such action and approves the participation of the persons involved.<sup>37</sup>

These missions can improve the implementation of CITES and NDFs.<sup>38</sup> For example, the Secretariat conducted a mission in the United Arab Emirates (“UAE”) from October 27 to November

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<sup>31</sup> CITES, *supra* note 1, art. XIII(2).

<sup>32</sup> *Id.* art. XIII.

<sup>33</sup> See *Email Exchange*, *supra* note 6.

<sup>34</sup> Telephone Interview with Tom De Meulenaer, Senior Scientific Officer, Scientific Support Unit, CITES Secretariat, in Geneva, Switz. (Dec. 1, 2005).

<sup>35</sup> CITES, *supra* note 1, art. XII(2)(d).

<sup>36</sup> *Id.* art. XIII(2).

<sup>37</sup> *Id.*; see also *supra* note 19.

<sup>38</sup> Details of the missions led by the Secretariat to various CITES parties are included in the yearly reports on the activities of the Secretariat prepared in accordance with Article XII, paragraph (g). *Yearly Reports on the Activities of the CITES Secretariat*, available at [http://www.cites.org/eng/disc/sec/ann\\_rep/index.shtml](http://www.cites.org/eng/disc/sec/ann_rep/index.shtml).

1, 2001, that concluded that “permits and certificates were being issued and accepted contrary to the provisions of the Convention and Resolutions.”<sup>39</sup> As a result, the Standing Committee recommended that the parties suspend trade in specimens of CITES-listed species with the UAE.<sup>40</sup> The findings of the mission also resulted in the organization of several CITES training workshops for Management and Scientific Authorities in the UAE,<sup>41</sup> which ultimately led to the lifting of trade sanctions against the UAE.<sup>42</sup>

Similarly, the Standing Committee recommended that the Secretariat undertake a mission to investigate concerns that Paraguay was failing to implement CITES properly, and to ensure that exports were sustainable.<sup>43</sup> Between September 15 and 19, 2003, members of the Secretariat and the Scientific Authority of Spain visited Argentina and Paraguay.<sup>44</sup> The Secretariat consulted the Management and Scientific Authorities in Paraguay and other key decision-makers on environmental issues and concluded that there was “inadequate awareness of the requirements of the

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<sup>39</sup> CITES 46th Meeting of the SC, Mar. 12-15, 2002, *Interpretation and Implementation of the Convention—Implementation of the Convention in Individual Countries*, para. 11, SC46 Doc. 11.2, available at <http://www.cites.org/eng/com/SC/46/46-11-2.pdf>.

<sup>40</sup> See CITES 45th Meeting of the SC, Paris, Fr., June 19-22, 2001, *Summary Report of the Forty-fifth Meeting of the Standing Committee*, SC45 Summary Report, available at <http://www.cites.org/eng/com/SC/45/E45-SumRep.pdf>.

<sup>41</sup> After organizing a general CITES training workshop for Management and Scientific Authorities (February 28-March 7, 2002), the Secretariat organized another training workshop from August 31 to September 4, 2002, for enforcement authorities (customs and port authorities) and staff from the Management and Scientific Authorities who had not been trained before. Other training workshops for government staff responsible for CITES implementation took place in 2003 in each of the seven Emirates. See CITES 47th Meeting of the SC, Santiago, Chile, Nov. 1-2, 2002, *Implementation of the Convention in Individual Countries*, para. 6, SC47 Doc. 10.2, available at <http://www.cites.org/eng/com/SC/47/E47-10-2.pdf>.

<sup>42</sup> *Id.* para. 4.

<sup>43</sup> CITES 50th Meeting of the SC, Mar. 15-19, 2004, *Interpretation and Implementation of the Convention*, para. 4, SC50 Doc. 28, available at <http://www.cites.org/eng/com/SC/50/E50-28.pdf>.

<sup>44</sup> *Id.* para. 5.

Convention and even of basic administration (such as permit issuance)" and that "concerns regarding the implementation of the Convention in Paraguay were justified."<sup>45</sup> However, the Secretariat also concluded that "there was little, if any evidence of unsustainable exports of wildlife" even if the management of export quotas needed to be refined.<sup>46</sup> Nevertheless, on September 29, 2003, the government of Paraguay imposed a voluntary moratorium on trade in wildlife until "the Secretariat and Paraguay are jointly satisfied that sufficient remedial action had been taken."<sup>47</sup> The government of Paraguay also agreed to implement a series of supplementary actions such as separating the functions and providing clear mandates for the Management and Scientific Authorities, taking measures to ensure continuity of staffing in the two authorities, developing legislation, conducting population surveys by independent entities to establish NDFs, and preparing management plans for the main species in trade.<sup>48</sup> The Secretariat continues to provide advice and technical assistance to Paraguay with the help of the Spanish Scientific Authority.<sup>49</sup>

### 3. The Secretariat's Authority to Make Recommendations

Article XII(2)(h) requires the Secretariat "to make recommendations for the implementation of the aims and provisions of the present Convention, including the exchange of information of a scientific or technical nature."<sup>50</sup> The Secretariat interprets this

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<sup>45</sup> *Id.* paras. 7-8.

<sup>46</sup> *Id.* para. 8.

<sup>47</sup> *Id.* para. 11; see also CITES 50th Meeting of the SC, Mar. 15-19 2004, *Summary Report of the Fiftieth Meeting of the Standing Committee*, at 22-23, SC50 Summary Report, available at <http://www.cites.org/eng/com/SC/50/E50-SumRep.pdf>.

<sup>48</sup> F. Wayne King et al., *Paraguay*, CROCODILE SPECIALIST GROUP NEWSLETTER, (IUCN—The World Conservation Union Species Survival Commission, Gainesville, Fla.), July-Sept. 2003, at 16, available at <http://www.flmnh.ufl.edu/natsci/herpetology/newsletter/csgnews223.pdf>.

<sup>49</sup> CITES SC50 Doc. 28, *supra* note 43, para. 10.

<sup>50</sup> CITES, *supra* note 1, art. XII(2)(h).

provision broadly and issues a wide range of recommendations to parties, the COP and the Standing Committee. These recommendations have included:

- Recommendations to the Standing Committee to impose<sup>51</sup> or to lift<sup>52</sup> trade sanctions;
- Recommendations for the COP to adopt a draft decision or a draft resolution written by the Secretariat to facilitate implementation of CITES;<sup>53</sup>
- Recommendations for the COP to adopt or reject listing or delisting proposals;<sup>54</sup>
- Recommendations for the Standing Committee to request cooperation from a party (i.e. request

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<sup>51</sup> See Secretariat's Recommendation on the Suspension of Imports of *Naja naja* spp. from the Lao People's Democratic Republic, Annex to Document SC50 Doc. 23, available at <http://www.cites.org/eng/com/SC/50/E50-23.pdf> (recommending the suspension of imports of *Naja naja* spp. from the Lao People's Democratic Republic) [hereinafter Recommendations of the Secretariat, Laos]. This recommendation was adopted by the Secretariat after the authorities of Lao People's Democratic Republic failed to respond to a request from the Secretariat asking for

information on the scientific basis on [sic] which they had established that the quantities of specimens of *N. naja* spp. exported from 1995 to 2000 were not detrimental to the survival of the species; on population distribution and trends, harvest rates, outcomes of population monitoring programmes, management programmes, etc.; and on the determination under Article IV that *N. naja* spp. specimens exported during this period were legally acquired.

*Id.* at 3.

<sup>52</sup> See CITES SC47 Doc. 10.2, *supra* note 41, para. 10 (recommending the lifting of trade sanctions against the UAE).

<sup>53</sup> See CITES COP13 Doc. 23, *supra* note 24, para. 30 and Annex 3.

<sup>54</sup> See CITES 13th COP, Bangkok, Thailand, Oct. 2-14, 2004, *Proposals to Amend Appendices I and II: Comments from the Parties and Comments and Recommendations from the Secretariat in Interpretation and Implementation of the Convention—Amendment of the Appendices*, COP13 Doc. 60 at Annex 2, pp. 14-79, available at <http://www.cites.org/eng/cop/13/doc/E13-60.pdf>.

communication of information, request authorization of a verification mission, etc);<sup>55</sup>

- Recommendations for CITES authorities to make use of guidelines for the issuance of permits;<sup>56</sup> and
- Recommendations on methods to improve exchange of information among parties.<sup>57</sup>

The authority to make recommendations relating to implementation of the Convention, deriving either from the Convention itself or from resolutions of the parties, provides an incentive for parties to collaborate with the Secretariat.<sup>58</sup> For example, if a party fails to respond to a Secretariat inquiry relating to the adequacy of NDFs, the Secretariat may recommend trade sanctions against that party.<sup>59</sup>

#### B. *The Secretariat's Authority to Provide Scientific Advice on NDFs*

The expertise of the CITES Secretariat and its capacity to give advice to parties on the making of NDFs is widely recognized.<sup>60</sup> For example, Res. Conf. 10.3 recommends that "the Parties consult

<sup>55</sup> See CITES 53rd Meeting of the SC, Geneva, Switz., June 27-July 1, 2005, *Interpretation and Implementation of the Convention*, SC53 Doc.32 para. 17, available at <http://www.cites.org/eng/com/SC/53/E53-32.pdf> (recommending that the Standing Committee request Saudi Arabia's cooperation to enable the Secretariat to conduct an *in situ* verification mission to assess compliance with the Convention).

<sup>56</sup> CITES 12th COP, Santiago, Chile, Nov. 3-15, 2002, *Interpretation and Implementation of the Convention—General Compliance Issues*, COP12 Doc. 27 para. 31, available at <http://www.cites.org/eng/cop/12/doc/E12-27.pdf>.

<sup>57</sup> CITES Secretariat Annual Report for 2003, at 12, available at [http://www.cites.org/eng/disc/sec/ann\\_rep/2003.pdf](http://www.cites.org/eng/disc/sec/ann_rep/2003.pdf).

<sup>58</sup> This is illustrated, for example, by Paraguay's decision to impose a voluntary moratorium on trade in wildlife until the Secretariat and Paraguay "are jointly satisfied that sufficient remedial action had been taken." See *supra* note 47.

<sup>59</sup> See Recommendations of the Secretariat, Laos, *supra* note 51.

<sup>60</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

with the Secretariat when there is reason for concern as to whether the proper Scientific Authority findings are being made.”<sup>61</sup> Article XII(2)(d) requires the Secretariat to “undertake scientific and technical studies in accordance with programs authorized by the Conference of the Parties.”<sup>62</sup> As described below, the Secretariat facilitates the preparation of NDFs by contributing to the creation and improvement of NDF guidelines for Scientific Authorities.<sup>63</sup> The Secretariat also contributes to the advancement of “best science” by overseeing the preparation of scientific studies that can be used by Scientific Authorities in making NDFs.<sup>64</sup> Finally, the Secretariat facilitates proper access to available scientific data by all parties.<sup>65</sup>

### 1. Preparation of Guidelines to Facilitate the Making of NDFs

The Secretariat’s enhanced role in providing technical and scientific advice specifically related to NDFs was triggered by CITES Res. Conf. 8.6 (which has since been repealed).<sup>66</sup> That resolution directed the Secretariat to prepare general guidelines for Scientific Authorities to conduct appropriate scientific reviews for making NDFs, to provide these guidelines to the Animals Committee and Plants Committee for review, and to coordinate regional workshops on the conduct of Scientific Authorities.<sup>67</sup>

To help prepare guidelines for making NDFs, the Secretariat drafted a questionnaire on the activities and functions of the Scientific Authorities<sup>68</sup> and sent this questionnaire to the Scientific

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<sup>61</sup> The authority for the Secretariat to give advice on NDFs was initially granted by CITES Res. Conf. 8.6 which was later incorporated into CITES Res. Conf. 10.3, *supra* note 16.

<sup>62</sup> CITES, *supra* note 1, at XII(2)(d).

<sup>63</sup> Telephone Interview with Tom De Meulenaar, *supra* note 34.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> CITES Res. Conf. 10.3, *supra* note 16.

<sup>67</sup> CITES 8th COP, Kyoto, Japan, Mar. 2-13, 1992, Res. Conf. 8.6, *Role of the Scientific Authority*, available at <http://www.cites.org/eng/cop/08/E-Resolutions.pdf>.

<sup>68</sup> A copy of this questionnaire and an analysis of the responses received by the Secretariat are included in CITES, 13th Meeting of the Animals Committee (“AC”), Pruhonice, Czech Rep., Sept. 23-27, 1996, Doc. AC.13.16 (on file with author).

and Managements Authorities of 127 parties.<sup>69</sup> More than half of the parties responded to the Secretariat<sup>70</sup> and after careful examination of the answers received, the Secretariat decided that since the major problems encountered by Scientific Authorities “seemed to be more of a structural or organizational nature,” guidelines to conduct appropriate reviews by Scientific Authorities in making NDFs “would be of little use.”<sup>71</sup> Because many responses expressed the need for training, the Secretariat proposed to compile information from training seminars into a manual for Scientific Authorities.<sup>72</sup> The parties later adopted Resolution 10.3 to address the need for further CITES training of Scientific Authorities through the organization of workshops.<sup>73</sup> This resolution (which repealed CITES Conference Resolution 8.6) eliminated reference to the need for the Secretariat to draft guidelines for making appropriate NDFs and focused more exclusively on the development of workshops and seminars “designed specifically to improve the implementation of CITES by Scientific Authorities.”<sup>74</sup>

To stimulate compliance with CITES Conference Resolution 10.3, the World Conservation Union (“IUCN”) organized two workshops on the making of NDFs by CITES Scientific Authorities.<sup>75</sup> The CITES Secretariat was actively involved in the organi-

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<sup>69</sup> *Id.*

<sup>70</sup> 145 authorities from 64 CITES parties responded to the questionnaire. *See id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *See* CITES 13th Meeting of the AC, Pruhonice, Czech Rep., Sept. 23-27, 1996, *Summary Records of 13th Meeting of the CITES Animals Committee*, AC13.Min at 11, available at [http://www.cites.org/common/com/AC/AC13\\_sum.pdf](http://www.cites.org/common/com/AC/AC13_sum.pdf). This recommendation was endorsed by the Animals Committee and the Secretariat presented a compilation of its training “overheads” at the 14th meeting of the Animals Committee. *See* CITES 14th Meeting of the AC, Caracas, Venez., May 25-29, 1998, *Guidelines for Scientific Authorities—Resolution Conf. 10.3*, Doc. AC.14.20 (on file with author).

<sup>73</sup> CITES 10th COP, Harare, Zimb., June 9-20, 1997, *Interpretation and Implementation of the Convention—Designation of Scientific Authorities*, Doc. 10.76, available at <http://www.cites.org/eng/cop/10/doc/E10-76to78.pdf>.

<sup>74</sup> CITES Res. Conf. 10.3, *supra* note 16.

<sup>75</sup> *Hong Kong Workshop on the Making of NDFs by Scientific Authorities*, October 1998 and *Cambridge Workshop on the Making of NDFs by Scientific Authorities*, October 1999. *See* <http://www.iucn.org/themes/ssc/pubs/CITES/CITES-guidance-prelims.pdf> for more details.

zation of these workshops and contracted with IUCN for part of the process.<sup>76</sup> As a result, a draft manual on making NDFs was created.<sup>77</sup> The CITES Secretariat has worked in close collaboration with IUCN to further develop this draft manual which "though very useful in its general approach . . . may need some refining in order to make it more useful for Scientific Authorities in particular countries or (sub)regions."<sup>78</sup> Work on further development of "practical guidance for making non-detriment findings, including a manual and checklist, and samples of non-detriment findings and case studies" is still included in the list of the activities planned for the CITES Secretariat and for the CITES Animals and Plants Committees in the near future.<sup>79</sup>

## 2. Preparation and Distribution of Scientific Information

The Secretariat also helps to prepare and distribute scientific information for use as a reference for making NDFs.<sup>80</sup> Under Article XII(2)(d) of CITES, the Secretariat must "undertake scientific and technical studies in accordance with programs

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<sup>76</sup> The second workshop held in October 1999 was organized by IUCN, under contract to the Secretariat and with additional financial support from the United States of America. See CITES, 11th COP, Gigiri, Kenya, Apr. 10-20, 2000, *Interpretation and Implementation of the Convention—Assistance to Scientific Authorities for Making Non-Detriment findings*, CITES Doc. 11.40, available at <http://www.cites.org/eng/cop/11/doc/40.pdf>.

<sup>77</sup> *CITES Scientific Authorities Checklist to Assist in Making Non-Detriment Findings for Appendix II Exports*, reproduced in CITES Doc. Inf. 11.3, available at <http://www.cites.org/eng/cop/11/info/03.pdf>.

<sup>78</sup> CITES Doc. 11.40, *supra* note 76, para. 9 and Annex (detailing the program of work developed by the Secretariat for further development of a manual for making non-detriment findings).

<sup>79</sup> CITES, 19th Meeting of the AC, Aug. 18-21, 2003, *Strategic Planning—Implementation of the Strategic Vision through 2005*, CITES Document AC19 Doc. 6.1 at Objective 2.3.1, available at <http://www.cites.org/eng/com/AC/19/E19-06-1.doc>; see also 21st Meeting of the AC, May 20-25, 2005, *Strategic Planning—Implementation of the Strategic Vision through 2007*, CITES Document AC21 Doc. 6.1 at Objective 2.3.1, available at <http://www.cites.org/eng/com/AC/21/E21-06-01.pdf>.

<sup>80</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

authorized by the Conference of the Parties.”<sup>81</sup> The Secretariat contracts for the preparation of various scientific studies to assist Scientific Authorities in making accurate NDFs.<sup>82</sup> For example, the Secretariat contracted for the preparation of a paper giving explanations to Scientific Authorities on the making of NDFs and the setting of quotas for *Swietenia macrophylla* for the second meeting of the Bigleaf Mahogany Working Group.<sup>83</sup>

The Secretariat has also been deeply involved in the CITES process initiated to ensure the sustainability of trade in sturgeons.<sup>84</sup> A statement from the U.S. Department of the Interior reflects the impact of the Secretariat’s contribution on the determinations made by the CITES parties:

On March 11, 2003, we received a “Report on Results of Complex Interstate All-Caspian Sea Expedition on the Assess[ment] of Sturgeon Species Stocks” from the CITES Secretariat. This report summarized the 2002 sturgeon stock-assessment survey for the Caspian Sea and provided new data that would enhance the accuracy of previous population data, while providing sufficient new data that detailed the current status of the Caspian Sea beluga sturgeon population. We believed the information contained in the report would address substantial disagreements regarding the status of the species, and would be relevant to our final determination.<sup>85</sup>

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<sup>81</sup> CITES, *supra* note 1, art. XII(2)(d).

<sup>82</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

<sup>83</sup> 2nd Meeting of the Bigleaf Mahogany Working Group, Belem, Braz., Oct. 6-8, 2003, *Sustainable Management and Scientifically Based Non-Detriment Findings—Making a Non-Detriment Finding For Swietenia Macrophylla; Quota Setting*, CITES MWG2 Doc. 7, available at <http://www.fws.gov/citestimber/pdf/nondetriment.pdf>.

<sup>84</sup> For a very detailed explanation of this process, see <http://www.cites.org/eng/prog/Sturgeon/docs.shtml#SC45>.

<sup>85</sup> Department of Interior, Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; Final Determination of Threatened Status for the Beluga Sturgeon (*Huso huso*), 50 C.F.R. § 17, RIN 1018-AI11, available at

The Secretariat also participated in the International Workshop on CITES Implementation for Seahorse Conservation and Trade.<sup>86</sup> The purpose of the workshop was to help parties identify possible national management and monitoring strategies that could be implemented in their countries to promote sustainable harvest of seahorses and to properly implement the CITES Appendix-II listing for these species.<sup>87</sup> The workshop discussed what should be included in a functional national management program, including how to make NDFs as required to export these species.<sup>88</sup>

### 3. Ensuring Access to Scientific Data

The Secretariat often assists Scientific Authorities that face obstacles to obtaining the relevant and up-to-date scientific information necessary to make robust NDFs.<sup>89</sup> The obstacles to obtaining such data are numerous: many experts in African species are based in Europe and publish their work in European journals, and their data and conclusions are not always easily accessible in Africa; and much scientific literature is published only in English.<sup>90</sup> The CITES Secretariat tries to facilitate communication between the Scientific Authorities and the academic and scientific community.<sup>91</sup> For example, the Secretariat has brought together a

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<http://www.sturgeonaquafarms.com/BelugaESA/2004%20Federal%20Register%201.htm>.

<sup>86</sup> See CITES 20th Meeting of the AC, Mar. 29-Apr. 2, 2004, Johannesburg, S. Afr., *International Workshop on CITES Implementation for Seahorse Conservation and Trade*, Mazatlan, Mex., Feb. 3-5, 2004, *Summary Recommendations*, CITES Document AC20 Inf. 24 (Rev.), available at <http://www.cites.org/common/com/AC/20/E20i-24R.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> Copies of the Proceedings of the Workshop are available from Andy Bruckner (Andy.Bruckner@noaa.gov) as a hard copy or PDF. See also *id.*

<sup>89</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

<sup>90</sup> See *id.*, and see *Email Exchange*, *supra* note 6.

<sup>91</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

French scientist and the Scientific Authority of Chad for collaboration on the determination of NDFs and export quotas.<sup>92</sup>

Because of existing limitations of resources and time, however, the Secretariat is limited in its ability to fulfill this role. It is seeking to overcome these limitations by posting information on the availability of scientists and scientific resources on the CITES website to facilitate communication between the academic and scientific community and CITES Parties.<sup>93</sup>

## II. THE SECRETARIAT'S ROLE IN THE CONTEXT OF THE REVIEW OF SIGNIFICANT TRADE

The Secretariat also plays a significant role in improving NDFs through the review of significant trade. The review of significant trade is a process that the parties developed specifically to ensure that exports of Appendix II species take place "at a level that will not be detrimental to the survival of th[ese] species."<sup>94</sup> As explained below, the Secretariat participates in the selection of the species included in the review, in defining the recommendations to range states concerned by the review, and in defining punitive measures for non-compliance with these recommendations.

### A. *Selecting Species for Inclusion in the Review of Significant Trade*

The review of significant trade provides a mechanism to identify Appendix II species that are subject to unsustainable levels of international trade.<sup>95</sup> The selection of species for inclusion in the review relies heavily on the participation of the CITES Secretariat. The Secretariat first consults with the range states<sup>96</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> CITES Res. Conf. 12.8 (Rev. CoP13), *supra* note 12.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* Under CITES, a range state is defined as "a State whose territory is within the natural range of distribution of a species." See CITES Glossary, <http://www.cites.org/eng/resources/terms/glossary.shtml>.

concerning the implementation of Article IV and communicates information transmitted by the range States to the Animals Committee or the Plants Committee.<sup>97</sup> If the information communicated to the Animals Committee or the Plants Committee is sufficient to justify the selection of the species in the review, the Secretariat is asked to compile information on the species in order to make a "preliminary categorization of the species" for examination by the Animals Committee and the Plants Committee.<sup>98</sup> The parties make the final selection of the species to include in the review based on this information.<sup>99</sup>

Since the creation of the review of significant trade,<sup>100</sup> the Secretariat has interpreted its responsibilities in the selection of species broadly.<sup>101</sup> One of the most creative interpretations of its role was the proposal for a country-based review of significant trade. By proposing a country-based review of significant trade, the Secretariat introduced a new method for selection of species for the review of significant trade and recommended criteria governing this new type of selection:

The Secretariat therefore suggests that the Committee, could conduct a country-based Review of Significant Trade, as a test case, for a Party that has a significant overall level of trade in specimens of Appendix-II species and has:

- a) been subject to the recommendations in relation to several species for which there continues to be a justifiable concern over the implementation of Article IV concerning exports;

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<sup>97</sup> See CITES Res. Conf. 12.8 (Rev. CoP13), *supra* note 12.

<sup>98</sup> The Secretariat is authorized to hire a consultant to help at this stage of the process. *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> CITES Res. Conf. 8.9, *The Trade in Wild-Caught Animal Specimens*, available at <http://www.cites.org/eng/cop/08/E-Resolutions.pdf>. This resolution is now incorporated into CITES Res. Conf. 12.8. (Rev. CoP13), *supra* note 12.

<sup>101</sup> *Email Exchange*, *supra* note 6.

- b) experienced problems in establishing and implementing export quotas and in addressing recommendations made by the Committee in accordance with Resolution Conf. 8.9 (Rev.);
- c) experienced problems in the monitoring of trade and meeting CITES reporting requirements;
- d) not adopted adequate legislation to implement CITES and/or experienced problems with the enforcement of legislation (e.g. persistent illegal trade); and
- e) remained subject to trade suspensions recommended by the Standing Committee.<sup>102</sup>

The Secretariat also proposed objectives for the country-based review of significant trade.<sup>103</sup> Implementation of CITES Article IV by Scientific and Management Authorities and the assessment of NDFs were at the center of these objectives:

Objective 2:

To use the findings of the country-based Review of Significant Trade to develop (in close cooperation with the Secretariat) a functional and generic model for effective implementation of Article IV for the export of Appendix-II species that the Animals Committee can recommend to the Party concerned, and that consists of an implementation plan and guideline outlining the appropriate sequence of events and the respective responsibilities of the CITES Management and Scientific Authorities of the Party concerned;

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<sup>102</sup> CITES 17th Meeting of the AC, Hanoi, Vietnam, July 30-Aug. 3, 2001, *Implementation of the Review of Significant Trade—Proposal for the First Country-Based Significant Trade Review*, CITES Document AC17 Doc. 7.5, para. 4, available at <http://www.cites.org/eng/com/AC/17/E17-07-5.doc>; see also CITES Document PC11 Doc. 11.2.1.

<sup>103</sup> CITES Document AC17 Doc. 7.5, *supra* note 102 at Annex.

Objective 3:

To ensure that the implementation model covers all key aspects of managing exports of Appendix-II species, i.e. the assessment of population status, the identification of gaps in information, sources of information to underpin non-detriment findings, the process of making non-detriment findings, quota setting, the supervision of different production systems (e.g. wild harvesting, ranching, and captive breeding), the issuance of export documents, monitoring of trade, compilation of trade data, and the production of annual and other CITES reports, as required from CITES Management and Scientific Authorities . . . .<sup>104</sup>

The Animals Committee and the Plants Committee supported the proposals made by the Secretariat and, following recommendations from the Animals Committee adopted at its 17th meeting (Hanoi, July-August 2001) and the Plants Committee at its 11th meeting (Langkawi, September 2001), the first country-based review of significant trade was initiated by the Secretariat with Madagascar chosen as the subject of the review.<sup>105</sup>

*B. Defining Recommendations to Range States*

Once the Animals Committee or the Plants Committee selects a species for inclusion in the review, the appropriate committee and the Secretariat consult with individual parties to determine the measures necessary to ensure that trade in the species concerned becomes sustainable.<sup>106</sup> The Secretariat's primary role in this context is to facilitate communication between the members of the commit-

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<sup>104</sup> *Id.*

<sup>105</sup> See 17th Meeting of the AC, Hanoi, Vietnam, July 30-Aug. 3, 2001, *Summary Record*, CITES Document AC17 Summary Record, available at [http://www.cites.org/eng/com/AC/17/AC17\\_Summary\\_Record.pdf](http://www.cites.org/eng/com/AC/17/AC17_Summary_Record.pdf).

<sup>106</sup> See CITES Res. Conf. 12.8 (Rev. CoP13), *supra* note 12.

tees and the range states.<sup>107</sup> The committees decide on recommendations to the range states in consultation with the Secretariat.<sup>108</sup> The Secretariat transmits these recommendations to the range states concerned and determines, in consultation with the appropriate committee, if these recommendations have been implemented.<sup>109</sup>

The Secretariat can assist parties with the implementation of the recommendations made by the Animals Committee or the Plants Committee. For instance, in cases where there is "insufficient information on the population, distribution and life history parameters and insufficient monitoring of the levels and impacts of trade to enable CITES NDFs to be made reliably,"<sup>110</sup> the Animals Committee or the Plants Committee can recommend that further investigations be conducted on the biological basis for determining whether exports are sustainable.<sup>111</sup> The Secretariat can assist parties in conducting these investigations.<sup>112</sup> This occurred when, following the review of significant trade in 1993, the Animals Committee recommended an investigation of the biological basis for determining whether exports of chameleons from Madagascar are non-detrimental to the survival of the species. The *Direction Générale des Eaux et Forêts* asked IUCN for assistance in developing a project to undertake field assessments of the status of Madagascar chameleons.<sup>113</sup> The project was supported by the European Commission and the CITES Secretariat.<sup>114</sup>

At the sixteenth meeting of the Animals Committee in December, 2000, the Secretariat informed the Committee that it

<sup>107</sup> Telephone interview with Tom De Meulenaer, *supra* note 34.

<sup>108</sup> See CITES Res. Conf. 12.8 (Rev. CoP13), *supra* note 12.

<sup>109</sup> *Id.*

<sup>110</sup> LEE D. BRADY & RICHARD A. GRIFFITHS, STATUS ASSESSMENT OF CHAMELEONS IN MADAGASCAR v (International Union for the Conservation of Nature 1999), available at [http://europa.eu.int/comm/environment/cites/studies/chameleons\\_en.pdf](http://europa.eu.int/comm/environment/cites/studies/chameleons_en.pdf). This study explains that in the early 1990s, recognizing this lack of information, IUCN, through its Wildlife Trade Program, associated with the Species Survival Commission, started to develop field projects to assess the status of certain CITES Species.

<sup>111</sup> See CITES Res. Conf. 12.8 (Rev. CoP13), *supra* note 12.

<sup>112</sup> *Id.*

<sup>113</sup> BRADY & GRIFFITHS, *supra* note 110.

<sup>114</sup> *Id.*

had decided to review the implementation of all recommendations that had been formulated by the Committee in the context of Conference Resolution 8.9, as revised, on Trade in Specimens of Appendix II species Taken from the Wild (now replaced by Res. Conf. 12.8 on the Review of Significant Trade in Specimens of Appendix II Species).<sup>115</sup> The Committee supported this initiative and the Secretariat started compiling all recommendations formulated by the Animals Committee and the Standing Committee concerning the Appendix II species that were subject to the review of significant trade, assessing the implementation of these recommendations, and analyzing their relevance.<sup>116</sup> At the eighteenth meeting of the Animals Committee in April, 2002, the Secretariat informed the Committee that it would hire TRAFFIC International as a consultant to assist in the compilation and analysis of this information.<sup>117</sup> A database<sup>118</sup> containing all relevant information is now finalized and available to the parties, who can request it from the CITES Secretariat.<sup>119</sup> This database inventories all recommendations on the "basis of non-detriment findings" and provides details on their implementation.<sup>120</sup> This

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<sup>115</sup> TRAFFIC International, *Review of Significant Trade In Specimens of Appendix II Species (Resolution Conf. 12.8. and Decision 12.75)—Review of the Implementation of Recommendations*, CITES Document AC20 Doc. 8.2, available at <http://www.cites.org/eng/com/AC/20/E20-08-2.pdf>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (describing the structure of this database).

<sup>119</sup> At the 21st Meeting of the Animals Committee, the Secretariat introduced document AC21 Doc. 10.1.1 (Rev. 1), adding that it would distribute CD-ROM copies of the database created by TRAFFIC to some parties for testing. See CITES 21st Meeting of the AC, May 20-25, 2005, *Summary Record of the Twenty-first Meeting of the Animals Committee*, CITES Document AC21 Summary Record para. 10.1.1, available at <http://www.cites.org/eng/com/AC/21/E-AC21-SummaryRecord.pdf>.

<sup>120</sup> In the database, every recommendation has been allocated a type to enable different kinds of analyses. The types of recommendations are as follows: "Basis of non-detriment finding; enforcement measures; export controls; export policy; export quota; harvest quota; identification of specimens; legislation; other; population status and distribution; production systems; temporary export restriction; trade data; wild management programs." See CITES Document AC20 Doc. 8.2, *supra* note 115, para. 8(e)(iv).

information will be very useful in “evaluat[ing] the contribution of the Review of Significant Trade to the implementation of Article IV, paragraphs 2(a), 3 and 6(a).”<sup>121</sup> It will allow parties to make recommendations to improve the efficiency of the roles of the Animals Committee, the Plants Committee and the Secretariat in helping Scientific Authorities fulfill their obligation to make accurate non-detriment findings.<sup>122</sup>

### C. *Defining Measures to Adopt for Non-Compliance*

If the Secretariat determines that the recommendations to the range states have not been implemented, it is to “recommend to the Standing Committee appropriate action, which may include, as a last resort, a suspension of trade in the affected species with that State.”<sup>123</sup> The Standing Committee then decides on appropriate action and makes recommendations to the state concerned, or to all parties, on the basis of the Secretariat’s report.<sup>124</sup>

The Secretariat has significant discretion in utilizing its power to make recommendations to the Standing Committee for possible sanctioning of non-compliant parties.<sup>125</sup> At the last meeting of the Standing Committee in the summer of 2005, this quasi-unlimited power to make recommendations attributed to the Secretariat in the context of the review of significant trade played against the application of the Precautionary Principle.<sup>126</sup>

<sup>121</sup> *Terms of Reference for an Evaluation of the Review of Significant Trade*, in Decisions of the Conference of the Parties to CITES in Effect after the 13th Meeting, Annex 3, available at <http://www.cites.org/eng/dec/valid13/E13-Dec.doc>.

<sup>122</sup> Formulation of recommendations in view of the results of the evaluation is one of the objectives of the evaluation. *See id.*

<sup>123</sup> *See* CITES Res. Conf. 12.8 (Rev. CoP13), *supra* note 12.

<sup>124</sup> *Id.*

<sup>125</sup> *See infra* Part II.B. for further development on the Secretariat’s power to make recommendations.

<sup>126</sup> The Precautionary Principle is codified in Principle 15 of the Rio Declaration which states: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent

The Secretariat introduced document SC53 Doc. 25 Addendum concerning trade suspensions for *Cacatua sulphurea* and *Ptyas mucosus* from Indonesia that the Standing Committee had recommended in 1993 in the context of implementing the review of significant trade.<sup>127</sup> It referred to information that Indonesia had submitted regarding those two species in a document submitted to the Standing Committee<sup>128</sup> and explained that this information led it to conclude, in consultation with the Chairman of the Animals Committee, that the recommendations for trade suspensions should be withdrawn.<sup>129</sup> The Secretariat chose to recommend lifting of the trade suspensions despite noticing a certain number of flaws in the documentation submitted by Indonesia (such as failure to include population estimates and indicate the levels of harvest and export that would be allowed in 2005 or 2006).<sup>130</sup> Documentation on this issue was submitted late with no previous consultation of the Animals Committee as a whole.<sup>131</sup> Members of the Standing

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environmental degradation." See Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874 [hereinafter the Rio Declaration].

<sup>127</sup> CITES 53rd Meeting of the SC, June 27-July 1, 2005, *Interpretation and Implementation of the Convention—Review of Significant Trade*, CITES Document SC53 Doc. 25 Addendum, available at <http://www.cites.org/eng/com/SC/53/E53-25-Add.pdf>.

<sup>128</sup> CITES Management Authority of Indonesia, *Sustainability of Rat Snake (Ptyas mucosus) Harvests in Indonesia: A Discussion of Issues*, CITES Document SC53 Inf. 3, available at <http://www.cites.org/common/com/SC/53/E53i-03.pdf>.

<sup>129</sup> CITES Document SC53 Doc. 25 Addendum, *supra* note 127.

<sup>130</sup> The Secretariat even tries to justify these lacks in the Indonesian documentation:

Indonesia has not included population estimates, but this may be difficult for such a common species. The levels of harvest and export that would be allowed in 2005 or 2006 are not communicated, but this may be due to the timeframes and process in the establishment of quotas as outlined in the document, i.e. through research and consultation in the second half of the year and based on harvest levels of previous years.

*Id.* para. 6(c).

<sup>131</sup> CITES 53rd Meeting of the SC, June 27-July 1, 2005, *Summary Record of the Fifty-third meeting of the Standing Committee*, CITES Document SC53 Summary Record (Rev. 1) para. 25, available at <http://www.cites.org/eng/com/SC/53/sum/E53-SumRec.pdf>.

Committee expressed "concern about the late submission of the documentation which prevented the representatives from consulting their respective regions and about the level of export of *P. mucosus* that would be allowed if trade were to resume."<sup>132</sup> "The Committee adopted the recommendations made by the Secretariat concerning [*Cacatua sulphurea*] and *P. mucosus* in Indonesia but specified that this adoption should not set a precedent for taking decisions on the basis of documents submitted late."<sup>133</sup>

Application of the Precautionary Principle is "particularly relevant in cases of serious or irreversible harm such as the threatened extinction of species."<sup>134</sup> Annex 4 of CITES Conference Resolution 9.24 (Rev. CoP 13)<sup>135</sup> sets out a number of "precautionary measures" to be considered as part of the amendment process for the CITES Appendices. In its opening paragraph, it states that:

When considering proposals to amend Appendix I or II, the Parties shall, by virtue of the precautionary approach and in case of uncertainty either as regards the status of a species or the impact of trade on the conservation of a species, act in the best interest of the conservation of the species concerned and adopt measures that are proportionate to the anticipated risks to the species.<sup>136</sup>

The decision to lift trade suspensions for *Cacatua sulphurea* and *Ptyas mucosus* from Indonesia without ensuring proper regional consultations or the conduct of adequate scientific studies is not "in the best interest of the species concerned."

At the last meeting of the Standing Committee, the Secretariat informed the Standing Committee that it had initiated a

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 361 (1st ed. 1998).

<sup>135</sup> CITES Res. Conf. 9.24 (Rev. CoP13), *Criteria for Amendment of Appendices I and II*, available at <http://www.cites.org/eng/res/09/09-24R13.shtml>.

<sup>136</sup> *Id.*

project to systematically review all recommendations to suspend imports of specimens of Appendix-II species that had been in place for longer than two years.<sup>137</sup> The purpose of the project was to make proper recommendations to the Standing Committee in compliance with Res. Conf. 12.8 (Rev. CoP13).<sup>138</sup>

The CITES Secretariat has used its authority to review NDFs as an opportunity to develop extensive training for Scientific Authorities on the implementation of CITES Article IV.<sup>139</sup>

### III. THE SECRETARIAT'S TRAINING ACTIVITIES ON THE MAKING OF NDFS

The CITES Secretariat provides technical assistance to parties through programs which aim to raise the capacity of the parties to implement the Convention.<sup>140</sup> The Capacity Building Unit ("CBU") of the Secretariat coordinates training and capacity-building activities through workshops, seminars, training packages, and dissemination of information through the Internet and newsletters, technical assistance, and CD-ROMS, among other things.<sup>141</sup> The Scientific Coordination Unit ("SCU") of the Secretariat provides assistance to the CITES parties to enhance the scientific basis for decision-making in CITES.<sup>142</sup> The SCU conducts workshops on NDFs and quota management, as well as the creation of identification manuals.<sup>143</sup>

A United Nations report recognized that the critical importance of the NDF to the credibility of CITES justifies "the enhancement of the ability of Scientific Authorities to make the necessary scientific findings and fulfil [sic] their other scientific

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<sup>137</sup> CITES Document SC53 Summary Record, *supra* note 131, para. 25.

<sup>138</sup> *Id.*

<sup>139</sup> *See infra* Part III.

<sup>140</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

<sup>141</sup> *Id.*

<sup>142</sup> World Trade Organization, *Convention on International Trade in Endangered Species of Wild Fauna and Flora: Brief Description*, available at [http://www.wto.org/English/tratop\\_e/envir\\_e/cites\\_e.doc](http://www.wto.org/English/tratop_e/envir_e/cites_e.doc).

<sup>143</sup> *Id.*

obligations under the Convention.”<sup>144</sup> To that end, the Secretariat organizes training for scientific authorities according to a yearly training program called “CITES and Science” that includes two or three seminars per year.<sup>145</sup>

In addition, the Secretariat sometimes provides training to Scientific Authorities at the request of a particular country or group of countries.<sup>146</sup> For example, the Australian Management Authority requested the organization of a second capacity-building workshop on NDFs, which was held in Brisbane in August 2004.<sup>147</sup>

The Secretariat also provides training at the request of the COP or the Standing Committee on a range of issues, including trade in wild animal and plant species, the making of NDFs for exports of Appendix-II listed species, quota setting, and monitoring of harvest. For example, the Secretariat participated in training on the making of NDFs for Bigleaf Mahogany pursuant to Decision 13.59, which directed the parties, the Secretariat, and intergovernmental and non-governmental organizations to “seek ways to share information though the organization of regional workshops, capacity-building programmes, the exchange of experiences and the identification of financial resources.”<sup>148</sup>

Despite the critical importance of these capacity building activities, the parties considerably reduced funding for such activities at the last meeting of the COP.<sup>149</sup> The lack of resources

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<sup>144</sup> 8th Meeting of the Environmental Management Group, Sept. 1, 2004, *Outline of UN Activities and Initiatives on Environment Related Capacity Building and Technology Support*, at 19, Document EMG 8/6, available at [http://www.unemg.org/download\\_pdf/EMG8/DOC\\_8\\_6.pdf](http://www.unemg.org/download_pdf/EMG8/DOC_8_6.pdf).

<sup>145</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

<sup>146</sup> *Id.*

<sup>147</sup> Australian Government Environment Protection Report—2004, available at <http://www.deh.gov.au/about/publications/annual-report/04-05/pubs/deh-legislation-annualreport0405-epbc.pdf>.

<sup>148</sup> *Decisions of the Conference of the Parties to CITES in Effect After the 13th Meeting*, at Decision 13.59, *Bigleaf Mahogany*, available at [http://www.cites.org/eng/dec/valid13/13-55\\_59.shtml](http://www.cites.org/eng/dec/valid13/13-55_59.shtml).

<sup>149</sup> Telephone Interview with Tom De Meulenaer, *supra* note 34.

for such activities makes it very difficult for the Secretariat to respond to the needs of parties in this regard.<sup>150</sup>

#### CONCLUSION ON THE NEED FOR MORE GUIDANCE FROM THE COP

Failure to make appropriate NDFs is an infraction which, in countries who have designated a Scientific Authority, is difficult to trace. The CITES treaty does not have any mechanism ensuring that parties will ever communicate a copy of their NDFs to the CITES Secretariat when not ordered to do so by the COP or by the Standing Committee.<sup>151</sup> Control of the implementation of the obligation to make accurate NDFs by the CITES Secretariat and by CITES subsidiary bodies occurs exclusively *a posteriori* once the adoption of detrimental export permits has occurred and is causing a degree of unsustainable trade noticeable enough to trigger the control of a party's compliance. This approach is contrary to the Precautionary Principle and could potentially cause the extinction of some species in trade. The CITES parties could review this process and introduce a system where parties would regularly give notice of their NDFs to the Secretariat for possible monitoring by a group of experts. Such a mechanism would allow the detection of illegal NDFs before these NDFs irreversibly impact the species in trade.

By adopting a broad interpretation of its mandate under CITES Articles XII and XIII, the Secretariat has played a key role in strengthening the enforcement of the parties' obligation to make accurate NDFs. CITES Conference Resolution 10.3<sup>152</sup> includes a few recommendations on the types and sources of information that might be taken into account when making NDFs, but defining CITES requirements for the validity of NDFs is still an ongoing process. This uncertainty allows significant room for discretion in the Secretariat's findings. The CITES Conference of the Parties must define more detailed guidelines on what constitutes a valid NDF in order to protect the transparency and the credibility of the

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> CITES Res. Conf. 10.3, *supra* note 16.

review of NDFs by the Secretariat, the Animals Committee, the Plants Committee and the Standing Committee.