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CITES and the CBD: Tensions and Synergies

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INTRODUCTION

The international legal regime for the protection of biological diversity evolved, throughout the last half of the twentieth century, in an ad hoc and piecemeal fashion, reflecting changing political realities, conservation challenges and the rapidly developing scope and nature of international environmental law. This fragmented and unsystematic development, in the face of ecological challenges on a global scale, raises serious problems of lack of coordination, replication of efforts and policy divergence between regimes. Concern about these inefficiencies has prompted a range of recent initiatives to promote coherent links between environmental agreements, with the United Nations Environment Programme (UNEP) as the prime motivator.[1] These include an ongoing project focusing on the harmonization of national reporting requirements,[2] a United Nations University/UNEP 1999 Conference on 'Interlinkages: Synergies and Coordination between Multilateral Environmental Agreements', and statements or substantive action brought about by many multilateral environmental agreements (MEAs) to address the need for cooperation.[3]

POTENTIAL FOR SYNERGIES AND CONFLICTS

However, these efforts to promote coordination assume an underlying harmony in the policy objectives and legal principles and rules embodied in environmental agreements. Is this unduly optimistic? The mushrooming of international regimes raises the potential for competing, or at least incoherent, norms and rules in different fora – one example is the (arguably) divergent approach to intellectual property taken by the Convention on Biological Diversity and the World Trade Organization (WTO) Trade-Related Intellectual Property Rights (TRIPS) agreement.[4] This is not just an academic issue: the compatibility of 'overlapping' regimes – those with part of their functional scope in common[5] – will influence their potential for cooperation and their cumulative efficacy. Mutually supportive norms, principles and rules can give rise to constructive synergies, but where these are competing, tensions or conflicts may arise.[6] Environmental agreements are often assumed to be, by nature, mutually supportive and complementary, but as the momentum gathers for the promotion of substantive inter-linkages it is worth examining this assumption in some detail.

CITES AND THE CBD

The institutional landscape governing biodiversity is reasonably cluttered. The Convention on Biological Diversity (CBD), opened for signature at Rio de Janeiro in 1992, was motivated, in part, by a desire for a globally applicable framework convention building on and complementing the patchwork of regional, sectoral, ecosystem- or taxon-specific agreements which existed at the time.[7] This article examines the relationship between the CBD and one of these more specific agreements: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; Washington, 1973). These treaties overlap considerably

[1] See, e.g., UNEP Governing Council decision 19/1, annex, para. 3(b), and decision SS. V/2, emphasizing the role of UNEP in enhancing inter-linkages and coordination between international environmental conventions.

[2] See, e.g., information on the website available at <http://www.unep-wcmc.org/conventions/harmonization.htm>.

[3] For a summary, see generally UNEP Publication Series, *Synergies: Promoting Collaboration on Environmental Treaties* 1–4.

[4] See, e.g., G.K. Rosendal, 'Impacts of Overlapping International Regimes: The Case of Biodiversity', 7 *Global Governance* (2000), 95; R.G. Tarasofsky, 'The relationship between the TRIPs Agreement and the Convention on Biological Diversity: Towards a Pragmatic Approach', 6 *RECIEL* (1997), 148.

[5] O.R. Young, 'Institutional Linkages in International Society: Polar Perspectives', 2 *Global Governance* (1996), 1.

[6] Rosendal, n. 4 above.

[7] See Preamble, para. 22, regarding the desire 'to enhance and complement existing international arrangements for the conservation of biological diversity and sustainable use of its components'; and F. Burhenne-Guilmin and S. Casey-Lefkowitz, 'The Convention on Biological Diversity: A Hard Won Global Achievement', 3 *Yearbook of International Environmental Law* (1992), 43. Apart from the many regional agreements, the agreements operating at a global level were the Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 1972), CITES (Washington, 1973), Convention on Wetlands of International Importance (Ramsar, 1971) and the Convention on Migratory Species of Wild Animals (Bonn, 1979).

in scope and purpose – while dozens of bilateral, regional or international instruments address conservation, only these two are potentially applicable to every species, in any habitat in the world. These are, without doubt, also the most important. At the time of writing, the CBD has 181 parties and CITES 154. Detailed analyses of the content of the Conventions are widely available elsewhere, but this article begins with a brief introduction to each.

The CBD is a broad 'framework' Convention that sets out general principles and commitments on an extensive range of issues related to biodiversity. Its stated objectives are threefold: the conservation of biodiversity, the sustainable use of its components, and fair and equitable sharing of the benefits of utilization of genetic resources.[8] With respect to conservation and sustainable use, it contains provisions on, *inter alia*, national strategic planning, the identification and monitoring of components of biodiversity and processes, and activities likely to have significant adverse impacts, measures for *in situ* and *ex situ* conservation and for sustainable use, incentive measures and environmental impact assessment.[9] All these are obligations to be carried out by State parties at a national level. The Convention also deals with a range of 'access' issues: provisions governing access to genetic resources,[10] access to and transfer of technology, including biotechnology,[11] and access to and sharing of benefits derived from the use of genetic resources.[12] The handling of biotechnology is addressed[13] and this subject has been elaborated further in the Biosafety Protocol (Cartagena, 2000). In general, the imposition of specific binding obligations is avoided, and qualifying phrases such as 'as far as possible and as appropriate' are used extensively through the text.

CITES addresses the specific threat to wild species of plants and animals posed by international trade. Its purpose was recently stated to be:

> To ensure that no species of wild fauna or flora becomes or remains subject to unsustainable exploitation because of international trade.[14]

It establishes a set of trade measures providing different levels of regulation for species[15] listed on three Appendices. Species are included in Appendix I if they are threatened with extinction and are or may be affected by trade.[16] Commercial trade in these species is effectively banned, and the very limited trade allowed requires permits from both importing and exporting States, to be issued only if, *inter alia*, trade is not detrimental to the wild population.[17] Appendix II lists species which, although not necessarily threatened with extinction, may become so unless trade is regulated.[18] Commercial trade in these species requires the issuing of permits by the exporting State on a similar 'non-detriment' basis, and the importation requires presentation of this permit.[19] Individual parties may list species on Appendix III when they wish to ensure they are not traded by other parties without their national authority.[20] This simple underlying structure has been extensively modified over the years by the development of a range of more flexible trade controls, including quotas for trade in Appendix I species, split-listings of different populations of species on different Appendices, and the 'ranching' of wild species.[21] The Convention currently regulates around 29,000 species.[22]

LINKS BETWEEN THE CONVENTIONS

Links between the two Conventions are currently at an early stage of development. There has been widespread and repeated expression within both Conventions of the need to coordinate with other MEAs generally, and each other in particular, but formal links between the Conventions rest at the level of a Memorandum of Understanding (MOU). This MOU, concluded in October 1996, set out in general terms potential areas of cooperation, addressing such actions as reciprocal participation in meetings, exchange of information and exploration of the potential for harmonization of reporting requirements.[23] More recently, proposed joint activities to be carried out under this MOU include, *inter alia*, the harvesting of non-wood forest

[8] UN Convention on Biological Diversity, Article 1.
[9] Ibid., Articles 6–11, 14.
[10] Ibid., Article 15.
[11] Ibid., Article 16.
[12] Ibid., Articles 15(7), 16(3), 19(2).
[13] Ibid., Article 19(3), (4).
[14] *Strategic Vision through 2005* (CITES Doc. 11.1), Annex 1.
[15] Or geographically separate populations and any 'readily recognizable' part or derivative: see Article I(b).
[16] CITES, Article II(1). The rudimentary criteria given in the Convention text for listing species have been expanded by subsequent COPs, most recently in Res. Conf. 9.24 (the 'Fort Lauderdale' or 'Everglades' criteria).
[17] Ibid., Article III
[18] Ibid., Article II(2). Appendix II also lists species which must be regulated to effectively control trade in species meeting these criteria (Article II(2)(b)). It thus lists 'lookalike' species that may be confused with species listed in their own right.
[19] Ibid., Article IV.
[20] Ibid., Article II(3).
[21] See generally IUCN, *Trade Measures in Multilateral Environmental Agreements; A Report by IUCN – the World Conservation Union on the Effectiveness of Trade Measures contained in the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Report prepared for the Economics, Trade and Environment Unit, United Nations Environment Programme (10 May 2001), at 21–35.
[22] Ibid., at 11.
[23] UNEP/CBD/COP/3/Inf.39.

products, including 'bushmeat', and the potential for use of economic incentives to promote sustainable use of wild fauna and flora.

There is a clear rationale for a complementary and mutually supportive relationship between these agreements. The policy aims appear complementary: CITES is a specific agreement addressing unsustainable exploitation due to international trade, an aim easily encompassed by the CBD's aims of conservation and sustainable use of biodiversity. More specifically, the latter agreement calls for parties to:

> provide conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components,

to ensure specific uses are sustainable and that the use of specific resources is sustainable. CITES fits comfortably within this rubric.

There is also no apparent legal conflict. CITES contains a provision stating that it does not affect obligations incurred deriving from subsequently concluded international agreements relating to 'other aspects' of, *inter alia*, trade and taking of specimens,[24] while the CBD contains an unusual provision preserving rights and obligations deriving from any existing international agreement:

> except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.[25]

Indeed, some judge simply that:

> [t]he provisions of CITES ... represent significant implementation of specific obligations of the Biodiversity Convention.[26]

However, this judgment risks oversimplification. CITES and the CBD are the products of very different political forces, negotiated 20 years apart in the context of very different perceived threats to biodiversity. While their aims are clearly complementary and their scope overlapping, the two agreements may be shaped by divergent underlying norms, principles and specific policy objectives. How compatible are they? How is each shaped by its political environment and legal context? Do the two share a set of common priorities and strategies for effective biodiversity conservation? This article aims to raise these questions and suggest some answers. Three sources of 'tension' between the Conventions are first sketched out, including the ways in which they 'pull in different directions', and a few potential practical synergies between the two are then suggested.

DEVELOPMENT AND DIFFERENTIATED RESPONSIBILITIES

The 20 years between the negotiation of CITES and the CBD means that they are shaped by a considerably changed political and legal environment. CITES originated in response to a set of concerns, expressed primarily by developed countries, about the steep decline of particular species which were commercially hunted and/or traded. In particular, anxieties had been aroused by escalating imports of luxury 'big cat' furs into the boutiques of the United States and Europe.[27] While there had been international moves towards the formation of a convention controlling trade in threatened species for some time,[28] the final push was led by the USA, motivated in part by the concerns of a vocal domestic fur and leather industry seeking regulation of competing imports.[29] While not uncontroversial, the Convention was opened for signature in Washington in 1973 with little politicization and without protracted negotiation.[30] The legal antecedents of CITES can be found in the trade controls of conservation conventions signed by colonial powers earlier in the century, which sought to preserve African game species from overhunting.[31]

Twenty years later, biodiversity had become a locus for North/South tensions and a slew of competing regional, sectoral and political priorities.[32] The CBD was opened for signature at the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, a meeting which formed the culmination of an unprecedented and intense

[24] Article XIV(2).
[25] Article 22(1).
[26] C. Wold, *The Biodiversity Convention and Existing International Agreements: Opportunities for Synergy* (Humane Society of the United States, 1995), at 1.

[27] IUCN, n. 21 above, at 45.
[28] In 1963 the 8th General Assembly of the IUCN in Nairobi adopted a Resolution calling for an international convention regulating export, transit and import of rare or threatened wildlife and wildlife products, and the IUCN Environmental Law Programme developed successive draft articles over subsequent years.
[29] P.H. Sand, 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment', 1 *EJIL* (1997), 29, at 33.
[30] Ibid.
[31] Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa Which are Useful to Man or Inoffensive (London, 1900), Convention Relative to the Preservation of Fauna and Flora in their Natural State (London, 1933). See generally P. Sands, *Principles of International Environmental Law Volume I: Frameworks, Standards and Implementation* (Manchester University Press, 1995), at 388.
[32] Burhenne-Guilmin and Casey-Lefkowitz, n. 7 above; M. Grubb *et al., The Earth Summit Agreements: A Guide and Assessment* (Royal Institute of International Affairs, 1993).

process of international negotiation, and which highlighted rather than resolved a series of deep divides in the international community. By this time, developing countries constituted an organized and vocal G-77 block with considerable negotiating power. North/South divisions and hard bargaining characterized the negotiation of the Convention, which was fiercely contested up until its final day, resulting in 'a treaty of uneasy compromises and delicately balanced interests'.[33]

Meanwhile, during the period between the signing of CITES and UNCED, a number of general principles emerged in international environmental law.[34] Two are relevant here: the recognition that issues of environment and development must be treated in an integrated manner, and the principle of the 'common but differentiated responsibilities' of developed and developing countries. The CBD is shaped by both its context of negotiation and by these emerging principles.

The recognition of a link between the environment and development was not a new one,[35] but was a prominent theme at UNCED, articulated most clearly by the Rio Declaration provision that:

> environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4)

Within the CBD, many features illustrate this situation of conservation measures firmly within the context of development issues and concerns. The Preamble stresses that for developing countries, 'economic and social development and poverty eradication are the first and overriding priorities'. The economic importance that utilization of living natural resources has for many developing countries has shaped the emphasis throughout the Convention on the sustainable use of biodiversity, rather than on conservation alone. The development context of decisions about conservation and sustainable use is recognized by the frequent qualification of obligations by the phrase 'as far as possible and as appropriate', reflecting the competing capacities and priorities of developing countries.

The principle that developed and developing countries have 'common but differentiated responsibilities' with respect to international environmental efforts reflects the recognition that the developed and developing world have contributed in unequal measure to present environmental degradation, and have different resources and capacities to address it. In practice, it usually translates as decreased obligations for developing countries and greater contributions by developed. The principle is articulated in the Rio Declaration, and shapes aspects of the Montreal Protocol, the United Nations Framework Convention on Climate Change, its Kyoto Protocol and the CBD itself.[36] The CBD recognizes biodiversity as being of 'common concern', and through various provisions assigns different roles to developed and developing States. Conservation is located within an implicit *quid pro quo*, in which developing countries agree to obligations regarding conservation and sustainable use of biodiversity and access to genetic resources, but are recompensed by 'new and additional financial resources . . . to meet the agreed full incremental costs',[37] and the transfer of technology 'on fair and most favourable terms' with 'fair and equitable' sharing in benefits.[38] The quid pro quo is explicit: implementation of commitments by developing country parties is conditional on the 'effective implementation by developed country parties of their commitments . . . related to financial resources and transfer of technology'.[39]

CITES presents a marked contrast. It is a treaty addressing impacts on wildlife: apart from a recognition in the Preamble that species have economic value, it does not incorporate or address issues of the developmental or economic context of conservation action. The Convention does not distinguish between developing and developed country parties; recognize the financial burden of conservation; or provide for financial and technical transfer from developed country parties to allay this cost. In a number of ways the implementation of CITES in fact imposes fresh financial burdens upon the developing countries with the most extensive biodiversity resources. The costs of being a party stem from two sources: the costs of implementing and enforcing the Convention, which can be considerable, and the cost of forgoing income from trade in listed species.[40] While some funding is

[33] S.H. Bragdon, 'The Evolution and Future of the Law of Sustainable Development: Lessons from the Convention on Biological Diversity', 8 *Georgetown International Environmental Law Review* (1996), 423, at 434.

[34] See generally FIELD, *Report of a Consultation on Sustainable Development: The Challenge to International Law* (FIELD, 1993); P. Sands, 'The "Greening" of International Environmental Law: Emerging Principles and Rules' 1 *Indiana Journal of Global Legal Studies* (1994), 293, at 297–311; D.M. Bodansky, 'International Law and the Protection of Biological Diversity', 28 *Vanderbilt Journal of Transnational Law* (1995), 623, at 627–631.

[35] For example, the relationship of conservation and development was a central theme of the 1949 UN Conference on the Conservation and Utilisation of Resources. The first coherent articulation of the link between environment and development generally is usually credited to the Founex meeting in 1971, which preceded the 1972 Stockholm Conference on the Human Environment: see *Development and Environment: The Founex Report* (Founex, Switzerland, 4–12 June 1971).

[36] For an overview see, e.g., P.T.B. Kohona 'UNCED: The Transfer of Financial Resources to Developing Countries', 1 *RECIEL* (1992), 307.

[37] UN Convention on Biological Diversity, Article 20(2).

[38] Ibid., Articles 15(7), 16(2), 19(2).

[39] Ibid., Article 20(4).

[40] IUCN, n. 21 above, at 93–96.

channelled to activities such as capacity building in developing countries, CITES in general has access only to relatively limited funds.[41]

More broadly, the absence of consideration of social and economic impacts of conservation within CITES has been a source of considerable controversy. The proponents of sustainable use have long argued that wildlife, particularly large animals, impose costs, and that sustainable use provides a source of financial recompense to offset these. Costs imposed by wildlife can include damage to crops or human life and the considerable outlays required for maintenance of large protected areas. In fact, however, CITES has, if anything, moved away from recognition of these considerations in listing decisions. The first set of criteria guiding listing of species in the Appendices, the Berne criteria, were in 1994 replaced by the Fort Lauderdale (Everglades) criteria, which set out specific technical and scientific guidelines for listing decisions.[42] While this move was motivated by desires to increase the objectivity of listing, reduce controversy and conflicts over listing decisions and increase the effectiveness of the Convention in targeting endangered species, it also underlines that equity considerations and consideration of the social and economic impacts of listing have no place in these decisions.[43] In practice, however, the determination of listing proposals by a vote of the Conference of Parties (COP), and the widespread use of secret ballots, enables parties to incorporate these considerations into their decision making, and some parties openly admit the force of economic and developmental considerations in shaping their voting.[44]

THE LOCUS OF DECISION MAKING: NATIONAL SOVEREIGNTY AND UNILATERALISM

A second underlying divergence apparent between the CBD and CITES is the emphasis each places on national sovereignty over management of natural resources, and the corresponding locus of decision making on action for conservation and sustainable use. Some of the language of CITES appears to emphasize and seek to protect sovereignty: its Preamble states that 'peoples and states are and should be the best protectors of their own wild fauna and flora'.[45] Furthermore, parties who object to the listing of a particular species can enter a Reservation with respect to that species, removing the obligation to regulate trade.[46] However, in a number of ways, the operation of CITES results in the ceding of some measure of control over a party's utilization of natural resources to other bodies or States. First, proposals regarding the listing and de-listing of species are decided by a two-thirds majority of the CITES COP. Listing decisions may have considerable economic consequences for range States (or, indeed, importing States). However, these States exercise no more influence over this process than any other party, but must act in accordance with COP decisions (although retaining the option of a Reservation). During the original negotiations on CITES, this point was the source of some disagreement: Kenya led a group of developing countries who argued for the rights of range States to determine their own lists of regulated species.[47] More recently, there has been recognition within CITES of the desirability of consulting with range States before submitting listing proposals.[48] Effectively, however, the COP is given the power to determine conservation priorities and actions that must be implemented nationally. Second, (very limited) trade in Appendix I species requires permits to be issued by both exporting and importing parties, effectively duplicating the decision as to whether trade should be allowed.[49] Accordingly, after a trade has been judged non-detrimental by the exporting country, it may be disallowed by the importing country. No consensus guidelines for decision making on the issuance of permits have been reached, leaving this process open to controversy. Third, CITES provides for parties to take 'stricter domestic measures' with respect to trade controls,[50] which effectively allows importing States to unilaterally determine whether range States can export wildlife products. Stricter domestic measures may also be used collectively to gain compliance – in several cases the Secretariat has recommended that parties take collective stricter domestic measures against imports from countries in persistent non-compliance with the Convention.

[41] Ibid., at 90–91.

[42] See generally Anon., 'The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decision-making', 114 *Harvard Law Review* (2001), 1769; S. Dansky, 'The CITES Objective Listing Criteria: Are they "Objective" Enough to Protect the African Elephant?', 73 *Tulane Law Review* (1999), 961; and B. Dickson, 'Land and Resource Management I. CITES in Harare: A Review of the Tenth Conference of the Parties', *Colorado Journal of International Environmental Law and Policy* (1997), 55.

[43] Ibid.

[44] Dickson, n. 42 above.

[45] CITES, Preamble, para. 3.

[46] Article XXIII allows the making of Reservations with respect to particular species when a country becomes a party and for a limited period after a listing decision has been made. These are then treated as non-parties for the purposes of trade in the specified species (see Article X and Res. Conf. 9.5).

[47] Sand, n. 29 above, at 34.

[48] Res. Conf. 9.24.

[49] Technically, the decisions are made on slightly different grounds. In practice, they will typically both hinge on whether the removal of the species from wild habitat will be detrimental.

[50] CITES, Article XIV(1). Note: for instance, some importing countries, including the European Union, the United States and Australia have instituted a system of controls for Appendix II and III species which mirrors that for Appendix I species, i.e. requiring an import permit based on a non-detriment finding.

Finally, a specific multilateral application of stricter domestic measures is the 'significant trade process'. This is a process of oversight of trade in species on Appendix II, by the Animals or Plants Committees, aimed at identifying and addressing trade occurring without proper and reliable 'non-detriment' findings. If recommendations made by the Animals Committee (in the case of animals) are not implemented by the State concerned, it risks suspension of trade in that species by all CITES parties. While this process involves repeated consultation with range States,[51] it effectively results in enforceable decision making on wildlife policy by a group of external experts rather than national governments.

There is clearly a solid rationale for this external decision making and enforcement of obligations under CITES, and some might argue these features represent its strength. To some extent, the subject matter itself dictates that the decisions of other States will play a large role – international trade is an inter-State issue and must be addressed through regulation of both demand and supply. Moreover, external enforcement may be a key factor in the overall success of the Convention in limiting unsustainable trade: obligations lacking a means of external enforcement are unlikely to be adequately implemented. With respect to the requirements for import permits for Appendix I listed species, the possibility for illegal trade, corruption and forged documentation suggests that an external overview is advisable.[52] Finally, many range States lack the management and scientific capacity to make secure decisions on the impacts of trade, so an 'extra layer' of trade scrutiny may provide extra protection.

Despite these advantages, these facets of CITES sit uncomfortably with the international developments that shape the CBD. The emergence of strong and concerted efforts towards global environmental action in the late 1980s and early 1990s, in the lead up to UNCED, was perceived by some developing countries as posing a threat to their control over the natural resources under their jurisdiction. This led to a reassertion of State sovereignty,[53] with statements emerging such as:

> [t]he developing countries have the sovereign right to use their own natural resources in keeping with their developmental and environmental objectives and priorities. Furthermore, environmental considerations should not be used as an excuse for interference in the internal affairs of the developing countries, nor should these be used to introduce any forms of conditionality in aid or development financing or to impose trade barriers affecting the export and development efforts of the developing countries.[54]

In consequence, an emphasis on asserting sovereign rights over natural resources is apparent throughout the text of the CBD, which represents, in fact, the first statement of the principle of State sovereignty over natural resources in a binding international agreement. The locus for decision making on action to counter threats to biodiversity remains firmly at the national level. Developing countries strongly resisted throughout the negotiations any suggestion of 'global' priorities or 'globally determined' priorities.[55] While the Convention sets out many obligations that are specific in nature, the means of implementing these obligations is left to parties themselves. So, for instance, obligations regarding measures for conservation and sustainable use are not accompanied by guidance on specific actions to be avoided or pursued, and, in practice, any attempts to list specific threats or actions have been strongly resisted to avoid limiting or dictating national strategies. Any suggestion that parties may be obliged to take action to conserve biodiversity within the sovereign territory of another is avoided; the provisions of the Convention are expressly restricted to action within national jurisdiction or under national jurisdiction or control (Article 4). This emphasis on avoiding extraterritorial action is echoed in the Rio Declaration, which expressly urges avoidance of '[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country'.[56]

In this political and legal climate it is unsurprising that CITES provisions which allow for action to counter extraterritorial threats, particularly unilateral actions, have provoked claims of excessive infringement of national sovereignty.[57] Some developing countries have made vigorous protests over the extent to which CITES provisions may allow developed countries to impose their value systems or conservation priorities onto developing countries, potentially restricting development options open to the latter.[58] This protest has been a prominent feature of the debates and acrimony over trade in elephant ivory, which have characterized

[51] See J. Hutton, 'Who Knows Best? Controversy over Stricter Domestic Measures', in J. Hutton and B. Dickson, *Endangered Species: Threatened Convention* (Earthscan, 2000), at 57–66.

[52] See CITES Doc. 10.28 for a recent examination of problems such as illegal trade, acceptance of invalid documents, fraud and poor border controls.

[53] See S.H. Bragdon, 'National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity?', 33 *Harvard International Law Journal* (1992), 381, at 387.

[54] This was part of a statement by Ministers from 41 developing countries at the Ministerial Conference on Environment and Development (18–19 June 1991): *Beijing Declaration on Environment and Development* (Xinhua. Gen. Overseas News Service, 20 June 1991), Item No. 0620135 (Lexis Database, Nexis Library).

[55] L. Glowka *et al., A Guide to the Convention on Biological Diversity* (Environmental Policy and Law Paper No. 30, IUCN Environmental Law Centre, 1994), at 4.

[56] Rio Declaration, Principle 12.

[57] See, e.g., Hutton, n. 51 above, for discussion.

[58] See, e.g., Dickson n. 42, above.

recent decades of CITES.[59] Priorities between States may differ for many reasons: countries at different developmental stages may assign a different priority to species protection as opposed to economic considerations; countries may hold varying conceptions of effective conservation strategies; or differ in the weight accorded to animal welfare considerations compared to conservation or development goals. This external determination of policy may be judged as being particularly inequitable, as it is range States which bear the costs of conservation, in terms of forgone trade revenue, management expenses, and potential damage to crops and human life from wild animals, although of course this should be balanced against the considerable conservation-related investment made by developed countries. Some, indeed, go so far as to view trade controls as 'a device the West uses to compel developing countries into acquiescence'.[60]

It is largely sovereignty considerations such as these that prompted, and continue to prompt, the resistance within the CBD to incurring specific, externally determined or enforceable obligations. Somewhat paradoxical, in view of this development, is the fact that CITES has progressively extended its influence over national conservation strategies. This is most clearly evident in the significant trade process, reflecting a move beyond issues limited to international trade, to the (enforceable) oversight of national management itself. While this clearly carries conservation benefits, and reflects the recognition that unsustainable exploitation demands action at a national level, it provides a sharp contrast to the steadfast opposition to external influence over national policy within the CBD regime.

TRADE AND SUSTAINABLE USE IN CONSERVATION

The third divergence, or rather set of related divergences, between the CBD and CITES regimes reflects the different threats to biodiversity that provided the impetus for their negotiation, and which shape their provisions in various ways. Unlike those discussed, these are divergences at the level of strategy, of specific policy objectives.

CITES originated in a period when overexploitation of species for the purposes of international trade was a topic of great and increasing concern, particularly for some high-profile and charismatic fauna. Thus, in various ways, it is built on the assumption that trade and conservation are antithetical: endangerment is to be countered by restricting trade, and conversely, trade restrictions bestow greater protection. The 'ratchet' structure of the Appendices is the clearest example, with increasing endangerment or threat demanding tighter limitations on trade. Another is the ban on commercial trade of species in Appendix I. A presumption against permitting trade is effectively introduced by the wording of provisions regarding the 'non-detriment' findings required for trade in listed species: these require a positive finding of lack of detriment, much more onerous than the requirement that no evidence of potential detriment be found. In the case of uncertainty, endemic when considering the status of many endangered species and the impacts of trade, this language mandates withholding a permit without consideration of any further factors.

These features were motivated by the undoubted threats posed to some species by overexploitation for international trade. However, trade is not the only threat, and under some circumstances trade restrictions may have little impact on, or even exacerbate, causes of extinction. By the time of the CBD's negotiation, 20 years after CITES, biodiversity was threatened by waves of extinction facing entire suites of (often poorly known) species. The 'Evil Quartet' of threats to biodiversity had been identified: habitat destruction and fragmentation, introduction of alien species, overexploitation (for subsistence or domestic or international commerce) and chains of extinction.[61] Of these, it was, and is, reasonably clear that the most potent is habitat destruction, which typically occurs due to conversion to more lucrative purposes than supporting biodiversity.[62] This fact underlies the argument that the long-term future of wild lands relies on providing positive economic incentives for their maintenance, incentives that can be provided through, *inter alia*, sustainable utilization and trade based on biodiversity.[63]

The CBD is permeated by this emphasis on positive incentives. It specifically provides for parties to adopt measures that operate as incentives for conservation and sustainable use, and throughout continually emphasizes sustainable use. Furthermore, its establishment of broad principles for a global trade in genetic resources adds value to biodiversity, providing positive incentives for its maintenance.[64] By contrast, the closing down of trading opportunities for species under threat mandated by the CITES Convention text may serve, in some circumstances, to simply reduce the

[59] See, e.g., T. McBride, 'The Dangers of Liberal Neo-Colonialism: Elephants, Ivory and the CITES Treaty' 19 *Boston College Third World Law Journal* (1999), 733.
[60] Ibid., at 755.
[61] J. Diamond, 'Overview of Recent Extinctions', in D. Western and M. Pearl, *Conservation for the Twenty-first Century* (Oxford University Press, 1989), at 37–41.
[62] World Resources Institute *et al., World Resources 1994–1995* (World Resources Institute, 1994), at 149.
[63] See, e.g., T.M. Swanson, *The International Regulation of Extinction* (Macmillan, 1994).
[64] D.R. Downes, 'The Convention on Biological Diversity: Seeds of Green Trade?' 8 *Tulane Environmental Law Journal*, 164.

incentives for conserving species and their habitat.[65] In part due to recognition of this problem, CITES has steadily moved from being a negative regulatory mechanism to restrict unsustainable trade, towards being a positive mechanism to facilitate sustainable trade.[66] The COP has recognized that, 'commercial trade can be beneficial to the conservation of species and ecosystems and/or the development of local people',[67] and innovative mechanisms relying on utilization, and providing incentives to conserve species, have progressively been developed, including methods such as 'ranching' or setting quotas for trade in Appendix I listed species.[68] In addition, the criteria for listing species established in 1994 (the Everglades criteria) are (probably) more permissive of sustainable use than the previously applicable criteria.[69]

The contemplated threats to biodiversity shape each agreement in other ways. CITES concentrates on a targeted list of enumerated species, sub-species, or populations, and stretches further to address the welfare of individual animals.[70] The systemic nature of the threats addressed by the CBD dictates its focus at the level of ecosystems, rather than individual species. The CBD explicitly endorses conservation of species *in situ* and within the country of origin.[71] Some CITES provisions, by contrast, may function to promote *ex situ* conservation. Unlike wild-caught species, captive-bred specimens of Appendix I listed species may be exempted from the permit system and, under certain circumstances, may be traded commercially.[72] While the motivation for these exemptions is to relieve pressure on wild populations by satisfying demand from captive populations, facilitation of trade in captive specimens may reduce or eliminate incentives for range States to conserve wildlife habitat. Furthermore, technological requirements often mean captive-breeding operations are situated in developed countries, effectively transferring the benefits of biodiversity from range States to consumer States, thereby decreasing incentives for *in situ* conservation.

WHERE TO FROM HERE?

The purpose of this section is to suggest some specific possibilities for synergies between CITES and the CBD, without attempting an exhaustive review. These are prompted by the foregoing considerations of divergences between the regimes, without being closely tied to them. There are clear practical reasons why more extensive synergies could or should be developed between the two Conventions. First, their spheres of action are complementary and interdependent. International trade in endangered species is not a discrete, isolated conservation problem, and trade controls alone may frequently be inadequate to ensure conservation. Effective tackling of unsustainable international trade mandates addressing problems of national management of wild species, economic incentives for conservation and sustainable use, and national protection of species from exploitation – all policy areas within the ambit of the CBD. Conversely, regulation of international trade in species lies beyond the CBD's scope, but exploitation for international trade will have a major impact on national-level conservation and sustainable use. Second, their international and national foci are complementary – international and national-level policy and decision making needs to be coordinated and mutually reinforcing to be effective. Third, the breadth of the CBD's subject area, and the great divergence of views within it, hamper effective and timely formulation of policy and implementation within specific subject areas, such as international trade, while this is facilitated in more mature and focused fora such as CITES. Finally, and related to the previous point, cooperation could increase the effectiveness of the funding available to developing countries to meet the incremental costs of implementation of the CBD, administered through the Global Environment Facility (GEF), and provide a source to augment the limited (and stretched) funds available to CITES.

What might some substantive synergies look like? The framework nature of the CBD, and the specific nature of CITES, have prompted the occasional suggestion that CITES could become a formal Protocol to the CBD. There is an appealing logic to this, echoing the structure which has become familiar through framework conventions and associated protocols in the area of ozone-depleting substances, climate change and the CBD itself. Presumably, this would require CITES obligations to be interpreted within the overarching structure of principles set out in the CBD. However, the idea poses major practical and political problems, and raises thorny questions of treaty law. The imperfect overlap of parties to the two agreements is one serious obstacle. Requisite amendments of the CITES text would be extremely difficult to achieve, and institutional desires for autonomy make a movement by CITES towards a hierarchically subordinate position unlikely. The divergences outlined here between the two regimes would make an overall subsuming of CITES under the CBD a fractious and uneasy cohabitation. This conceptually attractive solution, then, is unlikely in the extreme.

[65] Swanson, n. 63 above, at 223.
[66] See, e.g., M.J. Hickey, 'Acceptance of Sustainable Use within the CITES Community', 23 *Vermont Law Review*, 861.
[67] CITES Res. Conf. 8.3. See also other statements recognizing the value of sustainable use: Res. Conf. 9.20 (Rev), Res. Conf. 11.16 and Decision 11.1, Annex 1: Strategic Plan through 2005.
[68] IUCN, n. 21 above, at 21–35.
[69] Hickey, n. 66, at 880–881.
[70] See, e.g., CITES, Article III(2)(c), (3)(b), 4(b), 5(b) and analogous provisions in Articles IV and V.
[71] CBD, Articles 8 and 9. *Ex situ* measures are to be taken 'predominantly for the purposes of complementing *in situ* measures' (Article 9).
[72] CITES, Article VII, para. 5.

Less ambitiously (but more plausibly), CITES could function in a manner similar to a protocol, making inputs, or reporting, to the CBD on a regular basis. This would facilitate greater harmonization of policy priorities and objectives, and better coordination of work. This interaction would function as a lever to political pressure for CITES obligations to be interpreted in the light of CBD norms and principles (and might be resisted by some parties on this basis). A more immediately feasible suggestion is the establishment of joint programmes of work on issues of shared interest. The CBD has successfully established such joint programmes with the Ramsar Convention and the Convention on Migratory Species. The two Conventions overlap considerably in general aims, and issues of common concern might include, for instance, commercial exploitation in particular regions, of particular taxa, or capacity building for wildlife management. The international focus of CITES and the national focus of the CBD would make such programmes more comprehensive and effective than could be achieved by either alone. Furthermore, as one of the 'more practically oriented and mature'[73] conventions, CITES has experience and concrete on-the-ground impact from which the CBD could substantially benefit. Movement has been made in this direction, with six policy issues of shared concern being jointly identified by the Secretariats of each Convention,[74] but no substantive action has yet been taken.

Another possibility is the establishment of a 'referral' system between the two Conventions. The listings process within CITES functions to highlight particular species that are at risk: these species might then be referred to the CBD to receive priority for the allocation of GEF funding. Currently, the listing of a species in Appendix I or II carries with it no accompanying input of funds to allow a response to the threat: a situation which both runs counter to the normative stance of the CBD and inhibits effective conservation responses. CITES has not been particularly successful at accessing GEF funding – it has, to date, received only a single contribution from this source.[75] This process could function also for the management regimes of States. CITES processes frequently highlight States with consistently poor wildlife management regimes. Species at risk are not evenly distributed, but tend to be clustered within particular countries. Again, these States or regions could be allocated priority for funding under the CBD for, e.g., capacity-building assistance. These links would facilitate timely and effective responses to developing conservation threats.

CONCLUSION

The CBD and CITES both address the threat of extinction of wild plants and animals, but are shaped by highly divergent political and legal contexts, and employ divergent and even competing strategies for conservation and sustainable use. This may not bring them into conflict, but it is tempting to speculate that it is a factor in the relative lack of substantive cooperative action between them. Cooperation between regimes is certainly likely to be facilitated by a shared framework of principles and policy objectives: achieving this in the biodiversity context may require recognition of sources of tension as well as routes to synergy.

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[73] W. Wijnstekers, 'Synergies and CITES', 2 *Synergies*, UNEP Publication Series (2000), 2.

[74] See UNEP/CBD/QR/11, para. 124.

[75] IUCN, n. 21 above, at 91.