IELP White Paper
on Verification of Permit Findings

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I. Introduction

The final step in ensuring that non-detriment findings eliminate unsustainable trade and promote conservation is defining the verification mechanisms available to Parties when they are faced with inadequate permit findings, especially when the Party knows that adequate permit findings have been made, despite a facially complete permit. Clarifying that Parties can verify the requirement to make all permit findings is necessary because it ensures proper implementation of the Convention, thus preventing unsustainable trade and species extinctions, listings, and transfers in the Appendices. Section I of this memo provides background on what constitutes non-compliance regarding permit findings. Section II describes three major legal disputes that have raised serious questions over the legal significance of substantively or facially invalid CITES permits. These cases highlight that questions remain as to whether an importing country may or must reject imports that it knows or has reason to know are accompanied by inadequate non-detriment and other permit findings. Section III proposes amendments to Resolution Conf. 11.3 that would clarify the authority of Parties to "look behind" a permit to assure itself that all permit findings have been made adequately.

II. Non-Compliance Regarding Permit Findings

Compliance is generally understood in customary international law as conduct by a Party that is consistent with treaty rules. Accordingly, failure to conform to explicit treaty rules is considered non-compliance. Within CITES, common examples of non-compliance include inadequate national implementation legislation, failure of the Parties to report to the Secretariat, and failure to designate a Scientific Authority.[1]

Similarly, when a Party issues a permit without making all requisite permit findings, or with inadequate permit findings, such action constitutes non-compliance. The Convention clearly states that all trade in Appendix I and II specimens must be in compliance with the relevant provisions of Articles III and IV, respectively.[2] The issuance of a permit without making the relevant permit findings is clearly inconsistent with these provisions and therefore constitutes non-compliance.[3] The failure to make *adequate* permit findings by ignoring, omitting, or failing to review relevant information is no different. Resolution Conf. 10.3 notes that the "issuance of permits by a Management Authority without *appropriate* Scientific Authority findings constitutes a lack of compliance with the provisions of the Convention and

[1] Twice in the 1990s, the Standing Committee recommended a trade suspension in response to Greece's failure to designate a Scientific Authority. *Id.* at 124–125

[2] Convention on International Trade in Endangered Species of Wild Fauna and Flora, *signed* Mar. 3, 1973, *entered into force* July 1, 1975, 993 U.N.T.S. 243, arts. III(1), IV(1).

[3] *Id.* arts. III(2)(a), IV(2)(a).

seriously undermines species conservation."[4]

The Secretariat has supported findings of non-compliance when it appears that an exporting country has failed to make an adequate non-detriment finding. For example, the Solomon Islands in 2003 exported twenty-eight bottlenose dolphins to Mexico. This export triggered a number of questions about the validity of the Solomon Islands' non-detriment findings.[5] For example, the IUCN's Cetacean Specialist Group, in a review of the export, concluded that

> "[n]o scientific assessment of the population-level effects of the removals of bottlenose dolphins in the Solomon Islands was undertaken in advance of the recent live-capture operations. Without any reliable data on numbers and population structure of bottlenose dolphins in this region, it is impossible to make a credible judgment about the impacts of this level of exploitation. *Until such data are available, a non-detriment finding necessary under CITES Article IV is not possible.* Therefore CITES Parties should not issue permits to import dolphins from the Solomon Islands."[6]

The Secretariat investigated the trade in live bottlenose dolphins between the Solomon Islands and Mexico[7] and stated that "[i]f evidence is received that the requirements of CITES have not been met, the Secretariat *will not hesitate to recommend rejection of export permits* issued by the Solomon Islands."[8]

Inadequate NDFs are not singled out for non-compliance—the failure to make other required permit findings also constitutes non-compliance. For example, in 2001, the Brazilian Management Authority issued export permits for mahogany, an Appendix III species at the time, pursuant to a judicial order.[9] However, the Brazilian Management Authority had not yet made a finding, as required for Appendix III export permits, that the mahogany had been legally

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[4] Resolution Conf. 10.3, *Designation and Role of the Scientific Authorities* , preamble, para. 8 (emphasis added).

[5] GRAHAM ROSS, FRANCES GULLAND, NICK GALES, ROBERT BROWNELL & RANDALL REEVES, REPORT OF A FACT-FINDING VISIT TO THE SOLOMON ISLANDS, 9-12 SEPTEMBER 2003, 2, available at www.iucn-vsg.org/ Solomons%20Report%20VSG-CSG.pdf (last visited November 23, 2005). Prior to the export, the Secretariat advised Mexico (a Party to CITES) to seek "comparable documentation" from the Solomon Islands (a non-Party) in accordance with Article X. Press Release, CITES, *Trade in Live Dolphins from the Solomon Islands to Mexico* (July 30, 2003), *available at* http://www.cites.org/eng/news/press/030730_dolphin.shtml. Because bottlenose dolphins are included in Appendix II of CITES, the Solomon Islands needed to ensure that the export of these animals would not be detrimental to the survival of the species in the wild. CITES, *supra* note 2, art. IV(2)(a). Mexico followed the Secretariat's advice and obtained the appropriate documentation from the Solomon Islands. Then, despite Resolution Conf. 11.18's recommendation that Parties apply stricter domestic measures to shipments of Appendix II specimens exported by a non-Party when there is reason to believe the export is detrimental to the survival of the species, Mexico accepted the shipment of dolphins. Resolution Conf. 11.18, *Trade in Appendix-II and -III Species*, para. b of "RECOMMENDS."

[6] ROSS, *supra*, at 5 (emphasis added).

[7] Press Release, CITES, *Trade in Live Dolphins* (Mar. 5, 2004), *available at* http://www.cites.org/eng/news/press/ 2004/040305_dolphin.shtml.

[8] Press Release, CITES, *Trade in Live Dolphins from the Solomon Islands to Mexico* (July 30, 2003), *available at* http://www.cites.org/eng/news/press/030730_dolphin.shtml (emphasis added).

[9] R. (on the application of Greenpeace Ltd.) v. Sec'y of State for the Env't, Food and Rural Affairs, [2002] EWCA Civ 1036, [2002] 1 W.L.R. 3304, *available at* 2002 WL 1446160, para. 11.

obtained.[10] Under these circumstances, the Secretariat stated that "all the export permits in question were issued contrary to the provisions of article V, paragraph 2(a), of the Convention,"[11] thus constituting non-compliance.

III. Legal Disputes Regarding Permit Findings—U.S. and U.K. Cases

Despite these seemingly straightforward parameters regarding non-compliance, three major legal disputes have raised serious questions over the legal significance of substantively or facially invalid CITES permits. Two of the cases raised questions about the rights and obligations of importing country authorities when they know or suspect that facially valid CITES permits do not actually comply with the substantive requirements of CITES. A third case directly challenged the permits findings of the importing State.

The preamble to Resolution Conf. 10.3 notes that the issuance of permits without appropriate findings, including non-detriment findings, "constitutes a lack of compliance with the Convention and seriously undermines species conservation." The operative provisions of Resolution Conf. 12.3 recommend that the Parties "refuse to accept" any permit or certificate that is invalid, including "documents that contain information that brings into question the validity of the permit or certificate."[12] Resolution Conf. 11.3 further recommends that the Parties

> (iv) ensure strict compliance and control in respect of all mechanisms and provisions of the Convention relating to the regulation of trade in animal and plant species listed in Appendix II, and of all the provisions ensuring protection against illegal traffic for the species included in the Appendices.
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> (v) in case of violation of the above-mentioned provisions, immediately take appropriate measures pursuant to Article VIII, paragraph 1, of the Convention in order to penalize such violation and to take appropriate remedial action[.]

Despite this language recommending that the Parties take forceful action to ensure compliance with permit requirements, questions remain as to whether an importing country may or must reject imports that it knows or has reason to know were accompanied by inadequate non-detriment and other permit findings. While it may appear straightforward that an importing country could respond to noncompliance by barring the import that is subject of noncompliance, courts of the United States and the United Kingdom have taken vastly different approaches to

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[10] *Id.* at para. 19. CITES, *supra* note 2, art. V(2)(a).

[11] *Id.* at para. 18, *quoting* a Letter from the Senior Enforcement Officer, CITES Secretariat, to the United States Management Authority (June 6, 2002). *See supra* note 46 for more on the Secretariat's letter.

[12] Resolution Conf. 12.3, *Permits and Certificates*, Section XIV, para. (d) of "RECOMMENDS". Resolution Conf. 12.3 is even more specific with respect to the requirement that permits be issued only if the specimen was legally acquired. Resolution 12.3 recommends that "Parties not authorize the import of any specimen if they have reason to believe that it was not legally acquired in the country of origin." *Id.* at Section II, para (f) of "RECOMMENDS". Similarly, Resolution 11.3 recommends that, if an importing country "has reason to believe" that specimens of Appendix II or III specimens "are traded in contravention of the laws of any country involved in the transaction," that it notify the country whose laws were thought to have been violated and, where possible, apply stricter domestic measures consistent with Article XIV of the Convention. Resolution 11.3, *Compliance and Enforcement*, para. (c) of the first "RECOMMENDS."

this proposition. Although the cases concern challenges to the finding of whether Appendix III specimens were legally acquired, they are relevant to questions concerning inadequate permit findings for shipments of specimens of Appendix I or II specimens.

A. United States Courts

1. *Castlewood*

In the United States, the D.C. Court of Appeals upheld a district court decision affirming the authority of customs officials to investigate the validity of CITES documentation when it has good reason to doubt the validity of the permit.[13] U.S. officials detained sixteen shipments of bigleaf mahogany lumber and veneer from Brazil when it suspected that the bigleaf mahogany had been harvested after the date on which Brazil banned the logging and export of bigleaf mahogany.

The dispute centered on what constituted a "valid" permit. The United States detained the mahogany because IBAMA, the Brazilian management authority, indicated that it had not determined whether the mahogany had been legally acquired, as required prior to issuance of a CITES export permit. IBAMA issued the export permit pursuant to a preliminary injunction issued by a Brazilian court. Despite issuing the permit, IBAMA stated that the issuance of the permits did not reflect its independent judgment that the mahogany had been legally obtained.

The plaintiffs claimed that U.S. officials had unlawfully detained their bigleaf mahogany because the mahogany was in fact accompanied by a valid export permit—it had been issued by IBAMA, which had indicated in the permit itself that the mahogany was legally obtained. According to plaintiffs, U.S. officials could not "look behind" the permit to determine whether the substantive requirements of CITES had actually been met. Instead, they argued that the authority of U.S. officials under CITES (and the Endangered Species Act (ESA) as the U.S. implementing legislation) was limited to determining whether the shipments of bigleaf mahogany were accompanied by facially "valid" export permits. In other words, it's the plaintiffs' assertion that "once the Management Authority of the exporting state has issued an export permit, the permit must be accepted as 'valid' by authorities in the United States."[14]

The court began its analysis by noting that the U.S. implementing regulations required that a "valid foreign export permit . . . must be obtained prior to such importation" and that an export permit "issued and signed by a management authority will be accepted as a valid foreign document."[15] However, the court determined that the regulation "does not specify the conditions that a foreign export permit must meet in order for U.S. officials to regard the permit as valid."[16] Moreover, the regulations require a Management Authority to issue and sign an export permit to be accepted, but they do not suggest that this is the only condition an agency may impose before accepting a permit. The court, thus, determined that "the language of the regulations is ambiguous as to whether U.S. officials may 'look behind' a lawfully signed and issued export

[13] Castlewood Products v. Norton, 365 F.3d 1076 (D.C 2004), affirming 264 F.Supp.2d 9 (D.D.C. 2003).
[14] *Id.* at 1083.
[15] 50 C.F.R. §23.12(a)(3)(i) & §23.14(a).
[16] *Castlewood Products*, 365 F.3d at 1083.

permit to determine whether the substantive requirements of CITES (*i.e.*, that the Management Authority was satisfied that the specimen was not obtained unlawfully) had actually been met."[17]

When the meaning of regulatory language "'is not free from doubt,'" the Supreme Court has instructed reviewing courts to give effect to an agency's "reasonable" interpretations of statutes and regulations within that agency's purview.[18] The court determined that the U.S. interpretation of the CITES implementation regulations was reasonable.

The ESA grants the Secretary of Interior broad statutory authority to "promulgate such regulations as may be appropriate to enforce" the ESA.[19] As the implementing legislation for CITES, the ESA bars "any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention."[20] The regulations at issue in this lawsuit implement the Convention.[21]

The court indicated that these provisions sufficed to find that "the Government acted reasonably in requiring more than facial satisfaction . . . [of a permit] when determining whether an export permit is "'valid.'"[22] Additionally, the court noted several other factors that weighed in the government's favor. For example, the ESA specifically prohibits trade contrary to the provisions of the Convention,[23] and the Convention requires that an export permit for an Appendix III species shall only be granted when "a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora."[24]

The court also found resolutions of the Parties persuasive authority for the reasonableness of the government's decision to investigate the validity of the permit. In particular, Resolution Conf. 11.3 recommends that "if an importing country has reason to believe that an Appendix . . . III species is traded in contravention of the laws of any country involved in the transaction, it . . . immediately inform the country whose laws were thought to have been violated."[25] Resolution Conf. 12.3 recommends that "the Parties refuse to accept any permit or certificate that is invalid, including authentic documents that do not contain all the required information . . . or that contain information that brings into question the validity of the permit or certificate."[26]

In finding the resolutions persuasive, the court specifically addressed the non-binding nature of resolutions:

> This does not render the resolutions meaningless, however. There would be no point in the contracting states agreeing on resolutions only to then completely ignore them. Therefore, while not binding, it was surely reasonable for FWS and

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[17] *Id.*
[18] *Id.* (quoting Martin v. OSHRC, 499 U.S. 144, 150–51 (1991)).
[19] 16 U.S.C. §1540(f).
[20] 16 U.S.C. §1538(c)(1).
[21] 50 C.F.R. §23.1(a).
[22] *Castlewood Products*, 365 F.3d at 1084.
[23] 16 U.S.C. §1538(c).
[24] CITES, *supra* note 2, art. V(2)(a).
[25] CITES, Resolution 11.3, *supra* note 12.
[26] CITES, Resolution 12.3, *supra* note 12, § XIV(d).

APHIS to look to the CITES resolutions for guidance in interpreting the regulations implementing CITES.[27]

The court concluded that "[t]hese provisions, taken together, make it clear that the agencies' interpretation of the applicable regulations is perfectly reasonable. It is also clear here that, to date, there are no 'valid' export permits for the disputed shipments. There is no dispute that Brazil's Management Authority questioned whether the goods in the disputed shipments were obtained legally. The United States thus had a reasonable basis for inquiring further and detaining the shipments until a finding of legal acquisition could be made."[28]

In this case, the U.S. government also declared that it would release detained shipments if a Brazilian court made a final determination that the mahogany had been legally obtained, "regardless of whether the foreign Management Authority disagrees with the judicial decision."[29] Since a Brazilian court had only issued a preliminary injunction and had not ruled on the merits of whether the mahogany had been legally obtained, the U.S. government had reasonably and lawfully detained the shipments "for want of assurance, either from IBAMA or pursuant to judicial decree, that the wood in the disputed shipments was legally obtained."[30]

2. *Born Free v. Norton*

It is important to emphasize that the *Castlewood* decision affirmed the agency's discretion to detain the shipments while it verified that the exporting country had actually determined that the specimens were legally acquired. The court did not *require* the agency to detain the shipments. Another U.S. legal challenge relating to the adequacy of the importing country's permit findings illustrates that U.S. agencies have broad discretion to implement the Convention. Although the court upheld the U.S. decision to detain shipments of mahogany, the court's decision suggests that it would have also upheld an agency decision not to detain the shipments.

In *Born Free v. Norton*, several groups challenged U.S. Fish & Wildlife Service's (FWS) issuance of permits to the San Diego Zoo and the Lowry Park Zoo to import eleven elephants from Swaziland.[31] The zoos intended to display the elephants and use them to revive their captive breeding programs. The plaintiffs claimed that FWS incorrectly found that the import will be for purposes that are not detrimental to the species and that the purposes of the import will not be for primarily commercial purposes. The plaintiffs sought to enjoin the importation of the elephants until a final determination on the merits of its claims. Plaintiffs faced the difficult task of demonstrating that they were likely to succeed in showing that the FWS's issuance of the permit was "arbitrary and capricious," the legal standard for overturning decisions of agencies under the U.S. Administrative Procedure Act.[32]

Although the court emphasized that the importing state must determine that the import will be for *purposes* that are not detrimental to the survival of the species involved, it took into

[27] *Castlewood Products*, 365 F.3d at 1084.
[28] *Id.*
[29] *Id.* at 1085.
[30] *Id.* at 1086.
[31] Born Free v. Norton, 278 F.Supp.2d 5 (D.D.C. 2003).
[32] 5 U.S.C. §706.

account information concerning the effects of the export on the status of elephants. For example, it viewed favorably evidence that the sale of the elephants would generate funds for conservation in Swaziland and that decreasing Swaziland's elephant population would reduce conflicts between elephants and black rhinos and destruction by elephants of bird nesting sites. As such, the court concluded that, because the elephants are to be used for breeding in the United States and because proceeds from the importation will be used by Swaziland for the benefit of the elephant habitat there, "it was not arbitrary and capricious for FWS to determine that the importation would not be for purposes that are detrimental to the survival of the species."[33] In particular, the court found that "the zoos' purpose of propagating the species through captive breeding is not inconsistent with the continued survival of African elephants."[34]

The plaintiffs also argued that the elephants would be used for primarily commercial purposes, because the elephants would be exhibited for paying guests, elephants tend to increase gate admissions at zoos, and, to the extent that the zoos seek to use the elephants for captive breeding purposes, any newborn elephants would be displayed for financial benefit or sold to other zoos to be displayed for admission fees. The court acknowledged that one significant use of the elephants would be for display and that Resolution Conf. 5.10 provides that "all uses whose non-commercial aspects do not clearly predominate shall be considered primarily commercial."[35] Nonetheless, it determined that "the zoos' status as non-profit institutions, their plans to use the elephants for breeding purposes and not merely for display, and their role in educating the public about conservation together provide a reasonable basis for FWS's conclusion that the importation is not for primarily commercial purposes" within the meaning of Resolution Conf. 5.10.[36] Moreover, the court concluded that plaintiffs' interpretation of the commercial purposes test "would essentially preclude all importation of Appendix I species by zoos that would display the animals and charge a fee for general admission—almost always the context where zoos are involved. Neither the language of CITES nor the Resolution indicates that the Treaty goes that far." *Id.*

B. United Kingdom

As in *Castlewood*, a court in the United Kingdom was asked to determine the validity of permits accompanying mahogany shipments from Brazil.[37] Just as in *Castlewood*, IBAMA had issued the permits pursuant to preliminary judicial orders that did not reach the merits of whether

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[33] *Born Free*, 278 F.Supp.2d at 14.

[34] *Id.* Although the court recognized that the United States, as the importing country, was required to determine that the import will be for *purposes* that are not detrimental to the survival of the species," the Fish & Wildlife Service focused almost exclusively on whether the *removal* of the elephants would be detrimental to the survival of the African elephant. In addition, the court focused on the effects of the removal and the sale of the elephants. Only in the last sentence, almost a throw-away sentence, did the court state that the zoos' *purpose* of propagating elephants through captive breeding was not inconsistent with the continued survival of the African elephant. Even here, where the court attempts to address the purpose of the import, it did not suggest that Fish & Wildlife Service considered the *purposes* of the import. Moreover, the court did not provide a basis for the conclusion that the importation of elephants taken from the wild and introduced to zoos for captive breeding is not detrimental to the survival of the species.

[35] *Id.* at 15.

[36] *Id.* at 16.

[37] R (on the application of Greenpeace) v. Secretary of State for the Environment, Food and Rural Affairs, [2002] EWCA Civ. 1036 (July 25, 2003).

the mahogany was legally acquired. IBAMA, as well as the Brazilian Embassy in the United Kingdom, had written letters noting that no final determination been made that the mahogany was legally acquired.

In contrast to *Castlewood*, in which the court was asked to determine whether the U.S. government *may* look behind the four corners of a permit, the *Greenpeace* court concluded that the Secretary of State for Environment, Food and Rural Affairs, as the competent official for determining the validity of CITES export permits, was not *required* to verify the permit findings made by an exporting country. The decision did not turn on the "reasonableness" of the government's action as in *Castlewood*; instead, it was based on a strict "document-based" approach to interpreting whether a permit was valid.

The *Greenpeace* court was asked to interpret language in the regulations of European Union law similar to that found in U.S. law. That is, does the requirement of Article 4(3) of Council Regulation (EC) No. 338/97 that a permit be "issued in accordance with the Convention by an authority of that country competent for the purpose" allow or require the importing country to look behind the four corners of a permit to determine that the substantive provisions of the Convention have been met? The three judges all adopted a strict "document-based" approach, and all three judges rejected the view that "the authorities of the importing state are obliged to satisfy themselves that the species in question had not been obtained in contravention of the local conservation laws of the state of export."[38] They relied heavily on Article VI of the Convention, which provides that permits shall be granted in accordance with the provisions of Article VI and that "[a]n export permit or certificate shall contain the information specified in the model set forth in Appendix IV . . .[.]" In their view, this language limited the review of the permit to the formalities of the permit — in other words, whether the permit was complete. It did not allow importing countries to ascertain whether the substantive provisions of Articles III, IV, or V had been met.[39]

In addition, a majority of the court agreed that an importing country is not required to reject an export permit even "if it in fact happens to learn that the stated effect of the export permit is incorrect because the management authority of the state of export was not satisfied that the required conditions had been met."[40] According to Judge Mummery, the importing country may treat an export as valid "unless and until" the export permit is unilaterally revoked or cancelled by the management authority of the exporting country or by a court order of the exporting country.[41] Both Mummery and Dyson believed this conclusion was consistent with a document-based approach to permits.

Judge Mummery went even further, however. He concluded that not only could the authorities of the importing country refuse to detain shipments when they know the exporting state disagrees with its own permit findings, but also that they may not detain shipments when they know that the management authority was not in fact satisfied that a permit condition had

[38] Laws, LJ, at para. 23; Dyson, LJ, at para. 45; Mummery, LJ, at para. 56.
[39] Laws, LJ, at para. 23; Dyson, LJ, at paras. 42-44; Mummery, LJ, at para. 56, 58.
[40] Mummery, LJ, at 58; Dyson, LJ, at para.49.
[41] Mummery, LJ, at para. 59.

been met.[42] In other words, the importing country has no discretion to detain the shipments even if it knows the management authority of the exporting country failed to make a necessary permit finding, provided that the permit is otherwise complete.

Judge Laws, in a minority opinion, concluded that the requirement of EC Regulation Article 4(3)(a) — that permits be issued "in accordance with the Convention" — means exact compliance with the Convention's substantive permit requirements of Article V(2)(a) and the formal requirements of Article VI.[43] Thus, where the importing state knows at the time the permit is presented that the management authority of the exporting state is not satisfied that the permit conditions were not met, "they should have rejected the permit for failure to comply with article 4(3)(a) of the Regulation. The permits in this case were accordingly unlawful."[44]

It would not be correct to say that the courts in *Castlewood* and *Greenpeace* reach incompatible decisions. In *Greenpeace*, the question was whether the importing country *must* detain a shipment when it knows that the management authority of the exporting country is not satisfied that a particular permit finding has been met. In *Castlewood*, the question was whether the importing country *may* detain shipments when it knows that the management authority of the exporting country is not satisfied that a particular permit finding has been met. Whether the importing country has the discretion to detain a shipment under such circumstances was not before the *Greenpeace* court. Nonetheless, Judge Mummery appeared to suggest that the importing State lacked the discretion to detain shipments that it knew failed to satisfy the requirements for export.[45] Because this particular issue was not before the court, however, it should be treated as dictum. Moreover, neither Judge Dyson nor Judge Laws addressed this issue.

In contrast to the *Castlewood* court, the majority in *Greenpeace* did not consider the relevance of resolutions adopted by the parties. Resolution Conf. 10.2 (now found in Resolution Conf. 12.3, Section II), recommends that Parties "not authorize the import of any specimen if they have reason to believe that it was not legally acquired in the country of origin." The decision to ignore this resolution, without explanation, is surprising, because the court was presented with a letter from the enforcement officer from the CITES Secretariat stating that "all the export permits in question were issued contrary to the provisions of art V, para 2(a), of the Convention."[46]

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[42] Mummery, LJ, at para. 59.

[43] Laws, LJ, at para. 34.

[44] *Id.* at para. 35.

[45] "[I]t is lawful for the Customs and Excise Commissioners to refuse to detain the specimens pending the outcome of litigation involving IBAMA in Brazil. They would not be justified in detaining them [the specimens] on the ground that, notwithstanding the presentation to them [the Commissioners] of an authentic export permit, they know that the management authority was not in fact satisfied that the conditions have been met." Mummery, LJ, at para. 59.

[46] On June 6, 2002, the CITES Secretariat notified the management authority of the United States as follows:

> It is clear from the information provided in the fax [viz the letter of 3 June] that the Management Authority of Brazil had not made a finding regarding the legal origin of the specimens prior to granting export permits. Consequently, all the export permits in question were issued contrary to the provisions of art V, para 2(a), of the Convention.

III. Solution

These contrasting views on the authority of customs and other relevant officials can be easily corrected. For example, the Parties have made clear in the preamble to Resolution Conf. 10.3 that the issuance of permits without appropriate findings "constitutes a lack of compliance" with the Convention and seriously undermines species conservation." Similar language could be included in the operative provisions of a resolution.

In addition, the operative provisions of Resolution Conf. 12.3 (Rev. CoP13) recommend that the Parties "refuse to accept" any permit or certificate that is invalid, including "documents that contain information that brings into question the validity of the permit or certificate."[47] Because the rulings of the courts in both *Castlewood* and *Greenpeace* turned to a large degree on what constituted a "valid" permit, the language of a resolution should not focus on "the validity of the permit," but rather on whether the importing country has reason to believe that relevant permit findings of Articles III, IV, or V of the Convention have been made adequately. Further, both Resolution Conf. 12.3 (Rev. CoP13) and Resolution Conf. 11.3 (Rev. CoP13) contain language recommending that Parties "not authorize the import of any specimen if they have reason to believe that it was not legally acquired in the country of origin,"[48] but this authority does not extend to the other permit requirements of Articles III, IV, and V.[49]

> However, it appears that IBAMA has subsequently been able to make such a finding in respect of some of the shipments; particularly those referred to in tables 5, 6 and 9. That being the case, the Secretariat believes the opportunity now exists for the Management Authority of Brazil and countries of destination to discuss bilaterally the issuance of retrospective permits, following the guidance in s VII of Resolution Conf 10.2 (Permits and certificates), so as to enable the trade to take place.
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> Such discussions would also provide an opportunity for Brazil and other relevant Parties to discuss whether any of the shipments referred to in tables 1, 2, 3, 4, 7, 8 and 10 are capable of being designated as being of legal origin and, thereafter, the trade authorized by the issuance and acceptance of retrospective permits.

See Laws, LJ, para. 18 (quoting the letter).

[47] Resolution Conf. 12.3 (Rev. CoP13), Section XIV, para. (d) of "RECOMMENDS".

[48] Resolution Conf. 12.3 (Rev. CoP13) is even more specific with respect to the requirement that permits be issued only if the specimen was legally acquired. Resolution 12.3 (Rev. CoP13) recommends that "Parties not authorize the import of any specimen if they have reason to believe that it was not legally acquired in the country of origin." *Id.* at Section II, para (f) of "RECOMMENDS". Similarly, Resolution 11.3 (Rev. CoP13) recommends that, if an importing country "has reason to believe" that specimens of Appendix II or III specimens "are traded in contravention of the laws of any country involved in the transaction," that it notify the country whose laws were thought to have been violated and, where possible, apply stricter domestic measures consistent with Article XIV of the Convention. Resolution 11.3 (Rev. CoP13), para. (c) of the first "RECOMMENDS."

[49] Resolution Conf. 11.3 (Rev. CoP13) arguably provides importing countries with the discretion to refuse permits when they have reason to know that an import permit is accompanied by an inadequate non-detriment finding. Such discretion is not expressly stated, however. Resolution Conf. 11.3 (Rev. CoP13) recommends that the Parties

> (iv) ensure strict compliance and control in respect of all mechanisms and provisions of the Convention relating to the regulation of trade in animal and plant species listed in Appendix II,

To remedy this situation, IELP proposes the following revisions to Resolution Conf. 11.3 (Rev. CoP13) on Compliance and Enforcement, which would apply to both importing and exporting countries and to all permit findings of Articles III, IV, and V.

proposed new language underlined
proposed deletions in strikeout

Regarding compliance, control and cooperation

AGREES that the issuance of permits without appropriate findings constitutes a lack of compliance with the Convention and seriously undermines species conservation.

RECOMMENDS that:

c) if a~~n importing~~ country knows or has reason to believe that specimens of ~~an Appendix-II or -III~~ species included in Appendix I, II, or III are traded ~~in contravention of the laws of any country involved in the transaction~~ without the relevant permit findings being made or without adequate support for the finding, regardless of whether the permit specifies that the finding has been made, it:

> i) immediately inform the country whose permit findings are thought not to have been made adequately ~~laws were thought to have been violated~~ and, to the extent possible, provide that country with copies of all documentation relating to the transaction; ~~and~~
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> ii) immediately detain such shipments of specimens until information is received confirming that all relevant permit findings were made adequately;
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> iii) where possible, apply stricter domestic measures to that transaction as provided for in Article XIV of the Convention;

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and of all the provisions ensuring protection against illegal traffic for the species included in the Appendices.

(v) in case of violation of the above-mentioned provisions, immediately take appropriate measures pursuant to Article VIII, paragraph 1, of the Convention in order to penalize such violation and to take appropriate remedial action;