

Sustainable eNews

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SPECIAL EDITION

December 2004



IWMC
World Conservation Trust

ULTRA VIRES

Open letter to the Secretary General of CITES

Dear Secretary General,

The term that serves as a title to this letter means, as you know, to commit an abuse of power. To declare that the Conference of the Parties would be *ultra vires* in taking a particular action is therefore a serious action which, especially when originating from the Secretariat, should be fully justified. Such a statement was made, at CoP13, in what was probably the last document produced by the Secretariat, document CoP13 Doc. 51 Addendum. In fact we should rather say a non-document since it was not considered at all by the Conference and was not published on the web-site of the Secretariat. Nevertheless it was drafted and circulated, possibly with the hope that the debate on the matter would be reopened in a plenary session, and its content is worrying. Even more when, as we were told from various reliable sources, this was done after a meeting of the Conference Bureau during which the Secretariat tried, without success, to impose its views, claiming that it was the authority in charge of interpreting the Convention and decisions of the Conference of the Parties. Such a claim, if confirmed, would actually be *ultra vires*.

What about the justification? That appearing in the document is not acceptable, for the following reasons. The document in question referred to the debate about the revision of Resolution Conf. 11.11 on the Regulation of trade in plants, and was directed especially to the definition of the term 'artificially propagated', including the use of wild-collected seeds. The debate, which started in meetings of the Plants Committee, was very controversial, because the United States of America, which was designated to chair a working group, had put in question the interpretation given by most Parties to that part of the Resolution. This was exacerbated by the sudden change of opinion of the Secretariat sometimes in 2003.

Before going further, let us recall that, when the first definition of the term 'artificially propagated' was considered and adopted by the Conference of the Parties, at CoP2 in San José de Costa Rica, in 1979, the omission of the qualifier 'wild' before seeds, and other propagules, was not due to an oversight by absent-mindedness but was decided consciously. This was to follow the views expressed first by Australia, which, in a document submitted to the meeting,

indicated that, under their legislation, plants produced from seeds in a controlled environment were considered as artificially propagated, whether the seeds were from wild origin or not. This was not changed until CoP13, in spite of various revisions of the original resolution.

The possibility to use wild seeds for the production of artificially-propagated plants is accepted by most Parties, at least, and was by the Secretariat (e.g. in its Participant Manual, CITES Training Seminar, South Africa, 1997, and through the registration of a Chilean nursery so propagating specimens of the species *Araucaria araucana*), as well as by you Mr Secretary General. Indeed, in a note in chapter 14 of the seventh edition of *The Evolution of CITES* (2003) you wrote "... we can grow live plants from wild-collected seeds, cuttings, etc.; these plants are then considered as artificially propagated" [translation from the French version].

To justify its position, the Secretariat, in the 'document' in question here, repeats what was said peremptorily by its representative in the fifth session of Committee I, i.e. "a specimen of a plant that has been taken from the wild can never be described as artificially propagated". How to disagree with such a truism? This would be absurd, as to dispute that five minutes before his death, Marshal La Palice was still alive. The problem resides in the fact that this Secretariat's sentence implies that, in its views, a seed and the plant grown from it are one and the same specimen, so a whole plant. On this basis, the Secretariat concludes that the adoption of an interpretation like that proposed in document CoP13 Com. I. 10, agreed by Committee I before being adopted by the Conference, is *ultra vires*. Although the Conference of the Parties, not the Secretariat, could have or might so decide, it never did and never intended to do. It has never considered seeds as plants but always as 'specimens' described in Article I of CITES as 'parts and derivatives'. This destroys the Secretariat's argument.

This is of significance for another reason also. Actually, if seeds would be considered as whole plants, it would not be possible to exempt them from the provisions of the Convention, as they are for most species included in Appendices II and III. If the new reasoning of the Secretariat were to be followed, most annotations placed against these species would have had to be changed to eliminate seeds, since the same term may not be defined differently depending on its use. We can be confident that the Conference will never take such a decision.

In continuation to its justification, the Secretariat indicates that the text proposed "reflects a similar situation encountered in the field of fauna" and overcome by CITES through the ranching scheme. So doing, the Secretariat omits, as the United States did before, what the Parties agreed repeatedly, including in the preamble of Resolution Conf. 11.11, i.e. that fauna and flora are different and must be treated differently. This explains why the Parties have adopted fundamentally different definitions for the term 'bred in captivity' and the term 'artificially propagated', the second excluding notably the second-generation requirement. In addition, the Parties recognize that artificial propagation "has a positive effect on the conservation status of the wild population" and "could also increase conservation interest in the areas of natural distribution" (see the preamble of Resolution Conf. 9.19). They do not expressed the same recognition for captive breeding. We do not have the feeling that this would be changed. We are persuaded indeed that any change would be counterproductive.

We do agree however that the establishment of some safeguards to the harvesting of wild seeds, including for the production of artificially-propagated plants is reasonable. This was done in Bangkok. However, the conditions to be met and the limitation essentially to tree species for the use of wild seeds are in our views excessive. Consequently, the revision of the definition of the term ‘artificially propagated’ adopted at CoP13 may not be considered as a simple improvement of the clarity of the earlier definition, what was required under Decision 12.11, paragraph e); the new definition is actually much more restrictive than that provided in Resolution Conf. 11.11.

We are also pleased that the Conference of the Parties has adopted the two draft decisions in document CoP13 Com. I. 9 without deleting the words “pertaining to the production of specimens of Appendix-I species grown from wild-collected seeds and spores”. This was suggested by the Secretariat in its continuing insistence to defend its own views on the issue, for unknown reasons, which it would be interesting to know.

How should we interpret the last paragraph of document CoP13 Doc. 51 Addendum? This is another question. Just as a refusal by the Secretariat to undertake a work directed to it by the Conference of the Parties? This would also be *ultra vires*, and in contradiction with Article XII, paragraph 2 (i), under which the Secretariat shall “perform any other function as may be entrusted to it by the Parties”. In addition, it is largely exaggerated to put forward, as an excuse, that to make changes in Resolution Conf. 9.19 to remove inconsistency with the revised Resolution Conf. 11.11 “is subject to varying interpretations” and “that such judgements are more properly undertaken by the Conference of the Parties”. First of all we do not believe that this is true, the work required being essentially to transpose wording from a resolution into another. Furthermore, the Secretariat is constantly making interpretations, in particular when it is making recommendations as it ought to do. We have little doubt, if any, that it will be able to amend Resolution Conf. 9.19 in a proper way. In any case, all Secretariat’s interpretations may be contested by the Conference of the Parties, which always has the last word.

Instead of that, the Secretariat would have been better-advised in reminding Committee I that it would be *ultra vires* to exempt “whole artificially propagated plants in pots or other small containers, each consignment being accompanied by a label or document stating the name of the taxon or taxa and the text ‘artificially propagated’”. Indeed, the Convention does not allow any exemption for whole plants, whether they are wild-collected or artificially propagated. As indicated in summary report CoP13 Com. I Rep. 10, this exemption, related to *Taxus* species, was surprisingly suggested by the Netherlands, on behalf of the 25 Member States of the European Community. It was approved by Committee I. This occurred apparently without any reaction from any Party, observer or member of the Secretariat (two botanists were present). We could have reacted but we must admit that we were not in the room when this happened. It is only after the meeting that we discovered this error. This was in fact shortly before taking note of Notification to the Parties No. 2004/073 of 19 November, in which the Secretariat has judiciously inserted a footnote to point out the error and indicate that it will submit the issue to the Standing Committee. Regarding the footnote however, the Secretariat could have added that the specimens in question could be traded in a way similar to the ‘exemption’, on the condition that the required document (this would not be applicable to the label) would be a phytosanitary certificate issued in accordance with Resolution Conf. 12.3, section VII.

If the Secretariat failed to properly advise the Parties on the above issue and has now to propose a way to repair the error made, we must note also that it provided them a wrong advice in the final plenary session regarding the amendment introduced by the United States for proposal CoP13 Prop. 40 (see document CoP13 Plen.5). “The Secretariat pointed out that proposal CoP13 Prop. 42, which proposed an amendment of footnote 8 for *Phalaenopsis*, had been withdrawn and therefore could not be reconsidered, [this was correct] and so the proposed amendment by the delegation of the United States would be in contradiction with an existing footnote.” This last comment obviously implied that the amendment, in the Secretariat’s opinion, was not receivable regarding *Phalaenopsis* spp. Fortunately, the Conference did not take this erroneous comment into consideration and adopted proposal CoP13 Prop. 40, as amended by the delegation of the United States.

To conclude, we consider regrettable that the Secretariat has tried in various ways to impose its views on a significant issue, without appropriate consideration of the potential consequences for the Parties and, as importantly, for the conservation of CITES listed species, and was unable to properly and timely advise the Conference. In the first case, fortunately, the Parties did not follow the Secretariat’s views; they were nevertheless pushed to adopt measures that are probably too strict. Regarding the second issue, we do hope, Mr Secretary General, that the Standing Committee will be able to correct the error.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Jaques Berney', written in a cursive style.

Jaques Berney
IWMC Executive Vice-President