

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES
OF WILD FAUNA AND FLORA



Nineteenth meeting of the Conference of the Parties
Panama City (Republic of Panama), 14 - 25 November 2022

Species specific matters

Elephants (Elephantidae spp.)

Trade in live African elephants

CLARIFYING THE FRAMEWORK: PROPOSAL OF THE EUROPEAN UNION

1. This document has been submitted by the European Union and its Member States*.

Background

2. At AC31, the Animals Committee agreed to refer certain concerns to the Standing Committee for advice and further recommendations. These concerns were two-fold:

- 1) Namibia's interpretation of its exports of live African elephants (*Loxodonta africana*) to non-range States outlined in paragraph 7 of document AC31 Doc. 18.1, Addendum 1; and
- 2) Zimbabwe's reservation submitted following the changes adopted at the 18th meeting of the Conference of the Parties in Resolution Conf. 11.20 (Rev. CoP18) on *Definition of the term 'appropriate and acceptable destinations'* and the export of live elephants occurring in 2019 as outlined in paragraph 9 of document AC31 Doc. 18.1, Addendum 1, while noting discrepancies between document AC31 Doc. 18.2 and the response provided by Zimbabwe in Annex 3 to document AC31 Doc. 18.1.

At SC74 a first in depth discussion was held on these issues related to African elephants.

3. The first element relates to the implementation of Res. Conf. 11.20 (Rev. CoP18) on "Definition of the term 'appropriate and acceptable destinations'" ([SC74 Doc. 50](#) (paragraph 5 – 9 and recommendation 17.b). Parties with African elephant populations included in Appendix II who have exported wild caught African elephant to non-African elephant range States were requested, pursuant to Decision 18.153, to submit information on their implementation of this Resolution. The second issue relates to the communications from Botswana, the Democratic Republic of the Congo, Eswatini, Namibia, South Africa, the United Republic of Tanzania, Zambia and Zimbabwe on their reservation with respect to "the update of the references to the Resolutions mentioned in annotation 2 relating to the populations of *Loxodonta africana* in Botswana, Namibia, South Africa and Zimbabwe". In document [SC74 Doc. 86](#), the Secretariat provided details about their practice of updating references to Resolutions to reflect the fact that the CoP has revised the Resolutions concerned, meaning that the previous versions are therefore out of date.
4. This practice of revising the publication of Resolutions after each CoP is directed by Res. Conf. 4.6 (Rev. CoP18) and the Secretariat has followed this diligently. However, this practice only became a controversial issue after the adoption by CoP18 of changes to the reference to Res. Conf. 11.20 on "Definition of the term

* The geographical designations employed in this document do not imply the expression of any opinion whatsoever on the part of the CITES Secretariat (or the United Nations Environment Programme) concerning the legal status of any country, territory, or area, or concerning the delimitation of its frontiers or boundaries. The responsibility for the contents of the document rests exclusively with its author.

'appropriate and acceptable destinations" that is included in the annotation of the African elephant. This annotation 2 is currently the only annotation that contains references to Resolutions: Res. Conf. 11.20 (Rev. CoP18) and Res. Conf. 10.10 (Rev. CoP18). The changes adopted at CoP18 had the effect to change the obligations under the legally binding text in the Appendices, without providing the possibility for Parties to enter reservations as they would be able to do for changes of the Appendices according to Article XV.

5. The EU and its Member States have reflected on the different elements raised at SC74 in Lyon (see relevant summary records and draft summary record) and provide some ideas for further deliberation in this document. While part of the discussion clearly only relates to African elephants, another part of the discussion goes beyond this particular species and discussion should therefore be more generalised. The two questions can be discussed in parallel; however, it would be necessary to have clarity and common understanding on the underlying legal issues before agreeing on specific issues linked to the trade in live elephants, such as changes to annotations. This document presents the issues taking a stepwise approach. It addresses first the need to clarify and agree on the effects of reservations to annotations and the procedure applicable to changes to Resolutions referred to in annotations. Secondly, it looks at the specific issues linked to trade in live elephants: laying down clear conditions on how trade in live elephants can take place in Res. Conf. 10.10 (Rev. CoP18) and a possible revision of annotation 2 on African elephants.

Reservations to annotations

6. The questions on the communication of several African elephant range States to the update of the reference of the Resolution in annotation 2 has brought to light a larger issue. Under the current framework of the Convention it is unclear if a reservation can be entered after changes are adopted to an already existing annotation, and what the effect would be of such reservations. A first attempt to clarify this can be found in [Inf. Doc. 12](#) which was submitted by the USA for SC74. While this document provides useful suggestions, some unresolved issues remain.
7. In essence, the Information document from the USA explains that when a substantive change is made to an annotation in accordance with Art. XV and subsequently a reservation is entered in accordance with Art. XV, paragraph 3, this reservation will only have an effect on the amendment made to the annotation. The Party that entered the reservation can only continue to trade this species in accordance with the unamended annotation.
8. While this suggested way forward is legally valid, it could create some implementation challenges. It would require the Secretariat to maintain records of all changes done to annotations, and reservations made to annotations. It may result in complicated situations where for example Party A would trade in a species with annotation X version 1, whereas Party B would trade in that same species but with annotation X version 2, and all other Parties would trade in that same species with annotation X version 3. This might create a very complex system which may prove difficult to implement and enforce.
9. However, a different interpretation of the legal effect of a reservation to an annotation faces legal issues. For instance, in our view it is not legally sound to argue that a reservation to a change in the annotation is applicable to a species. This would be understood as a reservation to the entire listing of that species. According to the Convention, a reservation should be entered within 90 days after the CoP at which the amendments were adopted. It is our view this rule means that any reservation to the inclusion of an annotation, or a change in an existing annotation for a species that is already included in Appendix I or II, cannot be accepted as a reservation to the listing of that species in itself. Such a reservation should have been introduced within the 90 days of the listing of the species itself.
10. Although Resolution Conf. 4.25 (Rev. CoP18) on *Reservations* already provides some useful guidance, careful consideration needs to be given to the effects reservations on annotations may have, and all situations need to be looked at.
11. Alternatively considerations could be given to whether or not reservations to annotations should be allowed at all.
12. In any case it is clear that this has ramifications that go well beyond the listing of African elephants and needs to be resolved in order to provide legal clarity to all Parties.

Safeguards to avoid references to resolutions on annotations

13. As detailed in SC74. Doc.86, the mixture of the text of the Convention including its Appendices with Resolutions and combined with the fact that the process for amendment of Resolutions is different from that of amendment of annotations, has created a complicated situation. This situation currently only exists in one annotation (namely annotation 2 applicable to African elephants). It may be advisable that the Conference of the Parties adopts clear guidelines that in principle, Resolutions should not be referred to in annotations and that if such references exist, changes to that Resolution which would substantially change the scope of the listing should be done in accordance with Article XV of the Convention.
14. This could be done by including two new provisions in paragraph 1 of Res. Conf. 11.21 (Rev. CoP18) on Use of annotations in Appendices I and II, for example as follows:

New e) it is to be avoided to include references to Resolutions in annotations adopted by the Conference of the Parties;

New f) Resolutions, which are referred to in a substantive annotation relating to species in Appendix I or II may only be amended or deleted by the Conference of the Parties in accordance with Article XV of the Convention insofar as they alter the scope of the listing;.

15. Whichever wording is used, in our view the aim should be to avoid the creation of additional situations where a reference to a Resolution is included in an annotation, and if such references exist, amendments should be done in accordance with Art. XV of the Convention, at least to the extent that the change in the Resolution would alter the scope of the listing.

Common framework for trade in live African elephants

16. At SC74 the EU and its Member States expressed a wish to establish a common framework for trade in live African elephants, which received some support during this meeting. In this chapter we explain more in detail how this could be done. Several options are possible and further discussions will be required. This document presents one option: the entire deletion of Res. Conf. 11.20 (Rev. CoP18) and subsequent inclusion of relevant sections into a dedicated chapter on "Trade in live African elephants" in Res. Conf. 10.10 (Rev. CoP18) for elephants and a dedicated chapter on "Trade in live rhinoceroses" in Res. Conf. 9.14 (Rev. CoP17) for rhinoceroses.
17. For elephants, such a dedicated chapter could be based on the currently existing conditions in Res. Conf. 11.20 (Rev. CoP18) and already include a reference to the non-binding best practice guidance on how to determine whether "the trade would promote in situ conservation" as well as the non-binding guidance for "determining whether a proposed recipient of a living specimen of African elephant and/or southern white rhinoceros is suitably equipped to house and care for it. This dedicated chapter could be worded as follows and included after paragraph 30, with text from existing Resolution Conf. 11.20 (Rev. CoP18) underlined and completely new text double underlined:

Regarding trade in live African elephants

31. AGREES that any trade in live African elephants taken from the wild¹ should only go towards in situ conservation programmes or secure areas in the wild, within the species' natural and historical range in Africa, except in exceptional circumstances where, in consultation with the Animals Committee, through its Chair with the support of the Secretariat, and in consultation with the IUCN African elephant specialist group, it is considered that a transfer to ex-situ locations will provide demonstrable in-situ conservation benefits for African elephants taking into account the Non-binding best practice guidance on how to determine whether "the trade would promote in situ conservation", or in the case of temporary transfers in emergency situations;

32. FURTHER AGREES that for any trade in live African elephants taken from the wild:

a) the Management and Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it sustainably, taking into

¹ Excluding elephants that were in ex-situ locations at the time of the adoption of this Resolution at the 18th meeting of the Conference of the Parties.

account the Non-binding guidance for determining whether a proposed recipient of a living specimen of African elephant is suitably equipped to house and care for it; and

b) the Management and Scientific Authorities of the State of import and the State of export are satisfied that the trade would promote in situ conservation taking into account the Non-binding best practice guidance on how to determine whether “the trade would promote in situ conservation”;

33. ENCOURAGES that any permit authorizing trade of live elephants contain a condition stating that the elephant ivory from those animals and from their progeny may not enter commercial trade or be sport hunted outside of their historic range; and

34. RECOMMENDS that all Parties have in place legislative, regulatory, enforcement, or other measures to prevent illegal and detrimental trade in live elephants, to minimize the risk of negative impacts on wild populations and injury, damage to health or cruel treatment of live elephants in trade, and to promote the social well-being of these animals.

18. A similar decision would then also need to be taken for rhinoceroses.

Potential relevant changes to annotation 2 applicable to African elephants

19. Once it has been clarified what the effects would be when a Party enters a reservation to a change in an existing annotation, changes to annotation 2 applicable to *L. africana* can be considered.

20. Paragraphs g) and h) could be considered for deletion, as they have become obsolete as they refer to events that occurred in the past. This deletion would also solve the issue of the inclusion of a reference to Res. Conf. 10.10 (Rev. CoP18) in this annotation.

21. Paragraph b) could be deleted or amended in order to establish a common framework for trade in live African elephants. Several options exist here, which need careful considerations by all Parties and especially the African elephant range States. Three options are detailed in this document as examples and further consideration. These amendments are to be considered in conjunction with the described changes under the previous title on “Common framework for trade in live African elephants”. For each option the potential consequences are mentioned:

Option a): deletion of paragraph b) entirely.

Consequences: any trade in live elephants can only be done under the provisions of Art. III (as all trade in live elephants will be trade in a specimen listed in Appendix I). This means that trade could not be authorised for primarily commercial purposes. There would be no ambiguity anymore as to whether or not trade is possible under either Appendix I or Appendix II requirements. It would also delete the reference to this Resolution in the annotation.

Option b): partial change to paragraph b):

~~b): trade in live animals to appropriate and acceptable destinations, as defined in Resolution Conf. 11.20 (Rev. CoP18), for Botswana and Zimbabwe and for in situ conservation programmes for Namibia and South Africa;~~

Consequences: trade for primarily commercial purposes in live elephants from those 4 populations would be possible, but bound by the conditions in the Resolution and the requirements of Article IV. There would still be a certain ambiguity as to whether or not trade in live elephants from any of these 4 populations would still be possible under the App. I regime, however in practice this would no longer be relevant, as all trade (App. I and App. II) would need to follow the same conditions as laid down in the Resolution. It would also delete the reference to this Resolution in the annotation.

Option c) insertion of the conditions under which trade in live elephants from these 4 populations may take place in paragraph b) of the annotation itself.

Consequences: commercial trade in live elephants from 4 populations remains possible, but subject to the conditions in the annotation for App. II elephants. App. I elephants would then be subject to the same conditions, but these would be laid down in the Resolution. This option would also imply the deletion of the reference to this Resolution in the annotation.

Recommendations

22. The Conference of the Parties is invited to take note of the issues outlined in this document and adopt the draft decision contained in the Annex 1.

COMMENTS OF THE SECRETARIAT

- A. The Secretariat notes the overlapping nature of the matters addressed in documents CoP19 Doc. 66.4.1, submitted by Benin, Burkina Faso, Equatorial Guinea, Ethiopia, Liberia, Niger, Senegal and Togo, and document CoP19 Doc. 66.4.2, submitted by the European Union and its Member States. The Secretariat welcomes the two documents and appreciates the proponents' efforts to contribute to clarifying the conditions for an unambiguous legal framework for trade in live African elephants. The Secretariat draws the attention of the Parties to the importance of finding common ground, bringing all the Parties concerned together and building consensus around a technical and evidence-based deliberation that is aligned with the fundamental principles of the Convention as stated in Article II.
- B. The Secretariat notes the complexities concerning the conditions for a clear legal framework for trade in live African elephants and is of the opinion that further discussion on this matter would be beneficial. The Secretariat believes that the amendments to Resolution Conf. 10.10 (Rev. CoP18) on *Trade in elephant specimens*, as proposed in document CoP19 Doc. 66.4.1, would preclude such a discussion. The Secretariat therefore recommends that the Conference of the Parties do not adopt the amendments to Resolution Conf. 10.10 (Rev. CoP18) proposed in document CoP19 Doc. 66.4.1.
- C. The Secretariat is of the opinion that a discussion on reservations to annotations and the conditions for a clear legal framework for trade in live African elephants could be facilitated through the process proposed in document CoP19 Doc. 66.4.2, including the suggested CITES dialogue meeting for African elephant range States. The Secretariat therefore recommends that the Conference of the Parties adopt the proposed draft decision in Annex 1 of document CoP19 Doc. 66.4.2.
- D. In this context, the Secretariat would like to draw Parties' attention to document [CoP19 Doc. 88](#) on *Communications concerning amendments to the Appendices received by the Depositary Government after CoP18*. The content and recommendations in this document seem to address the issues raised in document CoP19 Doc. 66.4.2, notably the issue of the reservation to annotations and the safeguards to avoid references to Resolutions in annotations. As a result, paragraphs a) and b) of the proposed draft decision in Annex 1 to document CoP19 Doc. 66.4.2 may appear redundant and should be subsumed or taken into account under the discussion on agenda item 88 that is scheduled to take place earlier in the working programme.
- E. The Secretariat would also like draw Parties' attention to document [CoP19 Doc. 85.3](#), which has been submitted by the Chair of the Standing Committee in consultation with the Secretariat and which suggests the development of a proposal on the feasibility and requirements for an informal review mechanism for existing and proposed annotations. The Secretariat notes the complementary contribution of the approach proposed in document CoP19 Doc. 66.4.2 to a potential informal review of existing and proposed annotations.

**DRAFT DECISION ON
RESERVATIONS AND ANNOTATIONS
LINKED TO TRADE IN LIVE AFRICAN ELEPHANTS**

Directed to the Standing Committee

19.AA The Standing Committee shall

- a) provide guidance on how to deal with reservations made to changes in the scope of a listing introduced through amendment of an annotation and propose changes to the relevant Resolutions to CoP20;
- b) consider ways to avoid references to resolutions in annotations, and propose relevant changes to Resolution Conf. 11.21 (Rev. CoP18) on *Use of annotations in Appendices I and II* to CoP20;
- c) consider to call a CITES dialogue meeting as per Resolution Conf. 14.5 on *Dialogue meetings* for African elephant Range States to consider a harmonisation of the conditions to trade in live African elephants and propose relevant changes to Resolutions to CoP20 as well as relevant changes to annotation 2, including changes to streamline and simplify the annotation.

**TENTATIVE BUDGET AND SOURCE OF FUNDING
FOR THE IMPLEMENTATION OF DRAFT RESOLUTIONS OR DECISIONS**

According to Resolution Conf. 4.6 (Rev. CoP16) on Submission of draft resolutions, draft decisions and other documents for meetings of the Conference of the Parties, the Conference of the Parties decided that any draft resolutions or decisions submitted for consideration at a meeting of the Conference of the Parties that have budgetary and workload implications for the Secretariat or permanent committees must contain or be accompanied by a budget for the work involved and an indication of the source of funding.

Direct costs:

The organization of a three-day Dialogue meeting of range States of the African elephant is estimated to cost USD 100,000.