

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



Fifty-fourth meeting of the Standing Committee
Geneva (Switzerland), 2-6 October 2006

Strategic and administrative matters

LEGAL PERSONALITY OF THE CONVENTION AND THE SECRETARIAT

1. This document has been prepared by the Secretariat.
2. As used in this document, the term 'legal personality' includes both legal capacity within the host country and international personality.

Background

3. Under international law, the legal personality of an international organization need not be specified expressly in the instrument which creates it, but may be derived from implied institutional powers. Some of the general rights and duties of international organizations have been codified in the 1969 Vienna Convention on the Law of Treaties, but the bulk of legal rules in this field continues to evolve through international practice, custom and case law.
4. As with many multilateral environmental agreements, the text of CITES creates an entity, the Secretariat, to perform stated functions and any other function as may be entrusted to it by the Parties. This is why the Secretariat is sometimes characterized as a treaty body. The Secretariat is provided by the Executive Director of the United Nations Environment Programme (UNEP) but its duties are legally and functionally distinct from those of UNEP and could be transferred to one or more other suitable intergovernmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild fauna and flora (see Article XII of the Convention). Indeed, the Secretariat was previously provided by IUCN.
5. Under similar arrangements, UNEP provides secretariat functions for other multilateral environmental agreements and offers an administrative infrastructure within which those secretariats operate. There is no significant substantive difference in the independent legal natures of the secretariats of other conventions and that of the CITES Secretariat.
6. The Secretariat has always operated under the assumption that it possesses both the legal capacity and international personality (as an autonomous treaty body) needed to perform its functions under the Convention. This legal personality, however, has been implicit rather than explicit in nature.
7. Article XI, paragraph 3 (a), of the Convention authorizes the Conference of the Parties to "make such provision as may be necessary to enable the Secretariat to carry out its duties". To date, the Conference has not found it necessary to make express reference to the Secretariat's legal personality.

Legal capacity

8. The absence of any express recognition of the Secretariat's legal capacity in the Convention, and its derivative legal capacity under the host government agreement between the United Nations and Switzerland, has led to occasional challenges regarding that capacity. For example, questions have

arisen regarding the Secretariat's legal capacity to conclude a host government agreement for organizing meetings of the Conference of the Parties and to enter into a memorandum of understanding with an intergovernmental organization. More recently, its request for the '.int' domain on the Internet was rejected.

9. Article XII, paragraphs 2 (a) and 2 (b), of the Convention authorizes the Secretariat "to arrange for and service meetings of the Parties" and "to perform any other function as may be entrusted to it" by the Parties, but it does not make specific reference to the Secretariat's legal capacity. By contrast, Article 24, paragraph d), of the Convention on Biological Diversity authorizes the CBD Secretariat "to coordinate with other relevant international bodies and, in particular to enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions".
10. Section 1 of Article I of the 1946 Agreement on Privileges and Immunities of the United Nations, concluded between the Swiss Federal Council and the Secretary-General of the United Nations, states that:

The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organization cannot be sued before the Swiss Courts without its express consent.

11. The above language has been interpreted by Switzerland to afford UNEP and the Secretariat (as well as other MEA secretariats located in Switzerland) derivative legal capacity. The Secretariat has had discussions with Swiss authorities about concluding a separate host government agreement, which would clarify the Secretariat's legal capacity, but it has been advised that this is not possible.
12. By contrast, the 1995 Agreement between the United Nations and the Federal Republic of Germany concerning the Headquarters of the United Nations Volunteer Programme expressly provides that it "may also be made applicable, *mutatis mutandis*, to other intergovernmental entities, institutionally linked to the United Nations, by agreement among such entities, the Government and the United Nations" (see Article 4, paragraph 8). Under this provision, a complementary host government agreement was concluded in 2002 between the Federal Republic of Germany, the United Nations and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS). Article 4 (Legal Capacity) of the 2002 Agreement provides that:
 - (1) *The Convention Secretariat shall possess in the host country the legal capacity to:*
 - (a) *contract;*
 - (b) *acquire and dispose of movable and immovable property; and*
 - (c) *institute legal proceedings.*
 - (2) *For the purpose of this Article, the Convention Secretariat shall be represented by the Executive Secretary.*

13. The CITES Secretariat has argued that its legal capacity is implicit in the Convention and the host government agreement between the United Nations and Switzerland. It has also argued that such implicit legal capacity has been exemplified by its entry into a wide range of administrative, contractual and other legal arrangements (e.g. contracts for goods or services, host government agreements and memoranda of understanding) over its more than 30 years of existence. This argument has proven persuasive in the face of most challenges but the Secretariat has had to expend a great deal of time and energy to make it, and often to reiterate it. In some cases, the argument has failed. The Secretariat now appears to be the only secretariat of a multilateral environmental agreement whose legal capacity has not been made explicit in writing. It therefore seems timely to consider formalizing the Secretariat's legal capacity in some way.
14. CITES Parties have been reluctant to consider and adopt additional amendments to the text of the Convention. There might be scope, however, for the Secretariat to work with the United Nations Office in Geneva and the Swiss Government to craft a written text – other than a host government agreement – which would clarify the Secretariat's capacity to enter directly into administrative and contractual arrangements. Alternatively, the Parties might consider adopting a resolution which clarifies the implicit legal capacity of the Secretariat to perform its functions under the Convention. The Annex to this document contains a draft of such a resolution.

International personality

15. Staff of the CITES Secretariat are staff of the United Nations, though their contracts are generally limited to service in the Secretariat. As such, they (and the CITES Trust Fund) are subject to both UNEP and UN administrative and financial rules and regulations. It is in this context that the Secretary-General reports to the Deputy Executive Director and Executive Director of UNEP. UN privileges and immunities are extended to Secretariat staff, and they travel on official business under the authority of a United Nations laissez-passer.
16. UNEP's provision of the CITES Secretariat, however, does not affect the independent status of the Convention, which has its own standing under international law. This independence is exemplified by the 1997 Agreement between the Standing Committee of the Conference of the Parties to CITES and the Executive Director of UNEP.
17. It may be argued that the Secretariat similarly possesses an international personality, separate from that of UNEP, as a treaty body which is directed by and answerable to the Conference of the Parties. The Secretariat is not a programme within the primary structure of UNEP and is not guided by the Governing Council of UNEP. Indeed, it is UNEP's responsibility to ensure that the Secretariat has the autonomy needed to perform its functions under the Convention and in accordance with the policy, budgetary and operational guidance it receives from the Conference of the Parties. UNEP does not speak for CITES in international meetings. Rather, the Secretariat participates as an independent entity in such fora, speaking on behalf of the Convention and its Parties.
18. Despite being provided with information on the Secretariat's operation and its similarity to other MEA secretariats, the International Assigned Numbers Authority (whose functions are now performed by the Internet Corporation for Assigned Names and Numbers) decided recently that neither CITES nor the CITES Secretariat had independent legal personality and that therefore it did not qualify for the '.int' domain. Other UNEP and UN-administered secretariats were nevertheless determined by IANA to possess independent legal personality and were thereafter granted the '.int' domain.

Recommendation

19. The Secretariat recommends that a discussion document incorporating the draft resolution on clarification of the legal capacity and international personality of the Convention Secretariat, contained in the Annex to this document, be submitted for consideration at the 14th meeting of the Conference of the Parties.

DRAFT RESOLUTION OF THE CONFERENCE OF THE PARTIES

Legal personality of the Convention's Secretariat

RECOGNIZING that the legal personality of the Secretariat is implied, but not explicitly stated, in Article XII of the Convention;

AWARE that the Secretariat has generally operated and been treated as though it possesses both the legal capacity and independent international legal personality needed to perform its functions under the Convention;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

RECOGNIZES that the Secretariat possesses independent international legal personality;

RECOGNIZES FURTHER that the Secretariat possesses the legal capacity:

- a) to contract;
- b) to acquire and dispose of immovable and movable properties; and
- c) to perform any legal act in furtherance of its functions and objectives; and

ENTRUSTS the Secretariat to coordinate with other relevant international bodies and, in particular, to enter into such administrative and contractual arrangements as may be required for the effective performance of its functions.