

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



Sixty-ninth meeting of the Standing Committee
Geneva (Switzerland), 27 November - 1 December 2017

Species specific matters

Maintenance of Appendices

PROCEDURE FOR ENTERING RESERVATIONS WITH RESPECT TO
THE AMENDMENTS OF APPENDICES I, II AND III

1. This document has been prepared by the Secretariat.

Introduction

2. In accordance with the provisions of Article XV of the Convention, the Conference of the Parties to the Convention, at its 17th meeting (CoP17, Johannesburg, 2016) considered the amendments to Appendices I and II proposed by the Parties. The Conference of the Parties decided on a number of amendments to the Appendices which were communicated by Notification to the Parties No. 2016/063 of 29 November 2016.
3. Notification No. 2016/63 also contained the following paragraphs regarding the entry into force of the amendments and the possibility for Parties to make reservations with respect to the agreed amendments:

In accordance with the provisions of Article XV, paragraph 1, sub-paragraph (c), of the Convention, the amendments adopted at the 17th meeting of the Conference of the Parties shall enter into force 90 days after that meeting, i.e. on 2 January 2017, for all Parties except those which make reservations in accordance with paragraph 3 of that Article.

In accordance with the provisions of Article XV, paragraph 3, of the Convention, and during the period of 90 days provided for by subparagraph (c) of paragraph 1 of that Article (i.e. by 2 January 2017), any Party may by notification in writing to the Depositary Government (the Government of the Swiss Confederation) make a reservation with respect to one or more amendments adopted at the 17th meeting of the Conference of the Parties. Until such reservation is withdrawn, the Party shall be treated as a State not party to the Convention with respect to trade in the species concerned. The other Parties shall then apply the provisions of Article X of the Convention to such trade with the Party having made the reservation.

Late reservations

4. By Notification to the Parties No. 2017/010 of 26 January 2017, the Secretariat circulated information from the Depositary Government (Government of Switzerland) in relation to Article XV, paragraph 3, of the Convention on reservations received with respect to the amendments to Appendices I and II adopted at CoP17.
5. In relation to four of the reservations, the Notification contained the following note:

Although these reservations were received after the deadline set out in the Convention, the Depositary Government has indicated that in keeping with the practice followed by other depositaries in similar cases, it intends to consider these reservations as received if there is no objection from any CITES Party by 24 April 2017.

6. The Notification also mentioned that

*The Secretariat has exchanged letters with the Depositary Government regarding the practice of receiving late reservations under certain conditions. **This practice is to propose to the Parties to receive late reservations for deposit in the absence of any objection on the part of any of the Parties within a given deadline, either to the deposit itself or to the procedure envisaged.** The Secretariat, in consultation with the Depositary Government, will bring this issue to the attention of the Standing Committee at its next meeting to seek clarification. (Emphasis added)*

7. By Notification to the Parties No. 2017/029 of 6 April 2017, the Secretariat informed the Parties that the Depositary Government did receive objections to the reservations in question before the deadline it had established. Consequently, the Depositary Government had informed the Parties that the reservations after the 90-day deadline (i.e. 2 January 2017) would not be accepted for deposit.

Discussion

8. As indicated in the Notification of January 2017 and based on the exchange of letters between the Secretariat and the Depositary, the Secretariat is bringing this matter to the attention of the Standing Committee for its consideration and possible recommendations.
9. In its letter of 19 January 2017, the Secretariat expressed the view that the practice of accepting late reservations would apply in the broader context of Article 20 of the Vienna Convention on the law of treaties on the acceptance of and objections to reservations “unless the treaty otherwise provides.” The Secretariat further noted, that in the case of CITES, the treaty explicitly provided otherwise in Article XV, paragraph 3.
10. The Depositary responded in a letter dated 20 January 2017 explaining that the practice of accepting late reservations in the absence of an objection is described in the “Summary of Practice of the UN Secretary-General as Depositary of Multilateral Treaties”¹ as follows: *Under established customary international treaty law, as codified by the Vienna Convention on the Law of Treaties, reservations may only be made (when allowed) at the time of signing or of depositing an instrument of ratification or the like, or alternatively, with the unanimous consent of all parties concerned (see article 19 of the Vienna Convention).* From this, the Depositary Government, in its letter to the Secretary-General of CITES, concluded that *a reservation to an Amendment of an Annex to the CITES, decided by a CoP, may only be made within the 90 days deadline or, alternatively, with the unanimous consent of all Parties to CITES. Since a single objection is sufficient to finally refuse the reservation, as happened in 2005, the above mentioned approach is nothing but a precise check by the depositary whether the condition of unanimous consent is tacitly fulfilled. It seems that another approach for CITES could not be easily justified, despite the precise deadline laid down in Article XV, paragraph 3, of CITES, particularly since the precedent of 2005.*²
11. Further the Depositary stated:

If the depositary were to simply reject reservations submitted after the 90 days deadline, it would prevent the Parties from their right, offered by customary international treaty law, to accept such a reservation by unanimous consent. Such action would not be, in our understanding, in conformity with the depositary’s obligation to act impartially, as stated in article 76 para. 2 of the Vienna Convention. Within a given treaty, it is always up to the Parties to take decisions, and not to the depositary. The approach taken offers the Parties the possibility to express themselves on this issue. It is therefore, in our view, in line with the tasks and the status of the Depositary of a treaty. Of course, it would be helpful if decisions taken by the CITES CoP in the future could explicitly state whether late reservations should continue to be treated according to this practice or, on the contrary, should not be admitted in principle.

12. The Secretariat notes that the views expressed by the Depositary with respect to reservations as regulated by articles 19-23 of the Vienna Convention and the international customary practice described above concern late reservations that should have been made at the time of “signing, ratifying, accepting, approving or acceding to a treaty”, but for some reason were only formally made later in time. However, the matter at

¹ Prepared by the Treaty Section of the Office of Legal Affairs of the United Nations and available at: https://treaties.un.org/doc/source/publications/practice/summary_english.pdf

² In 2005, the Depositary followed the same approach with regard to a later reservation submitted by a Party with respect to amendments decided at CoP13.

hand concerns reservations that are in fact objections to the entry into force of an amendment with respect to the Party making the reservation.

13. The Secretariat has discussed the issue with the treaty section of the United Nations Office of Legal Affairs (OLA), who acts as the Depositary of all UN treaties. OLA supported the views of the Secretariat and explained the difference between a 'reservation' and 'an objection to the entry into force of an amendment' and noted that the "objection procedure" in articles XV and XVI permits parties to "opt out" in order not to be bound by an agreed amendment to the Appendices. However, in the Convention, the "objection procedure" is explicitly called a 'reservation' and is linked, in the Convention itself, to the provision on reservations in Article XXIII. In view of OLA, this seems to be the origin of the course of action undertaken by the Depositary. OLA further indicated that acting as a Depositary, OLA would never extend the deadline for objections to the entry into force of an amendment, noting that the numerous treaties deposited with the UN explicitly require such notification of objection to the entry into force to be made within a deadline. These treaties do not mix the concept of objections to the entry into force (explicit notification of no consent to be bound) with the concept of general reservations to a provision/provisions of a treaty; these are treated as two different legal concepts.
14. The Convention on Migratory Species (CMS) contains similar rules to CITES in Article XI of the CMS. The Secretariat has therefore also consulted the Depositary Government of the CMS (the Government of Germany) on their practice. The Government of Germany noted that it does not have any archives of similar cases, but indicated that they would probably not accept reservations to an amendment made after the deadline in the Convention, should the case occur.
15. Based on the clear deadline in Article XV, paragraph 3, for making a reservation with regard to an amendment, the Secretariat is of the view that there is no basis to depart from these provisions and that accepting late reservations would undermine the integrity of the Convention and its functioning. This would in turn lead to legal uncertainty among Parties and the regulated community as to the regime governing trade in specimens of species covered by a late reservation. Furthermore, it is not clear how late such late reservations may be made. It should also be noted that the CoP at the time of adoption of an amendment in some specific cases has decided that the entry into force of the amendment should take place at a later date than the normal 90 days.¹ Further, there seems to be no established practice of accepting such late "reservations" as indicated by the UN Depositary in its discussions with the Secretariat.
16. The Depositary for CITES has indicated that it would be helpful if decisions taken by the CITES CoP in the future could explicitly state whether late reservations should continue to be treated according to this practice or, on the contrary, should not be admitted in principle.

Recommendations

17. Based on the above, the Standing Committee may wish to propose to the Conference of the Parties that it amend Resolution Conf. 4.25 (Rev. CoP14) on *Reservations* to include a paragraph clarifying this matter. It may also consider the adoption of a decision on further guidance to the Depositary on late reservations with respect to amendments.
18. The Standing Committee may furthermore wish to request the Secretariat to prepare a draft proposal for such an amendment to the Resolution and explore the need for more clear guidance for consideration at its 70th meeting.

¹ See for instance the listings of sharks and rays with an entry into force delayed by twelve or six months.