

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



Seventy-fourth meeting of the Standing Committee  
Lyon (France), 7 - 11 March 2022

Species specific matters

Maintenance of the Appendices

RESERVATIONS ENTERED AFTER  
THE 18TH MEETING OF THE CONFERENCE OF THE PARTIES:  
REPORT OF THE SECRETARIAT

1. This document has been prepared by the Secretariat.
2. This document addresses the issue of reservations entered after the 18th meeting of the Conference of the Parties (CoP18, Geneva, 2019) and the practical legal questions that have arisen in relation to the update of references to Resolutions in the new Appendices that the Secretariat published after CoP18. It also explains the rationale of the Secretariat for doing so and addresses related communications from several Parties in response to Notification to the Parties No. 2019/052. These were published by the Secretariat in Notification to the Parties No. 2019/077 of 20 December 2019. Paragraph 8 of this Notification states:

*The Secretariat intends to submit a detailed report on the matters covered by this Notification to the Parties to the 73rd meeting of the Standing Committee.*

3. Given the disruptions related to the COVID-19 pandemic, this document is presented to the Standing Committee at its 74th meeting, rather than its 73rd meeting as originally foreseen.

Background

4. The listing in Appendix II of the populations of *Loxodonta africana* of Botswana, Namibia, South Africa and Zimbabwe is subject to annotation 2. Paragraph b) of that annotation makes reference to Resolution Conf. 11.20 (Rev. CoP18) on *Definition of the term 'appropriate and acceptable destinations'*; and paragraph g) ii) of the annotation refers to Resolution Conf. 10.10 (Rev. CoP18) on *Trade in elephant specimens* as follows:

[...]

- 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;*

[...]

- g) *trade in registered raw ivory (for Botswana, Namibia, South Africa and Zimbabwe, whole tusks and pieces) subject to the following:*

[...]

- ii) *only to trading partners that have been verified by the Secretariat, in consultation with the Standing Committee, to have sufficient national legislation and domestic trade controls to ensure that the imported ivory will not be re-exported and will be managed in accordance with all requirements of Resolution Conf. 10.10 (Rev. CoP18) concerning domestic manufacturing and trade.*
5. At CoP18, the Conference of the Parties agreed to revisions of the two Resolutions mentioned above. Following past practice, the Secretariat updated the references to both Resolutions in annotation 2 to reflect the new versions and subsequent numbering of these Resolutions so that the annotation was not referring to Resolutions that were out of date.
  6. Following CoP18, the Depositary Government (Government of Switzerland) informed all Parties on 18 December 2019 (Section II of Depositary's notification 1/2019: "Communications with respect to Paragraph 4 of the CITES Notification to the Parties No. 2019/052 of 3 October 2019")<sup>1</sup>; that Botswana, the Democratic Republic of the Congo, Eswatini, Namibia, South Africa, the United Republic of Tanzania, Zambia and Zimbabwe had communicated 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".
  7. The Secretariat believes that clarification is required as to the nature of the communications made by these eight Parties. If these are considered reservations, then further clarification is required as to their validity and permissibility, and as to their legal effect – if any.
  8. The Secretariat is sharing these initial considerations as preparation for a more detailed discussion at the 19th meeting of the Conference of the Parties (CoP19) where the purpose would be to obtain new or additional guidance regarding these legal questions. Inputs and comments from the Standing Committee will be included in the document to be submitted by the Secretariat to CoP19. In particular, the Secretariat would like to invite comments of the Standing Committee on the suggested changes to Resolution Conf. 4.25 (Rev. CoP18) on *Reservations* with the aim of:
    - a) clarifying the legal nature of the communications, in particular whether they are reservations; and
    - b) clarifying their validity, permissibility and effects, if any.
  9. In the recent past, the Secretariat has liaised with the Depositary Government and raised similar questions on reservations with respect to amendments to Appendices I and II (see document CoP18 Doc. 98). A similar approach has been followed on the implications of the transfer of a species to Appendix I (see document CoP18 Doc. 49.1). The two issues resulted in amendments to existing resolutions. This is in line with the Secretariat's mandate of inviting the attention of the Parties to matters pertaining to the aims of the Convention [paragraph (e) of Article XII].

## Discussion

### *References to Resolutions in annotations and the practice of updating them*

10. Annotation 2 in relation to the populations of *Loxodonta africana* in Botswana, Namibia, South Africa and Zimbabwe includes references to two Resolutions of the Conference of the Parties. Parties are legally bound by the text of the Convention including its Appendices. However, Resolutions are formal expressions of the opinion or will of the Conference of the Parties and are not, generally speaking, binding on the Parties. Therefore, referring to a Resolution in an annotation to a CITES listing may be problematic because it may imply that the relevant Resolution should be considered as part of the legally binding aspects of the Convention. The fact that Resolutions are frequently amended may create further complications.
11. Since 2010, the practice of the Secretariat has been to update the references to the Resolutions specified in annotation 2 so as to reflect the fact that the CoP has revised the Resolutions concerned, and that the previous version is therefore out of date – perhaps even defunct.
12. Following changes made at CoP15 in 2010, the reference to Resolution Conf. 10.10 (Rev. CoP14) in the annotation to the listing of *Loxodonta africana* was updated to read "Resolution Conf. 10.10 (Rev. CoP15)". The reference to revised versions of Resolution Conf. 10.10 was subsequently updated by the Secretariat after CoP16 in 2013, CoP17 in 2016 and CoP18 in 2019 to reflect the revision of the Resolution at these

<sup>1</sup> See also CITES Notification to the Parties No. 2019/077

CoPs. The reference in annotation 2 to Resolution Conf. 11.20 was also updated after CoP17 in 2016 and CoP18 in 2019 to reflect the revision of that Resolution at these CoPs. This practice of updating the references in annotation 2 developed in the absence of specific guidance provided by the text of the Convention or the Conference of the Parties, and reflects what the Secretariat understood to be the will of the Conference of the Parties (i.e. that an annotation is to refer to the most recent version of a Resolution).

13. As regards the matter of whether a draft resolution, upon adoption, replaces existing Resolutions by revised versions, in paragraph 2 c) and 2 i) of Resolution Conf. 4.6 (Rev. CoP18) on *Submission of draft resolutions and other documents for meetings of the Conference of the Parties*, the Conference of the Parties recommends that:

c) *when drafting a resolution that is intended to treat a subject comprehensively, or to make significant changes in the way in which a subject is dealt with, a Party prepare the draft so that, if adopted, it will replace and repeal all existing Resolutions (or, as appropriate, the relevant paragraphs) on the same subject;*

[...]

i) *when a draft resolution is adopted that merely adds points to the recommendations (or other decisions) in existing Resolutions, or makes minor amendment thereto, the existing Resolutions be replaced by revised versions with the agreed changes;*

14. The Secretariat therefore considers that clarification is required as to whether:

- a) the changes made to the Resolutions referred to in annotation 2 to *Loxodonta africana* were significant enough to justify the replacement of the existing Resolution by a new Resolution, or merely to make a revised version of the existing Resolution;
- b) the updates to references in substantive annotations are mere corrections, or substantive amendments that should have followed the procedure provided for in Article XV of the Convention; and
- c) the Conference of the Parties will continue to allow substantive amendments that do not follow the Article XV procedure, but instead follow a procedure which the Parties appear to have agreed to by not expressly objecting to the Secretariat's practice of updating the references made to resolutions in annotations.

15. It is to be noted that Resolution Conf. 4.6 (Rev. CoP18) also directs the Secretariat to revise the publication of current Resolutions after each CoP to correct the texts of pre-existing Resolutions to ensure that all references to other Resolutions are accurate, but it does not refer to amalgamating Resolutions with the Appendices. Furthermore, Resolution Conf. 11.21 (Rev. CoP18) on *Use of annotations in Appendices I and II* is also silent about the question of updating references to Resolutions in substantive annotations.

16. Resolution Conf. 11.21 (Rev. CoP18) makes a distinction between 'reference annotations', which are for information purposes only, and 'substantive annotations' which are integral parts of the species listings. Annotation 2 to *Loxodonta africana* in Appendix II belongs to the latter group, i.e. "annotations that specify the inclusion or exclusion of designated geographically separate populations, subspecies, species, groups of species, or higher taxa, which may include export quotas" and "annotations that specify the types of specimens or export quotas". Resolution Conf. 11.21 (Rev. CoP18) provides that "substantive annotations relating to species in Appendix I or II may be introduced, amended or deleted only by the Conference of the Parties in accordance with Article XV of the Convention".

17. As stated above, when a Resolution is revised, the Conference of the Parties requires the Secretariat to update the references to that Resolution in other current Resolutions in accordance with Resolution Conf. 4.6 (Rev. CoP18). The Secretariat's rationale for the current practice is that if this were done without updating the references to Resolutions in annotations in the Appendices, this may create incongruity and consequent confusion. Resolution Conf. 4.6 (Rev. CoP18) provides that the objective of correcting the texts of existing Resolutions after each CoP is to ensure that references to other Resolutions are accurate. Since the text of a previous version of a Resolution ceases to be current once the text is amended, updating references to Resolutions is necessary for the sake of clarity. Indeed, keeping the name and number of a previous version that is no longer valid could cause confusion.

18. Prior to 2019, no Parties raised issues regarding the update by the Secretariat of the references to Resolutions in annotation 2. The silence of the Parties following the publication of Notifications with the new version of the Appendices following CoP15, CoP16 and CoP17 seemed to indicate acquiescence of the updating of references contained in annotation 2, and thereby the Secretariat continued this practice.
19. However, it now appears that this may be problematic when the changes made to the Resolution concerned are significant or substantive. Those changes effectively amend the obligations under the legally binding text in the Appendices, without offering a chance to Parties to enter reservations as would normally be the case with amendments, as provided by Articles XV and XVI.
20. Finally, it should be also noted that annotation 2 to *Loxodonta africana* in Appendix II contains other subparagraphs that refer to obsolete decisions which have ceased to have legal effects. At CoP17, the deletion of those decisions via the amendment procedure provided for in Article XV was discussed and rejected by the Parties. This was motivated by the willingness of a majority not to amend annotation 2.
21. The Secretariat will seek confirmation from the Conference of the Parties that its current practice of updating references to Resolutions in existing annotations is appropriate, or else receive new guidance from the Conference of the Parties. In providing its advice, the Conference of the Parties will be invited to consider the issues raised below.

*Legal nature of the reservations entered in response to Notification to the Parties No. 2019/052*

22. Article XXIII of CITES contains the provisions on reservations. The relevant parts read as follows:
  1. *The provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI.*
  2. *Any State may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:*
    - (a) *any species included in Appendix I, II or III; or*
    - (b) *any parts or derivatives specified in relation to a species included in Appendix III.*
23. Article XXIII of the Convention thus distinguishes between two types of reservations. Paragraph 2 concerns specific reservations made by a State at the time of depositing its instrument of ratification, acceptance, approval or accession. Paragraph 1 concerns specific reservations to an amendment to the CITES Appendices. Thus, CITES provides for the possibility of entering reservations at different points in time. A reservation may be entered when the Appendices are amended, provided that the procedures in Articles XV or XVI of the Convention are followed.
24. Article XV, concerning amendments to Appendices I and II provides, in paragraph 3, that “any Party may by notification in writing to the Depository Government make a reservation with respect to the amendment” of Appendix I or II where the Appendix has been amended following the procedures set out in Article XV. These procedures require, *inter alia*, that an amendment be proposed by a Party and its proposal communicated to the Secretariat within the deadline. A Party wishing to enter a reservation must notify the Depository Government in writing during the 90-day period provided for by Article XV 1(c) or XV 2(l). Article XVI concerns the entering of reservations in relation to the inclusion of species, parts and derivatives in Appendix III.
25. Pursuant to the above, reservations may only be entered when an Appendix is amended following the appropriate procedure. The Convention is silent about making a reservation in relation to annotations to the listings. Until now, there are no known cases of such reservations in the history of the Convention. The making of a reservation to the updating of an annotation when the updating was not specifically required by a listing proposal submitted pursuant to Article XV or XVI and Resolution Conf. 9.24 (Rev. CoP17) on *Criteria for amendment of Appendices I and II* is without precedent.
26. With regard to the issue at hand, the Parties in question communicated their reservations concerning changes to the reference to the Resolutions in annotation 2 of the Appendices within 90 days following the Secretariat’s notification of these changes. However, as noted above, it is possible that the updates made by the Secretariat, which were not made pursuant to the procedure set out in Article XV, might not be considered as ‘substantive’ amendments. If it is established that the updating of the references to

Resolutions in annotation 2 was a technical correction that does not amount to an amendment, then the question of reservations would not need discussing as it would not be possible to make reservations. If, however, the updates are considered to be amendments, then the ex-post question revolves around whether it was necessary that the procedure in Article XV be followed for updating the annotation.

27. Article 19 of the Vienna Convention on the Law of Treaties provides that:

*A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*

- (a) the reservation is prohibited by the treaty;*
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.*

28. Article XXIII of CITES provides that specific reservations may be made. This article does not expressly provide for entering reservations in respect of the Secretariat's updating of references to Resolutions in annotations to the Appendices, as such references and updates were not foreseen.

29. It is to be noted that CITES does not expressly state that only the reservations listed in Article XXIII are permitted.

30. The International Law Commission (ILC), in its Commentary on Guideline 3.1.2 of its "Guide to Practice on Reservations to Treaties", states that:

*A cursory reading of article 19, subparagraph (b), of the Vienna Conventions might suggest that it represents one side of the coin and subparagraph (a) represents the other. The symmetry is far from total, however. To have total symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case. Subparagraph (b) contains two additional elements which prevent oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions:*

- (a) The treaty's reservation clause must permit the formulation of reservations;*
- (b) The reservations permitted must be "specified";*
- (c) It must be specified that "only" those reservations "may be made".*

31. Guideline 3.1.2 of the ILC "Guide to Practice on Reservations to Treaties" is aimed at clarifying the meaning of the expression "specified reservations", which is not defined by the Vienna Convention. Guideline 3.1.2 reads as follows:

*For the purposes of guideline 3.1 ['permissible reservations'], the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.*

32. The ILC goes on to explain that it was initially considered that:

*Where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.*

However, it then notes that the subsequent inclusion of the word "only" in Article 19 (which was initially included in article 16 (b) of the 1966 draft) reverses the above presumption, offering the possibility of formulating reservations "even when the negotiators have taken the precaution of expressly indicating the provisions in respect of which a reservation is permitted", although it adds that:

*This amendment does not, however, exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.*

33. The question that then arises is: if Parties agreed to allow an amendment following a procedure different from that provided for in CITES, should reservations equally be allowed since they are not explicitly prohibited and would fit the spirit of the provisions concerning reservations, i.e. that Parties have an opportunity to enter reservations when amendments to the Appendices are made?
34. Article 39 *General rule regarding the amendment of treaties* of the Vienna Convention on the Law of Treaties provides that:

*A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.*

While the Vienna Convention's provisions relating to amendment and modification of treaties are of residual character meaning that primacy is given to the CITES text, the first sentence of Article 39 indicates that Parties should be given an opportunity to express their consent to be bound by treaty amendments, although unanimity may not necessarily be required. The Secretariat notes that some treaties, such as the International Convention for the Regulation of Whaling, expressly provide for a tacit acceptance procedure based on the premise that member States are automatically bound by an act of the organization adopted by majority vote unless they take specific action to avoid being bound by expressing their willingness to opt-out. In such cases, there remains a possibility of opting out. The right of a member to lodge an objection seems to seek to strike a balance between State sovereignty and a more expeditive amendment procedure.

*Possible legal effect of the reservations entered in response to Notification to the Parties No. 2019/052*

35. The effect of the reservations would depend on their validity and permissibility, based on the guidance provided by the Conference of the Parties which may consider some of the elements provided above.
36. If the reservations entered with regard to annotation 2 are valid and permissible,<sup>2</sup> questions arise as to their legal effect. Article XXIII of CITES concerning reservations provides that a State which has entered a reservation is treated as “not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation.” Furthermore, Resolution Conf. 4.25 (Rev. CoP18) on *Reservations* recommends that where a Party enters a reservation with regard to any species included in Appendix I, that species be treated as if it were included in Appendix II. However, the question at hand concerns reservations made to an annotation to populations listed in Appendix II. As the Convention does not provide for including annotations in the Appendices, consequently it does not provide for entering reservations on annotations. However, the Parties had specifically recognized the acceptability of using annotations – not only by adopting them but also by adopting a Resolution on their use [see Resolution Conf. 11.21 (Rev. CoP18) on *Use of annotations in Appendices I and II*].
37. In the case of *Loxodonta africana*, the annotation relates to specific populations and contains additional requirements. The populations of Botswana, Namibia, South Africa and Zimbabwe of *Loxodonta africana* are included in Appendix II with an annotation indicating that the purpose of the listing is to allow trade in certain specimens and under certain conditions. The listing indicates the reason why and the conditions under which these four populations are not included in the Appendix-I listing. Annotation 2 does not concern *whether* a species is included in an Appendix and hence covered by the Convention, but rather *how* the Convention applies to trade in certain specimens of a species included in an Appendix.
38. The characteristics of this annotation may cause uncertainty as to how the Convention would apply in the case where a reservation to such an annotation is entered. Several legal issues arise depending on what decision is made regarding the validity and permissibility of the reservation.
39. The effect of accepting the reservations would likely be that the Parties who expressed their unwillingness to be bound by the current version of annotation 2 would instead be bound by the versions of paragraphs b) and g) i) of annotation 2 that were in effect at the time of CoP18. This would likely result in simultaneous

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<sup>2</sup> As way of contextual information, reservations formulated in spite of a prohibition arising from the provisions of the treaty or in spite of their incompatibility with the object and purpose of the treaty are impermissible (see ILC, 2011, Guide to Practice on Reservations to Treaties, Guidance 3.1, 3.1.1 and 3.3.1). The ILC in its Guidance 4.5.1 provides that such reservations that do not meet the conditions of formal validity and permissibility are null and void.

application of different versions of the resolutions, despite the fact that previous versions of resolutions usually cease to be in effect once they are amended.

40. The issue of simultaneous application of different resolutions could be resolved by including the definition of the term “appropriate and acceptable destinations” in the *Interpretation section* of the Appendices, which is the appropriate location for definitions used in the Appendices. Indeed, the inclusion in annotations of references to Resolutions and the definitions articulated therein should be avoided, especially since it may give rise to issues like the one at hand.
41. The Secretariat believes that clarification from the Conference of the Parties is needed as to the legal effect – if any – of the statements made by several Parties in response to Notification to the Parties No. 2019/052.

#### Final considerations

42. In order for the Parties and the Secretariat to be better prepared to manage similar issues that might arise in the future, the Secretariat intends to bring to the attention of the Conference of the Parties at CoP19 the matters explained above, that could be summarized as follows:
  - a) avoiding inclusion of references to Resolutions and Decisions in the Appendices via their annotations: CoP19 to consider amending Resolution 11.21 (Rev. CoP18) *Use of annotations in Appendices I and II* to reflect that;
  - b) ensuring that definitions of terms used in the Appendices are not included in annotations but rather in the Interpretation section of the Appendices or any other appropriate location: CoP19 to consider amending Resolution 11.21 (Rev. CoP18) to this effect;
  - c) in relation to updating references to Resolutions:
    - i) clarifying what should be done with references to Resolutions in annotations when such Resolutions are amended at the CoP;
    - ii) clarifying any procedures to be followed for their updating if such updating is considered necessary; and
    - iii) amending, if appropriate, Resolution Conf. 4.6 (Rev. CoP18) to confirm or provide new guidance on the practice of updating Resolutions contained in substantive annotations.
  - d) in relation to the communications made by several Parties in response to Notification to the Parties No.2019/052 of 3 October 2019: CoP19 to consider appropriate changes to Resolution Conf. 4.25 (Rev. CoP18) *Reservations* with the aim of:
    - i) clarifying their legal nature and scope, in particular whether they are reservations; and
    - ii) clarifying their validity, permissibility and effects, if any.

#### Recommendations

43. The Secretariat would appreciate receiving any comments from the Standing Committee on the content of the present document, particularly on the questions identified, the legal principles invoked and the possible amendments to be considered. The Secretariat invites the Standing Committee to take note of the intention of the Secretariat to submit a document with recommendations for the consideration of the Conference of the Parties at its 19th meeting (CoP19).