

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

RESERVATIONS

1. This document has been submitted by the United States of America in relation to agenda item 86 on Reservations entered after the 18th meeting of the Conference of the Parties: Report of the Secretariat, to share with the Standing Committee additional considerations related to reservations entered by Parties.*
2. In Document SC74 Doc. 86, the Secretariat examines the reservations entered after the 18th meeting of the Conference of the Parties (CoP18; Geneva, 2019) and the practical legal implications of them, including the Secretariat's standard procedure of updating references to Resolutions where included in the Appendices, following amendments adopted at a meeting of the Conference of the Parties.
3. Following internal discussions and consultation with the Secretariat in response to the communications from several Parties to the Depositary Government following CoP18 (as presented in Notification to the Parties No. 2019/077), we identified several other issues related to reservations, which we believe merit bringing to the attention of the Committee for its consideration.
4. Concerning the scope of reservations that may be entered in accordance with Article XV

Article XV sets out a formal amendment process for changes to Appendices I and II, which includes the ability of a Party to take a specific reservation "with respect to the amendment," laid out in Article XV, paragraph 3. Until such reservation is withdrawn, a Party taking a reservation shall be treated as a State not a Party to the present Convention "with respect to trade in the species concerned." The scope of a reservation is limited both "with respect to the amendment" and "with respect to trade in the species concerned." In brief, the scope and effect of a specific reservation should be determined by the scope and effect of the requirements for trade resulting from the amendment. Where there is a substantive effect from an amendment to the Appendices, a reservation that is entered in accordance with Article XV, paragraph 3, has substantive effect only to the same extent that the amendment made in accordance with Article XV alters the scope of protection for fauna or flora under the Convention. For the Party taking the reservation, the same requirements would apply to that Party before and after the amendment with respect to the species concerned, as if the amendment had not occurred. We have identified three primary illustrative examples where clarification may be needed: 1) adoption of substantive annotations, and substantive amendments to an annotation; 2) nomenclatural changes; and 3) split listings.

5. Adoption of substantive annotations to an existing listing, and substantive amendments to an annotation

Article XV applies to substantive amendments to Appendices I and II, but provides no specific guidance on changes to annotations. We believe that, where a change to an annotation is substantive in nature (for example, the change alters what is included in the listing or the requirements for trade under the listing) it must also be subject to the amendment process laid out in Article XV, and thereby also subject to the reservation process articulated in Article XV, paragraph 3. The effect of such a reservation would only be

* *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*

“with respect to the amendment” and “with respect to trade in the species concerned,” meaning with respect to the scope of the change in requirements for trade in the species concerned resulting from the Article XV amendment.

In the case of the communications to the Depositary Government after CoP18 in relation to *Loxodonta africana*, the “reservations” were entered against a Resolution, which is not legally binding. However, because the substantive change to the annotation occurred as a result of an amendment to a Resolution rather than by formal amendment, the changes also have no legally binding effect.

We do not see a fundamental problem with including reference to a Resolution in an annotation to a CITES listing, and for the sake of keeping annotations reasonable in length, it may in some circumstances be preferable. However, when a Resolution is later updated, where the updates to the Resolution itself substantively change the scope of the listing (through the annotation), the update to the Resolution referenced in the annotation must be done by formal amendment under Article XV in order to be legally binding, which would provide Parties the opportunity to take a formal reservation under Article XV, paragraph 3. Where the changes to the Resolution do not substantively alter the scope of the listing, the Secretariat may update the reference to the Resolution in the annotation under its authority to make ministerial changes.

6. Nomenclatural change

Article XV applies to substantive amendments to Appendices I and II, but provides no specific guidance on nomenclatural changes. We believe that, where a nomenclatural change does not alter the intent or application of the existing listing, then such changes should not be subject to reservations. Even if they were subject to reservations, the effect of a reservation is only with respect to the scope of the change in requirements resulting from the Article XV amendment. As there would be no change in scope, there would be no substantive effect for the Party taking the reservation. The same requirements would apply to that Party before and after the amendment with respect to the species concerned, as if the amendment had not occurred. The only effect would be confusion in the names of species, and this should be avoided for clear and consistent application of the Convention.

7. Split listings

Article XV applies to substantive amendments to Appendices I and II, but provides no specific guidance on split listings. Specific reservations are limited both “with respect to the amendment” and “with respect to the species concerned.” Article I defines “species” as “any species, subspecies, or geographically separate population thereof.” Accordingly, in the case of split-listings, where one or more population/subspecies/species of an already listed taxon is transferred to a different Appendix, a reservation that is entered in accordance with Article XV, paragraph 3, applies only to the amendment made to the population/subspecies/species that is transferred, and has no substantive effect on any other population/subspecies/species of the already listed taxon. The effect of a reservation is only with respect to the scope of the change in requirements resulting from the Article XV amendment. For the Party taking the reservation, the same requirements would apply to that Party before and after the amendment with respect to the species concerned, as if the amendment had not occurred.

8. Based on the above considerations, the United States believes it would be appropriate as part of any document on reservations submitted to the 19th meeting of the Conference of the Parties to include discussion of these issues and also propose the following amendments to Resolution Conf. 4.25 (Rev. CoP18) on *Reservations*:

1. In the preamble, after the third preambular paragraph, insert new paragraph as follows:

RECOGNIZING ALSO that a Party having entered a reservation in accordance with Article XV, paragraph 3, should treat the species concerned as if the amendment to the Appendices had not been made with regard to requirements for trade in the species, and NOTING FURTHER that for the effective application of the Convention, clarity on the scope of a reservation entered in accordance with Article XV, paragraph 3, is critical.

2. In the operative part of the Resolution, amend paragraph 1 as follows:

1. RECOMMENDS that

- a) any Party having entered a reservation with regard to any species included in Appendix I treat that species as if it were included in Appendix II for all purposes, including documentation and control; and
- b) where an Appendix-II species prior to the transfer to Appendix I included a substantive annotation, a Party having entered a reservation to the Appendix I transfer continue to treat the species as if the substantive annotation applies to trade in the species under Appendix II;

3. In the operative part of the Resolution, after the first operative paragraph, insert new paragraphs as follows, and renumber subsequent paragraphs accordingly:

2. AGREES that

a) where there is no substantive effect from an amendment to the Appendices, for example a nomenclatural change that does not alter the original intent of the listing, a reservation also has no substantive effect and should not be entered by Parties; and

b) where there is a substantive effect from an amendment to the Appendices, a reservation that is entered in accordance with Article XV, paragraph 3, has substantive effect only to the same extent that the amendment made in accordance with Article XV alters the scope of protection for fauna or flora under the Convention, for example:

i) where a substantive annotation to an already listed species is amended in accordance with Article XV and alters the scope of protection for fauna or flora under the Convention, a reservation entered in accordance with Article XV, paragraph 3, has substantive effect only to the extent of the amendment made to the substantive annotation, and has no substantive effect on any other part of the annotation that is not amended or to the inclusion of the species in the Appendices;

ii) in the case of split-listings, where one or more population/subspecies/species of an already listed taxon is transferred to a different Appendix, a reservation that is entered in accordance with Article XV, paragraph 3, applies only to the amendment made to the population/subspecies/species that is transferred, and has no substantive effect on any other portion of the already listed taxon;

3. DIRECTS the Secretariat to maintain on the CITES website, in the table on Reservations entered by Parties, reference to the requirements for trade that apply to each Party having entered a reservation in accordance with Article XV, paragraph 3;