

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

Fifth Meeting of the Conference of the Parties

Buenos Aires (Argentina), 22 April to 3 May 1985

Interpretation and Implementation of the Convention

DEFINITION OF "PRE-CONVENTION SPECIMEN"

Note from the Secretariat

This issue was submitted by the Secretariat for consideration at the first meeting of the Technical Committee (Brussels, June 1984) (see document Doc. TEC. 1.21). Another document, Doc. TEC. 1.22 (Pre-Convention Acquisition and Breeding of Appendix I Species), was also submitted to the Technical Committee.

The document Doc. TEC. 1.22 was withdrawn subject to its contents being "absorbed into document Doc. TEC. 1.21". The Technical Committee then agreed that the Secretariat would redraft the draft resolution in document Doc. TEC. 1.21 to incorporate the contents of document Doc. TEC. 1.22 and any further comments sent in writing after the TEC meeting.

The Secretariat has received a document from the Netherlands which reconsiders the issue on the basis of the document Doc. TEC. 1.21 and of the discussions held in Brussels. This document effectively "absorb" the principles outlined in document Doc. TEC. 1.22.

The Secretariat considers the document prepared by the Netherlands to be fully satisfactory and, therefore, is presenting it as such.

Proposal from the Netherlands, Endorsed by the Secretariat

1. The wording of Article VII, paragraph 2, has, ever since the entry into force of the Convention, given rise to a number of difficulties, both of a technical and of a more fundamental nature.
2. Certain expressions and terms used require definition in order to prevent misunderstandings and abuses in the implementation of the exemption provided by that paragraph.
3. A more fundamental problem is caused by the fact that the Article does not provide for importing countries' responsibilities in its implementation.

4. The implementation of Article VII, paragraph 2, has been addressed in several instances by the Conference of the Parties and the Technical Committee, but inspite of the adoption of a Resolution on the subject at the fourth meeting of the Conference of the Parties (Gaborone, April 1983), the problems were not definitely resolved.
5. Resolution Conf. 4.11 addresses only some of the issues involved but unfortunately its scope was too limited and no careful consideration could be given to its consequences for the practical implementation of the exemption in general. It has appeared that the Resolution poses new problems which are sometimes more serious than the ones it intended to solve.

Some of these problems, however, are caused by the fact that most of the Parties have - as a result of the problem referred to in point 3 - an understanding of the exemption which does not correspond with the actual text of Article VII, paragraph 2.

6. A comprehensive resolution on the subject is urgently required.

Such a resolution should adequately address the following issues:

- a) How and when is a specimen acquired?
- b) When does the Convention apply to a given specimen and how is that influenced by the transfer of a species from one appendix to another or by the deletion of a species from the appendices?
- c) How can the negative effects of the problem referred to in point 3 be redressed?

7. How and When is a Specimen Acquired?

71. Resolution Conf. 4.11 gives a clear definition of the word "acquired": a live or dead specimen is acquired by the initial removal from its habitat, and parts and derivatives are acquired by their introduction to personal possession.
72. For an exporting country this definition provides a clear basis for the determination of the date of acquisition of a specimen which enables it to decide whether or not the Article VII, paragraph 2 exemption applies to that specimen. It may issue a pre-Convention certificate if on the date of acquisition (a) it was not a Party to the Convention, or (b) the species involved was not yet listed in one of the appendices, or (c) the species involved was subject to a reservation it had entered.
73. For an importing country, whose role in the implementation of the exemption is discussed in point 10, the definition is useful as it leads to more precise information on the date of acquisition.
74. For a re-exporting country the definition has the most far-reaching implications, which were apparently not identified during the discussions on Resolution Conf. 4.11.

The way in which Article VII, paragraph 2, is worded allows the Management Authority of a re-exporting country to interpret the words "acquired before the provisions of the present Convention applied to that specimen" as "imported into my country before it became a Party to the Convention".

Since the adoption of the definition of "acquired" in Resolution Conf. 4.11 it is no longer relevant whether, at the time of importation, a re-exporting country was a Party to CITES or not, if at the date of acquisition the Convention applied to the specimen in the exporting country.

This result is clearly in the spirit of the Convention.

8. When Does the Convention Apply to a Given Specimen?

81. Resolution Conf. 4.11 notes "that for the purposes of Article VII, paragraph 2, when a Management Authority determines when the provisions of the Convention first applied to a particular specimen, it may select either the date of entry into force of the earliest inclusion of the relevant species in Appendix I, II or III, or the date of entry into force of the Convention for the state which designated that Management Authority as such".

82. This note suggests that a Management Authority of the state of export or re-export has a choice ("may select") between two dates.

However, because of the problems related to a retroactive application of the Convention, which is legally not possible, there is no such choice.

83. The Management Authority of the country of export cannot but use the date of entry into force of the Convention with respect to its trade in a particular species, which is either the date of entry into force for its country of the Convention and the species it covered at that time, or the subsequent dates of entry into force of new inclusions of species in the appendices or the date of withdrawal of a previously entered specific reservation.

84. As we have seen in point 74., the Management Authority of a re-exporting country which was not a Party to the Convention at the time of importation does not have a choice either. It also depends on the situation at the date of acquisition in the country of origin.

9. What Are the Effects of the Transfer of Species from one Appendix to Another and of the Deletion of Species from the Appendices?

91. Resolution Conf. 4.11 recommends that "changes of status of a species from one appendix to another ... shall not be considered in determining when the provisions of the Convention applied to a particular specimen".

92. That recommendation is perfectly clear insofar as it means that the change in status does not affect the date of applicability of the Convention to a particular specimen.

93. If, however, the recommendation was also meant to imply (and from the introduction to the draft of Resolution Conf. 4.11 in document Doc. 4.28 that seems to be the case) that a specimen acquired under the regime of Appendix II must, after the transfer of the species concerned to Appendix I, be treated as an Appendix I specimen, there is a problem.

94. In the case of such an uplisting we have a similar situation as in the case of a new listing: the status of the specimen at the date of acquisition governs the regime under which it is dealt with, i.e. a specimen of a species acquired before that species was first included in one of the appendices is a pre-Convention specimen, and a specimen of a species acquired before that species was uplisted from Appendix II to Appendix I remains an Appendix II specimen.

In both cases there is a risk of stockpiling during the 90 days period between the adoption and the entry into force. Any resolution on the subject should therefore call on Parties to take any necessary measures to prevent that from happening.

95. In the case of downlisting or the deletion of a species from the appendices the situation is completely different.

First of all the legal problem related to retroactive application does not exist. Secondly, if a country issues export permits for specimens of an Appendix II species, there is no valid conservation argument whatsoever for not issuing an export permit for the same specimens just because they were acquired at a time when the species was still listed in Appendix I. Of course that acquisition must have been in compliance with the laws for the protection of fauna and flora in the country of origin [cf. Article III 2(b)].

If a species is deleted from the Convention appendices, the situation is even more obvious: CITES no longer applies to any specimens of such species, no matter whether the Convention once applied to it.

10. What Are the Effects of the Fact that Article VII, Paragraph 2, Does not Provide for Importing Countries' Responsibilities in its Implementation?

101. As it is worded, Article VII, paragraph 2, of the Convention provides for exporting and re-exporting countries to export and re-export, in full legality, a specimen "acquired before the Convention applied to that specimen".

The consequence thereof is that new Parties can export their pre-Convention stocks to countries which have already for some time implemented CITES and where as a result trade in Appendix I specimens may have disappeared.

Reopening such markets and having to allow imports of specimens without the conditions of Articles III to V of the Convention being met, were unacceptable to many Parties.

102. To implement CITES along these lines would indeed be to completely undermine the spirit of the Convention and even to create a situation which can be best described as paradoxical:

- a) exporting countries would be encouraged to join CITES as late as possible, and to establish stocks of specimens of Appendix I species;
- b) Parties which may not import Appendix I specimens from a country which is not a Party would be unable to refuse to allow the import of the same specimens as soon as the Convention enters into force in the country of origin concerned;

c) Parties would have to allow imports of specimens from a re-exporting Party state, which imports they would not allow if they would be directly from the country of origin.

103. In order to avoid the above negative effects of the described literal application of Article VII, paragraph 2, many Parties have taken measures for which the Article itself does not provide.

They only recognize pre-Convention certificates issued by exporting or re-exporting Party states if the specimens concerned were acquired before the date of entry into force of the Convention for the species involved in their own country.

104. As Article VII, paragraph 2, does not constitute a legal basis for such measures, these must be considered to be stricter domestic measures under Article XIV, paragraph 1, sub-paragraph (a), of the Convention.

105. The examples given in point 102., however, clearly demonstrate that such measures are, both in practical terms and with respect to the spirit of the Convention, necessary and that they should in fact be taken by all Parties.

106. In order to allow a proper implementation of this approach, it will be necessary that exporting and re-exporting countries either indicate in their pre-Convention certificates the exact date of acquisition or, at least, certify that the acquisition took place before a certain date, i.e. the date of entry into force of the Convention for the species involved in the importing country.

11. Proposal for Resolution

A draft resolution with recommendations on the above subjects is attached to this document.

If it is adopted by the Conference of the Parties, it will revoke Resolution Conf. 4.11

DRAFT RESOLUTION OF THE CONFERENCE OF THE PARTIES

Definition of the term "Pre-Convention Specimen"

RECALLING that Article VII, paragraph 2, of the Convention provides an exemption from the requirements of Articles III, IV and V where a Management Authority of the state of export or re-export is satisfied that a specimen was acquired before the provisions of the Convention applied to that specimen and issues a certificate to that effect;

NOTING that the implementation of that Article has given rise to serious difficulties, both of a technical and of a more fundamental nature;

NOTING that Resolution Conf. 4.11, adopted at the fourth meeting of the Conference of the Parties (Gaborone, 1983), only partly solved the issues it addressed and did not address the remaining problems related to the exemption;

CONSCIOUS of the aims and spirit of the Convention;

RECOGNIZING the necessity for importing Parties to assume their own responsibilities in the implementation of Article VII, paragraph 2, of the Convention;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

DECIDES to revoke Resolution Conf. 4.11, adopted at its fourth meeting;

RECOMMENDS

- a) that for the purposes of Article VII, paragraph 2, of the Convention, the date on which a specimen is acquired be:
 - i) for specimens taken from the wild: the date of initial removal of live or dead specimens from their habitat; and
 - ii) for parts and derivatives: the date of their introduction to personal possession;
- b) that the certificate referred to in Article VII, paragraph 2, only be issued by a Management Authority of an exporting country where it is satisfied that at the date on which a specimen was acquired:
 - the species involved was not listed in one of the Convention appendices; or
 - its country was not a Party to the Convention; or
 - the specimen concerned was subject to a reservation entered by its country with regard to the species involved;
- c) that the certificate referred to in Article VII, paragraph 2, only be issued by a Management Authority of a re-exporting country where it is satisfied that at the date on which a specimen was acquired:

- the species involved was not listed in one of the Convention appendices; or
 - the country of origin was not a Party to the Convention; or
 - the specimen concerned was subject to a reservation entered by the country of origin with regard to the species involved, and that, in addition, its own country:
 - was not a Party to the Convention; or
 - was treated as a state not a Party to the Convention with respect to trade in the species concerned under Article XXIII, paragraph 3, of the Convention;
- d) that a Management Authority of an importing country only recognize a pre-Convention certificate issued by another Party state if the date of acquisition of the specimen is anterior to the date at which the Convention entered into force in its country for the specimen concerned;
- e) that Parties which issue a pre-Convention certificate either indicate on this certificate the precise date of acquisition of the specimen concerned or certify that this specimen was acquired before a specific date;
- f) that a specimen be not qualified for the Article VII, paragraph 2 exemption if neither of the dates referred to in e) can be determined;
- g) that Parties do not accept pre-Convention certificates which have not been issued in compliance with this Resolution;
- h) that specimens which were acquired in compliance with the laws on the protection of fauna and flora and before the date of entry into force of the transfer of the species involved from one appendix to another be treated as follows:
- in the case of a species uplisted, i.e. from Appendix III to II or I, or from Appendix II to I, the specimens concerned shall remain subject to the provisions applicable to them at the date of acquisition; and
 - in the case of a species downlisted, i.e. from Appendix I to II or III, or where the species is deleted from the appendices, the specimens concerned shall be subject to the provisions applicable to them at the time of export, re-export or import; and
- i) that export permits and re-export certificates issued for the specimens referred to in the first indent of recommendation h) indicate the precise date of acquisition of the specimens concerned; and

CALLS on Parties to take any necessary measures in order to prevent the undue acquisition of specimens of a species between the date at which the Conference of the Parties approves the inclusion of that species in Appendix I and the date at which the inclusion takes effect.