

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

Seventh Meeting of the Conference of the Parties

Lausanne (Switzerland), 9 to 20 October 1989

Consideration of Proposals for Amendment of Appendices I and II

Other Proposals

CONSEQUENCES OF THE TRANSFER OF THE AFRICAN ELEPHANT
FROM APPENDIX II TO APPENDIX I

1. The Annex to this document has been prepared by the CITES Secretariat, in collaboration with Mr. Simon Lyster of WWF, author of "International Wildlife Law".
2. The preparation of this document was formally requested by the African Elephant Working Group at its second meeting (Gaborone, July 1989), in order that all Parties be clearly informed of the consequences of the transfer of the African elephant, Loxodonta africana from Appendix II to Appendix I.

It appears from many of the statements made and articles published on the above-mentioned transfer, that many of the authors of these statements or articles have not fully understood the implications of the text of the Convention and of the Resolutions of the Conference of the Parties.

3. The purpose of this document is not to take a position on the proposed amendment, but to ensure that whatever decision is made it is adopted in full awareness of its consequences.
4. Although this document refers to the African elephant and the trade in elephant products, ivory in particular, the same principles can be applied for any other species transferred from Appendix II to Appendix I, or even directly listed in the latter.

CONSEQUENCES OF THE TRANSFER OF THE AFRICAN ELEPHANT
FROM APPENDIX II TO APPENDIX I

BASIC PRINCIPLES

1. CITES is an international convention, and the 103 states that are Parties to CITES have a legal obligation to comply with its terms.

Although the text of the Convention may be amended (Article XVII), usually it takes a long time to have an amendment enter into force.

2. There are numerous instances where the provisions of the Convention are open to differing interpretations or where there has been a need for the Parties to agree on a more detailed way of applying the Convention's rules in order to make them more effective. As a result, at each meeting the Conference of the Parties to CITES has adopted a number of interpretative, or other, Resolutions. These Resolutions do not have the same legal force as the text of the Convention itself, but they are regarded in international law as so-called "soft" law and as establishing rules with which Parties should comply.

The Secretariat must take these Resolutions into account, in addition to the text of the Convention, when it makes recommendations.

Resolutions require a two-thirds majority of Parties present and voting to be adopted. They may subsequently be amended, or even cancelled, by a two-thirds majority vote.

RESERVATIONS AND STRICTER DOMESTIC MEASURES

3. Parties to CITES may not make general reservations with regard to the text of the Convention (Article XXIII.1). However, at the time it deposits its instrument of ratification, acceptance, approval or accession, a state may enter specific reservations with regard to species included in Appendix I, II or III (Article XXIII.2). Parties may also make reservations with respect to amendments to Appendix I, II or III provided they do so by notifying the Depositary Government, within 90 days of the amendment being adopted in the case of Appendices I and II (Articles XV.3 and XVI.2).
4. Parties are treated as non-Parties with respect to trade in the particular species for which they have made a reservation (Articles XXIII.3, XV.3 and XVI.2), although by Resolution (Conf. 4.25) it was agreed that Parties entering a reservation with regard to the transfer of a species from Appendix II to Appendix I should continue to treat the species as if it remained in Appendix II.

If the African elephant is transferred to Appendix I, Parties that enter a reservation should continue to apply the controls applicable to Appendix II species. They would not be bound by the stricter controls agreed under the so-called "quota system" since this would be made obsolete by the elephant's transfer to Appendix I. However, they would be free, if they chose to do so, to develop their own ivory trade control system.

5. Since Parties may not make general reservations, neither an individual Party nor the Conference of the Parties may make decisions which are less strict than the provisions of the Convention or contradictory to the Convention. However, Parties may adopt stricter domestic measures than those required by the Convention (Article XIV.1), and the Conference of the Parties may recommend, as it has on many occasions, that stricter domestic measures be implemented. For example, Resolution Conf. 6.10 recommended that Parties ban all trade, internal and international, in rhino horn except for non-commercial movement of legitimate hunting trophies.

DEFINITION OF "SPECIES" AND SPLIT-LISTING ALLOWED BY CITES

6. The Convention specifies that Appendix I shall include species threatened with extinction which are or may be affected by trade (Article II.1). "Species" is defined by the Convention to mean "any species, subspecies or geographically separate population thereof" (Article I.a). It is permissible, therefore, for one subspecies or geographically separate population to be in Appendix I and another subspecies or geographically separate population of the same species to be in Appendix II. This has been done many times.

However, it is not permissible for one product of a species (such as ivory) to be in Appendix I and another (such as skin) to be in Appendix II. Nor is it permissible to have live specimens in Appendix I and dead specimens in Appendix II, or vice versa (see paragraph 9. below for the definition of "specimen").

The decision of the sixth meeting of the Conference of the Parties (Ottawa, 1987) to include several Pteropus species in Appendix II with an annotation excluding live specimens was in clear contradiction of Article I of the Convention. It should not have been accepted and must be corrected (see also document Doc. 7.43 Annex 3).

7. Although it is not possible to have one product of a species in Appendix I and another in Appendix II, there is no reason why a geographically separate population of a species cannot be transferred from Appendix I to Appendix II, or vice versa, subject to certain conditions. For example, Peru and other Latin American countries had for some years wanted to retain the vicuna (Vicugna vicugna) in Appendix I of CITES but to allow trade in cloth made from the wool of live-sheared animals. The rules of CITES did not permit such trade while the vicuna remained in Appendix I, nor did CITES permit the cloth made from wool of live-sheared animals to be transferred to Appendix II with the species remaining in Appendix I. The solution, as agreed by the sixth meeting of the Conference of the Parties, was to transfer certain vicuna populations to Appendix II but with the condition attached that only cloth made from the wool of live-sheared animals could be traded.

In the context of the African elephant, therefore, it would not be possible to transfer the species to Appendix I and to permit trade in skins or meat but not ivory. Nor would it be possible to list ivory in Appendix I but to retain skins and meat in Appendix II. However, it would be possible to transfer the African elephant to Appendix I except for certain populations retained in Appendix II subject to conditions such as a special trade control system.

MEANING OF "SPECIMEN" AND "READILY RECOGNIZABLE"

8. It has been suggested by some that one way to allow trade in elephant skins and meat, but not ivory, to continue would be to transfer the African elephant to Appendix I and to deem skin and meat as not "readily recognizable" and therefore exempt from CITES controls. This would be in total contradiction of the spirit of the Convention and of Resolutions of the Conference of the Parties.
9. CITES regulates trade in specimens of species in the appendices and defines "specimen" to include "any readily recognizable part or derivative" (Article I.b.ii). CITES does not define "readily recognizable", but the Conference of the Parties has recommended that trade in any part or derivative of a species in the appendices be regulated (i.e., be considered readily recognizable) if it appears from an accompanying document, packaging, mark, label or any other circumstances, that the part or derivative is from that species (Resolution Conf. 5.9). It has also recommended that importing Parties not waive the requirement for export permits in the event that parts and derivatives are not considered as readily recognizable by the (re-)exporting country (Resolution Conf. 4.8). In addition, the Conference of the Parties has recommended that worked ivory be considered as readily recognizable and its trade subject to CITES controls (Resolution Conf. 6.16).

It would be quite wrong to consider elephant skin or meat as not readily recognizable when, under the terms of Resolution Conf. 5.9, it is apparent from the accompanying documentation, packaging, label, etc., that it is elephant skin or meat.

INTERNATIONAL TRADE IN APPENDIX I SPECIES

10. The listing of a species in Appendix I does not mean that all international trade is prohibited in that species. However, it does mean that international trade is subject to particularly strict regulation, and the Convention specifies that it "must only be authorized in exceptional circumstances" (Article II.1). Import and export permits must be granted before trade is permitted, and they should be granted only if, among other things, the Scientific Authorities of the countries of export and import have determined that the export and import will not be detrimental to the survival of the species (Article III).

It is important to note that in any international trade in Appendix I species the import permit must come first. Article III.2.d of CITES states that an export permit may be granted only when "a Management Authority of the state of export is satisfied that an import permit has been granted for the specimen". An export permit should not be given until an import permit has first been granted.

PRIMARILY COMMERCIAL PURPOSES

11. A very important condition for trade in Appendix I species is that the import must not be for primarily commercial purposes. The Management Authority of the importing country should not grant an import permit unless it is "satisfied that the specimen is not to be used for primarily commercial purposes" (Article III.3.c).

"Primarily commercial purposes" is not defined by the Convention, but Resolution Conf. 5.10 recommends that "all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily

commercial in nature with the result that the importation of Appendix I specimens should not be permitted". This clearly means that specimens of Appendix I species should not be imported for resale or for the purpose of manufacturing products to be sold.

12. Therefore, if the African elephant is transferred to Appendix I, it will not be possible to export raw or worked ivory if the purpose of import is to sell the ivory or to carve the ivory for subsequent sale. However, CITES prohibits only the import for commercial purposes, not the export. An Appendix I listing for the elephant would not prevent the export of a hunting trophy or a tourist souvenir or a scientific specimen, even if the motive for export is commercial, provided the appropriate import and then export documentation has been granted in accordance with Article III.2.

HUNTING TROPHIES

13. An Appendix I listing for the African elephant will not prohibit trade in hunting trophies. The Conference of the Parties has recommended that trade in hunting trophies of Appendix I species may be permitted in certain circumstances providing that the provisions of Article III are met (Resolution Conf. 2.11). This includes a requirement that the hunting trophy not be imported for re-sale or other primarily commercial purposes.

TOURIST SOUVENIRS

14. An Appendix I listing does not necessarily make international trade in tourist souvenirs illegal. Provided provisions of Article III have been met, i.e., the appropriate import and export documents have been granted and the import is for non-commercial purposes, international trade in ivory souvenirs would still be permitted. However, the Conference of the Parties (Resolution Conf. 4.12), in urging all Parties to fully comply with these requirements has also urged them to rigorously control the export and import of Appendix I specimens (including parts and derivatives) whether or not exported or imported as personal effects.

In practice, therefore, such trade will be extremely difficult because of the requirement that for any international trade in Appendix I species the import permit must be granted before the export permit (see paragraph 10. above). For the average tourist, this would make trade in souvenirs of Appendix I species virtually impossible because of their inability to obtain an import permit before returning home. To take a souvenir home and then apply for an import permit is prohibited.

TRADE IN LEOPARD SKINS

15. The fourth, fifth and sixth meetings of the Conference of the Parties agreed to a system of "quotas" for trade in skins of leopard, an Appendix I species. This has been seen by some as a relaxation of CITES rules, but in fact the import and export permit requirements and the requirement that the import be for non-commercial purposes still apply as they do for trade in all Appendix I species.

The main difference is that the leopard skin Resolutions recommend that the Convention's requirements for the grant of an import permit before the grant of an export permit be deemed to have been satisfied if the Management Authority of the country of import provides a written assurance that an import permit will be granted (see Resolution Conf. 6.9.d). This relieves the practical difficulty referred to in paragraph 14. above and means that tourists can more easily buy leopard skins in quota countries and take them home.

However, for species like the African elephant where tourist souvenirs are usually small items, establishing export quotas and ensuring that they are respected would be considerably more difficult than for leopard skins.

CONFISCATED OR ACCUMULATED SPECIMENS

16. If the African elephant is transferred to Appendix I, international commercial trade in ivory that is confiscated or accumulated in the future will effectively be prohibited. Trade will be allowed only if the Convention's import and export permit requirements for Appendix I species are satisfied and the import is for non-commercial purposes (Article III). Indeed Resolution Conf. 3.14 recommends that unless dead specimens (e.g., ivory) of Appendix I species can be exported for scientific/educational or enforcement/identification purposes they should be put in safe storage or destroyed.

When a living specimen is confiscated in an importing country, it should be returned to the country of export or sent to a rescue centre (Article VIII.4) (see also Resolution Conf. 3.14). However no provision has been made, either by the Convention or by Resolution of the Conference of the Parties, for the return of dead specimens or parts and derivatives such as ivory.

PRE-CONVENTION AND PRE-APPENDIX I SPECIMENS

17. CITES permit requirements do not apply to a specimen "acquired before the provisions of the present Convention applied to that specimen" provided the Management Authority of the state of export or re-export issues a pre-Convention certificate (Article VII.2). Recognizing the need for a common interpretation of Article VII.2 and, in particular, common agreement on the date the Convention should be considered to apply to a specimen, the Conference of the Parties has agreed by the Resolution Conf. 5.11:

- a) that a pre-Convention certificate should be issued only if the specimen was acquired before the species concerned was listed in one of the Convention's appendices or before the country concerned joined CITES if this was a later date (Resolution Conf. 5.11.b);
- b) that an importing country should recognize a pre-Convention certificate issued by another Party only if the specimen was acquired before the Convention entered into force in the importing country for that specimen (Resolution Conf. 5.11.d);
- c) in the case of a species transferred from Appendix II to Appendix I, that the specimen concerned should be subject to the provisions applicable to it at the time of export, re-export or import (Conf. 5.11.h). This means that a specimen acquired between the time the species concerned is listed in Appendix II or III and transferred to Appendix I, becomes an Appendix I specimen.

18. With respect to the African elephant, Resolution Conf. 5.11.h effectively means that ivory is eligible for a pre-Convention certificate only if it was acquired before 26 February 1976 since this is the date that the Convention first applied to the African elephant - it was listed in Appendix III by Ghana. The date would be later for countries that have joined CITES since February 1976.

If the elephant is transferred to Appendix I, ivory acquired between 26 February 1976 and 18 January 1990 (the date Appendix I listing would enter into force) will not be eligible for pre-Convention certificates (except in countries which joined CITES since 1976, in which case the cut off date for pre-Convention certificates is the date they joined) and will be subject to all the normal CITES restrictions on trade in Appendix I specimens provided by Article III.

19. Thousands of tonnes of ivory were acquired before 26 February 1976, and this will be eligible for international trade; thousands of tonnes of ivory have been acquired since 26 February 1976, but this will not be eligible for international trade. Thus, it will clearly be a major problem to distinguish between the two.
20. Resolution Conf. 5.11.h was the subject of considerable discussion before being accepted by the Conference of the Parties because it implies retroactive implementation of a legal text.

At the second meeting of the African Elephant Working Group, several Parties expressed concern about this recommendation because it prohibits trade in ivory imported in accordance with CITES regulations. The Secretariat was asked to prepare a proposal for its revision either globally or with respect only to ivory from African elephants (see document Doc. 7.43.2).

PERSONAL EFFECTS

21. Personal or household effects are exempt from CITES controls. However, in the case of Appendix I species, this exemption does not apply if the specimen is acquired by the owner outside his state of usual residence and imported into that state (Article VII.3). Tourist souvenirs of Appendix I species cannot, therefore, take advantage of the personal effects exemption and be traded without CITES permits. They can, of course, be traded if all the appropriate permits have been obtained (see paragraph 14. above).

OTHER EXEMPTIONS

22. Article VII, paragraphs 4 and 5, deals with captive-breeding, as well as Resolutions Conf. 2.12, 4.15 and 6.21.
23. Article VII, paragraph 6, deals with museum specimens, as well as Resolution Conf. 2.14.
24. Article VII, paragraph 7, deals with travelling zoos, circus, menageries and other exhibitions.
25. None of the exemptions mentioned under items 22., 23. and 24. above have significant relevance to the trade in the African elephant and its parts and derivatives. Therefore, they are not discussed in the present document.