Doc. 8.52 (Rev.)

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

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Eighth Meeting of the Conference of the Parties

Kyoto (Japan), 2 to 13 March 1992

Interpretation and Implementation of the Convention

"STRICTER DOMESTIC MEASURES"

This document is submitted by Botswana, Malawi, Namibia and Zimbabwe.

Background

In this presentation the relevant provisions of the Convention and the relevant sections from Resolutions are in normal type, and the proponents observations and remarks are in italics.

1. Article XIV 1. of the Convention provides the right for any Party to adopt stricter domestic measures for trade than are established by the Convention.

   [Almost certainly the drafters of the Convention meant that a range State was entitled to afford species within its country greater legal protection than that provided by the appendices of CITES. However, this provision has been used more by importing countries to restrict trade than it has by range States for protection purposes.]

2. Resolution Conf. 2.6 a) recommends that if a Party deems that an Appendix -II or -III species is being traded in a manner detrimental to the survival of that species, it should consult directly with the Management Authorities of the countries involved and/or make use of the options to take stricter domestic measures.

   [This is mildly prejudicial. Consulting with the Management Authority is an obvious first step. But if the species is being exploited unsustainably it is unlikely that stricter domestic measures imposed by an importing country will correct the problem. If the Scientific and Management Authorities in an importing State are better able to determine that a species is being exploited unsustainably in a range State than its own Scientific and Management Authorities then they have a moral responsibility to assist the exporting Party with a management programme for the species.]

3. Resolution Conf. 2.6 b) recommends that if a Party has reason to believe that a species is being traded illegally it should implement stricter domestic measures.

   [This is a totally appropriate use of stricter domestic measures under Article XIV.]

4. Resolution Conf. 3.6 f) recommends that Parties communicate information regarding stricter domestic measures to the Secretariat for dissemination to the Parties.

   [This is appropriate for range States.]

5. Some importing countries are demanding the prior granting of import permits by themselves before an Appendix II species may be imported (such provisions exist under Article III 3) for Appendix-I specimens but are not required for Appendix II).

   [This practice can be justified for live animals where it is clearly undesirable to have animals adrift on the high seas with ports of entry denied to them. Wijnstekers (1990, Notes 34 and 38) argues that it is an advantage when it comes

to re-export or compilation of CITES annual reports. By far the most powerful impression made on producer countries is that the validity of their documents is being questioned or, perhaps worse, their probity or competence.]

6. Stricter domestic measures have also been taken to deal with the problem of pre-Convention specimens. In Resolution Conf. 5.11 d) the "pre-Convention date" is taken as the date upon which the Convention entered into force in the importing country. In the case of pre-Convention specimens of species "uplisted" to Appendix I, Resolution Conf. 5.11 h) applies the rules of Article III for import in preference to the more lenient rules of Article VII 2.

   [Wijnstekers (1990, Note 57) remarks that these are instances where the Parties have adopted Resolutions which conflict with the provisions of the Articles of the Convention. These were thought to be "in the interests of conservation."]

7. Wijnstekers (1990, Note 95) notes the conflicts between measures taken under CITES and measures taken under GATT where Parties are bound to "accord to the commerce of the other contracting Parties treatment no less favourable than that provided for in the appropriate schedule ....". Another provision of GATT (Article XI 1.) provides that no contracting Party shall prohibit or restrict imports of products originating in other contracting Parties (they may however charge duties on them).

   *[In the same note, Wijnstekers remarks that "**many of the Resolutions adopted by the Conference of the Parties recommend measures that go further than the provisions of the Convention or urge Parties to take such measures in particular cases or circumstances."]***

8. Resolution Conf. 6.7 recommends that "each Party intending to take stricter domestic measures .... make every reasonable effort to notify the range States of the species concerned at as early a stage as possible prior to the adoption of such measures, and consult with those range States that express a wish to confer on the matter"; and "that each Party that has taken such stricter domestic measures for non-indigenous species prior to the adoption of this Resolution consult, if requested, on the appropriateness of such measures with range States of the species concerned."

   [This Resolution originated from producer countries. It is a diplomatic caution to importing countries that certain "stricter domestic measures" are being seen as prejudicial to the interests of range States. The Resolution is, perhaps, too polite: it has been ignored frequently.]

9. The proponents of the attached draft resolution recognize two distinct types of "stricter domestic legislation" in importing States:

   a) measures which are taken to enhance the policies and law enforcement efforts of range States; and

   b) measures which see CITES as too permissive and seek to restrict trade further.

   The former are in keeping with the spirit of the Convention; the latter make CITES redundant.

10. Management of wildlife in some producer countries is now recognized as a valid form of land use and, because it is profitable, it is leading to greater tracts of land under wildlife. For such positive developments to continue, international trade measures are required which treat wildlife products no differently than those of domestic livestock. Prejudice against the trade in products of wildlife will drive land out of wildlife production. Stricter domestic legislation in importing countries, underpinned by the assumption that the additional protection is enhancing conservation, is likely to produce the opposite effect.

Reference

Wijnstekers, Willem (1990). THE EVOLUTION OF CITES. CITES Secretariat, Lausanne, Switzerland. 284pp.

Allen, Robert (1980). *How to Save the World; Strategy for Wold Conservation*. Kogan Page, London. 150 p.

World Commission on Environment and Development (1987). *Our Common Future*. Oxford University Press. 400p.

IUCN (1990). Conservation of wildlife through wise use as a renewable natural resource. Resolution of the 18th Session of the IUCN General Assembly, Perth, Australia, 28 Nov. - 5 Dec. 1990.

DRAFT RESOLUTION OF THE CONFERENCE OF THE PARTIES

"Stricter Domestic Measures"

NOTING that Article XIV, paragraph 1, of the Convention provides for any Party to adopt stricter domestic measures for controlling trade than are established by the Convention;

INTERPRETING this to apply primarily to countries of origin of species;

OBSERVING that some stricter domestic measures conflict with the Articles of the Convention;

AWARE that some stricter domestic measures taken by Parties are prejudicial to the conservation and economic interests of the peoples of range States;

BELIEVING that the international protocols required for the products of wildlife are similar to those being applied for other products of land husbandry in countries of origin;

CONVINCED that CITES can only be implemented effectively when agreements reached by the Conference of the Parties are reflected in the domestic policies and laws of all Parties;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

RECOMMENDS that the provisions of paragraph 1 of Article VII be implemented by the Parties in the following manner:

a) range States should examine their domestic laws and regulations to ensure that they are adequate to promote sustainable use of species and minimize illegal trade;

b) importing Parties should adopt only those stricter domestic measures which producer States believe will give greater effect to their conservation efforts;

c) importing Parties should adopt protocols towards the products resulting from good husbandry of wild fauna and flora which are no more prejudicial than those adopted towards the products of domestic livestock;

d) importing Parties should ensure that their existing rules and regulations for importation of specimens of species and taxa listed in the appendices to the Convention are not more or less restrictive than the existing provisions of CITES which relate to the appendices of the Convention;

e) all Parties should ensure that their domestic rules and regulations give effect to and do not conflict with the Resolutions adopted by the Conference of the Parties; and

f) all Parties should ensure that their domestic legislation is adequate for proper implementation of CITES.

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COMMENTS OF THE SECRETARIAT ON DOCUMENTS DOC. 8.48 TO DOC. 8.52

Documents Doc. 8.48 to Doc. 8.52 address some of the fundamental issues in the implementation of the Convention and in the decision-making of the Conference of the Parties. For this reason, the Secretariat considers it important to make some general remarks, and some specific ones, about the subjects discussed in these documents. The following comments, however, have been kept to a minimum and do not deal with all the points about which the Secretariat has concerns in these documents.

Doc. 8.48 Recognition of the benefits of trade in wildlife

An affirmation that there are circumstances in which wildlife trade can be beneficial to species conservation is in accord with modern conservation thought, such as was expressed in the 1990 IUCN Resolution on "Conservation of wildlife through wise use as a renewable natural resource". Moreover, the acceptance of this fact might help to ensure a balanced consideration of proposals for amending the appendices.

The Secretariat is broadly in agreement with the recommendations in the draft resolution. However, the combination of recommendations does not seem a logical one and the Secretariat considers that each of the recommendations would be better dealt with in a resolution dealing with the specific issues: criteria for amending the appendices; definition of non-detrimental trade and non-detrimental purposes; ranching, captive-breeding and artificial propagation.

With respect to recommendation b), the Secretariat wishes simply to note that, although it would be useful to have an agreed definition of the term 'not ... detrimental', the recognition of any particular transaction as being "non-detrimental" does not alone mean that it is acceptable under the Convention. The other provisions of the Convention would still need to be met.

Doc. 8.49 Reconsideration of "primarily commercial purposes"

The Secretariat considers the draft resolution to be contrary to the Convention because it seeks to restrict the provisions of Article III to certain cases. Moreover the intention is to permit some commercial trade in specimens of Appendix-I species, even though this possibility is deliberately excluded by the Convention in order to avoid the normal processes of commerce generating a demand for specimens of highly endangered species that can not be met by legal trade. The draft resolution therefore can not, in the Secretariat's opinion, be considered acceptable.

Doc. 8.50 Criteria for amendments to the appendices (The Kyoto Criteria)

Document Doc. 8.50 contains much valuable commentary and a number of opinions on vital issues relating to the listing of species in the appendices and the effects of such listing. In the Secretariat's view, it is important to address these issues because there has been much disquiet about the adequacy and the application of the criteria currently applicable for considering amendment proposals. As document Doc. 8.50 is wide-ranging in its considerations, the Secretariat offers comments under several sub-headings.

Definition of a species

The background document (in point 7) reiterates the definition of "species" in Article I of the Convention but then ignores the definition and uses the word "species" in an undefined biological sense. This abandonment of a definition which was adopted for the purpose of avoiding ambiguity in a legal text, has important consequences for many of the key considerations and creates problems that need not exist (see e.g. point 41 of the background document).

For instance, in criterion 1.n) of the draft resolution, it is indicated that the listing of a species in Appendix I may have negative effects in countries where trade in the species is beneficial. This problem need not arise where listing of populations of a species in different appendices is accepted.

The Secretariat concurs with the principle in criterion 1.d) that split listings (including listing in Appendix I or II of certain populations of a species when the remaining populations are not listed at all) should be avoided as far as possible, but the current text of the criterion leaves open the question of how to determine when split listing is unavoidable. The Secretariat would recommend that decisions on split listing be made on a case-by-case basis, taking into account:

- the biological status of each population of the species concerned;

- the potential benefits of permitting trade in specimens from the healthy populations and the potential disadvantages to these populations if they are included in Appendix I; and

- the potential enforcement problems, to the detriment of the endangered populations, if only the latter were to be included in Appendix I.

Commercial trade

Point 25 of the background document is misleading in suggesting that Articles II and III of the Convention are in conflict. Article II only states fundamental principles and can not be read in isolation; it has to be read in conjunction with the rest of the Convention. Article III lays down the exceptional circumstances which are referred to in Article II.

The significance of criterion 1.l) to consideration of amendment proposals is a mystery since the purpose of individual transactions is not a consideration in deciding on the appropriate appendix in which to place a species.

Criterion 2.B.c) refers to the conditions (in Annex 2) for trade in specimens of Appendix-I species:

- The effect of condition "2" would be to render commercial trade in such specimens acceptable, although this would be in contravention of Article III of the Convention if the import were for commercial purposes;

- Condition "12" proposes to waive the application of Article III of the Convention in certain cases. This is not permissible under the Convention.

Scientific criteria for listing

The introduction, in criterion 2.A.e), of a scientific basis for making decisions on amendment proposals is appropriate and laudable. But there is reason to question the timing of the proposal and there are certain shortcomings which it barely touches.

In particular, firstly, the method proposed requires specific data either for the construction of a population model or for comparison with the criteria specified in Annex 1. However, for the majority of species, the data required do not exist. Secondly, the "Mace-Lande criteria" were proposed by the authors primarily with higher vertebrates in mind. They may not be suitable for other taxa. Although it is stated in the draft resolution that criteria are being developed for other taxa, there is no suggestion as to what criteria should apply to them for the time being.

It should be stressed that Mace and Lande recommended that their proposed criteria not be generally accepted until they had been assessed by practical comparative application. This assessment has not yet been done.

Mace and Lande were proposing their criteria as a basis for establishing the IUCN threat categories. But IUCN has not yet adopted the criteria and is in the process of going through an evaluation exercise. It may therefore be premature for CITES

to adopt the criteria even for higher vertebrates. Moreover, the consequences of embodying the IUCN threat categories in the criteria for listing species in the CITES appendices must be considered. Differences in interpretation of the data (especially where these are scant) may lead IUCN and CITES Parties to different conclusions about the classification of a species. The appropriate course of action in these circumstances needs to be clear.

Beneficial trade

In criterion 1.m), three conditions to be met are suggested, in order for trade to be considered as beneficial to conservation. The second - that trade must not lead to increased illegal trade is uncontentious. However, in the opinion of the Secretariat, the other two conditions are neither sufficiently general nor sufficiently comprehensive and precise to be satisfactory. The first condition could be considered acceptable if it were clear that it meant that the trade must not have, and must not arise from practices which have a harmful effect on the status of the species concerned. But the third condition is far from ensuring a benefit to conservation. Therefore, the present text does not guarantee such benefit.

The Secretariat believes that the text of this criterion would be improved if it simply assured the status of the species concerned and indicated the beneficial effects for conservation that must be obtained from the expenditure of the funds generated by the trade. Consideration needs also to be given to what criteria should apply when there are different circumstances in different range States of a species (beneficial trade in one but not in others).

Appendix III

Appendix III is the least well understood appendix of CITES and that for which the Convention's provisions are the least well implemented. Some Parties, moreover, deliberately do not implement controls on Appendix-III species. Certain countries apparently take Appendix III less seriously because they consider many species to be included without good reason. The Secretariat believes that the authors of document Doc. 8.50 have misinterpreted the significance of this appendix. In particular, they have assumed that it provides a degree of trade control that is not provided to species in Appendix II. This is quite incorrect.

Because of this misunderstanding, in criterion 3.f) (and point 49 of the background document) the authors suggest that when a range State of an Appendix-II species seeks to restrict the trade in specimens thereof it should list the species in Appendix III. However, the Secretariat wishes to stress that this would achieve nothing for such a species since, for trade from a State which has listed a species in Appendix III, the controls are virtually identical to those applying to species in Appendix II. This is obvious from the text of the Convention.

The very poor implementation of the provisions of Article V of CITES gives cause for concern about the suggestion, in criterion 1.f), to place single-country endemic species in Appendix III. The Secretariat does not believe that the inclusion of species with such restricted ranges in Appendix III (rather than Appendix II) would always provide for these species the degree of trade control that is required.

Captive-breeding, artificial propagation and ranching

Contrary to the statement in point 50 of the background document, Resolution Conf. 2.12 does not contain the agreement that captive-bred and artificially propagated specimens of Appendix-I species shall be treated as specimens of Appendix-II species. It merely provides an interpretation of certain terms. The agreement is in the text of the Convention (Article VII 4.) and applies only to specimens produced for commercial purposes.

Moreover, the recommendation ascribed to Resolution Conf. 4.15 is incomplete; the recommendations apply only to the breeding of Appendix-I species for commercial purposes.

Criterion 4.a) should refer only to breeding in captivity for commercial purposes, as does Resolution Conf. 4.15.

With respect to criterion 4.b), the Secretariat wishes to point out that the draft resolution annexed to document Doc. 8.38 (Guidelines for a procedure to register and monitor operations breeding Appendix-I animal species for commercial purposes) proposes the deletion and replacement of Resolutions Conf. 4.15, Conf. 6.21 and Conf. 7.10.

Scientific specimens

In criterion 1.h), the use of the word "normally" leaves open the question of how to select the species, traded only in small numbers of scientific specimens, that should be listed in the appendices. It is quite incorrect to state that Article VII, paragraph 6, of the Convention waives permit requirements for such specimens. The scope of that paragraph is patently restricted to museum and herbarium specimens and certain live plant material.

Other corrections

In criterion 1.k), the reference to Resolution Conf. 6.19 is presumably an error, since this Resolution does not deal with criteria for listing but with the control of trade.

Criterion 1.o) is not in fact a criterion at all but rather a statement of intent that would be better placed in the preamble.

In criterion 2.A.c) and in Annex 1, there is an error in the transcription of the "Mace-Lande criteria". In the second line of the second column (under "Endangered") "10" should be "20".

In criterion 2.A.e), the explanation of effective population size (N_e) (i.e. "the number of breeding individuals in the population") is not strictly correct. In fact Frankel and Soulé (1981, Conservation and evolution. Cambridge University Press. 327pp.) note that "N_e is not necessarily the same as the actual number of breeding individuals. Unless the sexes are equal, N_e is less than N."

Criterion 3.b) is superfluous. Article XVI of the Convention specifies which States may propose the inclusion of species in Appendix III.

Criterion 3.h) is superfluous because the relevant provision is already contained in Article XVI of the Convention.

Doc. 8.51 Support of range States for amendments to Appendices I and II

Since it is agreed by the Parties that peoples and States are and should be the best protectors of their own wild fauna and flora, it is important that the range States of each species have the opportunity to influence the process of deciding on its listing in the CITES appendices. The arguments are in general well put in the background document, although the comparison with GATT is false since that treaty is designed to curtail trade restrictions whereas CITES is designed to impose them.

The section in the draft resolution under 'Recommends' is designed to ensure that proposals to amend the appendices are adequately reviewed by the range States of the species concerned; and the Secretariat has no objection to the recommendations. However, what follows is less easy to accept. Article XV, paragraph 1.(a), of the Convention gives each Party the right to "propose an amendment to Appendix I or II for consideration at the next meeting". But the draft resolution seeks to give the range States the opportunity to veto such consideration. This would be irreconcilable with the Convention.

The Secretariat suggests that the problems perceived by the proponents should be handled at two levels. First it should be ensured that the information and views of range States are adequately taken into account during considerations of proposals to amend the appendices. Secondly, any revision of the criteria for amendments to the appendices should incorporate a regard for the effects of the proposed amendments on the conservation programmes for the species in the range States.

Doc. 8.52 Stricter domestic measures

The apparent intention of the draft resolution is to: ensure that range States of listed species have legislation which promotes sustainable use of wildlife; and to interpret Article XIV, paragraph 1, of the Convention so as to prevent "Importing Parties" from taking any stricter domestic measures. The Secretariat should comment in particular on the second of these points.

Article XIV, paragraph 1, states that the provisions of the Convention "shall in no way affect the right of Parties to adopt" stricter domestic measures. The IUCN Environmental Law Centre has already provided two consistent legal opinions on interpretation of this paragraph (provided to the Parties in Technical Committee document Doc. TEC. 2.5 and with Notification to the Parties No. 611 of 31 October 1990). From these it is evident that the draft resolution conflicts with the text of the Convention, by proposing to restrict a right which the Convention assures to the Parties. (There is no evident

basis for the suggestion in the draft resolution that Article XIV 1. was intended to apply primarily to countries of origin of CITES-listed species.) The Secretariat does not therefore consider the first four recommendations in the draft resolution to be either appropriate or useful.

On the other hand, the Secretariat agrees with the intent of the two final recommendations but notes that these are concerned with the adoption of national CITES-implementing legislation and not with stricter domestic measures.

The remaining problem, which has to be addressed by each Party individually, is, as stated by the proponents, that the existing Resolution Conf. 6.7 is frequently ignored. The Secretariat does not consider that there is anything to be gained from the adoption of further resolutions on the subject of stricter domestic measures, except perhaps to note that the views of range States should not merely be obtained but also taken into account.