

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



Eighteenth meeting of the Conference of the Parties
Colombo (Sri Lanka), 23 May – 3 June 2019

Strategic matters

REVIEW OF THE CONVENTION

1. This document has been submitted by the Democratic Republic of the Congo, Namibia and Zimbabwe.*

Background

2. CITES will have been in force for 44 years at the time of the 18th meeting of the Conference of the Parties. Over this period only one attempt was made to do a systematic review of the effectiveness of the Convention, namely in 1994, or 19 years after the Convention entered into force. That review led to a number of improvements, perhaps most notably the adoption of a Strategic Vision for CITES, formalizing cooperation with other Conventions and bodies, as well as a range of administrative actions ranging from the consolidation of Resolutions and Decisions through to the rather mundane improved numbering of the documents prepared for the meetings of the Conference to the Parties and new reporting requirements regarding the Secretariat and its functions and personnel.
3. The recommendations from the study that was commissioned on the effectiveness of the Convention were presented to CoP10. Document CoP10.21 "How to improve the effectiveness of the Convention – Consideration of the recommendations arising from the study" describes certain specific actions¹ that should be taken in response to some of the recommendations of the study. Document CoP10.21 in its Annex provides a list of recommendations from the study, indicating the relative priority of each recommendation and its classification into one of four categories (1. Readily implementable, 2. Requiring further study, 3. Requiring co-operation and 4. Dependent upon 1.-3.).
4. Some of the recommendations from the study have nevertheless not been implemented – despite these recommendations being classified as of priority (CoP10 Doc. 10.20 Annex) These are:
 - a) Recommendation 3C. The issue of sustainable use and its relation to CITES should be addressed in an interpretative resolution by the Conference of the Parties as a matter of priority.
 - b) Recommendation 4A. Consideration should be given to initiating an accelerated process of review of the scope and coverage of the appendices.

* 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.

¹ Wijnstekers, W. (2016): *The Evolution of CITES - 10th edition*. International Council for Game and Wildlife Conservation, reports that "At its 10th meeting (Harare, 1997), the Conference agreed to an Action Plan for implementing certain findings and recommendations of the review". Document CoP10.21 "How to improve the effectiveness of the Convention – Consideration of the recommendations arising from the study" although there is no trace of a document called an Action Plan as such.

- c) Recommendation 7D. The Standing Committee should enhance co-operation and information exchange between CITES and the GATT² prior to the conclusion of on-going WTO discussions on trade and environment issues.
5. All three of these recommendations were classified in CoP10 Doc. 10.20 Annex as Priority and in Category 2. Requiring further study. Two of the Decisions adopted regarding improvement of the effectiveness of the Convention at CoP10 addressed one, or are related to the subject matter of one, of these priority recommendations, i.e. cooperation between GATT and CITES, but there were no decisions taken regarding the other two priority recommendations that took full account of the relevant recommendations or the underlying issues that gave rise to those recommendations, or the identified need that further study is required concerning the issues addressed in those recommendations.
6. The two Decisions, directed to the Parties, that are relevant to cooperation between GATT and CITES³ (both currently listed as no longer valid on the CITES website) adopted were:
- 10.11 *The Parties should encourage co-ordination between the CITES Secretariat and the Secretariat of the World Trade Organization (WTO).*
- 10.12 *The CITES Management Authorities are encouraged to work with trade experts in their countries to improve mutual understanding of the objectives of both CITES and the WTO.*
7. One decision was directed to the Secretariat concerning sustainable use:
- 10.95 *The Secretariat shall try to improve its information materials in order to enhance the public understanding of the positive effect of listing of species in Appendix II for the sustainable use of all concerned species.*
8. Two identical decisions were directed to the Animals Committee and the Plants Committee respectively concerning the review of the Appendices:
- 10.71 and 10.83 *The review of species in connection with the criteria for amendment of Appendices I and II contained in Resolution Conf. 9.24 shall continue.*
9. The Secretariat presented a report on the implementation of these Decisions to CoP11 (Doc. 11.12.1)⁴ in connection with the review of the effectiveness of the Convention. This report reflected actions taken over the intervening period until CoP11, most of which were one off actions – and that was the end of any further discussion or consideration on the subject of the Review of the Effectiveness of the Convention.
10. With hindsight, the observation can be made that most of the decisions mentioned above were incorrectly targeted at tangential aspects of the issues rather than the core problems, and none reflected the priority assigned to the recommendations or the need to do further study or research concerning these issues.
11. It can be argued that if further work on these three recommendations were mandated by CoP10 there may have been a fundamental impact on subsequent processes and outcomes in CITES, as some of the most contentious issues in CITES before CoP10, and ever since, are directly related to these recommendations as outlined below.

² GATT = General Agreement on Tariffs and Trade 1994. This recommendation was inadequately drafted. There is no equivalent body in the WTO (which encompasses the GATT) to the Standing Committee of CITES. The governing body of the WTO is the WTO Ministerial Conference, comparable in most ways (except notably that it operates by consensus) to the Conference of the Parties to CITES (which operates by majority voting). There is no information on any “co-operation and information exchange between CITES and the GATT prior to the conclusion of on-going WTO discussions on trade and environment issues”, certainly at the level of the two governing bodies and specifically not on the compatibilities or incompatibilities of the two Treaties.

³ Decisions 10.11 and 10.12 only refer to coordination between the two Secretariats and a directive to the Parties to improve understanding of the objectives of the two treaties; thus no action was taken to address the potential incompatibilities of the two treaties at the time when the WTO was established and where it as the primary multilateral trade organization could have deliberated on potential incompatibilities and how to deal with them.

⁴ Doc. 11.12.1 interestingly also refers to the “Action Plan” although there is no evidence of any document presented to the Conference of the Parties titled an Action Plan.

The issue of sustainable use and its relation to CITES

12. CITES recognized, indeed welcomed, the Convention on Biological Diversity's Addis Ababa Principles and Guidelines on the Sustainable Use of Biodiversity (Resolution Conf. 13.2 (Rev. CoP14)) and the Conference of the Parties in that Resolution urges the Parties to make use of these Principles and Guidelines. Nonetheless, there still is no unified interpretation of sustainable use of wildlife in CITES nor the interpretative resolution recommended in the 1994-1997 review process (see paragraph 4. a. above). As a consequence, divisive and emotive debates on proposals to transfer species to Appendix II from Appendix I have tended to dominate meetings of the Conference of the Parties, often resulting in the rejection of such proposals or the proponents being forced to accept some or other unwanted restriction on trade or other compromise. The saga of the southern African populations of the African elephant since CoP7 until CoP17 is a case in point. Complex annotations to listings were created resulting in the "teeth of the animal being listed in a different Appendix than its tail⁵". Compromises were established, such as the so-called Decision Making Mechanism for the resumption of trade in ivory, that was subsequently not honoured; and a moratorium on the submission of trade proposals that was established in conflict with the fundamental rights of Parties enshrined in the text of the Convention⁶. The worst is, in CITES there are no consequences, no accountability, no form of redress.
13. Despite 42 years of prohibiting any trade in the horns of two species of African rhinos, illegal trade in rhino horn has continued unabated; prices of rhino horn have steadily increased and the costs of rhino conservation have skyrocketed. None of the arguments made by the proponents of establishing a regulated trade based on sustainably produced rhino horn to generate funding for rhino protection and to undermine illicit trade were ever good enough for the majority of the Parties - and ever so many armchair critics and self-proclaimed experts. To add insult to injury, there are those who continue to promote the destruction of legitimate stockholdings of Africa's most valuable product weight for weight, except diamonds, one of the products that Africa can produce competitively (and sustainably) in the world.
14. Well-regulated hunting for trophies of southern African populations of species such as lion and leopard, accounting for the bulk of international trade in these species, became the target of proposals from outside the southern African region to transfer these species to Appendix I or to cancel or reduce the quotas established for trade in such hunting trophies. The rationales given in these proposals focused on the declining status of these species outside southern Africa – where the opposite is true in almost every instance – without duly considering the impacts of their proposals, which were clearly NGO driven, on the conservation programmes of the South. Every recent CoP has seen such proposals targeting more and more species that are well protected in southern Africa and demonstrably sustainably used, usually starting from the largest sized species downwards. This means that the giraffe, hippopotamus, southern savanna buffalo, eland, roan antelope and so forth are likely to be next until eventually the smallest of antelopes are proposed to be included in the Appendices.
15. Some of these proposals could be defeated and solutions were found including the listing of geographically separate populations of such species in one or other Appendix, but at enormous cost in time, money and human resources that had to be redirected from real and meaningful *in situ* conservation work. Throughout the last two decades or more, range States of the most valuable African species accumulated hundreds of tonnes of products such as ivory and rhino horn, incurring the high recurrent costs required for their storage and security while at the same time running the real risk of progressive deterioration in their quality and value. Rural communities, by not being able to realize the full economic value of their wildlife resources, were effectively the collateral damage in all of this. Marginalized and vulnerable communities of people were deprived of opportunities to gain from their conservation programmes for these species. Conservation programmes were being starved of funds and became progressively more dependent on external aid – ironically from the countries and organizations that opposed their trade proposals. Politically-minded observers may well refer to this as neo-imperialism or neo-colonialism. CITES is definitely not pro-poor.
16. Regarding the Decision on sustainable use (see paragraph 7.), little can be said other than that the Decision was wholly misdirected and that nothing significant came from the endeavours of the Secretariat to educate the world and "*enhance the public understanding of the positive effect of listing of species in Appendix II for the sustainable use of all concerned species*". And how could such an assignment rationally have been seen as necessary only for a short period until the Secretariat itself proposed to the next CoP that the decision be scrapped?

⁵ Paraphrasing Rowan B. Martin, one of the most, if not the most, prolific authors on CITES

⁶ The right to submit a proposal to amend the Appendices for consideration at the next meeting – Article XV of the Convention

Consideration should be given to initiating an accelerated process of review of the scope and coverage of the Appendices

17. The periodic review of the Appendices, a standing item in the agenda of the meetings of the Conference of the Parties, can hardly be described as an outstanding success. Progress has been extremely slow, no dedicated funding for this process has been granted, and there is no evidence of any acceleration in the process. This process is understood by the Parties submitting this document to have meant to 1) review listings of species in the Appendices before scientific criteria for such listings were established through Resolution Conf. 9.24 as subsequently amended; 2) review listings of species on the basis of trends in trade and the conservation benefits or impacts of the current listing to assess whether a listing is still appropriate; and 3) to assess whether the listing of a species is in conformity with the criteria adopted for such a listing by the Conference of the Parties through Resolution Conf. 9.24 (Rev. CoP17).
18. Very little strategic guidance to the bodies tasked with the review of the Appendices, i.e. the Animals and Plants Committees, is nevertheless provided in Resolution Conf. 14.8 (Rev. CoP17) *Periodic review of species included in Appendices I and II* in this regard, except what not to do:
 2. FURTHER AGREES that the review will be conducted in accordance to the following process:
[...]
 - ii) the following taxa should not be considered for review: (*Emphasis added*)
 - A. species that were the subject of listing proposals at the previous three meetings of the Conference of the Parties (whether or not the proposals were adopted);
 - B. species subject to ongoing reviews, under the Review of Significant Trade [Resolution Conf. 12.8 (Rev. CoP17)], or periodic reviews conducted within the last 10 years; or
 - C. species subject to other reviews targeted by valid Decisions and Resolutions of the CoP; and
 - D. species for which it is clear that there has been no change in the status, range or trade and for which there is no possibility to need to amend the Appendices; and
[...]
19. This restriction on the Animals and Plants Committees means that the scientific bodies of the Convention are prevented from reviewing the listings of precisely those species that have caused the most controversy in CITES - especially those that have been repeatedly the subject of amendment proposals - bringing into question the intentions of the Conference of the Parties regarding the application of scientific expertise to resolve such contentious issues.
20. Resolution Conf. 14.8 (Rev. CoP17) is further silent on the urgency attached to the review of the Appendices by the Review of the Effectiveness of the Convention and the need for acceleration of this process (see paragraph 4. b. above).
21. Frustration with processes and their governing Resolutions is seldom expressed in CITES documentation, but frustration was expressed over this process by the Animals Committee and Plants Committees, to the extent that they jointly proposed major revisions to Resolution Conf. 14.8 (Rev. CoP17), see SC66 Doc. 24 and CoP17 Doc. 82.1.
22. Documents SC66 Doc. 24 and CoP17 Doc. 82.1 record that “the Animals and Plants Committees, at their 28th and 22nd meeting respectively, agreed to a series of revisions to Resolution Conf. 14.8 (Rev. CoP16) on Periodic review of species included in Appendices I and II. The revisions include: a) revisions to the preamble to clearly acknowledge the advisory role of the Scientific Committees, reflect language in Resolution Conf. 9.24 (Rev. CoP16) on Criteria for amendment of Appendices I and II, ensure that the overall purpose and measures of success for the review are clear, and recognize the benefits of undertaking the periodic review; b) reorganization of some of the existing operative paragraphs to separate elements providing general guidance on how to best undertake the process from the discrete steps to be followed, as well as new language intending to clarify the timeline and actions within the periodic review process; and c) modification of the process so that the Scientific Committees provide the recommendations resulting from

their review to the Secretariat, for provision to the range State(s), and the Conference of the Parties. Range States would be invited to submit a proposal if appropriate. If no range State is willing, the Animals or Plants Committee has the option of submitting a proposal (via the Secretariat and the Depository Government) but is not obligated to do so”.

23. The Secretariat in its comments on the proposed amendment to Resolution Conf. 14.8 (Rev. CoP16) in CoP17 Doc. 82.1 acknowledged that “the proposed revision of Resolution Conf. 14.8 (Rev. CoP16) is unlikely to substantially simplify or speed up the system that is in place to conduct the Periodic Review of the Appendices, but it does bring more clarity regarding the overall purpose of the reviews, and the manner in which the recommendations of the Animals and Plants Committees can be taken forward. The Secretariat hopes that it will result in CITES Appendices I and II that more appropriately list species in Appendix I and II, based on current biological and trade information”. *Emphasis added*

24. The amendments proposed by the Animals Committee and Plants Committees were rejected at CoP17.

Co-operation and information exchange between CITES and the GATT⁷

25. The underlying issues concerning the relationship between CITES and the GATT that came out of the Review of the Effectiveness of the Convention are alluded to (or were buried in) in Doc. 10.22 Annex 3, based unfortunately on what appears to be a single opinion or at least very limited opinions.

26. There are fundamental differences between CITES and the GATT. The GATT 1994, and its predecessor GATT 1947, as the nearly universal multilateral trade agreement serving as the basis for the global post World War 2 trade architecture, is founded on the principles of non-discrimination, national treatment, most favoured nation treatment and elimination of quantitative restrictions - thus what most people would understand as free trade.

27. The GATT 1994 contains special and differential (more favourable) provisions for developing countries and its own dispute resolution mechanism. It provides for regional trade agreements and plurilateral agreements with more preferential terms of trade than the terms of trade of the GATT itself. It contains provisions against unfair trade practices, including retaliation and compensation. Its governing body, the Ministerial Conference, operates by consensus and is empowered to make binding decisions on the Members. The GATT requires that its members adjust their domestic legislation to fully comply with the principles and provisions of the agreement – or face sanctions and retaliations if they don't by conducting trade in violation of the GATT. Almost all, if not all, Parties to CITES are Members of the WTO (and thus obligated to comply with the GATT) or are aspirant Members of the WTO in the process of accession.

28. CITES, in contrast, provides for discrimination (in WTO terms) e.g. stricter domestic measures; different terms of trade for different national populations or geographically separate populations; no national treatment (i.e. items in trade from one Party can be treated differently than like items from the Party of import); no most favoured nation treatment (i.e. discrimination is allowed between trade from one Party compared to trade from other Parties); establishment of quantitative restrictions (i.e. quotas, restrictive trade annotations to listings in the Appendices, restrictions on the purpose of the import of specimens such as restricting imports to primarily non-commercial purposes for Appendix I specimens) – thus, what most people would not regard as free trade by any description.

29. CITES contains no provisions against unfair trade practices, and no provisions for retaliation or compensation. Its governing body, the Conference of the Parties, operates by two thirds majority vote, even in defiance of the dictum in its own Preamble that “peoples and States are and should be the best protectors of their own wild fauna and flora” when the range State of the species concerned objects. It does not require that its members adjust their domestic legislation to fully comply with the principles and provisions of the agreement, it explicitly states that the Convention shall in no way affect the rights of Parties to adopt stricter domestic measures or domestic measures restricting or prohibiting trade (Article XIV). It does not have an internal dispute resolution mechanism other than to refer to negotiation between two disputing Parties or

⁷ This title is derived from Recommendation 7D, see paragraph 4. The phrasing of Recommendation 7D is peculiar. CITES and the GATT are inanimate legal agreements and cannot exchange information or cooperate. The entities that can co-operate and exchange information are the CITES Secretariat and the WTO Secretariat, but that would hardly solve the problem as such entities may attend each other's meetings but that would be just about that, unless they receive much more specific directives than just to share information and co-operate. One cannot help but conclude that this was the most perfunctory reaction possible to one of the most complex issues in CITES. What is really needed is a deep engagement on the two agreements by the Parties to them and their governing bodies, the WTO Ministerial Conference and the Conference of the Parties to CITES, on the basis of thorough legal and technical research that should be facilitated by the respective secretariats – and neutrally so.

submitting disputes to the Permanent Court of Arbitration at The Hague (thus *de facto* preventing Parties that are developing countries from arbitration due to the high costs involved). CITES does not allow regional trade agreements with more favourable terms of trade than CITES itself and offers no special or differential treatment to Parties that are developing countries. Almost all, if not all, Members of the WTO are also Parties to CITES (and are thus obligated to comply with CITES).

30. GATT and CITES share the concept of specific exemptions (but in opposite directions); i.e. exemptions to the non-discriminatory trade provisions of the GATT and to the regulations affecting trade in Appendix I, II and III species in CITES. The GATT in Article XX allows for the adoption of trade restricting measures that are deemed necessary to protect human, animal or plant life or health as long as such measures are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. CITES in Article VII provides trade liberalization measures by exempting pre-convention specimens, personal or household effects, captive bred or artificially propagated specimens, or specimens loaned, donated or exchanged between scientists or scientific institutions from the trade restricting provisions of various Articles.
31. The two trade agreements are thus opposites in almost every way and their co-existence is based on the tacit agreement that CITES as the more specific trade agreement for endangered species may contain discriminatory and trade-restricting measures that are adopted by consensus which otherwise would be contestable in the WTO⁸. But are all of the discriminatory and trade-restricting measures in CITES adopted by consensus? Evidently not, as many such measures are established by majority vote. The problem is that there is no jurisprudence or case law to rely on concerning the apparent inconsistencies between CITES and the WTO agreements and how they should be reconciled, thus maintaining the scope for legal challenges that could result in unfavourable outcomes in future.
32. Clearly there is need for more study on these inherent conflicts between CITES and the GATT 1994 (and therefore not focussing on cooperation between the CITES Secretariat and the WTO Secretariat but the discrepancies and conflicts between the two treaties), as indeed the recommendation in paragraph 4 alluded to.

Recommendations

33. Taking all of the above into account, it is recommended to the Conference of the Parties to:

Regarding the review of the Convention

- a) undertake a second comprehensive review of the Convention with the aim of improving – not the effectiveness of the Convention as in the first review, but the equitability of the Convention with regards to the role of people and States to be the best protectors of their own wild fauna and flora and the rights of rural communities and indigenous people over their own natural resources which include wild animals and plants;
- b) advise that the output of this review should consist of *inter alia* proposed amendments to Resolutions, Decisions and the Strategic Vision of CITES, and/or proposals for a new Protocol as an additional instrument to be adopted by the Conference of the Parties and/or an Addendum to the Convention that would require adoption and ratification by the Parties or, as a last resort, proposed amendments to the Convention.
- c) task the Standing Committee to establish a process that would demarcate the scope and terms of reference of the review specified in paragraph a.

⁸ Doc. 10.22 Annex 3 actually refers to the principle contained in the Vienna Convention on the Law of Treaties Articles 30(3) and 30(4) that when two agreements signed by the same parties are in conflict, the agreement later in time (*lex posterior*) is presumed to prevail. CITES was signed in 1973. The GATT of 1947 was incorporated into GATT 1994 as part of a suite of agreements and decisions that gave rise to the WTO. Very few countries signed either the GATT in 1947 or CITES in 1973, most acceded much later, especially in 1994 when the WTO was created. Can it be said that GATT 1947 is the same as GATT 1994? Probably not, meaning that GATT 1994 could prevail. This again points to a very tenuous co-existence between the GATT and CITES, and the prevalence of one over the other has not yet been properly tested.

Regarding CITES and the WTO

- d) commission through an inclusive and technically competent process a comprehensive study of the inherent contradictions between the GATT 1994 and CITES with the aim of identifying measures to better harmonize the underpinning principles of international trade and conservation and the obligations of the Parties to these two agreements.
- e) request the WTO to avail its expertise and other resources to work together with a representative working group to be established by the Standing Committee on the study specified in paragraph d.
- f) task the Secretariat in consultation with the WTO to develop modalities for the study specified in paragraph d. for consideration by the Standing Committee at its first ordinary meeting after CoP18.

Regarding the review of the Appendices

- g) revisit with urgency and priority the revision of the Appendices to validate that species and their geographically separate populations – especially Appendix I species - are correctly included in the Appendices in compliance with the criteria adopted by the Parties in Resolution Conf. 9.24 (Rev. CoP17).
- h) contract the IUCN or any other body with comparable competence to do an urgent but comprehensive review of the listing of species and/or the geographically distinct populations of species in the Appendices and to report to the 20th meeting of the Conference of the Parties in a manner, and by involving the Standing Committee and the Depositary Government, that would enable the Conference of the Parties to correct inappropriate listings of species in the Appendices in one session.

Regarding resources

- i) Request financial assistance for these activities from the Parties and cooperating partners.

COMMENTS OF THE SECRETARIAT

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TENTATIVE BUDGET AND SOURCE OF FUNDING
FOR THE IMPLEMENTATION OF DRAFT RESOLUTIONS OR DECISIONS

According to Resolution Conf. 4.6 (Rev. CoP16) on *Submission of draft resolutions, draft decisions and other documents for meetings of the Conference of the Parties*, the Conference of the Parties decided that any draft resolutions or decisions submitted for consideration at a meeting of the Conference of the Parties that have budgetary and workload implications for the Secretariat or permanent committees must contain or be accompanied by a budget for the work involved and an indication of the source of funding.