

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

Interpretation and implementation matters

Regulation of trade

IMPLICATIONS OF THE TRANSFER OF A SPECIES TO APPENDIX I

1. This document has been prepared by the Secretariat.

Introduction

2. At the 17th meeting of the Conference of the Parties (CoP17, Johannesburg, 2016), Parties agreed to include all eight known species of pangolin in Appendix I. The listing of the pangolin in Appendix I entered into force 90 days after the meeting in accordance with Article XV, paragraph 1 (c), i.e. on 2 January 2017. Parties also adopted Resolution Conf. 17.10 on *Conservation of and trade in pangolins* as well as Decisions 17.239–17.240 on *Pangolins*.
 3. In its report on the progress in the implementation of these Decisions to the Standing Committee at its 69th meeting (SC69, Geneva, November 2017) (see document [SC69 Doc. 57](#)), the Secretariat raised the issue of trade in stockpiles of pangolin specimens that were legally obtained in accordance with the provisions of the Convention prior to the transfer of the pangolin species to Appendix I at CoP17. The Secretariat recommended that “to monitor international trade in any stocks of pangolin specimens that were legally obtained in accordance with the provisions of the Convention prior to the transfer of all pangolin species to Appendix I at CoP17¹”, the Standing Committee should²:
 - a) encourage all Parties to:
 - i) declare any stocks of pangolin specimens obtained in accordance with the provisions of the Convention prior to the transfer of all pangolin species to Appendix I at CoP17, to the Secretariat before 28 February 2018;
 - ii) provide scanned copies of all permits and certificates issued to authorize trade in such pre-Appendix-I pangolin specimens;
- [...]
4. At SC69, Parties expressed different views with respect to the interpretation of Resolution Conf. 13.6 (Rev. CoP16) on *Implementation of Article VII, paragraph 2, concerning “pre-Convention” specimens*. The Secretariat noted its understanding that, in the past, some Parties had interpreted that a specimen of a species that was removed from the wild when the species concerned was listed in Appendix II or III, and where the species had subsequently been transferred to Appendix I, should be treated as an Appendix II or

¹ This footnote was included in the document: “See Resolution Conf. 13.6 (Rev. CoP16) on Implementation of Article VII, paragraph 2, concerning ‘pre-Convention’ specimens as it applies to the transfer of a species from Appendix II to Appendix I.”

² See paragraphs 49 and 59 of document [SC69 Doc.57](#) as amended by the Secretariat when introducing the document (see [SC69 SR](#))

III specimen. The Secretariat raised this issue noting that there seemed to be different interpretations between Parties on this matter; and that it would be important to clarify the matter to provide for a common understanding of applicable provisions when a species is transferred from Appendix II to Appendix I, possibly through amending Resolution Conf. 13.6 (Rev. CoP16).

5. However, it was not possible at SC69 to come to an agreed understanding on the matter; several Parties requested that their interventions be recorded in the summary record. Given the differing interpretation of Article VII paragraph 2 and Resolution Conf. 13.6 (Rev. CoP16) as they relate to the requirements for trade in specimens, including stockpiles, of Appendix I species that were obtained when the species was listed in Appendix II or Appendix III, the Standing Committee recommended that³:
 - a) *the Secretariat prepare a document for consideration at CoP18, including information relating to the implications associated with the different interpretations; and*
 - b) *in the interim and until a decision is made by CoP18, Parties should treat specimens, including stockpiles, of Appendix I species of pangolin obtained when the species was listed in Appendix II, as Appendix I specimens and regulate trade in accordance with Article III of the Convention*
6. This document aims at providing a basis for the Conference of the Parties to come to a common understanding of the matter. In preparing the document, the Secretariat consulted with the Office of Legal Affairs of the United Nations, the Secretariat of the World Trade Organization and benefitted from inputs provided by Parties and other stakeholders.

Legal basis

7. The requirements for trade in specimens of species included in Appendix I, II or III are set out in Articles III, IV and V, respectively. Article VII contains the exemptions and other special provisions relating to trade. Article VII, paragraph 2, states that:
 2. *Where a Management Authority of the State of export or re-export is satisfied that a specimen was acquired before the provisions of the present Convention applied to that specimen, the provisions of Articles III, IV and V shall not apply to that specimen where the Management Authority issues a certificate to that effect.*
8. The text of the Convention does not contain any explicit provisions concerning the situation where a species is first included in Appendix II or III and subsequently transferred to Appendix I at which point trade in specimens of the species occurs. However, transfer of species occurs almost at every meeting of the Conference of the Parties⁴, and the matter has therefore been discussed at several meetings of the Conference of the Parties (including CoP4, CoP5, CoP7 and CoP13). Recommendations on the issue were also included in past resolutions.

Brief recapitulation of past discussions and recommendations

Resolution Conf. 4.11

9. Resolution Conf. 4.11 on *Interpretation of "Pre-Convention Acquisition"* contained the following provision:

RECOMMENDS

- a) *that changes of status of a species from one appendix to another, subsequent to the dates referred to above [defining pre-Convention], be not considered in determining when the provisions of the Convention applied to a particular specimen;*

³ See summary record of SC69 for the full details of the discussion as well as the statements for the record ([SC69 SR](#)). The recommendation was adopted by a vote of the Standing Committee (11 in favour, 3 against and 1 abstention).

⁴ The notification to the Parties issued by the Secretariat after each meeting of the Conference of the Parties with the amendments to the appendices clearly indicates which species have been transferred from one appendix to another and which have been included without being transferred. See for instance Notification No. 2016/063 on Amendments to Appendices I and II of the Convention: <https://cites.org/sites/default/files/notif/E-Notif-2016-063.pdf>

Resolution Conf. 5.11

10. For the fifth meeting of the Conference of the Parties, one Party put forward a proposal to amend Resolution Conf. 4.11 to address remaining challenges in implementing Article VII, paragraph 2, as well as new problems posed by the Resolution, including clarity on the implication of the transfer of a species from one Appendix to another. The proposal,⁵ which was endorsed by the Secretariat at the time, suggested to replace the paragraph a) in Resolution Conf. 4.11 mentioned above with the following text:

- *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 specimen concerned shall be subject to the provisions applicable to them at the time of export, re-export or import;*

11. At the meeting, another Party proposed an alternative text to the above proposal to avoid that the “resolution would encourage excessive taking and stock-piling of the species for which there are uplisting proposals.” The alternative text was adopted by a vote of 37 in favour and three against and the new Resolution Conf. 5.11 on *Definition of the term ‘pre-Convention specimens’* therefore included paragraph (h) as follows:

The Conference of the Parties RECOMMENDS that

- (h) *in the case of a species uplisted, i.e. from Appendix III to II or I, or from Appendix II to I, or downlisted from Appendix I to II or III specimens concerned shall be subject to the provisions applicable to them at the time of export, re-export or import...⁶*

12. Thus, at the 4th and 5th meetings of the Conference of the Parties, the Conference of the Parties considered that the rules applicable at the time of the trade transaction, not at the time of the acquisition⁷ of a specimen, should be applied to the transaction.

Seventh meeting of the Conference of the Parties

13. This was confirmed at CoP7, to which the Secretariat prepared and submitted document 7.43.1 on *Consequences of the transfer of the African elephant from Appendix II to Appendix I*⁸. The Secretariat explained the purpose of the document as follows:

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. . . .*
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. . . .*

In the document, the Secretariat stated *inter alia* the following:

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-*

⁵ Doc.5.31 and annex

⁶ CITES, *Proceedings of the Fifth Meeting of the Conference of the Parties, Buenos Aires (Argentina), 22 April to 3 May 1985, Volume 1, p.52, 115 and 473.*

⁷ The term “acquisition” in this document means removed from the wild or born in captivity/artificially propagated in accordance with Resolution Conf. 13.6 (Rev. CoP16)

⁸ [Document 7.43.1 on Consequences of the transfer of the African elephant from Appendix II to Appendix I](#) prepared by the Secretariat for the seventh meeting of the Conference of the Parties (CoP7, Lausanne, October 1989)

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. . . .

Resolution Conf. 13.6 (Rev. CoP16)

14. Resolution Conf. 5.11 was replaced by Resolution Conf. 13.6 (Rev. CoP16) at the 13th meeting of the Conference of the Parties. Through a Notification to the Parties, the Secretariat invited the Parties to inform it of the resolutions that were considered difficult to implement at the national level or that were not implemented, and to provide an indication of the problems encountered or the reasons for non-implementation.⁹ On the basis of the responses received, the Secretariat reviewed Resolution Conf. 5.11 and prepared a new draft resolution on the issue. The new draft Resolution prepared by the Secretariat and included in document CoP13 Doc. 16 (annex 2a) did not include paragraph (h) of Resolution Conf. 5.11.
15. The document included the Secretariat's explanation of the main changes, including the following (emphasis added)
- a) *The draft resolution clarifies that the date from which the provisions of the Convention apply to a specimen is the effective date on which the species concerned was first included in one of its Appendices. **This date is used in determining whether or not a specimen is pre-Convention and obviously does not change when a species is transferred from one Appendix to another.***
- ...
- c) *Instead of the complex puzzle that exists, to decide which of many possible dates apply, where and to what, **it is proposed that all Parties use the date referred to in paragraph a) above to decide whether or not to issue a pre-Convention certificate.** . . .¹⁰*
16. The document did not provide further background to the reasons for omitting the inclusion of paragraph (h) in the Resolution. The summary record does not contain further explanation of this amendment either. Resolution Conf. 13.6 (Rev. CoP16) on *Implementation of Article VII, paragraph 2, concerning 'pre-Convention specimens'* as adopted by the Parties therefore does not explicitly state which rules apply in the cases of transfer of species from one Appendix to another.
17. The history of this regulatory issue shows that both interpretations have been considered by the CITES Parties. The interpretation requiring that the date of removal from the wild of the specimen be the governing date for determining which rules apply to future international trade in the specimen was rejected by the Parties at the 5th meeting of the Conference of the Parties. The competing interpretation requiring that the time of export, re-export or import (and introduction from the sea) be the governing date for determining which rules apply to international trade in the specimen was upheld in Resolution Conf. 5.11 at CoP5, and

⁹ CITES, *Proceedings of the Thirteenth Meeting of the Conference of the Parties, Bangkok (Thailand), 2 to 14 October 2004, CoP13 Doc.16 (Rev.1), p. 2 and Annex 2(a).*

¹⁰ CoP13 Doc.16 (Rev. 1), annex 2, paragraph 5 (a)

again at CoP7. At CoP13, the new Resolution was intended to simplify the text, providing no explicit explanation of the omission of the paragraph that had been included before.

Possible interpretation

18. As there are no specific provisions in the Convention and at present differing interpretations of recommendations provided in the Resolutions of the Conference of the Parties concerning the question of which rules apply to a specimen acquired before the transfer of a CITES-listed species from Appendix III or II to Appendix I, the Vienna Convention of the Law of Treaties (VCLT) may provide some guidance. According to paragraph 1 of Article 31 of the VCLT, “[a] treaty shall be interpreted in good faith in accordance with the **ordinary meaning** to be given to the terms of the treaty in their **context** and in the light of its **object and purpose**.”

Ordinary meaning

19. The ordinary meaning of the Convention with regard to trade in specimens of species listed in Appendix I is set out in Article III which clearly stipulates in paragraph 1 that “*all trade in specimens of species listed in Appendix I shall be in accordance with the provisions of this Article*”. Article IV, paragraph 1, and Article V, paragraph 1, contain equivalent stipulations with regard to specimens of species included in Appendix II or III, respectively. Each of these Articles establishes requirements for export, import, re-export and introduction from the sea of specimens of species included in Appendix I, II, or III, respectively.
20. With regard to species included in Appendix I, paragraph 2 of Article III requires that export of any specimen shall require the prior grant and presentation of an export permit and further that “*an export permit shall only be granted when the following conditions have been met:*

- (a) *a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;*
- (b) *a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;*

[...]

- (d) *a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.*

Paragraph 3 of Article III requires the import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate and further that “an import permit shall only be granted when the following conditions have been met:

[...]

- (c) *a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.*

21. Two provisional conclusions can be drawn from the ordinary meaning: 1) the controlling date(s) for the application of the rules of a specific Appendix is the date of issuance or the control of a CITES permit or certificate (the date of the trade regulated under CITES); 2) the rules relating to a particular Appendix apply to *any* specimen, regardless of when it was acquired.

Object and purpose of the Convention

22. Article III also needs to be interpreted in light of the object and purpose of the Convention. Here, the preamble of the Convention is important, and the fourth consideration seems particularly relevant:

*Recognizing, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against **over-exploitation through international trade.***

23. It is recalled, in this respect, that a number of Parties have voiced a concern over the interpretative approach under which the rules that should apply to a specimen are those that were in force on the date of the acquisition of a specimen. Those concerns relate to the over-exploitation of a species and excessive

stockpiling which may occur prior to the entry into force of that amendment,¹¹ including during the 90-day period after the decision of a transfer of a species from one Appendix to another.

24. On the other hand, the interpretation which follows from the ordinary meaning of Article III, under which the governing date for the application of the rules is the date of trade regulated under CITES Article III, does not raise similar concerns of over-exploitation. It can therefore be considered that such an interpretation is supported by the object and purpose of the treaty.

Context and relevance of Article VII, paragraph 2

25. According to the VCLT Article 31, paragraph 2, the context for the purpose of the interpretation of the Convention shall comprise the text of the treaty, including its preamble and annexes. As noted before, neither Article VII, paragraph 2 of the Convention, nor Resolution Conf. 13.6 (Rev. CoP16) regulate explicitly the situation of the transfer of a species from Appendix III or II to Appendix I.

26. Article VII is of a special character as indicated by the title '*Exemptions and Other Special Provisions Relating to Trade*' which suggests that it is a provision that relates to the special circumstances listed in the paragraphs of Article VII. Where those special circumstances occur in the case of Article VII, paragraph 2, the provisions of Articles III, IV and V do not apply. Therefore, Article VII, paragraph 2 leads to the disapplication of the rules that normally apply to the trade in specimens of CITES-listed species, but only where "a specimen was acquired before the provisions of the present Convention applied to that specimen" and it should therefore be interpreted strictly.

27. Some Parties have suggested that by virtue of analogy with Article VII, paragraph 2, the situations of transfer should be treated in the same manner, i.e. the date of acquisition being the governing date for determining which rules should apply. However, this interpretation does not seem to be appropriate. First, as discussed above, the ordinary meaning of Articles III, IV and V and the object and purpose of the Convention suggest that a different interpretation is appropriate: normal rules of Article III, IV and V apply to any specimen of a CITES-listed species with the date of trade¹² regulated under CITES being the governing date. Second, Article VII, paragraph 2 is an exemption disapplying general rules of Article III, IV and V in relation to 'pre-Convention specimens'. There is nothing in Article VII, paragraph 2 that indicates its relevance to the issue of transfer of species from one Appendix to another. It is argued that making general rules of Article III inapplicable to specimens acquired while the species concerned is listed in the CITES Appendix II or III would amount to a special exemption. At a minimum, such an exemption would require some textual basis in the Convention, which is absent in Article VII, paragraph 2 and cannot be extended by mere analogy.

28. This is further supported by paragraph 4 of Article II, which states:

The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.

29. The plain meaning of this provision is that any trade in specimens of CITES-listed species should follow the provisions of the Convention. This is further supported by paragraph 1 of Article II which states that:

Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

30. Based on the above, the Secretariat proposes that in the case where a specimen was acquired (removed from the wild or born in captivity/artificially propagated) while the species was listed in Appendix III or II and the species is subsequently transferred to Appendix I, the specimen concerned should be subject to the provisions of Article III at the time of international trade (export, import, re-export or introduction from the sea).

¹¹ Article XV, paragraph 1(c) of the Convention.

¹² It is noted that "the date of trade" is the date of export, re-export, import or introduction from the sea.

Implications of the proposed interpretation

31. At SC69, the Standing Committee further recommended that the Secretariat include information on the implications associated with the different interpretations. In the following, the Secretariat discusses the issue of retroactivity and the implications for international trade.

Non-retroactivity of CITES provisions

32. The first issue concerns the possible retroactive application of Article III of the Convention to specimens of species transferred to Appendix I if the date of the trade is used to determine the requirements for trade.
33. If a CITES transaction of any kind took place in the past and, in the meantime, the relevant CITES rules have evolved or changed, the question arises whether the old or the current provisions are to be applied. As a common rule, the provisions of the Convention do not apply to past transactions or events. This is the "principle of non-retroactivity of law". The essence of this principle implies that the effect of a law does not extend to past facts or situations and cannot pass judgment on events which occurred prior to its entry into force. Instead, a law only applies to events that occur after its entry into force. Thus, the date of entry into force is the decisive factor in determining the applicability of a law.
34. This principle is codified in Vienna Convention on the Law of Treaties which states in Article 28 that (emphasis added)

*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the **date of the entry into force of the treaty** with respect to that party.*

35. In this context, the date of entry into force is the date of the application of the new listing of a species that has been transferred from one Appendix to another. The principle of non-retroactivity applies to any act or fact which took place before this date or any situation that ceased to exist. The question is then whether the provisions of the Article that regulates trade of specimens in species at the time of international trade (export, import, re-export or introduction from the sea) are being applied retroactively, if they are applied to specimens of species that were acquired prior to this date.
36. It is important to distinguish between the date of acquisition (removal from the wild or born in captivity/artificially propagated) and the date of the trade transaction. These are not the same. The provisions in Article III concern the trade ("all trade in specimens of species included in Appendix I shall be in accordance with the provisions in this Article"). These provisions only regulate trade in species that are included in the Appendices from the date of the entry into force of the listing in Appendix I. The provisions are not applicable to trade in specimens of species that are not yet included in the respective appendices. There is thus no relevant act or fact that took place before the date of the entry into force.
37. With regard to a situation that ceased to exist, it is similarly considered that the Convention is not being applied retroactively with the proposed interpretation. The situation at hand is *which* provisions of the Convention apply to a proposed trade transaction, not *whether* the Convention applies. The latter question has already been settled by Article VII, paragraph 2. As indicated above, the Secretariat understands that it is not appropriate to propose an analogy with this provision.
38. A specimen that was legally acquired under the previous rules can still be held legally. There are no changes to the status of the legality of the acquisition. Furthermore, the Convention does not regulate domestic trade, which may still be allowed even after the transfer of the species to Appendix I. What changes are the rules that apply to *international* trade.

Implications for international trade

39. It is important to take into consideration the implications for the economic operators and traders that are engaged in legal trade of specimens of CITES-listed species. Among the main concerns for such entities are predictability and transparency of the rules and their application across the jurisdictions in which they are operating, including in the situation where a species is transferred from Appendix II/III to Appendix I. If economic operators remove from the wild or otherwise acquire stocks of specimens of a species included in Appendix II intended for export, they should be aware of any risks associated with such an investment in case the species is transferred to Appendix I. The Convention has taken this into account in two ways. First, proposals for amending the Appendices, including for transferring the species from one Appendix to another,

should be communicated at least 150 days before the meeting to the Secretariat. The Secretariat shall consult with other Parties on proposed amendments, which it does *inter alia* by placing all proposals on the CITES website. Secondly, proposals for amending the Appendices adopted by the Conference of the Parties only enter into force 90 days after the meeting of the Conference of the Parties at which they were adopted. This means that economic operators and traders have up to 240 days to adapt and manage the risk linked to acquiring stockpiles that can no longer be traded for commercial purposes if the species is transferred to Appendix I. The creation of these two mandatory deadlines in the text of the Convention indicates the intention of the drafters to address the issue by giving time (150 days) for consideration of the amendments before the Conference of the Parties and for the implementation of the new listings after it (90 days), to which the duration of the meeting of the Conference of the Parties itself should be added.

40. Annotations may be also adopted or changed at the meeting itself which could have an influence on the scope of an amendment proposal. This is an additional element to consider. In this context, it is noted that amendments to a proposal for amending Appendix I or II are only allowed to reduce scope or to make it more precise. Thus, traders are on notice at the time of a proposal as to the potential scope of its effect.
41. Once an amendment proposal to transfer a species to Appendix I is adopted but not yet entered into force, the previous rules still apply. This means that Parties can still apply the current trade provisions until the new listings have entered into force. For example, a Party can issue an export permit for a specimen of a species included in Appendix II in accordance with the provisions of Article IV, even after the Conference of the Parties has adopted the amendment to include the concerned species in Appendix I as long as the amendment has not entered into force. During this 90-day period, traders have the possibility of exhausting stockpiles that they will not be able to trade for commercial purposes after the entry into force of the amended Appendices. As noted above, the date determining whether to apply Article III, IV or V is the date the authorities are determining that the conditions are met and therefore authorizing the trade.
42. With regard to the import of specimens of species that have been transferred from one Appendix to another, it is the date of import that applies. Practical consequences arise when an export permit has been issued while the species was included in Appendix II and the transaction is underway and only completed after the entry into force of the transfer of the species to Appendix I. There is no practical guidance on which rules should apply to this specific case.
43. In the view of the Secretariat, it can be argued on the one hand that the export permit remains valid and the State of import should therefore accept the import. On the other hand, it can be argued that the State of import cannot accept the trade as this now requires an import permit and cannot be for primarily commercial purposes in accordance with Article III of the Convention. The exporter who has a valid export permit may expect that the shipment will be accepted as at the time of export there was no requirement to obtain an import permit. However, the State of import is expected to apply the current rules to current trade and should deny the import.
44. If the Conference of the Parties were to agree on developing practical guidance on this issue, one possibility would be to recommend that the validity of any export permit or re-export certificate issued from the time an amendment transferring a species from Appendix II to Appendix I has been adopted by the Conference of the Parties until that listing entered into force should be limited to the date of the entry into effect of the new listing. In other words, no export permit or re-export certificate could be issued with a period of validity beyond the date of the entry into force of the new listing. This could be done through an amendment to Resolution Conf. 12.3 (Rev. CoP17) on *Permits and certificates*. In view of the Secretariat, this would comply with Article VI, paragraph 2 of the Convention, which states that an export permit "*may only be used for export within a period of six months from the date it was granted*". It does not require the period of validity of an export permit to be a full six months.
45. If the Conference of the Parties does not agree on a solution for this issue, the Secretariat recommends that Management Authorities inform exporters of the change in rules and urge them to ensure that the physical trade transaction be completed before the amended listing enters into force, otherwise they run the risk of the shipment being refused entry or confiscated by the authorities of the importing State.
46. The Secretariat also recommends that Parties, notably range States, in their preparation for meetings of the Conference of the Parties, make efforts to assess carefully all the trade implications of an uplisting proposal and inventory any relevant stockpiles of specimens of species that may be subject to a transfer to Appendix I. This would anticipate any potential implementation problems of the new listings, while informing their position on an amendment proposal. The information could also be taken into consideration during the deliberations of the Conference of the Parties and contribute to ensuring that the amendment proposal is as sound and complete as possible.

47. In cases where an amendment proposal to transfer a species from Appendix II to Appendix I is adopted and relevant stockpiles of specimens of that species exist in a Party, the Party may consider entering a temporary reservation in accordance with Article XV, paragraph 3 of the Convention to be treated as a State not a Party to the Convention with respect to trade in specimens (including declared stockpiles) of the species concerned. According to Resolution Conf. 4.25 (Rev. CoP14) on *Reservations*, the Conference of the Parties recommends that the Party treat the species as if it were included in Appendix II for all purposes, including documentation and control. Therefore, the Party would be able to export the stockpile in accordance with the provisions of Article IV to another Party that has made a similar reservation. Once the stockpile has been traded, the Parties could withdraw the reservation and apply the normal provisions of the Convention. A Party finding itself obliged to enter a reservation to exhaust a stockpile should take all necessary measures to reduce or avoid any misuse, i.e. by publicly declaring the volume of the stockpile and establishing a national export quota corresponding to the stockpile. The Secretariat notes that recognizing that the option exists for a Party to enter a reservation in accordance with Article XV of the Convention when Appendix I or II is amended, should not be read as an endorsement of or limitation on the practice.
48. In some instances, the Conference of the Parties have given additional time to economic operators and others by delaying the application of a listing. However, this has not been used in the case of transfer of a species from Appendix II to Appendix I. Delaying an application of Appendix I listing could cause severe and possibly irreversible impact on the conservation status of the species and should be avoided. In the case of a transfer from Appendix III to Appendix II, the situation is slightly different. The Secretariat notes that a delayed application of a listing is not provided for in the Convention.

Transfer of annotated plant species to Appendix I

49. There may be additional implications and issues in the case of a transfer of a plant species from one Appendix to another or amendment of an annotation associated with a plant species listing. This may arise in the case of a transfer of an annotated listing to Appendix I, where all parts and derivatives are covered by the plant listing, or in other cases where an annotation associated with the plant listing is broadened. Although the pre-Convention date is still the date from which the provisions of the Convention first applied to the specimen, it may be difficult to prove that the specimen was not derived from a plant that was removed from the wild or artificially-propagated after the initial CITES listing of the species in the Appendices, when the previous listing applied to a narrower scope of specimens. This may be an important consideration for Parties to keep in mind when designing and agreeing on annotations for proposals to transfer plant species from one Appendix to another.

Implications for trade in timber of tree species transferred to Appendix I

50. It is recalled that, in Resolution Conf. 12.3 (Rev. CoP17), the Conference of the Parties has recommended that the validity of an export permit or re-export certificate for timber of tree species included in Appendix II or III with the annotation “logs, sawn wood and veneer sheet”¹³ may be extended beyond the normal maximum of six months after the date of issue on certain conditions.¹⁴ The Conference of the Parties may wish to consider modifying this recommendation to align with any new recommendation to limit the validity of the export permit or re-export certificate to the date of the entry into effect of the new listing. Noting that this is an exceptional circumstance not provided for in the Convention, Parties exercising this provision should be mindful of the consequences of a potential transfer to Appendix I from the time a proposal to transfer a species to Appendix I is submitted (150 days in advance of a meeting of the Conference of the Parties) and consider reverting to the normal practice of maximum of six months at that time. As mentioned above, allowing more time to adjust to the new trade regime when a species is transferred to Appendix I carries certain risks and enforcement challenges and needs to be considered carefully. The Secretariat has therefore not made any proposals in this regard.

Transfer of species from Appendix III to Appendix II

51. As recommended by the Standing Committee, this document addresses the situation where a species has been transferred from Appendix II/III to Appendix I. The Secretariat notes, however, that the legal arguments and the conclusions would be very similar in the case of a transfer from Appendix III to Appendix II. Further, the Secretariat recalls that previous versions of Resolution Conf. 13.6 (Rev. CoP17) (Resolution Conf. 4.11 and Conf. 5.11) did not make any distinction between transfers from one Appendix to another. During the

¹³ Annotation #5 Logs, sawn wood and veneer sheets, e.g. included for *Pericopsis elata*.

¹⁴ See paragraph 18 of the Resolution

course of debate over Resolution Conf. 13.6 in Committee II at CoP13, a delegation “*suggested that species included in Appendix III be exempt from this resolution. The Secretariat stated that Resolution Conf. 5.11 had applied to all species in Appendices I, II and III and, since the purpose of the review was only to simplify the text, it urged the Parties to agree it as presented.*”¹⁵ The Secretariat therefore proposes that the same approach should be applied for transfers from Appendix III to Appendix II.

Conclusions

52. Based on the above findings and considerations, the Secretariat considers that the following dates are relevant for determining how to apply the provisions of the Convention: the date the species concerned was first included in any of the CITES Appendices, the date the specimen was acquired (removed from the wild, born or bred in captivity, or artificially propagated), the date of the authorization of export, re-export, import or introduction from the sea and the date of the control of trade. Except in the situation where the exemption in Article VII, paragraph 2, applies, the Secretariat proposes that in the case a species is transferred from Appendix III or II to Appendix I, specimens concerned shall be subject to the provisions applicable to them at the time of export or import, i.e. that current rules are applied to current trade transactions. There should be no “pre-Appendix I” treatment for specimens acquired while the species was included in Appendix II or Appendix III. The Secretariat further proposes that the same approach should apply where a species has been transferred from Appendix III to Appendix II.
53. In order to ensure that all Parties and other stakeholders apply this interpretation, the Secretariat proposes to clarify this in a resolution. In the past, this clarification has been made in Resolution Conf. 13.6 (Rev. CoP16) on *Implementation of Article VII, paragraph 2 concerning ‘pre-convention’ specimens*. However, the Secretariat considers that the issue concerns the implications of the transfer of a species from one appendix to another and possible ‘transition arrangements’ which is different and separate from the use of the exemption for ‘pre-Convention’ specimens. As noted above, the Secretariat also considers that a recommendation in Resolution Conf. 12.3 (Rev. CoP17) on *Permits and certificates* with regard to the validity of permits and re-export certificates issued in the ‘transition period’ might be helpful. To address the immediate concerns raised at SC69, the Secretariat proposes amending Resolutions Conf. 12.3 (Rev. CoP17) and 13.6 (Rev. CoP16) for the consideration of the Conference of the Parties.
54. Furthermore, the Secretariat recommends that the Standing Committee be requested to consider whether further guidance should be developed on these issues, and if so, whether a separate resolution on this matter would be appropriate. This would also allow further reflection of the export of certain timber specimens.
55. The Secretariat considers that there are implications for the workload of the Secretariat or the Committees of the proposed draft amendments and decisions, but no budgetary implications.

Recommendations

56. The Secretariat recommends that the Conference of the Parties
 - a) adopt the draft decision presented in annex 1 to the present document;
 - b) adopt the proposed amendment to Resolution Conf. 12.3 (Rev. CoP17) on *Permits and certificates* included in Annex 2 to the present document; and
 - c) adopt the proposed amendment to Resolution Conf. 13.6 (Rev. CoP16) on *Implementation of Article VII, paragraph 2, concerning ‘pre-Convention specimens’* contained in Annex 3 to the present document.

¹⁵ <https://www.cites.org/sites/default/files/eng/cop/13/rep/E13-ComIIRep6.pdf>

DRAFT DECISION TO BE CONSIDERED AT COP18

Directed to the Standing Committee

- 18.AA The Standing Committee shall, with the assistance of the Secretariat, consider whether further guidance related to the period of transition, including the period between the adoption of a proposal to transfer a species from one Appendix to another and the entry into force of the new listing, should be developed and, if so, present amendments to an existing Resolution or a new draft resolution to the 19th meeting of the Conference of the Parties. In this context, the Standing Committee shall consider, in consultation with the Plants Committee, as appropriate, whether special recommendations should apply in the case of a transfer of a tree species with Annotation #5 or other annotated plant species.

AMENDMENT TO RESOLUTION CONF. 12.3 (Rev. CoP17)

New section IV in Resolution 12.3 ***Regarding the issuance of permits and certificates after the transfer of a species from one Appendix to another***

10. RESOLVES that in the case a species is transferred from Appendix III to II or I, or from Appendix II to Appendix I, specimens concerned shall be subject to the provisions applicable to them at the time of export, re-export, import or introduction from the sea;
11. RECOMMENDS that, in the case of a listing proposal adopted by the Conference of the Parties to transfer a species to Appendix I, the Management Authority ensures that any permit or certificate for trade in that species be valid only until the date that the new listing in Appendix I enters into force and that this be indicated in box 2 of the permit.

AMENDMENT TO RESOLUTION CONF. 13.6 (Rev. CoP16)

In paragraph 1, insert the following as a new subparagraph:

- c) only specimens acquired before the date on which the species concerned was first included in the Appendices qualify for this exemption;

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.

The Secretariat considers that the present proposals have no budgetary implications for the Secretariat or the Standing Committee. They will have some implications for the workload of the Secretariat and the Standing Committee.