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

TRADE IN 'PRE-APPENDIX-I' SPECIMENS

1. This document has been submitted by Côte d'Ivoire, Nigeria and Senegal.*

Background

2. At the 69th meeting of the Standing Committee, the CITES Secretariat submitted SC69 Doc. 57 on pangolins that stated the following:

> "[t]o 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 CoP17, the Standing Committee may wish to recommend that Parties declare such stocks to the Secretariat prior to authorizing any commercial trade in it, and provide scanned copies of any permits or certificates issued to authorize such trade to the Secretariat. The Standing Committee may further wish to recommend that Parties do not accept any permits or certificates issued for stocks that were obtained in accordance with the provisions of the Convention prior to the transfer of all pangolin species to Appendix I at CoP17, unless the Secretariat verifies that such stocks have been declared to it and that the permit or certificate issued was provided to the Secretariat."

3. In other words, the Secretariat's view was that specimens of pangolins acquired prior to the inclusion of a pangolin species in Appendix I should be treated as Appendix II specimens. Many Standing Committee members and Parties disagreed with the Secretariat's interpretation. Consequently, the Standing Committee adopted the following decisions, recorded in SC69 Com. 9:

> 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 recommends that:
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> a) the Secretariat prepare a document for consideration at CoP18, including information relating to the implications associated with the different interpretations; and

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* *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.*

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.[1]

4. This issue is of critical importance to many high-value species, and as such, the proponents submit this document to ensure that the relevant legal arguments and a recommendation in line with these arguments and policy concerns are before the Parties for their consideration.

Discussion

5. Clarity is important regarding trade in specimens acquired or stockpiled while the species was in Appendix II but subsequently transferred to Appendix I. Basic considerations such as administrative and enforcement challenges dictate the necessity of a common, clear understanding regarding so-called "pre-Appendix I specimens."

6. The Parties have long agreed that it is the timing of the trade that determines the applicability of CITES, not the date of acquisition, except in those cases where the pre-Convention exemption found in Article VII, paragraph 2, applies. Additionally, rules of interpretation of treaties under international law are clear that the plain meaning and scope of Article VII, paragraph 2, is narrow and does not provide the authority that the Secretariat suggests in SC69 Doc. 57. Finally, the argument that this interpretation violates the principle of non-retroactivity of the law is without merit.

7. Without such clarity, enforcement challenges arise, especially for some of the most high-value wildlife species for which Parties are working diligently to conserve and protect. For trade in pangolins, (*Manis spp.*), for example, it would be impossible to distinguish between specimens acquired or stockpiled while in Appendix II from those acquired or confiscated while in Appendix I. These are the precise enforcement challenges the Parties intended to avoid when previously agreeing that trade in all such specimens be subject to the provisions applicable to them at the time of export, re-export, introduction from the sea, or import.

8. Moreover, the Secretariat's SC69 interpretation would create perverse incentives to stockpile specimens of species that have been proposed for inclusion in Appendix I. Traders, seeing the possibility that trade for primarily commercial purposes might be banned, would seek to amass as many specimens as possible in the 150 days after a proposal to include a species in Appendix I becomes public. In addition, traders would presumably engage in similar behavior in the 90 days after the Parties agree to include a species in the Appendix I, since the new listing does not take effect until 90 days after the decision.

Previous Interpretations

9. The Parties have consistently agreed that no so-called "pre-Appendix I" exception exists. Historically, the Parties have expressed this understanding in resolutions regarding Article VII, paragraph 2.

10. In the first such resolution, Resolution Conf. 4.11, the Parties made clear in no uncertain terms that "changes in status of a species from one Appendix to another … shall not be considered in determining when the provisions of the Convention applied to a particular specimen."

11. Resolution Conf. 5.11 replaced Resolution Conf. 4.11. In negotiating Resolution Conf. 5.11, the Parties considered a proposal by the Netherlands that specimens be traded "subject to the provisions applicable to them at the date of acquisition." However, the Parties rejected this proposal and instead agreed to exactly the opposite, deleting "at the date of acquisition" and changing the language to "at the time of export, re-export, or import." Resolution Conf. 5.11 thus read:

"h) in the case of a species uplisted, i.e. from Appendix III to II or I, or from Appendix II to I, or down listed 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;"

12. In other words, the Parties have already explicitly rejected the same argument made by the Secretariat at SC69. The Parties have been consistently clear that other than for specimens acquired before the date of listing on any one of the Appendices, the date of the trade determines the applicability of the CITES permit

[1] *The People's Republic of China regards sub-paragraph b) as a voluntary stricter measure in accordance with Paragraph 1 of Article XIV of the Convention that is a right instead of an obligation of a Party.*

regime. In the case of specimens acquired while a species was in Appendix II but exported after the species was put in Appendix I, the provisions of Article III apply.

13. Nothing in Resolution Conf. 13.6 (Rev. CoP16), which replaced Resolution Conf. 5.11, changes this understanding. The Secretariat is mistaken when it argues that paragraph 3 of Resolution Conf. 13.6 (Rev. CoP16) provides evidence for its interpretation. In fact, paragraph 3, which calls on Parties to prevent excessive acquisition of specimens prior to an Appendix I listing coming into effect, is the same language that was included in Resolution Conf. 5.11. This language reflects longstanding concern regarding the stockpiling and trade in specimens prior to an uplisting going into effect. Calling on Parties to prevent excessive acquisition cannot be read to contradict the decades-long understanding that the Convention applies based on the date of trade, not the date of acquisition.

14. The Secretariat's reading of paragraph 3 in Resolution Conf. 13.6 (Rev. CoP16) to create an exemption not provided for in the treaty contradicts the treaty itself but also international legal principles regarding treaty interpretation. CITES exemptions should be read in accordance with international law, which provides precisely that exemptions are interpreted narrowly as a general rule of treaty interpretation.[2] The maxim *exceptioeststrictissimaeapplicationis*, that exemptions should be interpreted narrowly, has been applied by several international bodies tasked with interpreting treaties.[3] Parties should bear this maxim in mind when interpreting and applying any deviation from Articles III, IV, and V of CITES.

<u>The principle of non-retroactivity does not apply</u>

15. The concern that the longstanding interpretation by the Parties violates the principle of "non-retroactivity of the law" is simply without merit. The principle has application in both international and domestic law. In the context of the application of treaties, the principle exists to ensure that the provisions of a treaty do not bind Parties regarding acts or facts occurring *prior to* the entry into force of the treaty. Paragraph 28 of the Vienna Convention on the Law of Treaties provides the following:

> **"**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."

16. An important distinction exists in applying this rule. While CITES cannot retroactively change the legality of past acts of trade, it can be applied to current or future acts of trade regardless of when the specimen was acquired because acquisition and trade are two separate acts. Since CITES only regulates trade, the non-retroactivity rule of treaty interpretation only applies to the act of "trade" in the CITES context. Said another way, since CITES does not make acquisition of listed specimens illegal, the non-retroactivity rule does not apply to past acquisition.

17. As applied to CITES, this rule means that CITES cannot be interpreted to regulate any *trade* that took place prior to its entry into force. If a specimen was exported while the species was listed on Appendix II, the entry into force of an up-listing to Appendix I of that species cannot render that act of trade illegal retroactively.

18. As applied in domestic law, the principle exists to ensure that individuals who engage in legal activities are not prosecuted for violating a law that subsequently prohibits those activities. In applying this principle, the critical element is to definite the "activity," just as in the case of applying the rule of treaty interpretation. In the case of domestic implementation of CITES, the activity of concern is trade, i.e. import, export, re-export, or introduction from the sea. If an individual had exported an Appendix II specimen lawfully prior to the

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2 *See* Interpretation of Article 79 of the 1947 Peace Treaty (French/Italian Conciliation Commission)UNRIAA vol. XIII, p. 397 ("Parmi les règles techniques de l'interprétation des traités, il y a l'adage exceptioeststrictissimae applications.").

3 Italian-United States Conciliation Commission established under Article 83of the treaty of Peace with Italy (Italy, United States), Flegenheimer Case—Decision No. 182 of20 September 1958, UNRIAA vol. XIV, 383 ("It should be furthermore considered that the provision contained in Article 78, paragraph 9 **(a),** sub-paragraph 2 of the Treaty of Peace, is a rule of an exceptional character, in that it extends the diplomatic protection of the United Nations to persons who are not their nationals; like every exception, it must be interpreted in a restrictive sense, because it deviates from the general rules of the Law of Nations on this point."); Case Concerning Certain German Interests in Upper Silesia PCIJ, Series A, No. 7, p. 76 (1926), available at https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polonaise_Fond_Arret.pdf("It should be observed, moreover, that the liability to expropriation of rural property constitutes, under the Geneva Convention, an exception; in case of doubt as to the scope of this exception, its terms must therefore be strictly construed."); and Free City of Danzig case, PCIJ Series A/B, No. 65 at 71 (1935), available at https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_AB/AB_65/04_Decrets-lois_dantzikois_Ordonnance.pdf ("Whereas the second paragraph of the said Article 71 at present constitutes the only exception to the general rule, and as therefore this exception cannot be given a wider application than is provided for by the Rules.").

inclusion of the species on Appendix I, the principle of non-retroactivity would bar a prosecutor from bringing charges against that person for unlawful commercial export once the species was included in Appendix I. However, regarding specimens acquired while a species was listed on Appendix II but *traded* while the species was on Appendix I, the principle of "non-retroactivity" simply does not apply. Acquisition and trade are two separate activities.

19. Whether considered as an international principle of treaty interpretation or a principle of domestic criminal law, the "non-retroactivity" principle does not mean that an individual who acquired specimens of an Appendix II species can trade them as Appendix II specimens after an Appendix I listing comes into force for that species.

Recommendation

20. The Parties can ensure that this interpretation is agreed by adding the following new paragraph 4 to Resolution 13.6 (Rev. CoP16) after paragraph 3:

    4. AGREES that in the case of a species that is transferred from one Appendix to another, trade in specimens of the species concerned shall be subject to the provisions of the Convention applicable to those specimens at the time of import, export, introduction from the sea, or re-export.

    4.5

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.