

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

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Interpretation and Implementation of the Convention

DEFINITION OF "PRIMARILY COMMERCIAL PURPOSES"

This document has been prepared by Denmark.

1. Background

Under Article III, paragraphs 3(c) and 5(c), of the Convention a permit can only be issued for the import or the introduction from the sea of specimens of Appendix I species if certain conditions are met. One of the three conditions is that the Management Authority of the state of import is satisfied that the specimens are not to be used for "primarily commercial purposes". This condition means that in the case of specimens of Appendix I species the Management Authority in question should seek an explanation of the import's purpose and not issue the import permit if it finds that the purpose in question is "primarily commercial".

The Convention does not contain an interpretation of the term "primarily commercial purposes" (nor of the term "commercial purposes" in paragraph 4 of Article VII nor of the term "non-commercial" in paragraph 6 of Article VII). The term "primarily commercial purposes" (as well as the other terms mentioned) may therefore be interpreted by the Parties in different ways, especially in the light of what "commercial" or "non-commercial" normally means in the relevant internal legislation of the Parties. As a result the Convention may not be applied uniformly in an area of relatively crucial importance, since as stated it concerns one of the three conditions attached to import permits for specimens of Appendix I species.

Moreover, if one takes the Parties' differing internal legislation and legal traditions into account, it could be difficult to reach agreement on an "objective" linguistic interpretation of the term "for primarily commercial purposes". This supports the idea of defining the term as broadly as possible in such a way that all imports whose nature is not clearly "non-commercial" are regarded as "commercial". If this principle is transposed to the term "primarily commercial purposes", it means that all transactions whose non-commercial aspects do not clearly predominate must be considered to be primarily commercial in nature with the result that the import cannot be permitted.

At present it is virtually impossible to come closer to a general definition of the term in question. This means that for the time being, the term must be interpreted with close reference to the transaction at issue. It must thus be determined specifically from case to case whether the non-commercial aspects are clearly dominant.

In recognition of the above, the Parties to the Convention should agree to a very general definition of "primarily commercial purposes" and rely more heavily on a statement of general principles and illustrative examples to assess transactions on a case-by-case basis.

DRAFT RESOLUTION OF THE CONFERENCE OF THE PARTIES

Definition of "Primarily Commercial Purposes"

OBSERVING that under Article III, paragraphs 3(c) and 5(c), of the Convention, a permit for the import or a certificate for the introduction from the sea of specimens of Appendix I species may be issued only if certain conditions are met, including that the Management Authority of the state of import (or introduction from the sea) is satisfied that the specimens are not to be used for primarily commercial purposes;

RECOGNIZING that because the Convention does not define the terms "primarily commercial purposes", "commercial purposes" in paragraph 4 of Article VII, or "non-commercial" in paragraph 6 of Article VII, the term "primarily commercial purposes" (as well as the other terms mentioned above) may be interpreted by the Parties in different ways;

ACKNOWLEDGING that the Parties' differing internal legislation and legal traditions will make it difficult to reach agreement on a simple "objective" interpretation of the term and that the facts concerning each importation will determine whether a proposed use would be for "primarily commercial purposes";

RECOGNIZING that lack of specific definitions for terms involving "commercial" and the importance of the facts concerning each proposed transaction create a need for consensus by the Parties regarding general principles and examples to guide the Parties in assessing the commerciality of the intended use of those specimens of Appendix I species to be imported;

AWARE that agreement on interpreting the term "primarily commercial purposes" is important because of the fundamental principle in Article II, paragraph 1 that trade in specimens of Appendix I species must be subject to particularly strict regulation and only authorized in exceptional circumstances;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

RECOMMENDS that for the purposes of Article III, paragraphs 3(c) and 5(c), of the Convention, the following general principles and the examples in the Annex attached to the present Resolution be used by the Parties in assessing whether the importation of a specimen of an Appendix I species would result in its use for "primarily commercial purposes":

General Principles

1. Trade in Appendix I species must be subject to particularly strict regulation and authorized only in exceptional circumstances.
2. An activity can generally be described as "commercial" if its purpose is to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.
3. The term "commercial purposes" should be defined by the country of import as broadly as possible so that any transaction which is not wholly "non-commercial" will be regarded as "commercial". In

transposing this principle to the term "primarily commercial purposes", it is agreed that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature with the result that the importation of Appendix I specimens should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix I species is clearly non-commercial shall rest with the person or entity seeking to import such specimens.

4. Article III, paragraphs 3(c) and 5(c), of the Convention concern the intended use of the Appendix I specimen in the country of importation, not the nature of the transaction between the owner of the specimen in the country of export and the recipient in the country of import. It can be assumed that a commercial transaction underlies many of the transfers of Appendix I specimens from the country of export to the country of import. This does not automatically mean, however, that the specimen is to be used for "primarily commercial purposes".

ANNEX TO DRAFT RESOLUTION ON THE DEFINITION OF
"PRIMARILY COMMERCIAL PURPOSES"

Examples

The following examples recognize categories of transactions in which the non-commercial aspects may or may not be predominant, depending upon the facts of each situation. The discussions which follow each example provide further guidance in, and criteria for, assessing the actual degree of commerciality on a case-by-case basis. The list is not intended to be exhaustive of situations where an importation of Appendix I species could be found to be not "for primarily commercial purposes":

- a) Purely Private Use: Article VII, paragraph 3, of the Convention contains special rules for specimens "that are personal or household effects". The exceptions mentioned do not apply when specimens of Appendix I species are acquired by the new owner outside of his or her country of usual residence and are imported into that country. It can, however, be deduced from these provisions that specimens imported for purely private use should not be considered to be for "primarily commercial purposes".
- b) Scientific Purposes: Article VII, paragraph 6, of the Convention uses the term "non-commercial loan, donation or exchange between scientists or scientific institutions". Thus, the Convention acknowledges that scientific purposes may justify a special departure from the Convention's general procedure. The import of specimens of an Appendix I species may be permitted in those situations where the scientific purpose for such importation is clearly predominant, the importer is a scientist or a scientific institution registered or otherwise acknowledged by the Management Authority of the country of import, and the resale, commercial exchange or exhibit for economic benefit of the specimens is not the primary intended use.
- c) Education or Training: Specimens of Appendix I species may also be imported by government agencies or non-profit institutions for purposes of conservation, education or training. For example, a specimen could be imported primarily to train customs staff in effective CITES control. Imports of this type would thus be considered permissible.
- d) Exhibition Purposes: Specimens of Appendix I species may be imported for broader cultural purposes such as exhibition in public zoos. Imports for such purposes should not be prohibited solely because the public pays an entrance fee for the exhibition. Close examination of the importing institution in question is required. If the importer is private in nature, paying profits to individuals or to share-holders, an import for exhibition purposes alone will not be acceptable. Conversely, institutions which are publicly owned and those for which any profit made remains within the institution and is used for its benefit and the benefit of the public may properly import Appendix I specimens for exhibition purposes.
- e) Biomedical Industry: Close scrutiny must be applied to imports of specimens of Appendix I species in connection with the biomedical industry with an initial presumption that such importation is commercial. The purpose of the import here would be twofold: to develop products to promote public health and to sell such products, i.e., to make a profit. The latter aspect in this case would usually be considered to be

predominant and as a result, imports of this type will most often not be acceptable. However, where the importer makes a clear showing to the Management Authority of the country of import that the sale of products is only incidental to public health research and not for the primary purpose of economic benefit or profit, then such imports could fall within group b) above.

- f) Captive Breeding Programmes: Importation of specimens of Appendix I species for captive breeding purposes raises special problems. Any importation of such specimens for captive breeding purposes must be aimed at the long term protection of the affected species as required in Resolution Conf. 2.12. Some captive breeding operations sell surplus specimens to underwrite the cost of the captive breeding programme. Importations under these circumstances should be considered similar to importations for exhibition purposes in public zoos noted in group d) above: while a profit might be made, it would not inure to the personal economic benefit of a private individual or share-holder. Rather, any profit gained would be used to support the continuation of the captive breeding programme to the benefit of the Appendix I species. It should not, therefore, be assumed that importation under such circumstances is inappropriate. As for imports of captive bred specimens for captive breeding programmes for commercial purposes, Article VII, paragraphs 4 and 5, eliminates the need to address the "primarily commercial purposes" standard in Article III, paragraph 3(c).
- g) Importation via Professional Dealers: A problem occurs with examples b) through f) above if the import is via a professional dealer. In such situations, the import initially serves a commercial purpose and in principle, therefore, should be prohibited under Article III, paragraph 3(c), of the Convention. The fact that the dealer states a general intention to eventually sell the imported specimen to an undetermined zoo or scientific institution should not change this overall conclusion. In practice, living specimens are generally imported commercially with just this aim in mind. However, it would be burdensome to require scientific, educational, or zoological institutions to import specimens of Appendix I species by themselves under examples b), c), d) or f) above in order to make such importations acceptable. Therefore, importations through a professional dealer by a qualified scientific, educational, zoological or other non-profit organization may be considered acceptable if the ultimate intended use would be for one of the purposes set out in examples b), c), d), and f) above, and where a binding contract (including a contract conditioned on the granting of permits) for the importation and sale of a particular Appendix I specimen has already been concluded between the professional dealer and the purchasing institution and is presented to the Management Authority of the country of import with the import permit application. The same should apply to example e) if sale is incidental to public health and not for the primary purpose of economic benefit or profit.

If a proposed importation of a specimen of an Appendix I species fits within one of the above examples, all other applicable provisions of the Convention must still be satisfied in order for the importation to be acceptable. For example, where the primary purpose for importation is scientific study or zoological exhibition, the remaining conditions under Article III, paragraph 3 or 5, as applicable, must still be met. Thus, it is possible for an importation for scientific or zoological exhibition purposes to be inappropriate where such importation is found to be detrimental to the survival of the species or where, in the case of live specimens, it is found that the ultimate recipient of the specimens lacks facilities suitably equipped to house and properly care for the specimens.