

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

Eleventh meeting of the Conference of the Parties
Gigiri (Kenya), 10-20 April 2000

Interpretation and implementation of the Convention

AMENDMENT OF RESOLUTION CONF. 5.10 ON THE DEFINITION OF
'PRIMARILY COMMERCIAL PURPOSES'

1. This document has been submitted by South Africa.

COMMENTS FROM THE SECRETARIAT

- A. As the proponent has provided no introduction to the proposed amendments to Resolution Conf. 5.10, the justification for them can be deduced only from a reading of the proposed amendments themselves.
- B. A large number of changes are proposed, many of them being to the style or grammar. Although some of these seem appropriate, others do not.
- C. The most important proposed changes of substance however, are evidently designed to provide the possibility for live specimens of Appendix-I species to be imported for holding on private property, where the reasons for obtaining the specimens have commercial aspects but there are also potential conservation benefits that are considered predominant. It should be noted that the example described in the proposed new paragraph f) of the Annex to the Resolution, like those in some existing paragraphs, is written with animals rather than plants in mind, although the principle would also be applicable to plants.
- D. In accordance with Article III, paragraph 3(c), of the Convention, an import permit for a specimen of an Appendix-I species may be issued only when "a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes". The proposed new paragraph 4 of the operative part of Resolution Conf. 5.10 indicates that, in the case of live specimens, the purpose of import may be described as not primarily commercial when there is a demonstrable benefit of the transaction for the conservation of the species and this predominates over the economic benefit it could generate. While sympathizing with this idea, the Secretariat believes that its implementation would not be in accordance with the Convention.
- E. A similar proposal was discussed at the 10th meeting of the Conference of the Parties and the Secretariat maintains the view that it expressed at that time. What is relevant is whether the purpose of an import is primarily commercial. It is not directly relevant whether a benefit to the species can be demonstrated unless the primary purpose of the import is to benefit the species. It is already recognized in Resolution Conf. 5.10, that an import of an Appendix-I specimen may be authorized even where the purpose of the import is to some extent commercial. The Management Authority of the State of import has only to satisfy itself that, if there is more than one purpose for the proposed import of a specimen, the non-commercial purposes predominate. This judgement can be quite difficult to make in practice and Resolution Conf. 5.10 provides some guidance in the form of examples, to which South Africa wishes to add one.
- F. For the reasons above, the Secretariat cannot support the proposed amendments in their current form but believes that the Conference of the Parties could provide guidance regarding issuance of permits in the case dealt with in this document. This would require further consideration during the meeting.

DRAFT RESOLUTION OF THE CONFERENCE OF THE PARTIES

Amendment of Resolution Conf. 5.10 on the definition of
'primarily commercial purposes'

(Note: additions in italics; deletions in [square brackets])

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] a 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 tradition will make it difficult to reach agreement on a simple 'objective' interpretation of the term '*primarily commercial purposes*' and that the facts concerning each importation will determine whether a proposed use would be for such ['primarily commercial] purposes['];

RECOGNIZING that lack of specific definitions for terms involving *the word* '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, of the Convention that trade in specimens of Appendix-I species must be subject to particularly strict regulation and only authorized in exceptional circumstances;

RECOGNIZING that the Conference of the Parties, when adopting Resolution Conf. 5.10, Definition of 'primarily commercial purposes', at its fifth meeting (Buenos Aires, 1985), was actually unable to define the term and simply recommended general principles and agreed upon examples included in the Annex to the Resolution to guide the Parties in their evaluation of the commercial aspects of imports of specimens of Appendix-I species;

RECOGNIZING further that the general principles so recommended were extremely strict, the Parties being asked to regard any transaction not wholly non-commercial as commercial and this principle being transposed to the term primarily commercial purposes, and were ignoring that transactions may have purposes primarily beneficial, directly or indirectly, to the conservation of the species concerned, although the import might have some commercial aspects;

The general principles should be amended as follows (additions in italics; deletions in [square brackets]):

1. Trade in specimens of Appendix-I species must be subject to particularly strict regulation and authorized only in exceptional circumstances.
2. An activity can generally be described as *primarily* commercial if its purpose is *primarily* to obtain economic benefit, including profit (whether in cash or in kind) and is directed towards resale, exchange, *production of offspring for sale*, provision of a service or other form of economic use or benefit.
3. *Except when general principle 4 applies*, the [The] term '*primarily* 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'] *Consequently*, it is agreed that [all] uses whose non-commercial aspects do not clearly predominate [shall] *should* be considered to be primarily commercial in nature with the result that the importation of specimens of Appendix-I [specimens] species should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix-I species is clearly *primarily* non-commercial [shall] *should* rest with the person or entity seeking to import such specimens.

4. *The purpose of import of live specimens of Appendix-I species may be described as not primarily commercial when the benefit of the transaction for the conservation of the species can be adequately demonstrated and clearly predominates over the economic benefit or profit it could generate.*

[4] 5. Article III, paragraphs 3(c) and 5(c), of the Convention concern the intended use of [the] specimens of Appendix-I species in the country of import[ation], not the nature of the transaction between the owner of the specimens 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 specimens of Appendix-I species from the country of export to the country of import. This does not automatically mean, however, that the specimens *are* [is] to be used for [']primarily commercial purposes['].

ANNEX

Examples

The examples in the Annex should be amended as follows (additions in italics; deletions in [square brackets]):

The following examples recognize categories of [transactions] *intended uses, in the country of import*, in which the [non-commercial] *primarily non-commercial* aspects may or may not be predominant, depending upon the facts of each situation. The discussions that 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 specimens 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] provisions for specimens "that are personal or household effects". The [exceptions] *exemptions* 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, *such as in the case of tourist souvenir specimens. In addition, tourist souvenir specimens, in accordance with Resolution Conf. 10.6 adopted at the 10th meeting of the Conference of the Parties (Harare, 1997), should not include live specimens.* 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 acknowledged by the Management Authority of the country of import for purposes of conservation, education or training. For example, [a] specimens could be imported primarily to train Customs staff in effective CITES control. Imports of this type would thus be considered permissible.
- d) 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 import[ation]s *are* 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.
- e) Captive-breeding programmes: The []import[ation] of specimens of Appendix-I species for captive-breeding purposes raises special problems. Any importation of such specimens for captive-breeding purposes should [must] be aimed as a priority at the long-term conservation [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. Import[ation]s under these circumstances could be allowed if any profit made 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 concerned. It should not, therefore, be assumed that import[ation]s under such circumstances [is] *are* inappropriate. As for imports of captive-bred specimens for captive-breeding programmes for commercial purposes, Article VII, paragraphs 4 and 5, eliminate the need to address the 'primarily commercial purposes' standard in Article III, paragraph 3(c). In connection with

captive-breeding purposes, it should be noted that as a general rule import[ation]s should [must] be part of general programmes aimed at the recovery of *the species concerned* and be undertaken with the help of the Parties in whose territory the species originate. The profit gained that might result should be used to support the continuation of the programme aimed at the recovery of the Appendix-I species *concerned*.

f) Field conservation programmes: *Live specimens of Appendix-I species may be translocated from one free-ranging (wild) situation to another, inside or outside their countries of origin. This may be undertaken for various reasons, e.g. to move specimens subject to heavy illegal hunting to safer locations, or to transfer specimens from a location where they are in sufficient or excessive numbers to another location from where they have disappeared or where they never occurred and where population stability or growth is expected. For certain species, such as rhinoceroses, the translocation outside the country of origin can have significant direct benefit for the conservation of the species concerned, e.g. in expanding the range of the species or the number of subpopulations. If the translocation is made to a national park, a natural reserve or a sanctuary, the import will be for non-commercial purposes. However, private lands, such as game farms and ranches, as well as other non-governmental lands, sometimes designated as conservancies, can offer additional opportunities to introduce or reintroduce animals in locations where their protection can be guaranteed to the benefit of the conservation of the species concerned. Obviously, such private lands may have commercial aspects but if the interest for conservation is demonstrated and predominant, the intended use should not be considered as primarily commercial. Imports of this type would thus be considered permissible.*

[f]g) Import[ation] via professional dealers: A problem occurs with examples b) through [e]) f) above if the import is via a professional dealer. In such circumstances [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, importations through a professional dealer by a qualified scientific, educational, zoological or other non-profit organization, *or a conservancy*, may be considered acceptable if the ultimate intended use would be for one of the purposes set out in examples b), c), [and] e) *and f)* above, and where a binding contract (including a contract conditioned on the granting of permits) for the import[ation] and sale of a particular specimen of an Appendix-I species has already been concluded between the professional dealer and the purchasing institution *or conservancy* and is presented to the Management Authority of the country of import with the import permit application. The same should apply to example d) if sale is incidental to public health and not for the primary purpose of economic benefit or profit.

If a proposed import[ation] of [a] specimens 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 import[ation] to be acceptable. For example, where the primary purpose for import[ation] 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 import[ation] for scientific or zoological exhibition purposes to be inappropriate where such import[ation] is found to be detrimental to the survival of the species concerned or where[, in the case of live specimens,] it is found that the ultimate recipient of [the] *live* specimens lacks facilities suitably equipped to house and properly care for them [the specimens].

Moreover, in keeping with the provisions of Article II, paragraph 1, the import[ation] of specimens of Appendix-I species removed from the wild for one of the purposes set forth above, *except those set forth in example f)*, should, as a general rule, not be allowed unless the importer has first demonstrated that:

- a) he has been unable to obtain suitable captive-bred specimens of the same species;
- b) another species not listed in Appendix I could not be utilized for the proposed purpose; and
- c) the proposed purpose could not be achieved through alternative means.