

RESOLUTION CONF. 5.10

*DEFINITION OF 'PRIMARYLY COMMERCIAL PURPOSES'*

1. At the 58th meeting of the Standing Committee (Geneva, July 2009), in document SC58 Doc. 16, the Secretariat submitted proposals to make non-substantive amendments to Resolutions, in compliance with Decision 14.19. With regard to the proposed amendments to Resolution Conf. 5.10, the Committee considered that some were of a substantive nature and should therefore be referred to the Conference. The proposed amendments are shown in the table below, together with the rationale.
2. The table below contains one additional proposed amendment. This relates to paragraph e) of the Annex to the Resolution, and is fully explained below.

Recommendation

3. The Secretariat recommends that the Conference of the Parties adopt the amendments to Resolution Conf. 5.10 shown in the table below.

NB: The left column contains the original text with proposed changes.  
Text to be deleted is ~~crossed out~~. Proposed new text is underlined.

Suggested amendments	Explanation
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 <del>internal</del> 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 import will determine whether a proposed use would be for primarily commercial purposes;	Deletion of the word "internal" as superfluous.
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, of the Convention that trade in specimens of Appendix-I species must be subject to particularly strict regulation and only authorized in exceptional circumstances;	

Suggested amendments	Explanation
<p style="text-align: center;">THE CONFERENCE OF THE PARTIES TO THE CONVENTION</p> <p>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 import of a specimen of an Appendix-I species would result in its use for primarily commercial purposes:</p> <p><b>General principles</b></p> <p>1. Trade in Appendix-I species must be subject to particularly strict regulation and authorized only in exceptional circumstances.</p>	
<p>2. An activity can generally be described as 'commercial' if its purpose is to obtain economic benefit, <del>including profit</del> (whether in cash or <del>otherwise in kind</del>), and is directed toward resale, exchange, provision of a service or any other form of economic use or benefit.</p>	<p>As "profit" is a type of "economic benefit", this word is unnecessary. The specification "whether in cash or otherwise" clarifies that this benefit may take other forms than money.</p> <p>The Secretariat further notes that:</p> <p>1) The expression "economic benefit" is used twice without the specification of "profit" in the present Resolution; and</p> <p>2) The expression "economic benefit, including profit, whether in cash or kind," appears in Resolution Conf. 12.10 (Rev. CoP14). Therefore the same amendment is proposed in that Resolution, which in any case also uses the expression "economic use or benefit" without referring to "profit".</p>
<p>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 import of specimens of Appendix-I species 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.</p>	
<p>4. Article III, paragraphs 3 (c) and 5 (c), of the Convention concern the intended use of the specimen of an Appendix-I species in the country of import, 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 specimens of Appendix-I species 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.</p>	
<b>(Annex) Examples</b>	
<p>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 that follow each example provide further guidance in, and criteria for, assessing the actual degree of commerciality</p>	

Suggested amendments	Explanation
<p>on a case-by-case basis. The list is not intended to be exhaustive of situations where an import of specimens of Appendix-I species could be found to be not for primarily commercial purposes:</p>	
<p>a) <i>Purely private use</i>: Article VII, paragraph 3, of the Convention contains special rules for specimens "that are personal or household effects". The exception mentioned does 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 this provision that specimens imported for purely private use should not be considered to be for primarily commercial purposes.</p>	
<p>b) <i>Scientific purposes</i>: 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 import 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 or commercial exchange of the specimens, or their exhibit for economic benefit is not the primary intended use.</p>	
<p>c) <i>Education or training</i>: 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 specimen could be imported primarily to train Customs staff in effective CITES control. Imports of this type would thus be considered permissible.</p>	
<p>d) <i>Biomedical industry</i>: 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 imports 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. 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.</p>	<p>"Profit" is a type of "economic benefit" and therefore redundant.</p>
<p>e) <i>Captive-breeding programmes</i>: Imports of specimens of Appendix-I species for captive-breeding purposes raise special problems. <del>Any import of such specimens for captive-breeding purposes must be aimed as a priority at the long-term protection of the affected species, as required in Resolution Conf. 10.16 (Rev.)<sup>1</sup>.</del> Some captive-breeding operations sell surplus specimens to underwrite the cost of the captive-breeding programme. Imports under these circumstances could be allowed if any profit made would not inure to the personal economic benefit of a private</p>	<p>The second sentence of paragraph e) originally referred to Resolution Conf. 2.12, which was repealed with the adoption of Resolution Conf. 10.16 at CoP10 (Harare, 1997). The latter Resolution was revised at CoP11 (Gigiri, 2000). Resolution Conf. 10.16 (Rev.) however says nothing regarding the conditions for import of specimens for captive-breeding purposes, and nothing about long-term protection of</p>

Suggested amendments	Explanation
<p>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 imports under such circumstances 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' requirement in Article III, paragraph 3 (c). In connection with captive-breeding purposes, it should be noted that, as a general rule, imports must be part of general programmes aimed at the recovery of species and be undertaken with the help of the Parties in whose territory the species originate. The profit that might result should be used to support the continuation of the programme aimed at the recovery of the Appendix-I species.</p> <p><del>4 — Corrected by the Secretariat following the 10th and 11th meetings of the Conference of the Parties: formerly referred to Resolution Conf. 2.12.</del></p>	<p>species. The Secretariat therefore proposes that this out-of-date sentence be deleted.</p>
<p>f) <i>Imports via professional dealers:</i> A problem occurs with examples b) through e) 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 an 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, imports 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) and e) above, and where a binding contract (including a contract conditioned on the granting of permits) for the import and sale of a particular specimen of an Appendix-I species 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 d) if sale is incidental to public health and not for the primary purpose of economic benefit or profit.</p>	<p>"Profit" is a type of "economic benefit" and therefore redundant.</p>
<p>If a proposed import 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 import to be acceptable. For example, where the primary purpose for import 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 for scientific or zoological exhibition purposes to be inappropriate where such import 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.</p>	

Suggested amendments	Explanation
<p>Moreover, in keeping with the provisions of Article II, paragraph 1, the import of specimens of Appendix-I species removed from the wild for one of the purposes set forth above should, as a general rule, not be allowed unless the importer has first demonstrated that:</p> <ul style="list-style-type: none"> <li>a) he has been unable to obtain suitable captive-bred specimens of the same species;</li> <li>b) another species not listed in Appendix I could not be utilized for the proposed purpose; and</li> <li>c) the proposed purpose could not be achieved through alternative means.</li> </ul>	