

## *The Spirit of the Convention*

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**Purpose:**

Prepared for the 33<sup>rd</sup> Meeting of the Animals Committee in Geneva, Switzerland, July 12 – 19, 2024. Particularly, this paper was written for Agenda Item No. 16 of the meeting discussing Non-Detriment Findings (NDFs) [Resolution Conf. 16.7 (Rev. CoP17) and Decision 19.133]. This paper addresses the issues that arose in Module 4 – NDFs for Appendix I Imports during the international expert “Workshop on Non-Detriment Findings” held in Nairobi, Kenya, December, 2023.

**Executive Summary:**

As the Convention<sup>1</sup> observes it's fifty-first year of existence, although much is to be celebrated, the Parties<sup>2</sup> remain haunted by a singular issue that has troubled the Convention from its inception. It is an issue over which the founding Parties held intense debates in Washington, D.C. in March of 1973. While there was much debate and discussion between the Parties, the final decision reached at the Plenipotentiary Conference<sup>3</sup> chiseled in stone the intention of the Parties that has set the precedent for the future. Yet, as the years have passed since that momentous day the treaty was signed, the interpretational issue of Article III.3(a)<sup>4</sup> rears its hydric head every so often, as it has now, to terrorize and corrupt the foundations of the Convention. Neither is it an inconsequential issue but one that has worked to the detriment of wildlife and conservation efforts around the world. It is time that the issue of interpreting Article III.3(a) be put to rest, once and for all, so that the next fifty years of the Convention will be free from the vagaries of misinterpretation and so that well-regulated trade may encourage and protect at risk species of wild fauna and flora.

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**Date:**

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<sup>1</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora.

<sup>2</sup> Convention Text, Art. I(h).

<sup>3</sup> Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife (Washington, D.C., United States, 1973).

<sup>4</sup> Convention Text, Art. III.3(a).

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*Recognizing that peoples and States are and should be the best protectors of their own wild fauna and flora . . .*

Preamble to the Text of the Convention

## **Text of the Convention**

### *Article III*

#### *Regulation of trade in specimens of species included in Appendix I*

##### *Paragraphs 1, 2, and 3*

1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.
2. The export of any specimen of a species included in Appendix I shall require the prior grant and presentation of an export permit. 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;
  - c. a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and
  - d. a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.
3. 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. An import permit shall only be granted when the following conditions have been met:
  - a. a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
  - b. a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
  - c. a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

## *The Spirit of the Convention*

### **Introduction**

On December 4<sup>th</sup> – 8<sup>th</sup>, 2023, experts gathered in Nairobi, Kenya for the second international Workshop on Non-Detriment Findings (NDFs). The workshop was called in accordance with Decision 19.133 of the 19<sup>th</sup> Meeting of the Conference of the Parties (CoP19)<sup>5</sup> which directed the Animals and Plant Committees, among other things, to:

- “b) participate as appropriate in the international expert workshop on NDFs where draft guidance materials are to be reviewed, advanced or completed;
- c) review and make recommendations concerning: the outcomes of the international expert workshop on NDFs; the use of its outputs in support of the making of NDFs by Scientific Authorities; and their publication on the CITES website . . .”

At the workshop, twelve different working groups (modules) were established to review, advance, and complete draft guidance for different NDF focuses. Among the working groups was Module 4, whose responsibility was to draft guidance for NDFs of Appendix I imports.

During the Module 4 working group session on December 5<sup>th</sup> and 6<sup>th</sup>, a debate arose among the working group members on the exact interpretation of Article III.3(a) of the Convention Text. The issue that divided the members of the working group was what exactly does the Text mean by “purposes which are not detrimental to the survival of the species involved?”<sup>6</sup> Some members of the working group interpreted the Text to authorize the Scientific Authority<sup>7</sup> of the importing country to replicate the findings of the exporting country by conducting its own scientific, biological assessment<sup>8</sup> of the species in order to ensure that granting an import permit would not be detrimental to the survival of the species involved. Further, some of those members even interpreted the Text to mean that “purposes which are not detrimental” may only constitute those which “enhance” the survival of the species. However, other members of the group held to the long standing, historical interpretation of the Text that such “purposes” are those which are not primarily commercial in nature<sup>9</sup> and that scientific, biological assessments of species remain the responsibility of the exporting country.

This paper intends to provide both a historical and evolutional analysis of Article III.3(a) as well as an examination of the current rules and guidelines for Scientific Authorities and NDFs. Beyond mere analysis, this paper also proposes an interpretation of the Text that seeks to settle the decades old debate of the meaning of Article III.3(a).

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<sup>5</sup> Dec. 19.133, Doc. 43.1, Nineteenth Meeting of the Conference of the Parties (CoP19), Panama City, Panama, 2022.

<sup>6</sup> Convention Text, Art. III.3(a).

<sup>7</sup> Convention Text, Art. I(f).

<sup>8</sup> Resolution Conf. 16.7(1)(a)(i) (Rev. CoP17).

<sup>9</sup> Convention Text, Art. III.3(c).

## **I. Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife (Washington, D.C., United States, 1973)**

From February 12<sup>th</sup> to March 2<sup>nd</sup> of 1973, eighty (80) countries and thirteen (13) international observers gathered in Washington, D.C. for the “Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife.”<sup>10</sup> The Plenipotentiary Conference met in fulfillment of the recommendations stated in Recommendation 99.3 of the United Nations Conference on the Human Environment held in Stockholm, June of 1972.<sup>11</sup> Resolution 99.3 stated:

*“It is recommended that a plenipotentiary conference be convened as soon as possible, under appropriate governmental or intergovernmental auspices, to prepare and adopt a convention on export, import and transit of certain species of wild animals and plants.”*<sup>12</sup>

Prior to the Conference, six (6) different drafts of the treaty had been prepared and circulated among the governments with the original draft developed as a result of the Eighth General Assembly meeting of the IUCN<sup>13</sup> in Nairobi, Kenya, 1963.<sup>14</sup> Of the six drafts prepared, five (5) were prepared by the IUCN and one (1), the fifth draft, was prepared by the United States. Upon convening at the Conference, the Parties discussed, debated, and amended what was known as the “Working Paper” of the Convention.

During the discussions and debates, an issue arose over the language in Article III.3(a) [then 2(a)] of the Working Paper. The particular issue was over proposed amendments from the United States (PA/III/4) and the United Kingdom (PA/III/1). The U.S. amendment proposed that:

*“No permit shall be granted for the import of Appendix I specimens from a Contracting State until a valid Export Permit from the State of export is presented, and the Scientific Authority of the State of import determines that the import will not be detrimental to the survival of the species, and will be for the purposes which will further the restoration of the species . . .”*<sup>15</sup>

The reasoning put forward by the U.S. for the amendments was to “prohibit any trade in Appendix I specimens unless the appropriate Scientific Authority in each case determines that the trade will not be detrimental to the survival of the species and will for restorative purposes.”<sup>16</sup> This meant that the Scientific Authority of both the exporting and importing country each had to make an independent scientific assessment NDF of the species involved to insure that an export or import

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<sup>10</sup> See generally William P. Rogers, *World Wildlife Conference: Efforts to Save Endangered Species*, U.S. Department of State, June 1973.

<sup>11</sup> Resolution Conf. 16.1.

<sup>12</sup> Recommendation 99.3, United Nations Conference on the Human Environment, Stockholm, Sweden, 1972.

<sup>13</sup> International Union for the Conservation of Nature.

<sup>14</sup> Resolution V, Eighth General Assembly, International Union for the Conservation of Nature, Nairobi, Kenya, 1963.

<sup>15</sup> PA/III/4, Proposed Amendment, Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Washington, D.C., United States, 1973.

<sup>16</sup> *Id.* at 2 (underline added).

permit would not be detrimental to the survival of the species. It also required the Scientific Authority of the importing country to only authorize an import permit if it would “enhance” the survival of the species.

The U.K. amendment expressly opposed the U.S. amendment. It proposed that:

*“No permit shall be granted for the import of Appendix I specimens from a Contracting State until a valid Export Permit from the State of export is presented.”<sup>17</sup>*

The reasoning put forward by the U.K. was that “*the onus for determining whether the import would be detrimental to the survival of the species should rest with the exporting State.*”<sup>18</sup> During the Eighth Plenary Session of the Conference, the U.K. further pressed its position that “*the important point in this amendment is that the exporting State is in a better position to assess the species survival in the exportation process than the importing State.*”<sup>19</sup> In the same session, the U.S. stood firmly on its proposal that both countries should become involved in the consultation.<sup>20</sup> As the debates continued during the plenary session, the desires and intentions of each Party became increasingly clear with the growing support of the U.K. amendment.

The Japanese Delegation supported the U.K. amendment and declared that “*the intent of the Convention is that the exporting nations are the ones to take the initiative in this issue.*”<sup>21</sup>

The Italian Delegation supported the U.K. amendment and declared that they are “*rather perplexed over the U.S. amendment with regard to the certification from the importing State. It appears to them that the exporting State will determine whether the certification is valid or not. This [U.S. amendment] is unacceptable to the Italian Delegation.*”<sup>22</sup>

The Australian Delegation supported the U.K. amendment and withdrew their amendment (PA/III/10).<sup>23</sup>

The French Delegation supported the U.K. amendment.<sup>24</sup>

The Austrian Delegation supported the U.K. amendment.<sup>25</sup> The Austrian Delegation further explained that

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<sup>17</sup> PA/III/1, Proposed Amendment, Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Washington, D.C., United States, 1973.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> SR/8 (Final), Summary Record, Eighth Plenary Session, Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Washington, D.C., United States, 1973.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 2-3.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.*

*“it seemed unmeritorious to ask the Scientific Authority in the state of import to decide the same question which the Scientific Authority in the state of export had already decided. Obtaining an export permit would mean that the Scientific Authority had already inquired into the detriment to the survival of the species and, therefore, a second consideration was not necessary. In any event, the Scientific Authority in the state of import could only be qualified to decide whether the import endangered the fauna or flora of the state of import. That question is not a trade question and is outside the scope of the convention.”<sup>26</sup>*

The Austrian Delegation then withdrew their proposed amendment (PA/III/10).<sup>27</sup>

The Swedish Delegation withdrew their proposed amendment (PA/III/3).<sup>28</sup>

The Canadian Delegation withdrew their proposed amendment (PA/III/6).<sup>29</sup>

In an attempt to recover favor for their amendment, the U.S. Delegation attempted to clarify its point regarding the role of the import country in the permitting process: that it was to see if the exporting country issued the permit “in the proper format.”<sup>30</sup> The U.K Delegation responded that, if so,

*“there would have to be mutual confidence between the exporting and importing States, and they indicated that they would let the export state do what is proper for the export State and let the import State do what is proper for the import State, and this would be in the Spirit of the Convention.”<sup>31</sup>*

Upon a request for clarification from the Kenyan Delegation, the U.K. Delegation explained that exporting is to be decided by the exporting country and cannot be overruled by the importing country.<sup>32</sup> The U.K. Delegation then suggested more precise language be added to the amendment which essentially states that *“no permit shall be granted for the import of an Appendix I specimen until the scientific authorities of the State of import advises that the importation will be for purposes which are not detrimental to the species.”*<sup>33</sup> The Chairman of the plenary session then declared that the U.K. amendment had the support of the Conference and had been accepted.<sup>34</sup>

The United States Delegation withdrew their proposed amendment (PA/III/4).<sup>35</sup>

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<sup>26</sup> From a series of annotations on the Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife by Heather Mitchell, a Canadian attorney. Published Winter of 1979. Publication unavailable.

<sup>27</sup> SR/8 (Final) at 5.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.* (bold/underline added).

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.* (underline added).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 5.

The Drafting Committee eventually incorporated the United Kingdom's proposed amendment into the Convention Text and is now found in Article III.3(a) which reads:

*“a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved.”*<sup>36</sup>

The overwhelming acceptance of the U.K. amendment and the rejection of the U.S. amendment by the Parties is evidence of the Convention's intent to acknowledge the exporting country's sole authority in the scientific management and assessment of its own fauna and flora. Thus, the Convention also recognized the exporting country's sole authority in determining if the issuance of an export permit would be detrimental to the survival of the species involved. The results from the Eighth Plenary Session of the Plenipotentiary Conference emphatically denied the involvement of the importing countries in the scientific, biological assessments and findings. The Parties overwhelmingly restricted the findings of importing countries to be to ensure that the purpose of the import was not detrimental to the survival of the species. Determining the “purpose” of an import may only involve investigations of primarily commercial activity – not scientific assessments of range state populations or “enhancement” findings. This was and is the intent of the Parties and was incorporated into the Convention Text on March 3, 1973.

## **II. Third Meeting of the Conference of the Parties (Cop3) – New Delhi, India, 1981**

The Parties convened for the Third Meeting of the Conference of the Parties (CoP3) in New Delhi, India in 1981. At the meeting, the United States tried to redefine the meaning of Article III.3(a) by attempting to incorporate a necessary “enhancement” finding. The U.S. submitted Doc. 3.27<sup>37</sup> as a draft resolution on Scientific Authority review of applications to import specimens of Appendix I species.<sup>38</sup> Among other things, the resolution intended to “*limit approval of such applications to import for purposes that are likely to enhance the survival of the species in its native ecosystems.*”<sup>39</sup> In summary, the resolution would limit a finding of non-detrimental purposes to instances where the activity for which the import was being made either enhanced species survival or where 1) the possibility of import neither directly nor indirectly contributed to the specimen's death or removal from the wild; 2) allowing the import would in no way contribute to the death or removal of any additional specimens from the wild; and 3) there were no reasonable alternative uses of the specimen that are more likely to contribute to the conservation of the species.<sup>40</sup>

As the meeting progressed it became increasingly clear that the Parties were not prepared to treat with the complex nature of the U.S. draft resolution. As a result, the U.S. offered to withdraw their draft resolution annexed to Doc. 3.27 and suggested that the meeting take note of the resolution and that informal discussions be held by the Parties on the operations of their Scientific Authorities.<sup>41</sup> The U.S. draft resolution for “Scientific Authority Review of Applications for the

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<sup>36</sup> Convention Text, Art. III.3(a).

<sup>37</sup> Doc. 3.27, Third Meeting of the Conference of the Parties (Cop3), New Delhi, India, 1981.

<sup>38</sup> *Id.* at 1.

<sup>39</sup> *Id.* (underline added).

<sup>40</sup> Doc. 3.27 Annex, Third Meeting of the Conference of the Parties (Cop3), New Delhi, India, 1981.

<sup>41</sup> Plen. 3.7 (Rev.), item XIV.8, (Note from the Secretariat), Third Meeting of the Conference of the Parties (Cop3), New Delhi, India, 1981.

Importation of Appendix I Specimens” (Doc. 3.27 Annex)<sup>42</sup> was formally withdrawn at the Seventh Plenary Session of CoP3.<sup>43</sup> As at the Plenipotentiary Conference eight years prior, the Parties continued to affirm that the exporting country is in a better position to assess the species survival in the exportation process than the importing country. They rejected the requirement that the importing country must replicate the finding of the exporting country as well as any inclusion of an “enhancement” finding.

### III. Eighth Meeting of the Conference of the Parties (CoP8) – Kyoto, Japan, 1992

Eleven years later at the Eighth Meeting of the Conference of the Parties (CoP8) in Kyoto, Japan, the U.S. once again proposed to reinterpret the role of Scientific Authorities, specifically Article III.3(a). Doc. 8.37, prepared and submitted by the U.S., proposed that:

*“Parties should not allow the importation of specimens of species listed in Appendix I unless a Scientific Authority of the State has advised that such import will be for purposes that are not detrimental to the survival of the species involved, and unless at least one of the following conditions is satisfied:*

- a) the activity is likely to enhance the survival of the species in its native ecosystem;*
- b) the activity is likely to enhance the survival of the species in a controlled environment when enhancement of survival in its native ecosystem is not feasible;*
- c) the activity is likely to enhance the survival of the species in a controlled environment when the ultimate effect is intended and is likely to enhance the survival of the species in its native ecosystem; or*
- d) the activity will not affect the species in the wild in any way.”<sup>44</sup>*

The proposals in the document expressed nearly verbatim the proposals in Doc. 3.27.<sup>45</sup> The document even expressly noted that “*the rationale for these findings was presented in document Doc. 3.27.*”<sup>46</sup> The proposals of Doc. 8.37 were incorporated into a draft resolution in Doc. 8.37 Annex.<sup>47</sup> The draft resolution on the “Role of the Scientific Authority” in Doc. 8.37 Annex recommended, notably, the following:

*“d) the Parties consult with the Secretariat when there is reason for concern as to whether the proper Scientific Authority findings are being made, and the Secretariat after review of such situation may, with the consent of the Standing Committee,*

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<sup>42</sup> Doc. 3.27 Annex.

<sup>43</sup> Plen. 3.7 (Rev.), item XIV.8.

<sup>44</sup> Doc. 8.37 (Rev.), Eighth Meeting of the Conference of the Parties (Cop8), Kyoto, Japan, 1992.

<sup>45</sup> See Doc. 3.27.

<sup>46</sup> Doc. 8.37 (Rev.) at 3.

<sup>47</sup> Doc. 8.37 (Rev.) Annex, Eighth Meeting of the Conference of the Parties (Cop8), Kyoto, Japan, 1992.

*recommend a trade moratorium with specific countries when it has been shown that trade from these countries is continuing without proper advice being given by the Scientific Authority, and especially when such trade is detrimental to the survival of species listed in the appendices;*

*e) each Scientific Authority issue advice on all permit applications for export or introduction-from-the-sea stating whether or not the actions will be detrimental to the survival of the species;*

*f) each Scientific Authority take into consideration the total harvest of native species from the wild (both legal and illegal), including subsistence and domestic use, in determining whether or not additional take for export or introduction from the sea will not be detrimental to the survival of the species involved;*

*g) the findings and advice of each Scientific Authority be based on independent scientific review of the biological status, distribution, population trend, total harvest, and trade information relating to the species concerned;*

*h) each Scientific Authority issue advice on import-permit applications for Appendix-I species stating whether the action will be for purposes not detrimental to the survival of the species, that is, when plants or animals in the wild will not be affected by the import in any way, or when the survival of the species involved will be enhanced by allowing the import;*

*i) each Scientific Authority monitor the status of native species and export data as appropriate, in order to recommend suitable remedial measures to limit the export of specimens to maintain each species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which the species might become eligible for inclusion in Appendix I;”<sup>48</sup>*

Group members of the relevant working group took exception to the U.S.’s attempt to redefine the roles of importing country Scientific Authorities. The draft resolution essentially would require each importing nation to make its own determination before importing based upon its own limited or unlimited expertise, judgment, and standards. It would have also expanded Resolution Conf. 2.11<sup>49</sup> (pre-revised) from the right to make examinations to an obligation, in every instance, to make examinations. After extensive debate, Doc. 8.37 Annex was revised to improve the language and to delete sections on which consensus was not reached.<sup>50</sup> The revised version was introduced to Committee I as Com. 8.24<sup>51</sup> by the U.S. Delegation, who happened to also be the Chairman of the relevant working group.<sup>52</sup> Com. 8.24 revised the above noted paragraphs of Doc. 8.37 Annex to read as follows:

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<sup>48</sup> *Id.* at 1-2.

<sup>49</sup> Resolution Conf. 2.11 (pre-revised).

<sup>50</sup> Com.I 8.13 (Rev.), item XIII.24, Eighth Meeting of the Conference of the Parties (Cop8), Kyoto, Japan, 1992.

<sup>51</sup> Com. 8.24 (Rev.), Eighth Meeting of the Conference of the Parties (Cop8), Kyoto, Japan, 1992.

<sup>52</sup> Com.I 8.13 (Rev.) at 2.

*“d) the Parties consult with the Secretariat when there is reason for concern as to whether the proper Scientific Authority findings are being made;*

*e) the appropriate Scientific Authority advise on the issuance of permits for **export** or introduction from the sea for Appendix-I or -II species stating whether or not the actions will be detrimental to the survival of the species in question and every export or introduction-from-the-sea permit be covered by Scientific Authority advice [re-export certificates do not require Scientific Authority advice];*

[Paragraph f) was deleted entirely.]

*f) the findings and advice of the Scientific Authority of the country of **export** be based on the scientific review of available information on the population status, distribution, population trend, harvest, and other biological and ecological factors, as appropriate, and trade information relating to the species concerned;*

*g) the appropriate Scientific Authority of the importing country advise on the issuance of permits for the import of Appendix-I species stating whether the import will be for **purposes** not detrimental to the survival of the species;*

*h) the appropriate Scientific Authority monitor the status of native species and export data as appropriate, in order to recommend suitable remedial measures to limit the export of specimens to maintain that species throughout its range at a level consistent with its role in the ecosystem and well above the level at which that species may become eligible for inclusion in Appendix I;”<sup>53</sup>*

A slightly amended version of Com. 8.24 was then accepted, and it was agreed to commend the document to the Conference of the Parties.<sup>54</sup> At the Eighth Plenary Session of CoP8, the Parties adopted Com. 8.24 (Rev.).<sup>55</sup> Com. 8.24 (Rev.) was then formally adopted as Resolution Conf. 8.6 (predecessor to Resolution Conf. 10.3).<sup>56</sup>

The continued resistance of the Parties to requiring importing countries to duplicate the scientific biological assessments was evident in the rejection and revisions of Doc. 8.37 Annex. The Parties continued to support the exporting countries’ sole role in the scientific assessment of their own wildlife and as to whether the export would be detrimental to the survival of their species. Any inclusion of an “enhancement” requirement was also firmly rejected by the Parties.

#### **IV. Ninth Meeting of the Conference of the Parties (CoP9) – Fort Lauderdale, United States, 1994**

The issue over the exact role of the Scientific Authority of the importing country surfaced again at the Ninth Meeting of the Conference of the Parties (CoP9) in 1994. However, the debate turned

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<sup>53</sup> Com. 8.24 (Rev.) at 1-2 (bold added).

<sup>54</sup> Com.I 8.13 (Rev.) at 2.

<sup>55</sup> Plen. 8.8 (Rev.), item XIII.24, Eighth Meeting of the Conference of the Parties (Cop8), Kyoto, Japan, 1992.

<sup>56</sup> Resolution Conf. 8.6.

not on the exact language of Article III.3(a) but on the language found in Resolution Conf. 2.11.<sup>57</sup> Originally adopted in 1979 at CoP2, Resolution Conf. 2.11 dealt with international shipment of sport-hunted trophies of Appendix I species.<sup>58</sup> The purpose of the resolution had been to correct “*differing procedures [for] the granting of permits for the trade in hunting trophies of Appendix I species.*”<sup>59</sup> However, it had been the practice of some countries, using Resolution Conf. 2.11(c) as their rationale, to refuse import permits for hunting trophies which were legally exported and approved by range States. Those countries denying import permits did so under the guise of the following text:

*“that in order to achieve the envisaged double control (also in the scientific field) by the importing and the exporting country of the trade in Appendix-I specimens, the Scientific Authority have the possibility of comprehensive examination concerning the question of whether the importation is serving a purpose which is not detrimental to the survival of the species. This examination should, if possible, also cover the question of whether the killing of the animals whose trophies are intended for import would enhance the survival of the species . . .”*<sup>60</sup>

Using this text, some importing countries substituted their own judgment for that which the Convention had allocated to the exporting country.<sup>61</sup> In so doing, they had also replaced the non-detriment standard with their own greater “enhancement” standard – a standard that had already been thrice denied by the Parties.<sup>62</sup> Both Doc. 3.27 and Doc. 8.37 had cited Resolution Conf. 2.11 as the basis for their proposed resolutions.<sup>63</sup>

These recurring issues and misinterpretations by importing countries prompted Namibia to prepare and submit Doc. 9.50 as a draft resolution.<sup>64</sup> The resolution sought to reinstate the double control system specified in the Convention. This complimentary determination system specifically assigned to each country a different role: the exporting country considers the impact of the removal of the animal from that country's wild population and the importing country considers the purpose of the import.<sup>65</sup> The system was meant to have dual permits that were complementary, not competitive. Thus, Doc. 9.50 Annex 2 proposed to amend Resolution 2.11(c) as follows:

*“that in order to achieve the envisaged complementary control of trade in Appendix-I species by the importing and exporting countries in the most effective and comprehensive manner, the Scientific Authority of the importing country accept the finding of the Scientific Authority of the exporting country as to whether or not the exportation of the hunting trophy is detrimental to the survival of the species, and limit its examination to the purpose to which the specimen will be put upon*

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<sup>57</sup> Resolution Conf. 2.11 (pre-revised).

<sup>58</sup> *Id.*

<sup>59</sup> Doc. 2.13 (Rev.), Second Meeting of the Conference of the Parties (CoP2), San Jose, Costa Rica, 1979.

<sup>60</sup> Resolution Conf. 2.11(c) (pre-revised).

<sup>61</sup> Doc. 9.50, Ninth Meeting of the Conference of the Parties (CoP9), Fort Lauderdale, United States, 1994.

<sup>62</sup> *Id.* at 1.

<sup>63</sup> See Doc. 3.27, Doc. 8.37 (Rev.).

<sup>64</sup> Doc. 9.50 at 1.

<sup>65</sup> *Id.*

*reaching the importing country and to whether it is the lawfully taken trophy it is purported to be.”<sup>66</sup>*

This amendment established and emphasized the role of the exporting country as the sole entity in the best position to “*determine the effect on the status of the wild population from which the specimen comes, the nature of its taking and the preparation of the specimen for export.*”<sup>67</sup> It further recognized that the importing country was not in the position to do so and that it should submit to the findings of the exporting country.

Doc. 9.50 Annex 2 was subsequently approved by Committee II and submitted to the Conference of the Parties as Com. 9.21<sup>68</sup> “*with no comments or amendments.*”<sup>69</sup> The Seventh Plenary Session of CoP9 adopted Com. 9.21<sup>70</sup> and then formally amended Resolution Conf. 2.11.<sup>71</sup> While Resolution Conf. 2.11 dealt with the immediate subject of sport hunted Appendix I species, the history and background of the amendment of Resolution Conf. 2.11 at CoP9 further cemented the intent of the Parties that exporting countries are in the best position to assess and manage their own fauna and flora and thus are the only responsible party in making scientific, biological NDFs.

## V. Current CITES Documents On the Role of Scientific Authorities and NDFs

### 1. Conference Resolutions

In addition to Resolution Conf. 2.11, several other Conference Resolutions address the roles of Scientific Authorities. Notably, these resolutions also address the specific role of importing country Scientific Authorities.

#### **Resolution Conf. 2.11 (Rev.)**

See above “Ninth Meeting of the Conference of the Parties (CoP9) – Fort Lauderdale, United States, 1994.”

#### **Resolution Conf. 10.3**

Resolution Conf. 8.6 (Rev.) was replaced by Resolution Conf. 10.3 in Harare, Zimbabwe, 1997.<sup>72</sup> Resolution Conf. 10.3 “Designation and Role of the Scientific Authorities” thoroughly discusses the duties of each Scientific Authority in paragraphs (2)(g) through (2)(i). Paragraph (2)(g) specifically allocates to the Scientific Authority of the exporting country the duty to advise on the issuance of export permits, “*stating whether or not the proposed trade would be*

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<sup>66</sup> Doc. 9.50 Annex 2, Ninth Meeting of the Conference of the Parties (CoP9), Fort Lauderdale, United States, 1994.

<sup>67</sup> Doc. 9.50 at 1.

<sup>68</sup> Com. 9.21, Ninth Meeting of the Conference of the Parties (CoP9), Fort Lauderdale, United States, 1994.

<sup>69</sup> Com.II 9.10 (Rev.), item XIV.8, Ninth Meeting of the Conference of the Parties (CoP9), Fort Lauderdale, United States, 1994.

<sup>70</sup> Plen. 9.7 (Rev.), item XIV.8, Ninth Meeting of the Conference of the Parties (CoP9), Fort Lauderdale, United States, 1994.

<sup>71</sup> Resolution Conf. 2.11 (Rev.).

<sup>72</sup> Resolution Conf. 10.3.

*detrimental to the survival of the species in question . . .*<sup>73</sup> The Resolution also specifically charges the findings of the exporting country Scientific Authority to be based on “*scientific review of available information on the population status, distribution, population trend, harvest and other biological and ecological factors, as appropriate, and trade information relating to the species concerned.*”<sup>74</sup> There is no such charge for the Scientific Authority of the importing country. The Scientific Authority of the importing country is merely tasked with advising on the issuance of import permits, “*stating whether the import will be for purposes not detrimental to the survival of the species.*”<sup>75</sup> There are no recommendations found in Resolution Conf. 10.3 that would indicate that the Scientific Authority of the importing country is supposed to conduct the same scientific and biological species assessments as allocated to the Scientific Authority of the exporting country in paragraph (2)(h).<sup>76</sup> If the Scientific Authority of the importing country was supposed to conduct the same scientific/biological findings as the exporting country, it would have plainly said so in Resolution Conf. 10.3. It did not.

### **Resolution Conf. 16.7 (Rev. CoP17)**

Resolution Conf. 16.7 (Rev. CoP17) “Non-detriment Findings” details the ways the Scientific Authority can make a non-detriment finding.<sup>77</sup> It is important to note that Resolution Conf. 16.7 is explicitly directed to the Scientific Authorities of exporting countries. In fact, the first paragraph of the preamble of the Resolution specifically acknowledges the exporting country’s role in making an NDF. It states:

*“RECOGNIZING that, in accordance with Articles III and IV of the Convention, export permits for specimens of species included in Appendices I and II shall be granted only when a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of the species (following a determination known as a ‘non-detriment finding’).”<sup>78</sup>*

The words “import” or “importing” do not occur at all in the Resolution. Neither is there any mention of a Scientific Authority for the State of import, an importing country, or an import permit. On the contrary, the word “export” occurs ten (10) times in the Resolution. Every time the word is used, it is used in the context of the Scientific Authority for the State of export, an exporting country, or an export permit. Furthermore, the fourth paragraph of the preamble of the Resolution specifically cites paragraph (2)(h) of Resolution Conf. 10.3 which specifically discusses the duties of the exporting country in making scientific, biological assessment NDFs.<sup>79</sup> Resolution Conf. 10.3(2)(h) states:

*“the findings and advice of the Scientific Authority of the country of export be based on the scientific review of available information on the population status,*

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<sup>73</sup> Resolution Conf. 10.3(2)(g).

<sup>74</sup> Resolution Conf. 10.3(2)(h).

<sup>75</sup> Resolution Conf. 10.3(2)(i) (underline added).

<sup>76</sup> Resolution Conf. 10.3(2)(h).

<sup>77</sup> Resolution Conf. 16.7 (Rev. CoP17).

<sup>78</sup> *Id.* at 1.

<sup>79</sup> *Id.*

*distribution, population trend, harvest and other biological and ecological factors, as appropriate, and trade information relating to the species concerned.”<sup>80</sup>*

The recommendations and NDF guidance information contained in Resolution Conf. 16.7 (Rev. CoP17) were specifically for the direction of Scientific Authorities of exporting countries. If importing countries were meant to conduct the same scientific, biological findings as exporting countries are, they would have been included in Resolution Conf. 16.7 (Rev. CoP17). They were not.

### **Resolution Conf. 14.7**

Resolution Conf. 14.7 “Management of Nationally Established Export Quotas” makes recommendations to the Parties concerning export quotas.<sup>81</sup> Even in the title itself, the Resolution is specifically concerned with exporting countries and the process whereby they establish and manage their quotas. Paragraph 10 of the Annex to the Resolution states:

*“When export quotas are established, they should be set as a result of a non-detriment finding by a Scientific Authority, in accordance with Article III, paragraph 2 (a), or Article IV, paragraph 2 (a), of the Convention, and should ensure that the species is maintained throughout its range at a level consistent with its role in the ecosystems in which it occurs, in accordance with Article IV, paragraph 3. Export quotas for wild-taken specimens should be set at a level that takes account of the number or quantity of specimens that are taken from the wild legally or illegally. A non-detriment finding should be made whenever an export quota is established for the first time or revised, and reviewed annually.”<sup>82</sup>*

Paragraph 10 specifically noted that NDFs are the responsibility of the exporting country according to Article III.2(a).<sup>83</sup> The obligation of ensuring that a species is “maintained throughout its range at a level consistent with its role in the ecosystems in which it occurs” by conducting non-detriment findings is the responsibility of the exporting country, not the importing country.<sup>84</sup> If Resolution Conf. 14.7 had intended to acknowledge the importing country’s role in the NDF process it would have also cited Article III.3(a). It did not.

## **2. CITES NDF Guidance**

The CITES website currently provides NDF Guidance materials on its “Non-detriment Findings” page (<https://cites.org/eng/prog/ndf/index.php>). The first versions (Version 1.0) of each Module have been published and are up for consideration at the 33rd meeting of the Animals Committee and the 27th meeting of the Plants Committee in July 2024. The CITES NDF Guidance for Module 4 - NDFs for Appendix I imports (V1.0) provides an excellent

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<sup>80</sup> Resolution Conf. 10.3(2)(h).

<sup>81</sup> Resolution Conf. 14.7.

<sup>82</sup> Resolution Conf. 14.7 Annex, paragraph 10.

<sup>83</sup> See Convention Text, Art. III.2(a).

<sup>84</sup> Resolution Conf. 14.7 Annex, paragraph 10. See also Convention Text, Art. III.2(a).

description of the distinction between roles of each Scientific Authority.<sup>85</sup> The NDF Guidance notes:

*“The provisions in the text of the Convention relating to the non-detiment finding to be made for the import and the export of Appendix I listed species differ slightly from one another . . . The difference is that while the Scientific Authority of an exporting country must determine that the export is not detrimental to the survival of the species, the Scientific Authority of the importing country must determine that the purpose of the import is not detrimental (not the purpose of the export, which may be different from the purpose of the import and would be considered by the Scientific Authority of the exporting country when making their NDF). The essential language of these provisions of the Convention is that the activity, whether the export or the purpose of the import, must not be detrimental to the survival of the species.”<sup>86</sup>*

The NDF Guidance goes on to note that Scientific Authorities of importing countries have “*limited guidance on how to advise that an import will be for purposes which are not detrimental to the survival of the species involved or on the information they need in order to give appropriate advice.*”<sup>87</sup> However, it makes it clear that the duties of the importing country are not the same as the duties of the exporting country. It is clear that the realm of authority of an importing country Scientific Authority is solely in the importing country – it does not extend into the exporting country. Vice versa, the realm of authority of an exporting country Scientific Authority is in the exporting country and does not extend into the importing country. Each Scientific Authority is designated to advise on matters within its own country.

## **VI. When are “purposes” detrimental to the survival of the species?**

As mentioned above, there is little guidance for Scientific Authorities of importing countries in advising on when an “*import will be for purposes that may be detrimental to the survival of a species involved.*”<sup>88</sup> However, a logical investigation of the Convention Text provides an enlightening answer to this perplexing issue. The following is a step by step analysis of the Text to interpret the intended meaning of Article III.3(a).

1. Per Article II.1, trade in specimens of Appendix I species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.<sup>89</sup>
2. Per Article III.1, all trade in specimens of species included in Appendix I shall be in accordance with Article III.<sup>90</sup>

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<sup>85</sup> Module 4 - NDFs for Appendix I imports (V1.0) (<https://cites.org/eng/prog/ndf/index.php>).

<sup>86</sup> *Id.* at 1-2.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> Convention Text, Art. III.3(a).

<sup>89</sup> Convention Text, Art. II.1.

<sup>90</sup> Convention Text, Art. III.1.

3. Per Article IX.1(a), the Management Authority is the entity that must issue the import permit.<sup>91</sup>
4. Per Article III.3(c), the only purpose for which the Management Authority should deny an import permit should be when the purpose of the import is “primarily commercial.”<sup>92</sup>
5. This is because “primarily commercial” purposes are or may be detrimental to the survival of the species involved and must be subject to particularly strict regulation.<sup>93</sup>
6. Because the Scientific Authority must advise the Management Authority, it is the responsibility of the Scientific Authority to advise the Management Authority on whether a permit should be granted or denied.<sup>94</sup>
7. That is, the Scientific Authority must advise the Management Authority on whether the proposed purpose of the import will be for “primarily commercial” purposes or not.<sup>95</sup>
8. The facts concerning each import will determine whether a proposed use would be for “primarily commercial” purposes.<sup>96</sup>
9. Thus, NDFs by the Scientific Authority of the importing country must make assessments and investigations into the purpose or use of the import and determine if that purpose or use falls into the category of “primarily commercial.”<sup>97</sup>
10. Reiterating from above, this is because “primarily commercial” purposes are or may be detrimental to the survival of the species involved.
11. In conducting an NDF, the Scientific Authority of the importing country should use the recommendations and guidelines for determining whether a proposed purpose is “primarily commercial” laid out in Resolution Conf. 5.10 (Rev. CoP19).<sup>98</sup>
12. THEREFORE, it is the role of the Scientific Authority of the importing country to
  - a. identify the exact purpose of the import,
  - b. determine whether it is “primarily commercial,” and
  - c. advise the Management Authority on the nature of such.

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<sup>91</sup> Convention Text, Art. IX.1(a).

<sup>92</sup> Convention Text, Art. III.3(c).

<sup>93</sup> Convention Text, Art. II.1.

<sup>94</sup> Convention Text, Art. III.3(a).

<sup>95</sup> *Id.*

<sup>96</sup> Resolution Conf. 5.10 (Rev. CoP19).

<sup>97</sup> Convention Text, Art. III.3(a).

<sup>98</sup> Resolution Conf. 5.10 (Rev. CoP19).

Resolution Conf. 5.10 (Rev. CoP19) Annex provides a non-exhaustive list of examples in which import of an Appendix I species could be found not for “primarily commercial” purposes.<sup>99</sup> These include purposes for:

- Purely private use
- Scientific purposes
- Education or training
- Biomedical industry
- Captive-breeding programs
- Imports via professional dealers<sup>100</sup>

Chapter 10 of *The Evolution of CITES* by Willem Wijnstekers provides other examples which may satisfy the requirements of Article III.3(a) and (c).<sup>101</sup> Notably, he includes the importation of hunting trophies as not for “primarily commercial” purposes.<sup>102</sup>

## VII. *The Spirit of the Convention*

In summary, Dr. William Brown, the 1977 Executive Secretary of the U.S. Endangered Species Scientific Authority, ironically, stated the matter well:

*“There is an important difference between the finding of ‘not detrimental to the survival’ that is required for export permits, and the finding of ‘for purposes not detrimental to the survival’ that is required before issuance of Appendix I import permits by the receiving country. The basic biological fact-finding on Convention species is the responsibility of the exporting countries, where the species occur in the wild. That is the only biological assessment made for trade in Appendix II specimens, incorporated in the finding of ‘not detrimental to the survival’ that is required before issuance of an export permit.*

*The ‘purposes not detrimental to the survival’ finding that is required for Appendix I imports serves as a limitation and a safeguard on trade in these most threatened species. However, the finding does not require the importing country to replicate the basic biological fact-finding that is required of the exporting country. Inclusion of the word ‘purposes’ indicates that the importing country’s approach should differ and, in particular, that it should focus on the nature and quality of the activity in the importing country as it relates to species survival.”<sup>103</sup>*

The debate over Article III.3(a) has troubled the Convention since the Plenipotentiary Conference in 1973. Even though alternate interpretations have been repeatedly rejected, the Article III.3(a) issue continues to surface due to the obscure language in the Text, special interest ideologies, and

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<sup>99</sup> Resolution Conf. 5.10 (Rev. CoP19) Annex.

<sup>100</sup> *Id.*

<sup>101</sup> Wijnstekers, W. (2018): *The Evolution of CITES* - 11th edition. International Council for Game and Wildlife Conservation.

<sup>102</sup> *Ibid.* at 130; *see also* Resolution Conf. 2.11 (Rev.) and Resolution Conf. 17.9.

<sup>103</sup> Policy on Import of Appendix I Specimens, 42 Fed. Reg. 42,297 (Aug. 16, 1977).

generational interpretations and values that are far removed from those who founded the Convention. A Resolution from the Conference is needed to finally put the debate to rest.

The Preamble to the Text of the Convention should be a stark reminder of the Parties' true intent: to recognize exporting countries as being in the best position to determine the effects of trade on the status of wild populations from which the specimen comes. As the third paragraph of the Preamble reads:

*Recognizing that peoples and States are and should be the best protectors of their own wild fauna and flora.*

The Parties in attendance at the Plenipotentiary Conference intended this to be so. And, in the famous words of the United Kingdom Delegation, that "*this would be in the Spirit of the Convention.*"<sup>104</sup>

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<sup>104</sup> SR/8 (Final) at 3 (underline added).