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U.S. COMMENTS ON SPAW-CITES COMPATIBILITY ISSUES

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INTRODUCTION

This paper summarizes U.S. views on certain questions concerning the relationship between the Protocol Concerning Specially Protected Areas and Wildlife to the Cartagena Convention (SPAW Protocol) and the Convention on International Trade in Endangered Species (CITES). It also addresses certain other matters regarding the interpretation of the Protocol.

These issues were first raised at the ISTAC meeting in Cuba last August, and were referred for intersessional consultations between governments. In addition, the CITES Secretariat commissioned legal opinions on these issues from (a) Mr. Chris Wold in the United States and (b) Professors Luigi Condorelli and Laurence Boisson de Chazournes in Switzerland. The UNEP/CEP Secretariat has circulated those opinions and requested governments to provide comments on them. The United States directs its comments to the two primary questions concerning articles 25 and 11 of the Protocol.

Article 25 of the Protocol

A question has arisen concerning the meaning of article 25 of the Protocol in cases where Protocol imposes more stringent measures than those required under CITES. Article 25 provides:

Nothing in this Protocol shall be interpreted in a way that may affect the rights and obligations of Parties under [CITES] and the Convention on the Conservation of Migratory Species of Wild Animals.

Does this provision provide an exemption from obligations under the Protocol (such as a prohibition on trade or possession of a particular species) for States that are bound by the less stringent obligations of CITES? The United States believes the answer is clearly "no", and concurs with the conclusions reached in both legal opinions on this point.

The fact that CITES may regulate international trade in a particular species in a less restrictive manner than the protection required under the Protocol in no way suggests an “incompatibility” between the two agreements. Indeed, article XIV of CITES expressly provides that its Parties may implement stricter domestic measures for any species. Although CITES does allow trade in species listed on Appendix II – and indeed there are many species that are completely unregulated by CITES – that does not mean that CITES establishes a <u>right</u> to trade in such species; it merely means that CITES does not place additional constraints on the trade in such species. The Protocol, by contrast, does create more stringent constraints than those in CITES for certain species, a possibility that was expressly foreseen and approved in article XIV of CITES. For these reasons, article 25 cannot be read in any way to relieve States of their obligation to

provide the higher level of protection required under the Protocol, regardless of whether CITES sets a lower threshold of protection.

As a legal matter, then, a State that is party to both the Protocol and CITES can fulfill its obligations under both agreements, and is legally bound to do so when the Protocol enters into force for it.

Article 11 of the Protocol

A separate question has been raised about the application article 11(4)(d): Can a State which has already ratified the Protocol submit a reservation, pursuant to article 11(4)(d), during the 90 day period following the entry into force of the Protocol? Again, the United States believes the answer here is clearly "no".

Article 11 (4)(d) deals only with amendments to add a species to an annex. It allows a Party to "opt out" of such an amendment, which by definition would take place only after the Protocol had entered into force. It has no bearing whatsoever on the procedure by which a State becomes bound by the Protocol and its initial annexes, which are governed by articles 26 and 27 of the Cartagena Convention. Several features make this clear. For example, paragraph 4 of article 11 specifically deals with "the procedures to amend the annexes." Similarly, the 90 day opt-out period begins after a "vote of the Parties". Those provisions would make no sense if article 11(4)(d) had been intended to allow a State 90 days after the Protocol initially entered into force in order to lodge its reservations.

Nor does any other provision in the Protocol or Convention allow such a grace period for making reservations. In accordance with established treaty law and practice, therefore, a State wishing to enter a reservation to any part of the original Protocol and annexes can only do so at the time its ratifies or accedes to the Protocol.

Signature Following Closure of the signature Period

Finally, the United States does not understand the basis for the question in the "Terms of Reference for an External Legal Advice" concerning the legal implications of signing the Protocol after the end of the signature period but before the Protocol enters into force. In theory, there can be no signature after the end of the signature period. When the signature period ends, a State that has signed it may ratify the Protocol, or a State that has not signed it may accede to the Protocol. But signature after the period provided for that purpose (in the case of the Protocol, from 18 January 1990 through 17 January 1991) would violate the express terms of the agreement, and is not a legally available option. For these reasons, the United States therefore requests additional information about the question.