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## **Exemptions to the SPAW Protocol under Article 11(2): a Legal Review**



## **Exemptions to the SPAW Protocol under Article 11(2): a Legal Review**

Prepared by Alice Stroud\*

### **EXECUTIVE SUMMARY**

In Article 11(2), the STAC is granted power to assess the pertinence of Parties' exemptions to the Protocol. Such exemptions are to be granted "*for scientific, education or management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*" and must not "*jeopardize the species*". Article 11(2) does not provide clear definitions of these requirements. This review intends to guide the Meeting of the Parties (COP), the Scientific and Technical Advisory Committee (STAC) and Contracting Parties in defining their obligations under Article 11(2). The review examines in particular:

- the nature of the information Contracting Parties should be required to provide to the Organization when granting an exemption (section 1)
- the standard for determining if adoption of an exemption is pertinent (section 2)
- the extent of the authority of the STAC under Article 11(2), and the procedure it should follow in making its assessments (section 3)
- the nature of the recommendations the STAC and the COP can make when reviewing an exemption (section 4); and
- the powers the COP has to enforce the recommendations of the STAC on pertinence (section 5).

All recommendations on ways to harmonize possible interpretations of the terms included in Article 11(2), and on procedures for identifying and implementing an exemptions process, are based on a careful examination of the object and purpose of the Protocol, and on common practice in other fora.

The review concludes that Article 11(2) as it stands is sufficiently broad to allow the Contracting Parties to create criteria and procedures permitting proper implementation of its requirements. The review recommends the creation of a Working Group by the STAC to guide the COP in the adoption of a decision on the proper interpretation of the terms included in Article 11(2), and on the creation of procedures for its implementation. The review consequently suggests adoption of the following recommendation by the STAC:

### **Recommendation on the creation of a Working Group on exemptions to the Protocol under Article 11(2)**

"Following Decision 7 of COP3, the STAC herewith establishes an intersessional Working Group with the assistance of the SPAW RAC to develop procedures and definitions of appropriate parameters for the application and implementation of Article 11(2). This Working Group should include representatives of the Contracting Parties with expertise on the application of exemptions in other legal instruments with a similar "object and purpose" to the SPAW Protocol, and qualified representatives of non-governmental organizations with experience in relevant international agreements on the conservation of species. This

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\* WDCS, the Whale and Dolphin Conservation Society. The author received a French Masters of International Law from the University of Amiens, France in June 1998, a French D.E.A (diploma of advanced studies) in International and European Law from the University of Paris XI, France in August 1999, and a LL.M in Environmental and Natural Resources Law from the Northwestern School of Law of Lewis and Clark College of Portland, Oregon in August 2001. She can be contacted at <alice.stroud@wdcs.org>. The author wishes to warmly thank Ronald Orenstein from the Humane Society International for his thorough comments and the time invested in the discussion of this paper.

Working Group could follow the model of the Working Group established by COP1 for review of the criteria for listing species under the Protocol.

Suggested tasks for this Working Group include the following:

- a) The creation of criteria clarifying the interpretation of Article 11(2), and of a procedure for its implementation.
- b) The preparation of a draft text for submission to COP4. Such text should include the following elements:
  - i) Definitions of the conditions for the adoption of an exemption under Article 11(2), including the terms '*scientific, education or management purposes*', '*necessary to ensure the survival of the species or to prevent significant damage to forests or crops*' and '*shall not jeopardize the species*';
  - ii) A systematic and transparent procedure for assessment by the STAC of the pertinence of exemptions;
  - iii) Guidelines to assist the COP in making recommendations to Contracting Parties based on the assessment by the STAC;
  - iv) The creation of appropriate mechanisms to ensure cooperation between Contracting Parties, the STAC, the RAC and the COP, including a collaborative process to assist Parties before an exemption is granted;
  - v) The creation of a follow-up procedure allowing periodic reevaluation by the STAC and by the COP of the pertinence of exemptions granted under Article 11(2);
  - vi) The creation of appropriate procedures for monitoring of compliance with the recommendations of the COP on the need to withdraw or to modify an exemption."

## Introduction

1. In Article 11(2), the Protocol Concerning Specially Protected Areas and Wildlife<sup>1</sup> (SPA) allows Contracting Parties to take exemptions to the prohibitions prescribed for the protection and recovery of species listed in Annexes I and II. This article sets out criteria for these exemptions in general terms: Contracting Parties can adopt exemptions “*for scientific, education or management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*” as long as they do not “*jeopardize the species*”.
2. At their second and third Meetings (COP2, Montego Bay, Jamaica, 06 May, 2002 and COP3, Montego Bay, Jamaica 27 September 2004), the Contracting Parties agreed that clarification of Article 11(2) was an important matter. The issue was most recently addressed by a decision of the COP3 to include a specific activity on Article 11(2) within the SPA Workplan for 2004-2005. The SPA Regional Activity Center (RAC) has expressed its desire to be involved, but seeks guidance and assistance in clarifying the issues associated with Article 11(2). Support for the development of an intersessional working group on Article 11(2) was also expressed at the COP3. As a result, the Secretariat to the SPA Protocol commissioned a paper that outlines a plan of action for this potential Working Group<sup>2</sup> and decided to request this legal review of Article 11(2).<sup>3</sup>
3. This review explores ways to harmonize possible interpretations of the terms included in Article 11(2), according to common practice in other fora, and provides procedural recommendations for identifying and implementing an exemptions process consistent with the spirit and intent of the Protocol. This review focuses on ways to guide the SPA Contracting Parties and the Scientific and Technical Advisory Committee (STAC) in their application of the existing Article 11(2). The option of revision of Article 11(2) is briefly assessed, but the review concludes that Contracting Parties have enough tools at their disposal to ensure proper application of Article 11(2) without a revision of the SPA Protocol.
4. Article 11(2) is very limited in its application. It only allows Contracting Parties to take exemptions “*to the prohibitions prescribed for the protection and recovery of the species listed in Annexes I and II*”. When an exemption is validated under Article 11(2), all other obligations included in the SPA Protocol continue to apply.
5. Article 11(2) requires that Contracting Parties granting exemptions report them to the Organization for assessment of their pertinence by the STAC. In giving this oversight role to the STAC in Article 11(2), drafters of the Protocol apparently intended it to have an impact on the legal status of exemptions granted under this article. No such role is attributed to the STAC in other provisions on exemptions included in the SPA Protocol. Article 14 of the SPA Protocol on the adoption of exemptions for “*traditional activities*”, for example, only requires that Contracting Parties which allow exemptions with regard to protective measures “*inform the Organization accordingly*”, but makes no mention of the STAC or of its potential role.
6. Interpretations of Article 11(2), therefore, should reflect the importance of the STAC and its findings in the evaluation of exemptions. An interpretation rendering the role of the STAC insignificant, or its findings of no effect, would be contrary to the text of the SPA Protocol and the presumed intent of its drafters.
7. The STAC is, however, limited in its role by the terms of Article 20, which defines its mandate. Under Article 20, the STAC is to “*provide advice to the Contracting Parties through the Organization on the [various] scientific and technical matters relating to the Protocol*” and on “*any (...) matters relating to the implementation of the Protocol.*” The COP is required in turn to “*analyze*

*the advice and recommendations of the STAC*” without being bound by decisions made by the STAC<sup>4</sup>. The COP can decide to make recommendations to Contracting Parties based on the advice of the STAC when “*oversee[ing] and provid[ing] policy guidance to the Organization*” under Article 23. Reading these provisions together with Article 11(2), therefore, it seems reasonable to assume that the intent is for the STAC to report its assessment of pertinence to the COP, which can then decide on what action (if any) it needs to take.

8. Decisions of the COP are not given binding authority in the text of the SPAW Protocol. While in many cases “recommendations” by international bodies are non-binding in international law, member States can nevertheless agree to treat them as authoritative. Contracting Parties to CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>5</sup>, for example, treat resolutions of the Conference of the Parties, and other measures including those relating to administrative, investigative and compliance procedures (some of which have involved sanctions against CITES Parties), as authoritative when nothing in the text of the treaty provides that they are obligated to do so.<sup>6</sup> In practice, SPAW Contracting Parties have also decided to treat decisions and recommendations by the COP as compulsory *de facto*.
9. Article 11(2) raises a number of important questions on the roles and obligations of the STAC, the COP and Contracting Parties. These questions include:
  - What kind of information should Parties granting exemptions be required to provide to the Organization?
  - What is the standard for determining pertinence?
  - What is the extent of the authority of the STAC under Article 11(2), and what procedure should it follow in making its assessments?
  - What kind of recommendations can the STAC and the COP make (i.e. can they only make a finding of “pertinent” or “not pertinent”, or can they also make recommendations to modify the exemptions?)
  - What powers does the COP have to enforce the recommendations of the STAC?
10. This review will examine each question and present recommendations for interpretation of the terms included in Article 11(2).
11. As a conclusion, the review will make recommendations to Contracting Parties on the way forward, and suggest in particular that Contracting Parties should establish an intersessional Working Group on Article 11(2). The paper will propose a list of tasks for this Working Group to consider according to relevant findings in the review, and per the guidance document previously referenced<sup>7</sup>. These recommendations will be presented to the next meeting of the STAC for discussion.

## **1. What kind of information should Parties granting exemptions be required to provide to the Organization?**

12. Under Article 11(2), a Contracting Party is obligated to ensure that three sets of requirements are met before adopting an exemption. The exemption shall:
  - be adopted “*for scientific, education or management purposes*”
  - be for purposes “*necessary to ensure the survival of the species or to prevent significant damage to forests or crops*”
  - not “*jeopardize the species*”

13. These terms lay out only vague conditions for the adoption of an exemption under Article 11(2). Although one Contracting Party (the Netherlands Antilles) has already brought an Article 11(2) exemption before the STAC, without further definition of these terms there are likely to be difficulties in establishing a clear, agreed-upon procedure for dealing with exemptions in the future.
14. Definitions of terms included in Article 11(2) should be established using fundamental rules of treaty interpretation as provided by the Vienna Convention on the Law of Treaties<sup>8</sup>, which codifies international customary law. Article 31, paragraph 1, of the Vienna Convention requires a treaty to be interpreted “*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*”. It is important for Contracting Parties to establish specific criteria for a uniform interpretation of Article 11(2) before further exemptions are granted that may be contrary to the object and purpose of the SPAW Protocol.

### **1.1 Definition of “scientific, education or management purposes”.**

15. The SPAW Protocol refers to “*education*”, “*scientific*” and “*management*” in other articles, without giving a precise definition of these terms<sup>9</sup>. However, the rules on the interpretation of treaties included in the Vienna Convention allow reference to “*any relevant rules of international law applicable in the relations between the Contracting Parties*”. All SPAW Contracting Parties are Parties to CITES, and Article 25 of the SPAW Protocol refers explicitly to the need to respect the rights and obligations of Contracting Parties under that Convention. Several definitions adopted in the context of CITES may be useful for interpretation of the terms included in Article 11(2). Also, because the SPAW Protocol is established to protect “*areas and wildlife*”, analysis of other legal provisions (international agreements, national legislation, etc.) which share the same “*object and purpose*” may be useful as guidance for the interpretation of Article 11(2).

#### **1.1.1 Scientific purposes**

16. The establishment of conditions relating to the registration and recognition of the researcher and of the scientific institution is not uncommon in the legal definition of what constitutes “*scientific research*” in other fora. The Annex to CITES Resolution Conf. 5.10 states that “*a special departure from the Convention's general procedure*” may be justified for scientific purposes under Article VII, Paragraph 6 of the Convention. When defining criteria for the evaluation of “*scientific purposes*”, the Annex states that exemptions can 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*”<sup>10</sup>.
17. Definitions of “*scientific research*” found in other legal instruments protecting wildlife and the environment include the following parameters:
- conditions related to qualification and training of the staff: obligation for the research to be conducted by “qualified personnel”; obligation to “*promote and encourage the implementation of programs aimed at retaining and increasing the knowledge of the technical staff*”;
  - conditions related to the institution or the business involved in or conducting the research: obligation to have “*an extensive program of research*” that provides “*a significant contribution*” to the general understanding of wildlife and to the management of its species; obligation to “*stimulate exchanges with universities, centers of research and correlative institutions, and students and technicians from other institutions*” and to cooperate in order to ensure that “*research*

*activities are carried out in a proper manner*”; obligation to establish programs “*incorporating behavior, social relationships, reproduction, feeding*”; obligation to “*have staff that is responsible for developing the main research programs*”; obligation to “*contribute to and cooperate with projects and studies carried out on [specimens] in the wild, aimed at increasing knowledge about their species and distribution in order to aid the conservation of the species*”;

- conditions related to the methods used for the research: obligation to “*ensure the most complete possible use of each biological sample and sample of post-mortem material by means of partnerships between the vets employed and recognized scientific institutions*”; obligation not to use any form of lethal research; obligation to “*ensure that all biological material obtained, including that which is collected post mortem, plays a significant role in the development of research projects or is used for educational purposes*”; obligation to observe appropriate “*restrictions on access to genetic resources*”
- conditions related to the results of the research: obligation for the results to be credible enough to likely “*be accepted for publication in a refereed scientific journal, (...) contribute to the basic knowledge of (...) biology or ecology, [and] (...) identify, evaluate, or resolve conservation problems*”; obligation for data available to “*be presented in publications and at national and international conferences*”; etc.<sup>11</sup>

18. In order to clarify interpretation of Article 11(2) and aid in the assessment of the pertinence of an exemption, the Contracting Parties could direct either the Working Group or the STAC to draft specific criteria for the definition of scientific purposes under the SPAW Protocol, and agree that any activity meeting these criteria could be considered to constitute a “scientific purpose” under Article 11(2).

### **1.1.2 Education purposes**

19. Criteria for the definition of education in the environmental context are seldom explicit in international agreements. CITES Resolution Conf. 5.10<sup>12</sup> recognizes, for example, that imports of Appendix I species may be permitted in some circumstances when the import is “*for purposes of conservation, education or training*” but fails to give details for the definition of what constitutes an education purpose. Various national laws have established criteria for the definition of what constitutes “*education*” in the environmental context. These criteria are, in essence, of the same nature as the criteria used to define scientific research and include:

- conditions related to qualification and training of the staff: obligation for the staff to have “*valid and documented experience in biology, eco-ethology, conservation*”; obligation to have at least one full-time employee in charge of education with appropriate degree and experience in the field of natural sciences/biology; obligation for the technical team in charge of education to have “*proven experience*” in biology and appropriate conservation issues;
- conditions related to the institution or the business involved: obligation to have an extensive educational program for visitors and school groups of all ages with programs designed specifically for school groups ; obligation for a competent technician to be available to manage the educational programs;
- conditions related to the program and to the methods used: obligation for programs to include at least some of the following elements: audio/visual support, interactive displays, figurative displays, guided tours, teaching programmes that can be developed outside the unit; obligation to make available to the visiting public scientifically accurate information in a booklet ; obligation for the



information provided to include specific details (information on species distribution, on the ecological relationship between the species, predators, parasites, etc.); obligation to ensure that all booklets and educational materials are prepared with full cooperation of the person in charge of education; obligation for the educational program for visitors and school groups to be based on the biology, ecology and conservation of the specimen in the wild; obligation for the content of the program to correspond with the level of schooling of the target audience; etc.<sup>13</sup>

20. The Contracting Parties could direct either the Working Group or the STAC to draft a list of criteria defining “education” in the context of the SPAW Protocol, and decide that an exemption can be adopted under Article 11(2) when these criteria are met.

### **1.1.3 Management purposes**

21. In the context of wildlife and environmental protection, management measures are intricately connected to their contribution to conservation. This has influenced the definition of “management” in provisions with the same object and purpose as the SPAW Protocol. When referring to species management, CITES Resolution Conf. 9.24 (Rev. CoP13)<sup>14</sup> gives six categories of measures to consider: management measures per se, population monitoring measures, control measures (international and domestic), measures on captive breeding and artificial propagation, habitat conservation measures and measures establishing safeguards. Assessment of each parameter is closely linked to the need to ensure conservation of the species and sustainability of possible takes. The US Marine Mammal Protection Act uses a similar approach and associates the terms “conservation” and “management” by giving them the same definition.<sup>15</sup> A definition of “management purposes” under Article 11(2) will thus require complete understanding of what can be considered as a conservation measure. The Convention on Biological Diversity<sup>16</sup> gives a detailed list of examples for “*in situ*” and “*ex situ*” conservation measures. Some of the actions included in this list include: adoption of measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions; rehabilitation and restoration of degraded ecosystems ; promotion of the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies; establishment of a system of protected areas or areas where special measures need to be taken to conserve biological diversity; etc<sup>17</sup>.

22. The Contracting Parties could direct either the Working Group or the STAC to draft a specific list of conservation measures defining “management” in the context of the SPAW Protocol, and decide that an exemption can be adopted under Article 11(2) when these conservation measures are present.

### **1.2. Definition of the term “Necessary”**

23. Article 11(2) requires that an exemption be for purposes “*necessary to ensure the survival of the species or to prevent significant damage to forests or crops.*” Analyses of international law have established that, when the term “necessary” is used in the legal and statutory sense, its meaning differs from the dictionary meaning of the term. An international lawyer and scholar noted, in particular, that: “ *In the legal context, ‘necessary’ means ‘being appropriate and well adapted to fulfilling an objective.’*<sup>18</sup> (...) *Courts in the United States and Australia, as well as the European Court of Human Rights,*<sup>19</sup> *have rejected arguments that ‘necessary’ means ‘essential’ or ‘indispensable’ in the legal context and have ruled that ‘necessary’ means ‘appropriate.’* ”<sup>20</sup>
24. However, in the context of species survival the use of such a definition may run counter to the Precautionary Principle<sup>21</sup>, a strongly-established tenet of international environmental law. For example, a measure that is merely “appropriate” to prevent damage to crops may be highly damaging

to wild species protected by the Protocol. If alternatives are available that are potentially less harmful, approving such a measure may be both non-precautionary and incompatible with the objectives of the Protocol. Application of the Precautionary Principle is “*particularly relevant in cases of serious or irreversible harm such as the threatened extinction of species*”<sup>22</sup>. Some even argue that the precautionary principle has become part of international customary law.<sup>23</sup> Contracting Parties to the SPAW Protocol are familiar with the application of the precautionary principle in the context of their participation in other international agreements<sup>24</sup>.

25. Any definition of “necessary” adopted by the Contracting Parties, therefore, should be strict enough to allow the STAC to assess proposed exemptions in a proper manner with respect to the Protocol itself. This will probably require the use of a definition considerably stricter than that established in a purely legal context.

### **1.3. Shall not “jeopardize” the species**

26. The term “*shall not jeopardize the species*” is neither strictly biological nor specific in scientific terms. In practice, it is of course impossible to be “certain” that an action will not put a species at risk. In order to be compatible with the objectives of the SPAW Protocol, interpretation of Article 11(2) must occur in the broader context of the application of the Precautionary Principle.
27. The Rio Declaration<sup>25</sup> was one of the first international recognitions of this principle. Rio Principle 15 states that: “*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*”
28. Similarly, Annex 4 of CITES Resolution Conf. 9.24 (Rev. COP 13)<sup>26</sup> sets out a number of “precautionary measures” to be considered as part of the amendment process for the CITES Appendices. In its opening paragraph, it states that “*When considering proposals to amend Appendix I or II, the Parties shall, by virtue of the precautionary approach and in case of uncertainty either as regards the status of a species or the impact of trade on the conservation of a species, act in the best interest of the conservation of the species concerned and adopt measures that are proportionate to the anticipated risks to the species.*”
29. The 1973 United States Endangered Species Act<sup>27</sup> offers the following definition of the term “jeopardize” in paragraph (k) of section 3: “*Jeopardize’ means to engage in an action that reasonably would be expected, directly, indirectly, or cumulatively, to reduce the likelihood of recovery in the wild of any listed species*”. Application of this definition has evolved throughout the years and has come to include a broad range of parameters.<sup>28</sup> A respected expert on the application of the Endangered Species Act remarked that the choice of a threshold for qualification cannot rely on science alone but has to involve policy decisions on the level of risk which can be considered as “acceptable” for a species:

*“ (...) there is no magic number above which a population is secure or below which it is headed toward extinction. Accordingly, even with perfect information, one cannot use science alone to say when a species faces ‘jeopardy’ and when it does not. Instead, a jeopardy determination – like calls regarding similar biological benchmarks – is of necessity a two step process. First, the Services must decide what level of risk to species or populations is too much, i.e., draw the line between “acceptable” risk and the level of risk that constitutes ‘jeopardy’ to listed species. Next, biologists must apply this standard to individual cases by using their scientific expertise to assess whether the*

*impacts caused by a specific proposal will result in a level of risk to the species that crosses over the line between jeopardy and no jeopardy. The difficulty lies in the fact that the first step involves a policy judgment, whereas the latter calls for a scientific determination.*"<sup>29</sup>

30. In order to properly decide what constitutes an "appropriate" level of risk to species regulated by the SPAW Protocol, the Contracting Parties will have to ensure adequate risk assessment for each exemption adopted under Article 11(2). The Contracting Parties will also have to ensure proper application of the Precautionary Principle which requires "taking action in the face of potentially serious risks without awaiting the results of scientific research that establishes cause-and-effect relationships with full scientific certainty."<sup>30</sup>
31. A definition of the obligation not to jeopardize the species should be established with proper consideration for the application of other appropriate provisions in the SPAW Protocol. Under Article 13, for example, Contracting Parties are obligated to conduct an Environmental Impact Assessment in "the planning process leading to decisions about industrial and other projects and activities that would have a negative environmental impact and significantly affect areas or species that have been afforded special protection under this Protocol." When conducting an Environmental Impact Assessment, Contracting Parties are required to "evaluate and take into consideration the possible direct and indirect impacts, including cumulative impacts, of the projects and activities being contemplated". Findings on the fulfillment of the obligation not to jeopardize the species must therefore take into account the conclusions of the Environmental Impact Assessment. Definition of jeopardy under Article 11(2) will also have to rely on the evaluation of "the possible direct and indirect impacts, including cumulative impacts" of the exemption being reviewed.

## **2. What is the standard for determining pertinence?**

32. Article 11(2) obligates the STAC to assess the "pertinence" of the exemptions granted. It fails, however, to define the term "pertinence", and gives no indication as to what constitutes an adequate assessment of pertinence under its terms. Definition of the term "pertinence" in other instruments has come to include various meanings, which comprise, for example: properness, appropriateness or suitability<sup>31</sup>; adequacy of interpretation<sup>32</sup>; ability to bring appropriate response to a problem<sup>33</sup>; applicability<sup>34</sup>; etc. Several methods have been developed to evaluate the pertinence of measures in other fora. For instance, assessment of the pertinence of a change in the financial mechanisms applied to Caribbean countries requires evaluation of the advantages and disadvantages of each mechanism.<sup>35</sup>
33. Panels of the World Trade Organization have decided to assess pertinence of an exemption to Article XIV of the General Agreement on Trade in Services (GATS)<sup>36</sup> by following a "four-step-methodology" which includes an assessment of the compatibility of the exemptions with the conditions included in Article XIV and a more general assessment of the compatibility with the Spirit of the Agreement as a whole<sup>37</sup>, an approach that may provide a model for a procedure under the SPAW Protocol.
34. By referring to the obligation to "assess the pertinence" of an exemption, drafters of the SPAW Protocol apparently intended for the STAC to evaluate the compatibility of granted exemptions, not only with the conditions set in Article 11(2), but with the Protocol as a whole. The Contracting Parties should take this into account when making a decision on the interpretation of Article 11(2).

### 3. What is the extent of the authority of the STAC under Article 11(2), and what procedure should it follow in making its assessments?

35. Article 11(2) provides that the STAC is to assess “*the pertinence of the exemptions granted*” (emphasis added). This seems to suggest that the STAC is to conduct its assessment only after an assessment has been adopted by a Contracting Party. This interpretation, however, was not followed in the only assessment conducted thus far by the STAC<sup>38</sup>, and makes no practical sense if the assessment by the STAC is to have an effect. It may be advisable, therefore, to interpret the term “granted” in Article 11(2) to mean “granted *conditionally, subject to assessment by the STAC and approval by the COP*”. Such an interpretation would maintain the importance of the role of the STAC in the exemptions process. It would also promote collaboration between the Contracting Parties, the COP and the STAC before an exemption is granted, reducing the chances of disagreement between the Contracting Party wishing to adopt an exemption and the STAC.
36. Under this interpretation of Article 11(2), Contracting Parties must first make a unilateral assessment of the conformity of the exemption they wish to grant by making sure that all the conditions set in the article are met. If they determine that their exemption meets the requirements of Article 11(2), they then have the obligation to report the exemption to the Organization for assessment of its pertinence by the STAC.
37. The wording of Article 11(2) may be contrasted with that in Article VIII of the International Convention on the Regulation of Whaling (ICRW). Although this article requires that permits granting exemptions for “scientific” whaling be reported to the International Whaling Commission (IWC)<sup>39</sup>, there is no associated requirement that these permits be assessed in any way. Language in Article VIII states that the right to grant such permits is notwithstanding any other language in the Convention. As a result, IWC member countries that have used the exemption for scientific whaling can and do disregard recommendations of the Commission on the pertinence of the exemptions granted and on the accuracy of the interpretation of the exemption provisions in the treaty<sup>40</sup>. By placing scientific whaling outside of the application of the rest of the treaty and by not conferring an oversight role to the Commission or to the Scientific Committee on the conduct of scientific whaling under Article VIII, the ICRW introduced a loophole which makes it possible for the countries involved in scientific whaling to completely disregard recommendations of the Commission.
38. Under SPAW, there is no “notwithstanding” language withdrawing exemptions from coverage by the Protocol, and the STAC is given a specific oversight role. Occurrence of similar circumstances within the SPAW Protocol would, therefore, potentially be more conflicting with the authority of the COP than failure by countries issuing scientific whaling permits to comply with IWC resolutions is to that body. In the context of the application of Article 11(2), it is therefore extremely important for Contracting Parties wishing to adopt an exemption to collaborate with the STAC and the COP at all stages of their decision-making process on the adoption of the exemption, to ensure as much as possible that the STAC can make an authoritative finding based on the best available information, and that there will be willing compliance by Contracting Parties with any ensuing recommendations by the COP.
39. The most efficient way to ensure proper collaboration between Contracting Parties and the Organization in the implementation of Article 11(2) would be to create an evaluation and review procedure for exemptions. The rules of Procedure of the STAC are flexible enough to allow its participation in a collaborative, intersessional and *ad hoc* assessment of exemptions under Article 11(2)<sup>41</sup>. When making recommendations on the adoption of such a procedure, the Contracting Parties can use examples applied in other fora. Evaluation and review procedures are very commonly used

when assessing the pertinence of an exemption in international agreements and national laws on the conservation of wildlife and the environment<sup>42</sup>. SPAW Contracting Parties have had broad experience on this matter in their application of CITES, particularly with reference to the Significant Trade Review Procedure, currently governed by CITES Resolution Conf. 12.8 (Rev. COP 13)<sup>43</sup>.

40. Such evaluation and review procedures traditionally include several steps, as reflected in the following **suggested procedure**

- 1) Notification of the STAC: A Contracting Party gives notification of its intent to grant an exemption to the Organization and submits appropriate information, in the proper format<sup>44</sup> on the proposed exemption. The Organization forwards it to the STAC with supporting information provided in compliance with terms of reference to be set by the COP;
- 2) Preliminary assessment of pertinence and recommendations by the STAC. At this stage of the process, the STAC can request clarifications and additional information to facilitate its assessment of the pertinence of the exemption. The STAC then makes a preliminary assessment of the pertinence of the exemption and gives notification of its decision and of possible recommendations to the Contracting Party seeking an exemption. The Contracting Party can respond in writing to the STAC and make comments on the preliminary assessment of pertinence and on the recommendations made by the STAC.
- 3) Final assessment of pertinence and recommendations by the STAC and Final Decision of the COP. The STAC considers possible changes to its preliminary assessment of pertinence and to its recommendations, based on the comments provided by the Contracting Party wishing to grant an exemption. Final assessment on the pertinence of the exemption is sent to the COP by the STAC with any recommendations for denying or modifying the exemption, if appropriate. The COP considers the advice of the STAC and makes a final decision on the exemption.
- 4) Follow-up and assessment of compliance. Contracting Parties report on the pertinence of their exemption and on their compliance with the recommendations of the COP at each meeting of the STAC and at each COP. When evaluating a report by a Contracting Party, the STAC evaluates the need to make a new assessment of pertinence for the exemptions granted and examines the possible need for new recommendations to the COP. The COP takes appropriate decisions to ensure compliance of the Contracting Party with its previous recommendations on the exemption and with the SPAW Protocol. In case a Contracting Party persists in not complying with recommendations of the COP, appropriate measures will have to be applied to bring the Contracting Party into compliance (see section 5 below for suggestions on measures to force compliance).

41. Most of the process could occur by email to avoid extra costs to the organization. A few members could be designated within the STAC to work on the assessment of exemptions intersessionally.

#### **4. What kind of recommendations can the STAC and the COP make?**

42. Article 11(2) fails to provide guidance on the kind of recommendations that the STAC or the COP can make. In other fora, provisions giving power of recommendation to an institution are fairly open and often fail to establish limits. CITES Resolution Conf.12.8 (Rev. CoP13) on the Review of significant trade<sup>45</sup> is a good example of the freedom left to the Animals or Plants Committee in the formulation of recommendations. These Committees are free to make a very broad range of

recommendations judged necessary. The text of the resolution guides the Committees in the following terms:

- “m) the Animals or Plants Committee shall, in consultation with the Secretariat, formulate recommendations for the remaining species. These recommendations shall be directed to the range States concerned;*
- “n) for species of urgent concern, these recommendations should propose specific actions to address problems related to the implementation of Article IV, paragraph 2 (a), 3 or 6 (a). Such recommendations should differentiate between short-term and long-term actions, and may include, for example:*
- i) the establishment of administrative procedures, cautious export quotas or temporary restrictions on exports of the species concerned;*
  - ii) the application of adaptive management procedures to ensure that further decisions about the harvesting and management of the species concerned will be based on the monitoring of the impact of previous harvesting and other factors; or*
  - iii) the conducting of taxon- and country-specific status assessments, field studies or evaluation of threats to populations or other relevant factors to provide the basis for a Scientific Authority’s non-detriment finding, as required under the provisions of Article IV, paragraph 2 (a) or 6 (a).*

*Deadlines for implementation of these recommendations should be determined by the Animals or Plants Committee. They must be appropriate to the nature of the action to be undertaken, and should normally be not less than 90 days but not more than two years after the date of transmission to the State concerned;*

- “o) for species of possible concern, these recommendations should specify the information required to enable the Animals or Plants Committee to determine whether the species should be categorized as either of urgent concern or of least concern. They should also specify interim measures where appropriate for the regulation of trade. Such recommendations should differentiate between short-term and long-term actions, and may include, for example:*
- i) the conducting of taxon and country-specific status assessments, field studies or evaluation of threats to populations or other relevant factors; or*
  - ii) the establishment of cautious export quotas for the species concerned as an interim measure.*

*Deadlines for implementation of these recommendations should be determined by the Animals or Plants Committee. They must be appropriate to the nature of the action to be undertaken, and should normally be not less than 90 days but not more than two years after the date of transmission to the State concerned;*

- “p) these recommendations shall be transmitted to the range States concerned by the Secretariat;”*

43. In practice, the conduct of evaluation and review procedures traditionally results in the issuance of at least five types of recommendations:

- Recommendations denying the exemption as a whole.
- Recommendations validating the exemption as a whole.
- Recommendations granting conditional validation of the exemptions pending the occurrence of certain adjustments
- Recommendations denying the exemption pending submission of additional information or pending occurrence of certain adjustments which will allow future reevaluation
- Recommendations imposing incentives for adjustments or sanctions of violations

44. When defining the roles of the STAC and of the COP in the procedure for the assessment of exemptions, Contracting Parties should adopt a broad definition of the term “*recommendation*” and allow the STAC and the COP to recommend the adoption of any measures they judge necessary to the good application of Article 11(2), including sanctions for non-compliance with the recommendations of the COP.

## **5. What powers does the COP have to enforce the recommendations of the STAC?**

45. The most vital jurisdictional question with respect to Article 11(2) concerns the extent to which the COP can take measures to ensure compliance by Contracting Parties. According to Article 60 of the Vienna Convention on the Law of Treaties, the violation of a provision essential to the accomplishment of the object or purpose of a treaty by one of the Parties entitles the other Parties, by unanimous agreement, to suspend the operation of the treaty in whole or in part. It is broadly recognized in the international scene that “*a ‘treaty’ consists of more than just its text and includes related agreements and practice by the parties*”.<sup>46</sup>
46. If a Contracting Party maintains an exemption despite an assessment of non-pertinence by the STAC, the conflict could undermine the authority of the Protocol. If, however, Article 11(2) is interpreted to equate non-pertinence of an exemption, as determined by the STAC and confirmed by the COP, as equivalent to non-compliance with the terms and objectives of the Protocol itself, then the COP could grant itself the right to impose measures and possible sanctions against Contracting Parties that refuse to withdraw or modify exemptions in accordance with its recommendations.
47. Parties to CITES have developed, and continue to develop, several types of compliance procedures. These procedures were developed by resolution to ensure enforcement of the treaty. CITES Document COP 12 Doc 26 refers to measures created to bring a Party back into compliance with the Convention. These measures include: advice and assistance; issuance of a formal caution; verification; public notification of non-compliance; the possibility of entering into a compliance action plan; suspension of rights and privileges (such as a temporary suspension of commercial or all trade in specimens of one or more CITES listed species). CITES Parties have not yet considered the adoption of financial penalties or the suspension of other rights and privileges such as restriction of the right to vote or suspension of the right to participate in Committees, Working Groups, etc.<sup>47</sup>
48. The SPAW Contracting Parties should determine appropriate measures to take as a response to non-compliance with recommendations on exemptions under Article 11(2). These could be incorporated into any formal procedure, as the CITES Parties have done for the Significant Trade Review Process.

## **6. Conclusions and recommendations on the way forward.**

49. Although, According to Article 23, Contracting Parties have the ability to make additions to the SPAW Protocol “*in the form of annexes, as well as amendments to this Protocol or to its annexes*”, a revision of Article 11(2) would entail cumbersome and lengthy proceedings<sup>48</sup>. It is important to note that Article 11(2) of the SPAW Protocol is sufficiently broad to allow the COP to create criteria and procedures as recommended in this review. A revision is not necessary.
50. Relying on a decision of the COP to interpret the terms left vague in Article 11(2) is the most efficient way to address concerns raised by this provision. Contracting Parties have used the same method when creating the review of significant trade at CITES. They created a very specific procedure to

ensure and monitor the implementation of Article IV, even though the treaty mentions neither the procedure nor the Committees charged with its operation. This procedure was adopted by Resolution of the COP; it did not require revision of the treaty.

51. When defining the terms governing the possible application of Article 11(2), the COP should:
  - Adopt a systematic method for defining the three sets of requirements governing adoption of an exemption under Article 11(2)
  - Adopt a systematic and transparent procedure for assessment by the STAC of the pertinence of exemptions
  - Create a collaborative process to ensure cooperation among Contracting Parties, the STAC and the COP before an exemption is granted.
  - Create appropriate procedures for monitoring compliance with recommendations of the COP to withdraw or modify an exemption
  - Create follow-up procedures allowing periodic reevaluation by the STAC and by the COP of the pertinence of the exemptions validated by a decision of the COP.
52. By creating a Working Group on the definition of appropriate parameters for the application of Article 11(2), the STAC will be able to guide the COP in this task. The STAC should therefore consider adoption of the recommendation on the creation of a Working Group included in Annex 1.
53. It is important for the Contracting Parties to agree on the proper interpretation of Article 11(2), and to develop a proper procedure for its implementation, before considering further exemptions. Adoption of further exemptions should therefore be delayed until a final decision of the COP setting out both the interpretation and the procedure to be followed.

**Annex 1. Recommendation on the creation of a Working Group on exemptions to the Protocol under article 11(2)**

54. “Following Decision 7 of COP3, the STAC herewith establishes an intersessional Working Group with the assistance of the SPAW RAC to develop procedures and definitions of appropriate parameters for the application and implementation of Article 11(2). This Working Group should include representatives of the Contracting Parties with expertise on the application of exemptions in other legal instruments with a similar “object and purpose” to the SPAW Protocol, and qualified representatives of non-governmental organizations with experience in relevant international agreements on the conservation of species. This Working Group could follow the model of the Working Group established by COP1 for review of the criteria for listing species under the Protocol.
55. Suggested tasks for this Working Group include the following:
  - a) The creation of criteria clarifying the interpretation of Article 11(2), and of a procedure for its implementation.
  - b) The preparation of a draft text for submission to COP4. Such text should include the following elements:
    - i) Definitions of the conditions for the adoption of an exemption under Article 11(2), including the terms ‘*scientific, education or management purposes*’, ‘*necessary to ensure the survival of the species or to prevent significant damage to forests or crops*’ and ‘*shall not jeopardize the species*’;



- ii) A systematic and transparent procedure for assessment by the STAC of the pertinence of exemptions;
- iii) Guidelines to assist the COP in making recommendations to Contracting Parties based on the assessment by the STAC;
- iv) The creation of appropriate mechanisms to ensure cooperation between Contracting Parties, the STAC, the RAC and the COP, including a collaborative process to assist Parties before an exemption is granted;
- v) The creation of a follow-up procedure allowing periodic reevaluation by the STAC and by the COP of the pertinence of exemptions granted under Article 11(2);
- vi) The creation of appropriate procedures for monitoring of compliance with the recommendations of the COP on the need to withdraw or to modify an exemption.”

#### **END NOTES**

- 1 Protocol Concerning Specially Protected Areas and Wildlife to the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Kingston, 18 January 1990, available at <<http://www.cep.unep.org/law/spawnut.html>> [hereinafter SPAW Protocol and Cartagena Convention]
- 2 Manal Stulgaitis, Working Group on Protocol Concerning Specially Protected Areas and Wildlife (SPAW) Article 11(2) Exemption Procedure and Criteria, Memo to the SPAW Secretariat, 1 May 2005 [hereinafter WG Memo].
- 3 The Secretariat is here acting pursuant to Article 22 paragraph (2) (c) of the SPAW Protocol which provides that it should “assist the Contracting Parties and the Scientific and Technical Advisory Committee, in co-operation with the competent international, intergovernmental and non-governmental organizations in (...) the formulation of recommendations containing common guidelines and criteria” dealing in particular with the management of protected species.
- 4 Article 23 of the SPAW Protocol.
- 5 Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973 available at <<http://cites.org/eng/disc/text.shtml>> [hereinafter CITES].
- 6 See CITES COP12 Doc. 26, Interpretation and implementation of the Convention - General compliance issues, available at <<http://cites.org/eng/cop/12/doc/E12-26.pdf>>. [hereinafter CITES Compliance Document] See also document IWC/57/Rep 6, Annex F, “Paper on options for compliance mechanisms under the RMS” presented by the United Kingdom at the last meeting of the International Whaling Commission in June 2005.
- 7 See WG Memo, supra note 2
- 8 Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF. 39/27. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].
- 9 See for example Articles 4 (2), 6 (2), 10 (7), 16, 17, 18, 20 (3) and 22 of the SPAW Protocol and Article 13 of the Cartagena Convention, supra note 1.
- 10 Annex to CITES Resolution Conf. 5.10, “Definition of ‘primarily commercial purposes’”, available at <<http://cites.org/eng/res/index.shtml>>
- 11 See Alaska Department of Fish and Game Division of Wildlife Conservation’s “Policy and Requirements for Scientific and Educational Permits” available at <[http://www.wildlife.alaska.gov/license\\_form/forms/policy.cfm](http://www.wildlife.alaska.gov/license_form/forms/policy.cfm)> [hereinafter Alaska permit requirements] or the licensing requirements established by the Authority responsible for Parcs and Wildlife in Quebec

(Société de la faune et des parcs du Québec) for “capture of wild animals for scientific, educational or wildlife management purposes” detailed at <[http://www.fapaq.gouv.qc.ca/en/faune/permis\\_seg/instructions.htm](http://www.fapaq.gouv.qc.ca/en/faune/permis_seg/instructions.htm)> [hereinafter Quebec licensing requirements]. See also Italian Regulations on the maintenance in captivity of dolphin specimens belonging to the species *Tursiops truncatus*, in application of Article 17 paragraph 6 of law 93 of 23 March 2001, Journal no. 15 of 18 January 2002, Environment Ministry – Decree 469 of 6 December 2001, translated from the original by the Whale and Dolphin Conservation Society [hereinafter Italian regulations] ; USA Legislation on the Marine Mammal Protection Act, 50 CFR Ch. II (10–1–96 Edition) [hereinafter USA MMPA legislation] and Brazilian regulations on the captivity of aquatic marine mammals, Federal Public Service, Ministry of the Environment Brazilian Institute for the Environment and Natural Renewable Resources, Regulation No 3 of 8 February 2002, translated from the original by the Whale and Dolphin Conservation Society [hereinafter Brazilian regulations]

12 CITES Resolution Conf. 5.10, supra note 10.

13 See Quebec licensing requirements, Italian Regulations and Brazilian Regulations supra note 11.

14 CITES Resolution Conf. 9.24 (Rev CoP13), Criteria for amendment of Appendices I and II, available at <<http://cites.org/eng/res/09/09-24R13.shtml>>

15 See Section.3 of the Marine Mammal Protection Act, 16 U.S.C. §§1361 et seq. [hereinafter MMPA]: “The terms ‘conservation’ and ‘management’ mean the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population. Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.”

16 Convention on Biological Diversity, 5 June 1992, 31 I.L.M. 818 available at <<http://www.biodiv.org/default.shtml> > [hereinafter CBD]

17 See Article 8 and Article 9 of the Convention on Biological Diversity which respectively list 13 in-situ conservation measures and 5 ex-situ conservation measures. See also the Quebec licensing requirements, supra note 11, which consider that the following actions constitute a management purpose: “Assess the status of wildlife populations, their range and health status for the purpose of wildlife harvesting or impact/environmental impact studies; Capture animals and reintroduce them into the natural environment in order to offset a deficiency in natural productivity or repopulate an environment or site from which wildlife has disappeared; Control animals in order to maintain a certain balance among wildlife populations, ease the pressure on wild species, ensure public safety or protect human property; Test a new wildlife management method, notably experimental rearing of fur-bearing animals in order to acquire technical data attesting to the feasibility of this type of operation. For more examples see the definition of conservation included in Section 3 (3) of the US Endangered Species Act, 16 U.S.C. §§1531-1544 [hereinafter ESA].

18 See Black's Law Dictionary 1052 (Bryan A. Garner ed.-in-chief, 7th ed. 1999)(defining "necessary and proper").

19 In interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human rights ruled: “The Court notes at this juncture that, whilst the adjective ‘necessary’, within the meaning of Article 10 para. 2 (art. 10\_2), is not synonymous with ‘indispensable’ (cf., in Articles 2 para. 2 (art. 2\_2) and 6 para. 1 (art. 6\_1), the words ‘absolutely necessary’ and ‘strictly necessary’ and, in Article 15 para. 1 (art. 15\_1), the phrase ‘to the extent strictly required by the exigencies of the situation’), neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’ (cf. Article 4 para. 3) (art. 4\_3), ‘useful’ (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1\_1), ‘reasonable’ (cf.

Articles 5 para. 3 and 6 para. 1) (art. 5\_3, art. 6\_1) or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context." Handyside Case, 1/1976/17/30, para. 48 (Dec. 7, 1976) <<http://www.dhcour.coe.fr/hudoc/>>

- 20 See Chris Wold, "Legal Opinion Concerning the Consistency of the SPAW Protocol with Aspects of the National Environmental Policy Act, the Marine Mammal Protection Act, and the Endangered Species Act", October 10, 2000, on file with author. Chris Wold is Instructor of Law and Director of the International Environmental Law Project at the Northwestern School of Law of Lewis & Clark College in Portland, Oregon.
- 21 The Precautionary Principle is codified in Principle 15 of the Rio Declaration which states: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." See Rio Declaration on Environment and Development, June 14, 1992, 31 ILM 874 [hereinafter the Rio Declaration].
- 22 David Hunet, James Salzman and Durwood Zaelke, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, University Casebook Series, Foundation Press (1998) p. 361. The authors are here confirming interpretation of Principle 15 of the Rio Declaration, ib.
- 23 See James Cameron & Juli Abouchar, The Status of the Precautionary Principle in International Law, in THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 29 (David Freestone & Ellen Hey eds., 1996) (reviewing the argument that the precautionary principle is too vague to be a principle of law, to conclude that the widespread inclusion of the precautionary principle in international agreements indicates it is customary law).
- 24 For examples of other agreements recognizing the application of the precautionary principle see Carolyn Raffernsperger, "Uses of the Precautionary Principle in International Treaties and Agreements", October 1999 available at <[http://www.biotech-info.net/treaties\\_and\\_agreements.html](http://www.biotech-info.net/treaties_and_agreements.html)>
- 25 Rio Declaration, supra note 21.
- 26 CITES Resolution Conf. 9.24 (Rev. COP 13), Criteria for amendment of Appendices I and II, available at <<http://www.cites.org/eng/res/09/09-24R13.shtml>>
- 27 ESA, see supra note 17.
- 28 See Daniel J. Rohlf, "Jeopardy Under the Endangered Species Act: Playing A Game Protected Species Can't Win", Washburn Law Journal Vol. 141, 28 November 2001, pp. 114 to 163 for a detailed analysis of the parameters used for definition and their evolution.
- 29 Ibid, pp. 158 and 159.
- 30 Gail Charnley and E. Donald Elliott, Risk Versus Precaution: Environmental Law and Public Health Protection, March 2002, 32 ELR 10363, available at <<http://www.healthriskstrategies.com/pdfs/rvp.pdf>>
- 31 European Liaison Committee on Services of General Interest, "Answers from the CELSIG to the thirty questions from the Green Paper on services of general interest", 15 September 2003, question 13. Available at <<http://www.celsig.org/documents/docsCELSIG/greenpaperanswersenglish.pdf>>

- 32 See “The French R&D Programme on Deep Geological Disposal of Radioactive Waste - An International Peer Review of the ‘Dossier 2001 Argile’”, prepared by the Nuclear Energy Agency Organization For Economic Cooperation and Development, OECD 2003 available at <<http://www.nea.fr/html/rwm/reports/2003/nea4432-andraeng.pdf>>
- 33 See the definition of pertinence include in the section on the “definition of the evaluation criteria applied by the European Commission European Commission”. 1996. Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century - Challenges and options for a new partnership. Brussels: European Commission, available at <<http://www.euforic.org/greenpap/chap2.htm>>
- 34 STEVEN R. RATNER, “Does International Law Matter in Preventing Conflicts”, INTERNATIONAL LAW AND POLITICS, Vol. 32:591, 2000, pp. 591 to 698 at p. 593.
- 35 “Managing and Financing Health To Reduce the Impact of Poverty In the Caribbean - Implementing Decentralization and Financing Strategies while Protecting the Poor”, Policy Document prepared by the Pan American Health Organization, United Nations Development Program (UNDP) and the Caribbean Community (CARICOM), Washington, DC, August 1999, available at <<http://bvs.insp.mx/componen/svirtual/calidad/reforma/030501.pdf>>
- 36 General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].
- 37 María Verónica Perez Asinari, “The WTO and the Protection of Personal Data. Do EU Measures Fall within GATS Exception? Which Future for Data Protection within the WTO e-commerce Context?”, 18th BILETA Conference: Controlling Information in the Online Environment, April 2003 available at <<http://www.bileta.ac.uk/03papers/perez.html>>
- 38 When presenting their exemption to the STAC, Parties engage in a debate on the legal justification of their exemption which implies that they consider assessment of the STAC as important for the validation of their exemption. See Paragraphs 93 and following of the Report of the First Meeting of the Scientific and Technical Advisory Committee (STAC) to the Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean Region, Havana, Cuba, 27-29 September, 2001, UNEP(DEC)/CAR WG.23/6, available at <[http://www.cep.unep.org/pubs/meetingreports/SPAW%20STAC/final%20reports/STAC%20WG.23%206\(E\)final.doc](http://www.cep.unep.org/pubs/meetingreports/SPAW%20STAC/final%20reports/STAC%20WG.23%206(E)final.doc)>
- 39 Created by the International Convention on the Regulation of Whaling, 2 December 1946, available at <<http://www.iwcoffice.org/index.htm>> [hereinafter ICRW]
- 40 Since the moratorium on commercial whaling came into force in 1985/86, the IWC has adopted more than 30 resolutions on scientific whaling, which are continually disregarded by the countries carrying out scientific whaling. These resolutions have tried to clarify conditions for proper application of the provisions on scientific whaling in the text of the International Convention on the Regulation of Whaling (Article 8) and declared that scientific whaling should: be terminated and scientific research limited to non-lethal methods only (2003-2); refrain from involving the killing of cetaceans in sanctuaries (1998-4); ensure that the recovery of populations is not impeded (1987); and take into account the comments of the Scientific Committee (1987). A new resolution proposed by Australia and 25 co-sponsors was adopted at the last IWC meeting in June 2005 in a last effort to obtain collaboration of the countries refusing to comply.
- 41 See in particular Rule 4 of the Draft Rules of Procedure for the Scientific and Technical Advisory Committee (STAC) to the SPAW Protocol on the frequency of meetings, 27 September 2001, UNEP(DEC)/CAR WG.23/3, available at <<http://www.cep.unep.org/who/spaw.htm>>

- 42 See Alaska permit requirements and Quebec licensing requirements, supra note 11; licensing process established by Canada for “Authorizing fish collection for Scientific, Educational or Public Display Purposes” described at < <http://www.pac.dfo-mpo.gc.ca/yukon/licensing/science.htm>>; ESA supra note 17. See also CITES, supra note 5; and ANNEX II to the Madrid Protocol on Environmental Protection to the Antarctic Treaty - Conservation of Antarctic Fauna and Flora, entered into force on January 14, 1998 and available at <<http://www.cep.aq/default.asp?casid=5074>>.
- 43 CITES Resolution Conf. 12.8(Rev. COP 13), Review of Significant Trade in specimens of Appendix-II species, available at <<http://cites.org/eng/res/12/12-08R13.shtml>>
- 44 Examples of the standardized forms used to assess pertinence of an exemption for scientific, education or management purpose can be found in the Quebec licensing requirements and in the Alaska permit requirements, supra note 11.
- 45 CITES Resolution Conf.12.8 (Rev. CoP13), supra note 43.
- 46 CITES Compliance Document, supra note 6, Paragraph 47, p. 9
- 47 CITES Compliance Document, supra note 6, pp. 8 and 9
- 48 Amendments would have to be adopted by a conference of plenipotentiaries which would be convened by the Organization at the request of the majority of the Contracting Parties to the Protocol. Their adoption would require approval by three-fourths of the Contracting Parties to the SPAW Protocol in attendance at the conference of plenipotentiaries. See Article 18 of the Cartagena Convention, supra note 1.
- 49 See Resolution Conf 12.8 (rev. CoP13), supra note 43.