Legal Assessment of Compatibility Issues between the Protocol Concerning Specially Protected Areas and Wildlife (SPAW) to the Cartagena Convention and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

I. Introduction

This paper addresses the questions posed by the CITES Secretariat in the Terms of Reference seeking legal advice concerning the relationship between the Protocol Concerning Specially Protected Areas and Wildlife (SPAW) to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean (the Cartagena Convention) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). In particular, questions have arisen concerning the compatibility of Articles 10 and 11 of SPAW with the trade measures of CITES.

To answer these questions, Section II describes the relevant provisions of SPAW and CITES. Section III analyzes these provisions for compatibility and concludes that Articles 10 and 11 of SPAW and the trade measures of CITES are completely compatible. If the provisions of the two treaties can be implemented simultaneously, then they do not conflict.[1] This is clearly the case for SPAW and CITES.

Section IV(A)-(C) answers the compatibility questions included in the Terms of Reference in light of the conclusion that the two agreements are compatible. Specifically, Article 25 of SPAW is not a statement of primacy, but rather a declaration of compatibility. Because the two agreements are legally distinct and of equal effect, States that are party to both SPAW and CITES must implement both agreements fully.

Section IV(D)-(F) addresses implementation questions peculiar to SPAW. It makes no conclusion regarding the self-executing nature of SPAW, because national law determines whether a treaty is self-executing. It concludes that "signature" does not mean "accession" or "ratification" and that a State must ratify or otherwise express its intent to be bound to SPAW by means other than signature. In addition, it concludes that the signing of SPAW after the signature period has the same legal effect as signing the SPAW during the signature period. While these Parties are not legally bound to SPAW, they must refrain from actions that defeat the object and purpose of SPAW.

Section V answers questions relating to reservations under Article 11 of SPAW. It concludes that a State may make reservations to the initial annexes (or the annexes as they exist at the time of ratification, accession), but only at the time of ratification, accession, acceptance, or approval. The language of Article 11, paragraph 4.d relates only to reservations to amendments to the annexes after a State becomes a Party to SPAW. Lastly, it concludes that Article 25 of SPAW is not a general exemption. A State with a reservation pursuant to CITES must make a reservation pursuant to SPAW for the same species if it wants to trade in the species. Section VI demonstrates that CITES does not confer "rights" on Parties to trade in species and, consequently, Article 25 does not grant an automatic exemption from SPAW provisions. Lastly,

[1] *See* E.W. Vierdag, *The Time of the'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 59 BRIT. Y.B. OF INT'L L. ANNALS 75, 100 (1988).

a SPAW Party must implement Articles 10 and 11 for a Protected or Annex I, II, or III species, regardless of whether that species is also listed in the CITES Appendices.

II. Overview of CITES and SPAW

Most of the general and specific questions posed in the Terms of Reference concern the compatibility of SPAW and CITES as those agreements control international trade. This paper concludes that the provisions of these two agreements relating to international trade are perfectly compatible and can be implemented simultaneously without conflict. Of course, the issue of compatibility does not arise until SPAW enters into force. Thus, for the purposes of assessing compatibility, this paper is written as if SPAW is now in force.

A. CITES

CITES regulates international trade carried out by Parties in species listed in its three Appendices. It does not regulate domestic trade or require Parties to prepare management plans for listed species or protect habitat. The Parties assess a species' vulnerability and vote to place it in either Appendix I or II based on a combination of biological and trade data described in Res. Conf. 9.24. A Party may unilaterally place a species in Appendix III to restrict or prevent exploitation.

Trade controls differ for the three Appendices, with Appendix I species subject to the strictest trade controls. Appendix I includes species that "are threatened with extinction and are or may be affected by trade." In general, trade is prohibited in Appendix I specimens for primarily commercial purposes and requires both an import and export permit. Appendix II includes species which "although not necessarily now threatened with extinction, may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival." Trade in Appendix II species is allowed, provided it is not detrimental to the survival of the species (known as the "non-detriment" finding). Only a certificate of origin or similar document is required to trade in Appendix III species.

CITES uses a permit system to monitor and regulate trade in listed species. The permit system is central to CITES' ability to prevent the loss of species due to trade, and thus, CITES requires that each Party establish a Management Authority and a Scientific Authority to make biological and other findings before a permit may be issued.

Under Article III, trade in an Appendix I species requires an import permit or, if the species is caught on the high seas, an "introduction from the sea" certificate. A trader must obtain the import permit from the country of import prior to exporting the species. Likewise, a trader must obtain the introduction from the sea certificate prior to transporting the species into the jurisdiction of the state of introduction.
Article III requires the country of import or the state of introduction to make three findings before issuing an import permit or an introduction from the sea certificate for an Appendix I species:

(1) the import is for purposes which are not detrimental to the survival of the species for which the permit is sought;
(2) the proposed recipient of a living specimen is suitably equipped to house and care for it; and
(3) the specimen is not to be used for primarily commercial purposes.

The "primarily commercial purposes" finding is the most important one for regulating trade in Appendix I species. The Parties have interpreted "primarily commercial purposes" very broadly to include "any transaction that is not wholly non-commercial." Res. Conf. 5.10.

In addition, the export of an Appendix I (art. III) or Appendix II species (art. IV) must be accompanied by an export permit. Before granting an export permit, the country of export must determine that:

(1) the export will not be detrimental to the survival of the species;
(2) the specimen was not obtained in contravention of the laws of that state;
(3) any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and
(4) an import permit has been granted for an Appendix I species.

If an Appendix II species is caught in the marine environment outside the jurisdiction of any Party, Article IV requires the State into which the specimen is transported to make the non-detriment and "humane transport" findings listed above. The conditions for a re-export permit are the same as those for an export permit, except that the re-exporting country is not required to make a non-detriment finding. For an Appendix III species, the country of export need not make any findings related to the biological status of the species; Article V requires only that the species was caught legally and will be shipped humanely.

Article XIV of CITES makes clear that the Parties may treat these permit requirements, and other requirements of CITES, as minimum requirements. Article XIV expressly allows Parties to take stricter domestic measures for CITES listed species as well as any other species.

B. **SPAW**

SPAW requires Parties to implement national as well as cooperative conservation measures for protected areas as well as endangered, threatened, protected, and endemic species. For example, Parties have obligations to establish and manage protected areas unilaterally and obligations to designate and manage protected areas collaboratively. Likewise, Parties have unilateral obligations to protect different endangered, threatened, protected, and endemic species, as well as obligations to list these types of species in one of three annexes.
Whichever obligations apply, they apply only in the "Wider Caribbean Region" (art. 2), defined to include the marine environment of the Gulf of Mexico, the Caribbean Sea, and the exclusive economic zones in the Atlantic Ocean of the Parties, as well as salt water areas landward of the

coast. The region also includes terrestrial areas designated by a Party having jurisdiction over that area (art. 1.c).

1. Habitat Conservation Obligations

Under Article 3, SPAW Parties have general obligations "to protect, preserve, and maintain in a sustainable way" protected areas and threatened and endangered species within their jurisdiction. Regarding protected areas, Parties must regulate, and "where necessary," prohibit activities that would adversely affect protected areas. Articles 4-6 create other, more specific obligations for the protection and management of protected areas. Article 7 requires the Parties to cooperate regarding protected areas, such as preparing a list of protected areas to determine priority for scientific research and other forms of mutual assistance.

2. Species Conservation Obligations

SPAW also creates a set of comprehensive national obligations under Article 10 for the protection of species. For example, Parties must identify any "threatened" or "endangered" species within their national territories, grant them "protected" status, and regulate or prohibit any activities that might adversely affect them or their habitats. In addition, Parties must regulate and prohibit, where necessary, "all forms of destruction or disturbance", including picking, collecting, or commercial trade, of these protected species of plants or their parts or products. Parties must also regulate and prohibit, "where necessary," the taking (including incidental taking) and commercial trade in protected species of animals, as well as other forms of disturbances. Parties are also required to take additional measures, through bilateral or multilateral agreements, for the protection and recovery of migratory species that are considered protected species.

Perhaps most significantly, Article 11 requires Parties to adopt cooperative measures for the protection and recovery of species that the Parties list in Annexes I, II, and III. While the inclusion of species in the Annexes is a multilateral process, implementation of conservation measures for those species is largely a national obligation. For threatened, endangered, and endemic species of flora included in Annex I, each Party must prohibit all forms of destruction or disturbance, including the picking, collecting, cutting, uprooting or possession of, or commercial trade in such species, their seeds, parts or products. Activities harming the species' habitat must be regulated.

For threatened, endangered, and endemic animal species included in Annex II, each Party must prohibit the taking, possession, killing, or commercial trade in such species, their eggs, parts or products, and, to the extent possible, disturbances to these species. Annex III includes both fauna and flora that are of apparent lesser conservation concern. Here, the Parties must cooperate with each other to develop and implement management plans that include measures to regulate the taking of both flora and fauna, and prohibit the non-selective killing of fauna.

SPAW does not include a provision for the implementation of stricter domestic measures. Its

language, however, allows Parties to prohibit all commercial trade and activities that may adversely affect listed species. This suggests that Parties may implement any measures necessary to protect species and their habitats. Lastly, Article 25 states that SPAW does not affect the rights and obligations of Parties under CITES.

III. The Compatibility of CITES and SPAW

A. Compatibility of SPAW's Habitat and Domestic Trade Provisions

Treaties must be interpreted to avoid inconsistency if possible. In the case at hand, the plain language of the provisions of CITES and SPAW compel the conclusion that they are completely compatible. First, international trade is the only area where the two treaties could possibly be incompatible, because CITES *only* addresses international trade. Thus, SPAW's provisions relating to habitat use, development of management plans, creation of protected areas, domestic trade, and domestic use of species, are compatible with those of CITES, because these provisions relate to a distinct subject matter. Without exception, all provisions of SPAW not relating to international trade are compatible with CITES.

Second, SPAW does not define the term "commercial trade." The most reasonable interpretation, however, based on the ordinary meaning of the term in international law and the context of SPAW itself, is that "commercial trade" means both domestic commercial trade and international commercial trade. International and regional trade agreements, including the General Agreement on Tariffs and Trade, govern domestic and international trade. SPAW's goals of protection and recovery of the species on a regional basis would be difficult to achieve if only domestic trade was regulated. As the following discussion demonstrates, the two agreements are compatible even as their provisions relate to international commercial trade.

B. Compatibility of International Trade Provisions

Article 10 of SPAW requires its Parties to regulate or prohibit commercial trade in species identified by a Party as endangered or threatened species and granted protected status under national law. Similarly, Article 11, paragraph 1.c, requires Parties to implement management plans that regulate the "sale" of animals and prohibit "all actions likely to cause local disappearance of a species." Although not specifically listed, such actions could reasonably include commercial trade. This paragraph also requires Parties to regulate commercial trade in flora. Article 11 prohibits commercial trade in Annex I (flora) and II (fauna) species.

These provisions of SPAW can be applied simultaneously with all CITES permit requirements. The provisions of SPAW never impinge on a Party's ability to implement CITES. Similarly, the provisions of CITES never impinge on a Party's ability to implement SPAW. Even when CITES prohibits non-commercial trade that would otherwise be permitted by SPAW, that does not result in an inability to apply SPAW's provisions. SPAW does not prohibit Parties from regulating or prohibiting trade for non-commercial purposes. It simply does not apply its provisions to non-commercial trade.

Similarly, regulations and prohibitions on commercial trade under SPAW that exceed CITES requirements do not conflict with CITES, even if that species is not listed in the CITES Appendices. The failure to include a species in the CITES Appendices does not confer rights to trade in that species. To the contrary, CITES imposes obligations to protect listed species. In addition, it leaves undisturbed a State's authority to impose additional restrictions on species. Article XIV of CITES expressly grants Parties the authority to implement stricter domestic measures for *any* species, regardless of whether it is included in the CITES Appendices.

In sum, the provisions of CITES and SPAW are compatible; they do not conflict.

1. Compatibility with CITES Appendix II

An example may help illustrate the compatibility of the two regimes. Assume that the SPAW Protocol is in force and that "Party" is bound by both SPAW and CITES. A species listed as a protected species or in any of the SPAW's three annexes is also listed in Appendix II of CITES.

1. The export of a Protected/Annex III species or an Annex I/II species from Party for non-commercial purposes requires an export permit issued pursuant to Article IV of CITES. Because SPAW does not regulate non-commercial trade, its provisions are not implicated. Thus, the implementation of CITES does not affect Party's implementation of SPAW. The provisions are compatible.

2. The export of a Protected/Annex III species from Party for commercial purposes requires, at a minimum, an export issued permit pursuant to Article IV of CITES. This constitutes regulation consistent with Articles 10 and 11 of SPAW. If the trade is prohibited under CITES because it is detrimental to the survival of the species, that too is consistent with SPAW, because both Article 10 and 11 contemplate commercial trade prohibitions for Protected and Annex III species.

The export of an Annex I/II species would be prohibited by Article 11, even though CITES would allow it if the requirements of Article IV were met. If CITES authorities make a detriment finding or the exporter fails to meet humane transport requirements, the export would be prohibited under CITES as well. SPAW's automatic prohibition does not contradict CITES, however, because CITES Parties are always free to implement stricter domestic measures under Article XIV. Further, CITES does not grant rights to trade in Appendix II species. To the contrary, CITES Party's have obligations to protect Appendix II species from detrimental impacts of trade.

In both situations, the implementation of one agreement is not frustrated by implementation of the other. Thus, the provisions are compatible.

3. The import of a Protected/Annex III species or Annex I/II species that is also listed in Appendix II of CITES into Party for non-commercial purposes does not trigger any trade-related obligations under CITES or SPAW, unless Party implements stricter domestic measures (the

CITES or customs authorities will need to verify that the shipment is accompanied by appropriate CITES permits, however). CITES does not require an import permit for Appendix II species. SPAW does not pertain to non-commercial trade. Thus, the implementation of CITES does not affect Party's implementation of SPAW. The provisions are compatible.

4. The import a Protected/Annex III species into Party for commercial purposes must be regulated or prohibited under SPAW, while the import of an Annex I/II Species must be prohibited. CITES does not require its Parties to make permit findings for the import of Appendix II species, although they do need to verify that the species is accompanied by valid CITES permits. A prohibition under SPAW of a CITES Appendix II species does not frustrate a Party's ability to implement CITES, however. This is not a case where SPAW requires its Parties to prohibit trade and CITES requires its Parties to allow trade. Further, CITES always allows its Parties to implement stricter domestic measures, and some CITES Parties regulate the import of Appendix II species. Because the implementation of CITES does not affect a the implementation of SPAW, the provisions of the two agreements are compatible.

2. Compatibility with CITES Appendix I Species

The provisions of Articles 10 and 11 of SPAW are also compatible with the provisions of CITES relating to trade in Appendix I species.

1. The export of any SPAW species that is also a CITES Appendix I species for non-commercial purposes requires, at a minimum, the issuance of an export permit, pursuant to Article III of CITES, after the importing country issues an import permit. Because SPAW does not regulate non-commercial trade, its provisions are not implicated. Thus, the implementation of CITES does not affect Party's implementation of SPAW. The provisions are compatible.

2. The export for commercial purposes of a Protected or Annex III species that is also a CITES Appendix I species would be prohibited at the point of import by CITES and must be regulated or prohibited by SPAW. The export of a Protected or Annex III species for commercial purposes would be prohibited by both CITES and SPAW. In fact, this situation should not arise under CITES, because the importing country must first verify that the specimen will not be imported for commercial purposes. The fact that SPAW permits regulation rather than prohibition does not suggest that the two agreements are inconsistent. SPAW does not require trade in Protected and Annex III species — trade in these species must be regulated or prohibited. Thus, implementation of CITES does not frustrate efforts to implement SPAW. In the case of Annex I and II species, CITES helps ensure that the provisions of SPAW are met, because the importing country must first verify that the specimen will not be imported for commercial purposes. Thus, these provisions of SPAW and CITES are compatible.

3. The import of any SPAW species also listed in Appendix I of CITES for non-commercial purposes requires Party to issue a valid import permit under CITES with a finding that the import will not be for primarily commercial purposes. SPAW does not pertain to non-commercial trade. Thus, the implementation of CITES does not affect Party's implementation of SPAW. The

provisions are compatible.

4. The import of a Protected or Annex III species also listed in Appendix I of CITES for commercial purposes would be prohibited by CITES, while the import of an Annex I or II species for commercial purposes would be prohibited by both CITES and SPAW. Because SPAW requires the regulation or prohibition of commercial trade in protected species, the CITES prohibition is consistent with SPAW. In addition, the CITES permit structure is merely one way to implement the SPAW prohibition against commercial trade. Again, the implementation of one agreement's provisions does not interfere with the implementation of the other agreement. The provisions are compatible.

IV. General Questions of Primacy and Compatibility

A. Could Article 25 of SPAW be interpreted as a clause foreseeing the express primacy of the global treaty CITES, or could it be considered as a declaration of compatibility (according to Article 30, paragraph 2, of the Vienna Convention)?

Rules of primacy are relevant in treaty interpretation only where a conflict exists between two provisions. Thus, the following discussion is relevant only to the extent that a conflict exists. As concluded in the previous section, however, SPAW and CITES are compatible.

That said, Article 25 does not establish a rule of primacy, but rather it is a declaration of compatibility. It is not necessarily a declaration of compatibility under Article 30, paragraph 2, of the Vienna Convention, however, for technical reasons explained below.

Article 25 of SPAW states:

> Nothing in this Protocol shall be interpreted in a way that may affect the rights and obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS).

Article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention)[2] states that a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given terms of the treaty in their context and in light of its object and purposes." The language of Article 25 of SPAW cannot in good faith be interpreted as expressing the primacy of CITES over the SPAW agreement.[3] The ordinary meaning of Article 25 merely provides that the provisions

[2]The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

[3]When negotiators wish to ensure the primacy of one treaty over the other, they clearly state so. For example, Article 103 of the United Nations Charter states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations

of SPAW can be implemented consistently with those of CITES (or CMS).

The negotiating history of the Convention on Biological Diversity (CBD) provides an appropriate context for analyzing this question. The negotiators to the Biodiversity Convention created a working group of lawyers to investigate whether or not any conflict existed with other international agreements. The group reported that no conflict existed with any existing agreement relating to conservation of habitat and wildlife.[4] The drafters of the CBD then expressed this opinion in Article 22 of the CBD, which states that the CBD "shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where to exercise those rights and obligations would cause serious damage or threat to biodiversity." Drafters of the CBD included Article 22 as an expression that, to the best of their knowledge, the provisions of the CBD could be implemented consistently with those of other treaties.

Article 25 of SPAW is phrased similarly to Article 22 of the CBD and thus reflects the general understanding among the negotiators that they believed that the provisions of SPAW could be interpreted and implemented consistently with CITES.

This declaration in Article 25, however, probably cannot be considered as falling under Article 30, paragraph 2, of the Vienna Convention. That provision states:

> When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

The problem is not that Article 25 fails to declare its compatibility with CITES; the plain meaning of Article 25 does. The problem is that Article 30 of the Vienna Convention applies only to "successive treaties relating to the same subject matter," according to Article 30, paragraph 1, of the Vienna Convention. The question then is whether SPAW and CITES are successive treaties relating to the same subject matter.

The history of the Vienna Convention indicates that the Parties established rules for interpreting successive treaties, such as GATT 1947 and GATT 1994, rather than for completely separate

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> under the present Charter prevail.

Similarly Article XV of the Agreement Establishing the World Trade Organization states:

> In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of a conflict.

[4]Telephone Conversation with Melinda Chandler, United States Department of State (Mar. 9, 1995). Ms. Chandler was the legal adviser to the U.S. delegation that negotiated the Convention and participated in the working group of lawyers that investigated other international agreements. *See also*, Melinda Chandler, *The Biodiversity Convention: Selected Issues of Interest to the International Lawyer*, 4 COLORADO J. INT'L ENVTL. LAW & POLICY 141, 149-150 (1993).

agreements that overlap. One scholar states that

> it would seem that the expression 'relating to the same subject matter' must be construed strictly. It will not cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty. Accordingly, a general treaty on the reciprocal enforcement of judgments will not affect the continued application of the particular provisions concerning the enforcement of judgments contained in an earlier treaty dealing with third-Party liability in the field of nuclear energy. This is not a question of the application of successive treaties relating to the same subject matter, but is rather a question of treaty interpretation involving consideration of the maxim *generalia specialibus non derogant* [general words do not derogate from special words].[5]

By analogy, SPAW and CITES do not relate to the same subject matter, even for the limited purpose of analyzing the compatibility of the international trade provisions of the two agreements, because SPAW generally covers conservation and management of listed species while CITES focuses specifically on regulating trade in species adversely affected by trade. Instead, more general rules of interpretation may determine compatibility.

But this is mere formalism. Article 25 of SPAW expresses the compatibility of SPAW with CITES, regardless of whether it can be categorized as falling within Article 30, paragraph 2, of the Vienna Convention. Further, the analysis in Section III of the provisions of SPAW and CITES that relate to international trade shows that these provisions can be implemented simultaneously without leading to incompatible results. As a result, there is no need to apply these rules of primacy and compatibility.

B. Which treaty has the priority of application? Would it be necessary to take into account principles such as "lex posteriori, priori derogat" or "generalibus specialia derogant"?

This paper concludes, based on the analysis in Section III, that SPAW and CITES are completely compatible, and thus, they both have equal priority. Thus, SPAW and CITES have distinct and independent legal identities. The doctrine of *pacta sunt servanda*, a peremptory norm which lies at the core of the law of international agreements and codified as Article 26 of the Vienna Convention, provides that "every international agreement in force is binding upon the Parties to it and must be performed by them in good faith." States that are Party to both agreements must implement them both in their entirety.

Because rules of treaty interpretation, such as "*lex posteriori, priori derogat*" or "*generalibus specialia derogant*," operate only when treaties are incompatible, it is not necessary to rely on them to determine priority. Nonetheless, if provisions of the two treaties are found to be incompatible, then resort to the rules of treaty interpretation under the Vienna Convention and

[5]SIR IAN M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 98 (2nd ed. 1984).

general rules of interpretation — the standard tools for resolving disputes between conflicting treaties — is necessary.[6] While older writings suggest that these rules apply only to treaties relating to the same subject matter, as defined above, more recent writings appear to expand the use of these interpretative tools to "incompatible treaties" or "overlapping provisions."[7] One drafter of the Vienna Convention has said that even if the rules on successive treaties on the same subject matter do not apply, general rules such as *generalia specialibus non derogant* do.[8]

Nonetheless, even if general rules of interpretation can be applied to treaties not relating to the same subject matter, and a conflict exists between two provisions, rules such as *lex posteriori, priori derogat* and *generalibus specialia derogant* will not be useful for determining the general priority of application between SPAW and CITES in any meaningful way. Instead, those rules would only determine the priority of the two agreements on a party-by-party basis, because the date for determining priority is the date the agreement applies to a specific party, not the date of entry into force of the treaty. The result would be a confusing array of priority, where a provision of SPAW may be superior between State A and State B, but not between State A and State C.

1. *Lex Posterior*

Article 30 of the Vienna Convention, as well as general rules of treaty interpretation, state that a later treaty prevails over an earlier treaty, by a rule known as *lex posterior* or *lex posteriori, prior derogat*. Again, the later treaty prevails only to the extent that the earlier treaty's provisions are incompatible with those of the later treaty. This rule is thus not directly applicable to CITES and SPAW, which are compatible. In addition, the rule only applies between States that are Party to both treaties.

The application of this simple rule is not simple, however. The Vienna Convention does not state when a treaty is "dated," but most scholars agree that the relevant date is the date of entry into force for a particular party.[9] Thus, the determination of the date of priority must be accomplished on a party-by-party basis, not a treaty-by-treaty basis. This conclusion is supported by the Vienna Convention's Expert Consultant, who noted that the date of the treaties is not important, but rather the concrete treaty situation of particular States at a particular moment in time, because Article 30, paragraph 3, from which *lex posterior* derives, applies only

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[6]Interpretation of an international agreement is limited to the text of the treaty, unless the provisions are ambiguous or obscure, or lead to absurd results. Vienna Convention, *supra* note 2, art. 32; *see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 627-28 (4th ed. 1990).

[7]IAN BROWNLIE, *supra* note 5, at 630.

[8]SINCLAIR, *supra* note 4, at 98.

[9]Other possible dates are the date of a treaty's adoption or the date the treaty enters into force. *See* Vierdag, *supra* note 1, at 92-95 (1988)(quoting the Expert Consultant as saying that the relevant date is "the date of entry into force of a treaty for a particular Party" while one delegate to the Vienna Convention negotiations thought it was the date the treaty enters into force); SINCLAIR, *supra* note 4, at 98 (stating that "it seems clear that, in determining which treaty is the 'earlier' and which the 'later', the relevant date is that of the adoption of the text and not that of its entry into force...But, of course, the rules laid down in Article 30 have effect for each individual Party to a treaty only as from the date of entry into force of the treaty for that Party").

to "Parties." Concluding that this approach is correct, one scholar notes that "Article 30(3) is based on the wrong presumption, namely that 'earlier' would always refer to one and the same treaty for all States involved in a particular case, and that, likewise, the would be the same for 'later' ... but this is not always the case."[10]

This conclusion leads to difficult implementation problems, assuming that any conflict exists. Assuming that SPAW enters into force, most, but not all, CITES Parties will have become Parties to CITES SPAW enters into force. Thus, for a State that becomes a party to CITES after it becomes a party to SPAW, CITES prevails. For a State that becomes a party to CITES before it becomes a party to SPAW, SPAW prevails. Thus, it is not possible to conclude that a particular SPAW provision always prevails over a conflicting CITES provision.

The situation could become even more confused, because the Parties to CITES amend the appendices at each conference of the Parties. Because many of CITES' provisions are implemented only when a species is listed in one of CITES' three appendices, the relevant date for treaty interpretation could rationally be the date the amendments to the appendices are adopted or entered into force.

If true,[11] such a situation would create extremely difficult and confusing implementation problems. For example, if CITES Parties add bluefin tuna to Appendix I after SPAW enters into force, then the provisions of CITES prevail over those of SPAW, at least for bluefin tuna. But the provisions of CITES for Javan rhinos would be inconsistent with SPAW, because Javan rhinos were included in the CITES Appendices in 1975, prior to entry into force of SPAW. In this case, SPAW is later in time and prevails. Of course, if a State becomes a CITES Party after it becomes a SPAW Protocol Party, then the opposite is true — CITES would prevail for trade in Javan rhinos for that Party. These "dating" problems multiply when one considers the different types of measures CITES uses. For example, the provisions of CITES might prevail over provisions of SPAW for some populations of a split-listed species, but not for others of the same species.

2. *Generalibus specialia derogant*

The rule that specific treaties or provisions control general treaties or provisions[12] is not stated in

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[10]Vierdag, *supra* note 1, at 102.

[11]One scholar claims that a treaty itself, not amendments to appendices, must be revised and re-adopted before it can obtain a new date. Vierdag, *supra* note 1, at 101.

[12]The international scholar, Fitzmaurice, describes *lex specialis* as follows:

> It does not merely involve that general provisions do not *derogate* from specific ones, but also, or perhaps as an alternative method of statement, that a matter governed by a specific provision, dealing with it as such, is thereby taken out of the scope of a general provision dealing with the *category* of subject to which that matter belongs, and which therefore might otherwise govern it as part of that category.

the Vienna Convention, but has been recognized since the days of Grotius.[13] This rule, known variously as *generalibus specialia derogant*, *generalia specialibus non derogant*, and *lex specialis*, applies even if a general provision is later in time but only if there is a conflict between the two provisions.[14]

Assuming that CITES and SPAW are incompatible, or that specific provisions are incompatible, then the principle could be used to establish priority. Still, determining which provision is more specific is often not easy.[15] In the case of SPAW and CITES, CITES appears more specific, even though SPAW is more comprehensive. While Articles 10 and 11 of SPAW require Parties to protect listed species through habitat protection, prohibitions against collecting and killing, and commercial trade prohibitions, it does not establish any structure for doing so.

CITES, in contrast, focuses sharply on international trade in listed species and establishes very specific rules for regulating that trade. It establishes criteria for including species in the Appendices, establishes a permit system for species in each of the three Appendices, and requires the creation of a Management Authority and a Scientific Authority to make the appropriate permit findings. Moreover, CITES establishes specific biological and trade thresholds below which trade is not permitted. For Appendix II species, trade is not permitted if it is detrimental to the survival of the species. Trade in Appendix I species is prohibited for "primarily commercial purposes." SPAW envisions none of these types of measures and none of this specificity. Because of CITES' specific focus on international trade and its detailed permit requirements and institutional mechanisms, it is more specific than SPAW.

C. Article XIV of CITES allows a contracting Party to adopt stricter domestic measures. Since this Article refers to the rights of Parties, would a contracting Party to SPAW be expected to develop the stricter domestic legislation require to implement its Provisions?

Article XIV of CITES merely acknowledges that CITES Parties retain their sovereign power to enact stricter domestic measures. This right to enact stricter domestic legislation remains with CITES Parties, who may use this right to protect any species, including those not listed in the CITES Appendices. However, it cannot be used to *require* a party to SPAW or any other treaty to implement specific, stricter domestic measures. Thus, a State that is party to both SPAW and CITES would not be expected to implement the provisions of SPAW by virtue of Article XIV of CITES.

Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. OF INT'L L. ANNALS 203, 236 (1957).

[13]GYÖRGY HARASZTI, SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES, 191 (1973) (citing HUGO GROTIUS, DE IURE BELLI AC PACIS, LIB. II, CAP. XVI, XXIX (1925).

[14]SINCLAIR, *supra* note 4, at 98.

[15]*See* Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVIRONMENTAL LAW, 841, 912-913 (1996) (suggesting that CITES could be interpreted as either more general *or* more specific than the General Agreement on Tariffs and Trade).

Nonetheless, any Party to SPAW must adopt legislation adequate to implement the provisions of SPAW by virtue of being a Party to that agreement. SPAW possesses distinct legal character and a SPAW Party that fails to implement its provisions would violate that Party's obligations under SPAW. Thus, a SPAW Party is expected to develop domestic legislation that is stricter than CITES to the extent that the provisions of SPAW are in fact stricter than CITES.

D. Is SPAW a self-executing Protocol (an international agreement that does not require legislative action on the part of the States for it to perform its intended function)?

It is difficult to declare with any authority whether SPAW is self-executing, because national law and often constitutional law of individual States determine whether a treaty is self-executing. As Ian Brownlie concludes, the "whole subject resists generalization, and the practice of states reflects the characteristics of the individual constitution."[16] A treaty is unlikely to be universally self-executing or non-self-executing.

In the United States, for example, the intent of the President or the Senate or the nature of the treaty determine whether a treaty is self-executing or non-self-executing. The President may specifically declare the status of the treaty, or the Senate may declare that implementing legislation is needed when it gives its advice and consent to ratification. The types of obligations in a treaty may also indicate whether a treaty is self-executing or not.[17] Certain types of provisions, such as obligations not to act, or to act only subject to certain limitations, are generally considered self-executing.[18] Stated somewhat differently, treaties or individual provisions of treaties are self-executing if they are specific enough to be judicially enforceable.

If this "enforceability" standard alone is used to determine the self-executing nature of SPAW, then a strong argument can be made that some of its provisions are self-executing and do not require implementing legislation. For example, Article 11 includes very clear, enforceable standards, such as a strict prohibition against the collection, possession or commercial trade in Annex I and II species. For Annex I species, Article 11, paragraph 1.a, does not leave much room for discretion: "*Each Party shall prohibit all forms of destruction or disturbance, including the picking, collecting, cutting, uprooting or possession of, or commercial trade in [Annex I] species, their seeds, parts or products.*" Article 11, paragraph 1.b, creates similarly specific prohibitions for Annex II species. Article 11 creates very specific prohibitions and very specific obligations to act in very specific ways — obligations which have been considered by U.S. courts as self-executing.[19] Implementing legislation cannot further clarify these strict prohibitions.

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[16]BROWNLIE, *supra* note 5, at 50-51. *See also* United States v. Postal, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979)("The self-execution question is perhaps the most confounding in treaty law").
[17]RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §111(4)(3rd ed. 1986).
[18]Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-703 (1878) (cited with approval by the United States Supreme Court, United States v. Rausher, 119 U.S. 407 427-428, 7 S.Ct. 234, 244-245, 30 L.Ed. 425 (1886)).
[19]*Id.*

Other obligations are not so clearly self-executing under this enforceability standard. A Party's obligations to formulate, adopt, and implement management plans for all Annex III species under Article 11, paragraph 1.c., and to regulate, "where appropriate," activities that have adverse impacts on endangered and threatened species, appear to need implementing legislation to direct a specific agency to prepare regulations or to undertake these activities.

On the other hand, one could possibly argue that implementing legislation is not needed, because it cannot help determine what constitutes management or recovery for individual species. What constitutes adequate and appropriate management, planning, and recovery differs from species to species due to each species' unique biological needs and characteristics. Just as a U.S. court can determine what constitutes "just compensation" under the U.S. Constitution on a case-by-case basis without additional implementing legislation, so too a court could determine what constitutes recovery on a case-by-case basis without implementing legislation. That said, the U.S. Department of State, while not specifically calling SPAW non-self-executing, stated that various U.S. statutes adequately implement SPAW and no further legislation is needed.[20]

E. Under SPAW Article 28, does the word "signature" refer also to "acceding" or "ratified"?

No. The word "signature" in Article 28 of SPAW, which states that the Protocol "shall be open for signature," does *not* refer to acceding (or accession) or ratified (or ratification). The express provisions of the Protocol, as well as general practice and general requirements of domestic law, support this conclusion.

Normally signature has no binding effect. Instead, it signals approval of the contents of the agreement for later ratification. Where ratification, acceptance, approval, or accession follows signature, "signature does not establish consent to be bound."[21] Ratification generally describes a domestic parliamentary or legal process that must be completed *after signature* for a treaty to be binding; accession, acceptance, and approval occur when a State that did not sign a treaty consents to be bound by it.[22]

According to Article 12 of the Vienna Convention, a State may be bound by signature only if the treaty provides that signature will have that effect, if the negotiating states agree that signature will have that effect, or if the representative of a State has authority to bind her State by signature. These circumstances are unusual and no evidence suggests that any of these three situations existed for SPAW.

Instead, SPAW expressly chooses the traditional two-step process for binding a State to SPAW.

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[20]Letter of Submittal, From Warren Christopher, Secretary of State, to The President, Mar. 31, 1993, *reprinted in* SENATE TREATY DOC. 103-5, 103RD CONG. 1ST SESS., IX, at page IX (1993).
[21]BROWNLIE, *supra* note 5, at 610-611.
[22]*See* Vienna Convention, arts. 11-15; J.L. BRIERLY, THE LAW OF NATIONS 319-322 (Sir Humphrey Waldock ed., 6th ed. 1963); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 610-612 (5th ed. 1998); RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §312 (3rd ed. 1986).

Article 28 provides a period of time during which any Party to the Cartagena Convention may sign SPAW. Article 27 of SPAW provides that its entry into force will occur in conformity with Article 28, paragraph 2, of the Cartagena Convention. That provision expressly states that protocols enter into force "on the thirtieth day following the date of deposit of the ninth instrument of ratification, acceptance, or approval of such protocol, or of accession thereto." This clear language offers no room for a different interpretation.

Further, Parties to the Cartagena Convention have been acting consistently with the plain meaning of the Protocol and the Convention. For example, the United States signed the Protocol, and then President Clinton transmitted it to the Senate for advice and consent to ratification.[23]

F. What is the legal implication of signing the Protocol after the end of the signature period (it ended on 17 January 1991), but before the Protocol itself is ratified (i.e., when 9 Parties have joined)? Are the States that are in this situation bound legally to the conditions of the Protocol or do the conditions only become binding when the Protocol is ratified?

Signatories are not legally bound to the conditions of the Protocol until they have ratified it and it enters into force. Similarly, States that have "signed" the Protocol after the signature period are not signatories to the Protocol, but their action could be interpreted as an exchange of instruments constituting the treaty subject to ratification. While they would not be legally bound to the Protocol, they must ensure that their actions do not defeat the object and purpose of the Protocol.

According to Article 18 of the Vienna Convention,

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance, or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.[24]

By "signing" the Protocol after the period for signature, a State has indicated its intent to proceed

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[23] *See, e.g.,* Message from the President of the United States transmitting the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Done at Kingston on January 19, 1990, 103RD CONG., 1ST SESS., TREATY DOC. 103-5 (1993).

[24] *See also,* BROWNLIE, *supra* note 5, at 611; RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §312(3).

with ratification, acceptance, accession, or approval. As an expression of approval of the Protocol, this action could be considered an exchange of instruments constituting the treaty subject to acceptance or approval, under Article 18, paragraph a, of the Vienna Convention. There does not appear to be any accepted meaning of "instruments constituting the treaty." But one should assume that a State undertakes the process of signature seriously, regardless of proper implementation of the process, and that even improper signature manifests a State's intent to be bound by the Protocol just as a proper signature does. Thus, a State that has improperly signed the Protocol is not bound to the Protocol, but it must refrain from acts that would frustrate the object and purpose of the Protocol and it must express its clear intention not to become a party.

The exact nature of a signatory's duties under this provision is not clear. Presumably, however, a signatory could not harvest to extinction a species included in Annex I of SPAW, or take other irreversible action. Failure to implement a management plan for a species included in Annex III may not defeat the object and purpose of SPAW, however, because one could be developed and implemented later.[25]

It appears, then, that a State's failure to sign the treaty during the signature period does not change the process or the extent of that State's obligations; it merely changes the terminology for the process. The Protocol does not require a State to sign the Protocol either to validate the text of the Protocol or to become a Party to it. The signature period is a process for States to voice their approval of the text of the Protocol, and the Protocol expressly allows States to accede or approve the Protocol. Thus, a State that has not signed the Protocol during the signature period will "accept" or "accede to" the Protocol, rather than "ratify" it. That distinction carries no significance, however, because a State becomes bound to the Protocol, regardless of when it signed the Protocol, only after it ratifies, accepts, or accedes to the Protocol and the Protocol has entered into force.

V. Specific Questions Relating to Article 11, paragraph 4.d of SPAW

A. If a State ratifies or accedes to SPAW (or by other modalities such as approval, acceptance or declaration of succession) after the signatory period, but before the Protocol itself is ratified (i.e. when 9 Parties have joined), does that State still have 90 days after the ratification of the Protocol to lodge reservations to the listings of species on the SPAW Annexes (refer Article 11 paragraph 4.d)?

A Party that ratifies SPAW after the signatory period but before entry into force of the Protocol may *not* make reservations to the annexes within 90 days after the Party's ratification. Instead, a State must make its reservation to a species included in the Annexes at the time of ratification, accession, or approval. This is true regardless of whether the State is a signatory, will ratify the Protocol, or will accept, approve, or accede to it.

[25] *See* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §312, comment i (suggesting that the irreversibility of the action would defeat the object and purposes of a treaty).

The language of SPAW relating to reservations is not clearly constructed. Article 11, paragraph 4.d states that a Party may make a reservation to the listing of a particular species in an annex "within 90 days of the vote of the Parties." Article 11, paragraph 4, however, refers to procedures for amending the annexes. Paragraph 4.d logically refers to reservations to amendments to the annexes, not reservations to the "initial annexes" or the annexes as they exist at the time of ratification. If the Protocol permits reservations to amendments to the initial annexes, then one can reasonably assume that the drafters intended to allow reservations to the initial annexes. But, neither the Protocol or the Cartagena Convention contain language concerning reservations to the initial annexes.

A good faith interpretation of the Protocol indicates that Article 11, paragraph 4.d creates specific rules for making reservations to amendments to the annexes, but not for making amendments to the initial list. The inclusion of this language in a provision relating to amendments to the annexes supports this interpretation. Further, the plain language of this provision logically refers only to amendments to the annexes. First, the language refers to the rights of a *Party* to make reservations within 90 days of the vote of *the Parties*. "Party" and "Parties" can only mean Parties to the Protocol, and no one is a Party to the Protocol before it enters into force. Thus, paragraph 4.d cannot reasonably be interpreted to mean that a *State* may make a reservation to the initial annexes, because that action occurs before the entry into force of the Protocol for that State. Further, the reference to (a) the listing (b) of a particular species in an annex (c) after a vote suggests a specific process occurring at a given moment in time — that is, an amendment to the annexes made at a meeting of the Parties pursuant to Article 23 of the Protocol.

Nonetheless, under general rules of treaty interpretation a State may make a reservation to a species included in the annexes as they exist at the time of ratification or accession. In the absence of specific rules in the Protocol or the Convention relating to reservations to a protocol or its annexes, general principles of treaty interpretation apply. Article 19 of the Vienna Convention provides that a State may make a reservation "when signing, ratifying, accepting, approving, or acceding to a treaty" unless the reservation is prohibited by the treaty, the proposed reservation is not included among the specifically enumerated reservations, or the reservation is incompatible with the object and purpose of the treaty. Thus, reservations to the initial annexes (or the annexes as they exist at the time of ratification or accession) are permissible, because the Protocol does not prohibit them and the conditions of the Vienna Convention for prohibiting them are absent.

However, unless otherwise provided by the agreement, a State must make its reservation at the time of ratification. Under Article 2(1)(d) of the Vienna Convention, a reservation by definition means a State's unilateral action "when signing ratifying, accepting, approving or acceding to a treaty, whereby it proposes to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." The definition includes both a substantive component and a timing component. The substantive component, of course, is the exclusion of a provision from applicability for that State. The timing component requires the reservation to be made at a specific time — at the time when the State consents to be bound by the agreement. Under these

rules, and because no other specific rules in the Protocol apply, a Party cannot make a reservation to the initial annexes (or the annexes as they exist at the time of ratification or accession) after it ratifies the Protocol, even if the Protocol has not yet entered into force.

Because SPAW does not expressly permit or prohibit reservations to the initial annexes, the reservation must be accepted, either expressly or tacitly, by the other Parties. Article 20, paragraph 5, of the Vienna Convention provides that a reservation is accepted if no objections are made within twelve months of making the reservation. An objection by a Party, however, does not preclude the entry into force of the agreement for the reserving State, unless the objecting Party expressly intends that result. Vienna Convention, art. 20(4)(b). Acceptance is required because the reserving State is in essence making a counter-offer to the text of the agreement. These rules of the Vienna Convention codify rules first articulated by the International Court of Justice.[26]

B. If the SPAW Annexes only come into force when the Protocol itself comes into force (refer Article 27, paragraph 1), is it correct to assume that existing signatory Parties have 90 days from the date the Protocol comes into force, to lodge reservations under Article 11 (paragraph 4.d)?

No. As explained in the preceding section, signatories and any other States must make their reservations to species included in the initial annexes (or the annexes as they exist at the time of ratification or accession) at the time they ratify or accede to SPAW. Article 11, paragraph 4.d, has no bearing on reservations to the initial annexes or the annexes as they exist at the time a State becomes bound to SPAW.

C. A State that recently signed SPAW, holds a reservation on hawksbill turtles in CITES. This State argues that they will not need to lodge reservations under SPAW Article 11 (paragraph 4.d) for this taxon, because they have a general exemption for this species under Article 25 of SPAW. Is it the case then that signatory Parties to SPAW do not require to register a reservation for Annex I- or II- listed taxa that they wish to trade?

No. Signatory States and all other States must make a reservation to a species included in the initial annexes (or the annexes as they exist at the time of ratification or accession) at the time they ratify or accede to SPAW, even if that State has a valid reservation for the same species under CITES. First, as stated in Section IV(A), Article 11, paragraph 4.d, applies only to reservations to species added to the annexes by amendment. For reservations to the initial annexes, a State must make a reservation at the time it ratifies or otherwise consents to be bound by SPAW.

Second, Article 25 of SPAW is not a general reservation relating to CITES. Rather, it is a

[26]International Court of Justice, *Reservations to the Genocide Convention*, ICJ Reports 15, 21, 24 (1951); *see* BROWNLIE, *supra* note 5, at 613.

statement that SPAW and CITES shall be interpreted as compatible. A statement of compatibility simply means that the two treaties can operate simultaneously without conflict. Compatibility, however, does not mean that a reservation to one treaty has operative effect *vis-a-vis* the other treaty. SPAW has a distinct and independent legal identity from CITES. The doctrine of *pacta sunt servanda*, a peremptory norm codified as Article 26 of the Vienna Convention, provides that "every international agreement in force is binding upon the Parties to it and must be performed by them in good faith." Thus, where two treaties prohibit the same activity, such as international trade in hawksbill turtle, then a State must make a reservation to both treaties if it wants to undertake that activity consistent with both treaties.

VI. Specific Questions Relating to Article 25 of SPAW

A. Small cetaceans are listed on Appendix II of CITES (trade is regulated), but on Annex II of SPAW (trade or possession is prohibited). Article 25 of SPAW has been interpreted by some recent signatory Parties to SPAW to mean that they have an automatic exemption to trade small cetaceans if they choose to, because it is their *right* under CITES. Is it the case that Article 25 of SPAW provides specific exemptions under the Protocol?

No. This claim has no merit, because Article 25 of SPAW does not provide a specific exception to the provisions and prohibitions of the Protocol. Under the general principle of international law, *pacta sunt servanda*, SPAW creates distinct legal obligations that must be performed in good faith, regardless of a Party's rights and obligations under CITES. States are always free to limit behavior and actions that are permissible under other treaties, and Article XIV of CITES expressly grants Parties the right to take stricter domestic measures. A State that agrees to be bound by SPAW chooses to limit actions that might be permissible under CITES, and chooses to adopt stricter domestic measures relating to CITES listed species.

Where SPAW imposes obligations beyond those of CITES, it is consistent with CITES, and Article 25 is not relevant because CITES does not create rights to trade in Appendix II species. To the contrary, Article IV creates obligations to regulate trade in Appendix II species and to prohibit exports if trade will be detrimental to the survival of the species, the species was obtained in contravention of law, or if a living specimen is not prepared for shipment in a way that minimizes risk to injury or health. A decision of the CITES Parties to regulate trade subject to these limitations does not create rights under international law to trade or under Article 25 of SPAW. Rather, such a decision merely leaves undisturbed sovereign power to regulate trade on terms defined by each sovereign, provided that those terms are consistent with the minimum requirements of CITES. Each State may, if it chooses, bind itself through another international agreement. This is precisely what States ratifying SPAW have done. Through SPAW, they have expressed their intent to implement measures stricter than CITES.

B. Conversely, it has been argued that a signatory Party to SPAW is not required to implement its Annex I, II, or III provisions if such taxa are not listed in the CITES Appendices! Can Article 25 be interpreted in this way?

No. Article 25 cannot be interpreted in this manner. The claim that a SPAW Party does not need to implement its Annex I, II and III obligations unless the species is also listed by CITES is totally without merit. Again, the two treaties create distinct legal obligations that must be performed in good faith. A State that is Party to both treaties must comply fully with the obligations of both treaties. As stated in the previous section, CITES does not confer rights to trade and thus Article 25 of SPAW cannot be interpreted as creating a vast, general exception to SPAW for all species not listed on CITES.

Further, Article 11 of SPAW creates comprehensive obligations to regulate or prohibit activities that disturb or destroy habitat, the harvest of listed species, and the taking, possession, and killing of listed species, among other things. CITES, on the other hand, regulates international trade in listed species. Thus, the Annexes to SPAW create very different legal obligations.

As a result, such an interpretation would deny the rights of States that are Party to SPAW but not to CITES to have the comprehensive provisions of SPAW implemented with respect to all species included in SPAW's Annexes. Certainly, the drafters did not intend States party to both SPAW and CITES to have fewer obligations than non-CITES Parties. Because the provisions of SPAW are far more comprehensive than the provisions of CITES, such a result would be absurd.

Such an interpretation would also make SPAW ineffective and violate the "effectiveness" rule, the "most widely accepted interpretive standard in the traditional repertoire."[27] The effectiveness rule simply states that a "treaty must remain effective rather than ineffective."[28] That is, a treaty's provisions should be interpreted to give them a meaning and effect consistent with the treaty's general purposes.[29] If SPAW's comprehensive provisions applied only when a species was listed in both CITES and SPAW, the purposes of SPAW would be defeated.

Prof. Chris Wold
September 1999

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[27] MYRES S. MCDOUGAL, HAROLD D. LASWELL & JAMES C. MILLER, THE INTERPRETATION OF INTERNATIONAL AGREEMENTS 156 (1994).
[28] SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT, 227-228 (1958).
[29] *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] I.C.J. Rep. 174, 179-184; *See, e.g.,* Permanent Court of International Justice, P.C.I.J., Ser. B, No. 17, at 19 (1930); *Acquisition of Polish Nationality*, P.C.I.J., Ser. B., No. 7, at 16 (1923).