

National ordinance containing rules for the conservation of nature and wildlife (Nature Conservancy Ordinance)

EXPLANATORY MEMORANDUM

General commentary

§ 1. Introduction

Aruban legislation on nature conservancy in general and the protection of both indigenous and non-indigenous flora and fauna in particular is incomplete, fragmented and often outdated. As the government wishes to be able to pursue a policy appropriate to the present situation and present time, the legislation as it stands is inadequate.

New legislation that gives the implementing authorities good and adequate instruments is therefore urgently needed, especially in order to protect the indigenous flora and fauna and maintain biodiversity. The indigenous flora and fauna and their habitat are coming under mounting pressure, particularly as a result of economic developments in recent years. The government considers that these developments, which are in themselves of essential importance to the general welfare of Aruba, should be better aligned with the equally vital protection of the country's ecosystems. In the government's opinion, these interests are not, in principle, conflicting; it sees them instead as interests that can be aligned and integrated on the basis of a well-conceived policy discussed with all parties. The possession of varied and attractive flora and fauna benefits both tourism, which will remain one of the pillars of Aruba's economic development, and the local population.

In addition, all manner of international developments have occurred in recent decades in the area of protection of flora and fauna and their habitats, which have resulted in the adoption of various international conventions in this field. Some of these conventions are already in force for

Aruba, but lack implementing legislation; others require legislation before Aruba can accede to them. This bill fulfils this need.

The government expects implementation of the bill to entail little if any extra expense for Aruba, since many of its provisions are simply a continuation of the existing legislation. The only extra costs might result from the obligation introduced by one of the conventions referred to in § 2 (i.e. CITES) for the Parties to arrange for the repatriation of animals and plants originating from their country but confiscated elsewhere and, possibly after a period of acclimatisation, for their return to the wild; however, it is hard, if not impossible, to estimate these costs, and even if they do occur they can be kept within bounds, partly through application of the provisions of the bill itself (e.g. article 21, paragraph 1).

§ 2. Implementation of international treaty obligations

As noted above in § 1, the present bill is intended to implement various conventions or create a framework for doing so. All relevant conventions currently in existence are briefly discussed below.

First of all, the bill implements – or creates a framework for the implementation of – the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed at Washington D.C. on 2 March 1973. This convention, which is usually referred to as the Washington Convention or CITES, has hitherto been in force within the Kingdom of the Netherlands only for the territory in Europe, but the Aruban government has informed the government of the Kingdom that it too wishes to accede to CITES. The aim of this Convention is to limit or regulate the trade in wild animals and plants by designating species whose specimens may be exported only subject to certain conditions. The animal and plant species for which this Convention requires an export permit per specimen are divided into three categories, each of which is included in a separate appendix to the convention. Appendix I contains the species threatened with extinction; the trade in specimens of these species is subjected to particularly strict regulation and may be authorised by the Parties only in exceptional cases. Appendix II contains the species which, although not necessarily now threatened with extinction, may become so unless trade in specimens of such species is subject to strict regulation by the Parties in order to avoid exploitation incompatible with their survival. Finally, Appendix III contains the species which any Party identifies as being subject to regulation within its

jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade.

Under CITES, trade in specimens of protected animals and plants is possible only with a permit or exemption, the granting of which is subject to certain conditions contained in articles III to VIII of CITES. For example, a Party must designate a management authority and a scientific authority which have specific duties in examining whether the conditions attached to the issue of a permit have been fulfilled. These conditions are first that the export will not be detrimental to the survival of the species concerned, second that it has been shown that the animal or plant was not acquired in contravention of the laws of that State for the protection of fauna and flora and, finally, that in the case of a living specimen, it has been prepared and shipped in such a way as to minimise the risk of injury, damage to health or cruel treatment. Derogation from these conditions is possible in certain cases, in particular for the transit or transshipment of specimens through or in the territory of a Party, provided that the specimens remain in Customs control. The present bill, which (as will be explained in §4) provides more far-reaching protection than prescribed by CITES, will make it possible for Aruba to accede to the Convention.

The Convention on the Conservation of Migratory Species of Wild Animals, with appendices, concluded at Bonn on 23 June 1979, has been in force for Aruba since 1 January 1986. The aim of this Convention is to protect species of wild animals that migrate across national boundaries. As such, it serves partly to supplement the provisions of CITES, which is based (broadly speaking) on the assumption that populations are static. The Bonn Convention attempts to achieve this by obliging the Parties to take measures, either separately or together, to conserve the species that occur within their territory and their habitats. This is done by affording direct protection for the species included in Appendix I to the Convention and by arranging for the conclusion of conventions for the conservation and management of migratory species included in Appendix II. The species listed in Appendix I are endangered migratory species. Those on this list of importance to Aruba include turtles. The species protected in the Bonn Convention are at present already protected under the marine environmental ordinance passed by the island territory of Aruba under the previous constitutional arrangement and subsequently adopted by general national decree of 8 June 1987 based on that national ordinance.

As a result of the instruments proposed in the bill, the protection for these species can be broader and in keeping with the tenor of the Convention. Where species are included in the

appendices to both the Bonn Convention and CITES (which is the case with many species), they are governed by the rules based on CITES, which are the most far-reaching.

The Convention on Wetlands of International Importance, especially as Waterfowl Habitat, concluded at Ramsar on 2 February 1971, has also applied to Aruba since 1 January 1986. This convention is known as the Wetlands Convention. As the name suggests, its aim is to protect wetlands of international importance, especially as waterfowl habitat. It is important to note in this connection that wetlands are broadly defined in this convention as areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres. Parties to the Convention must designate for inclusion in a list at least one wetland within their territory that is eligible for protection. The list is kept by a Bureau specially established for this purpose. Wetlands are eligible for inclusion in the list on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology. The Parties have undertaken to include in that list above all the wetlands which are of importance to waterfowl at any season. In the 1970s, the government of the Netherlands Antilles designated the Spanish Lagoon for Aruba. The government intends, once the present bill has entered into force, to seek the opinion of the Flora and Fauna Protection Committee on whether Bubali Pond and the islets off the Coastal refinery should be included in the list.

Being a party to this Convention also entails a number of other obligations. For example, the boundaries of the wetlands which are included in the list must be precisely described and delimited. In addition, a Party must promote the wise use of the wetlands and should inform the Bureau established under the Convention at the earliest possible moment if the ecological character of any wetland in its territory and included in the list has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Finally, each Party should promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands and provide adequately for their 'wardening'. This last point in particular is covered by the present bill.

The bill is also intended to provide the government with instruments for implementation of the Protocol concerning Specially Protected Areas and Wildlife concluded in Jamaica on 18 January 1990 (known as the SPAW Protocol). This Protocol itself implements article 17 of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Cartagena on 24 March 1983. The Convention and the Protocol are

in force for Aruba. The aim of the Protocol is to protect areas of special value and endangered species in the Caribbean region and to regulate and, if possible, prevent activities having adverse effects on these areas and species. The Parties to the Protocol are obliged, where necessary, to establish protected areas in particular to ensure the survival of representative coastal areas and marine ecosystems. Examples of the measures to be taken for this purpose are fishing and hunting bans, prohibition of the dumping of waste, prohibition of the import and export of endangered species of animals and regulation of shipping, without prejudice to the right of innocent passage. Management measures should also be adopted and the Parties should take measures, either individually or together, to protect the species of fauna and flora specified in the three annexes to the Protocol.

Finally, reference should also be made to the Convention on Biological Diversity, which was signed on behalf of the Kingdom of the Netherlands during the UNCED conference in Rio de Janeiro in June 1992, but which has not yet been ratified. In the opinion of the government of Aruba, this Convention should, after ratification, also apply to Aruba.

As regards the manner of implementation of the international conventions referred to above, it should be noted that some of them have a system in which the various categories of species of flora and fauna are included in appendices to the convention. As stated in the explanatory memorandum enclosed with the letter from the Minister of Foreign Affairs of 5 January 1982, requesting the tacit approval of parliament for CITES (House of Representatives, 1981-1982 session, 17284 (R 1201) no. 1), alterations to these appendices do not require parliamentary approval since the appendices relate only to the implementation of the Convention. This means that alterations to the appendices enter into force once the procedure for alteration of the appendix prescribed in the Convention itself has been completed. In view of the above and given that the alterations made to these lists to date concerned additions and did not entail removal of species from the lists, the government considers that it would not be efficient for the lists of species of flora and fauna included in the appendices to the conventions to be incorporated as schedules to national legislation. Reference will therefore simply be made to the appendices to the various international conventions. However, the bill does include a provision that the texts of the appendices and annexes that are in force should be deposited at the offices of certain government bodies for public inspection.

The procedure described above has an additional practical advantage in that it avoids any delay in alterations in the appendices taking effect in Aruba. Naturally, measures will be taken to

ensure that the government bodies specified in the bill receive the alterations as soon as they have been adopted so that they can immediately be acted upon by the authorities and the public alike.

§ 3. Relationship with existing legislation

The following legislation on the protection of flora and fauna is currently in force.

The National Ordinance on the Protection of Useful Species of Fauna (AB 1990 no. GT 46) dates from 1926. It is evident from its original full title, namely 'the national ordinance for the protection of species of fauna which are useful for agriculture and fruit-growing or are gradually becoming extinct and whose survival is considered valuable', that its aim is unduly narrow in the light of the preamble to the present bill. Although certain species have indeed been afforded protection under this national ordinance since the decree of the Governor of the Netherlands Antilles of 28 September 1931 to implement this ordinance (AB 1990 no. GT 47), and the government has recently added a number of species of bird and reptile to the list of protected species (by national decree of 13 November 1992 (AB 1992 no. 110)), Aruba has insufficient scope under this old ordinance to meet its treaty obligations.

The Endangered Fauna and Flora (Import and Export Prohibition) National Decree (AB 1991 no. 102), which is based on article 4 of the Import and Export National Ordinance (AB 1989 no. GT 102), contains provisions on the import and export of some of the fauna referred to in CITES, namely the flora and fauna threatened with extinction. However, these rules must be regarded as temporary measures (see the explanatory memorandum to that decree), in anticipation of the introduction of comprehensive legislation (i.e. the present bill), since the scope of the Import and Export National Ordinance is too narrow to provide a statutory basis for the entire regulation required by CITES of the trade in and possession of the species of flora and fauna included in Appendices II and III to CITES.

Third, the Aloe Plants (Export Prohibition) National Ordinance of 11 April 1942 has been in force since 1942. This national ordinance, which was originally adopted by the Netherlands Antilles and was included in the Official Journal of the Netherlands Antilles (1942 no. 84), was adopted by Aruba when the constitutional arrangements changed. It prohibits the export of aloe plants without a permit. Assuming that such a prohibition should continue to be enforced, this would be possible under chapter II of the bill.

Fourth, there is the Marine Environment Ordinance mentioned above. Under this ordinance a number of national decrees for the protection of certain species of marine animals have been introduced, in particular nos. 51 and 52 of 1987, no. 57 of 1988 and no. 70 of 1992. A bill to amend the Marine Environment Ordinance, which is currently before parliament, provides for the scope of the ordinance to be widened to make it possible to designate marine nature reserves where flora and fauna will have protected status. As the various instruments provided for in the Marine Environment Ordinance are also included in the present bill, it will no longer be needed when the bill comes into force. If the bill to amend the Marine Environment Ordinance has not yet been passed by parliament when the present bill is before parliament, it will naturally be withdrawn by the government.

Finally, the list of legislation to be adopted by Aruba under the terms of the general legislative and administrative transitional arrangements (AB 1987 no. GT 2) (known as the 'positive list') included the Marine Nature Reserves National Ordinance, as published in the Official Bulletin of the Netherlands Antilles, 1976 no. 157. It was included in the positive list in the hope that the government of the Netherlands Antilles would arrange for it to enter into force before 1 January 1986. As this hope subsequently proved illusory, this national ordinance has not entered into force for Aruba despite its inclusion in the positive list.

The above list of current legislation in force makes no mention of the Fisheries Ordinance (AB 1992 no. 116), which came into force on 20 March 1993 (AB 1993 no. 15). The government would observe as follows in this connection. At first sight, the Fisheries Ordinance would appear capable of being used to implement the treaty obligations in question. On closer examination, however, this impression proves to be incorrect. The aim of that ordinance, as stated in the preamble, is to regulate the economic aspects of fishing. The explanatory memorandum also explicitly states that the protection of the marine environment does not come within the scope and objectives of the ordinance. It follows that measures to prohibit or regulate the catching of other marine animals cannot be based on that ordinance. Although fishing for certain species of fish and the catching of undersized fish can be regulated under article 4 of the Fisheries Ordinance during a particular period, such a measure can be based only on criteria relating to the maintenance of sound fishing stocks from a purely economic perspective and not on criteria directly related to nature conservancy. Nature conservancy measures specifically intended to prohibit or regulate the trade in certain species or to prohibit fishing for certain species of fish, whether temporarily or otherwise, can be based only on the present bill.

§ 4. The design of the bill

For a better understanding of the articles explained separately below, the government considers it desirable briefly to describe the design and outline of the bill. As mentioned above, the government intends this bill to serve as a basis for the implementation of its entire nature conservancy policy and to enable it to act effectively without having to amend the statutory provisions on each occasion, in particular those of this national ordinance. This approach is not peculiar to Aruba, and has in fact been adopted elsewhere too. Usually, such an approach results in the adoption of framework legislation, i.e. an act of parliament that sets out the main points of the policy and leaves the drawing up of detailed provisions to the government or individual ministers. This approach has also been adopted here.

As regards the subject matter, however, it should be added that the government's freedom of action in this area is constrained to a great extent by various conventions. In other words, many measures seemingly peculiar to Aruba will in fact simply implement agreements made in a larger and sometimes global context. A good example of this is CITES, to which 118 countries have now acceded. The liberal policy hitherto pursued by Aruba with regard to trade in flora and fauna has been raised by various countries through démarches to the government of the Kingdom and has also been questioned in the domestic and foreign press. Although the pressure on Aruba has eased slightly since the entry into effect of the Endangered Fauna and Flora (Import and Export Prohibition) National Decree, it is nonetheless clear that not only the Kingdom of the Netherlands but also neighbouring countries such as Colombia and Venezuela wish Aruba to accede to CITES and observe its provisions. As other conventions too impose regulatory obligations on Aruba, the freedom of action which parliament delegates to the government by this bill is less than it appears.

The outline of the bill is as follows. Chapter I contains the definitions, for example the definition of certain treaty arrangements which are directly implemented in the bill and of the specific terms used in the bill. In addition, it includes a general delegation of powers to the government to implement conventions. This was discussed at some length in the previous paragraph.

Chapter II has three sections, which are intended to provide a coherent system of rules that make it possible to introduce regulations to protect local wildlife, as required by articles 3 to 6 of the SPAW Protocol. First of all, section 1 of chapter II provides for the appointment of a committee to advise and assist the minister concerned in developing and updating a wildlife

protection policy and, if necessary, to implement it too. The government proposes that the Marine Environmental Management Committee, established under the Marine Environment Ordinance (to be repealed under this bill), should be subsumed by this new committee. For the protection of both marine and land flora and fauna there will be a single committee consisting of experts in both fields. Section 2 describes the statutory instruments which can be used for the actual protection of indigenous flora and fauna. One such instrument is the prohibition of certain acts relating to flora and fauna, which will be included in a national decree containing general measures. The instruments described in this bill comprise those already included in the existing legislation (which is to be repealed) and also the necessary prohibitions. Finally, section 3 provides that nature reserves may be designated and management rules adopted for this purpose by national decree containing general measures. These nature reserves may be located both on land and in the waters (or parts of the waters) around Aruba. The international conventions referred to above, on which the bill is based, expressly provide that the parties should have the possibility of establishing nature reserves.

Chapter III contains provisions for the protection of non-indigenous flora and fauna. This chapter specifically implements CITES and the SPAW Protocol by means of a single, uniform regime. It should be noted in this connection that CITES, which relates specifically to the trade in endangered species of wild fauna and flora, contains very detailed regulations on how the trade in these species should be prohibited or regulated. By contrast, the SPAW Protocol merely provides in a more general sense (in article 11 (1) (a) and (b)) that each Party must take certain measures to ensure total protection and recovery to the species of fauna listed in the annexes to the Protocol. These measures include a prohibition on trade in the species listed. Article 25 of the SPAW Protocol also expressly provides that nothing in the Protocol is to be interpreted in a way that may affect the rights and obligations of Parties under CITES and the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention). Provided that account is taken of the above, the government believes that the creation of a single statutory regime for the implementation of both conventions will greatly enhance the clarity of Aruban legislation. Chapter III therefore contains prohibitions that differ according to whether they relate to specimens included in appendices I and II to CITES and annexes I, II and III to the SPAW Protocol or appendix III to CITES. This section continues the existing prohibition on the import and export of species threatened with extinction, and extends its scope to include species whose survival may possibly be threatened (namely the species listed in appendix II to CITES and annex III to the SPAW Protocol). Only in exceptional cases can an exemption from these

prohibitions be obtained. Appendix III to CITES concerns species which are already subject to protective measures in a Party through rules comparable to those of chapter II of this bill, but for which the Party concerned seeks the cooperation of other Parties in the interests of improved protection. Under the bill a certificate of origin is required for the import of these species and an export permit for the export of species which are included in a national decree as referred to in article 4, paragraph 1 of the bill and have been designated for inclusion in Appendix III to CITES.

Chapter IV relates to the establishment of various registers which the government believes are necessary (for example to implement CITES) for the protection of flora and fauna.

Chapter V contains penalties and the closely related rules on confiscation and forfeiture of animals and plants where infringements of the legislation occur. These provisions too are, in part, needed for the obligatory implementation of CITES.

Finally, chapter VI regulates the measures for enforcement of the bill and contains the usual concluding provisions of a national ordinance, including in this case a special provision for the entry into force of the provisions regulating possession of certain specimens and for the amendment of the Import, Export and Transit National Ordinance.

Commentary on individual articles

Article 1

Paragraph 1 contains a large number of definitions.

As regards the definition of the term 'indigenous flora and fauna', it should be noted that the word 'naturally' is not intended to mean that the species of animals or plants must have lived or evolved in the wild on Aruba since time immemorial in order to come within the definition. Instead, it is merely intended to indicate that the definition does not relate to animals or plants that have been released deliberately or accidentally. The definition therefore includes migratory birds which formerly visited Aruba only at certain times of the year but have now become permanent residents as a result of the creation of the Bubali pond for birds.

The terms import and export have been included as their definition differs from that in the Import, Export and Transit National Ordinance (and also in the Endangered Fauna and Flora (Import and Export Prohibition) National Decree). The term 're-export' (mentioned in CITES) does not appear in the present bill, since the definition of 'export' has been worded in such a way as to include re-export. It follows de facto from this definition that an animal or plant of a protected species may not leave Aruban territory or may leave it only after completion of a given procedure. Naturally, this prohibition does not extend to animals that live in the wild.

As chapter III of the present bill bases the protection of the various species on a system of reference to annexes and appendices to international conventions, as explained in the general commentary above, rather than on inclusion of schedules to the bill itself (which would have to be constantly updated), it is desirable that the conventions concerned should be identified in the definitions. This is why the terms 'Convention' and 'Protocol' are included in the definitions.

The term 'specimen' occurs in CITES and should be accurately defined since reference is made only to the annexes and appendices to the international conventions.

Paragraph 2 is intended to avoid a situation in which a new act of parliament is required for each nature conservancy convention that enters into force for Aruba in the future. Reference should also be made to what has been said above in § 4 of the general commentary regarding the design of the bill.

Paragraph 3 contains the designation of the government bodies – as already mentioned in § 4 – where the text of the conventions and protocols and, in particular the annexes and appendices to them, can be inspected when desired.

Articles 2 and 3

The government wishes to establish a committee which will carry out a range of duties in relation to the overall nature conservancy policy for Aruba. It does not propose to distinguish for this purpose between, for example, marine and non-marine aspects of this policy. However, this does not preclude the possibility that subcommittees may be established for each of these aspects (and possibly other aspects too).

As regards the composition of the committee it should be noted that the government has decided that it should consist of independent nature conservancy experts rather than civil

servants. As the government is aware that the number of experts in this field in Aruba is limited, it believes that the committee should be assisted and advised by civil servants. These could be the head of the Veterinary Service and the head of the Agriculture, Livestock Farming and Fisheries Department. In the opinion of the government, the head of the Housing, Spatial Planning and Environment Department should be designated in that capacity as secretary to the committee (see article 2, paragraph 3). This would ensure that the committee has a permanent link with the civil service organisation generally responsible for nature conservancy policy and is at the same time assured of a permanent support organisation which can guide the work of the committee.

The government also considered designating the committee as the scientific authority required by CITES of the Parties. However, the often highly specialised expertise required for this purpose is not present in Aruba outside the civil service. As a result, it was necessary to look for a different solution when designating a body to fulfil the duties of the scientific authority. In the opinion of the government, these can best be carried out by civil servants or government bodies which will, it may be assumed, contact scientific authorities in other Parties where necessary in the performance of their duties.

The government believes that a very important and worthwhile function of the committee will be to advise on the designation and management of nature reserves in order to maintain the desired level of biodiversity on Aruba.

Article 4

The government intends article 4 to replace a number of existing items of legislation (see article 25 (a), (b) and (c)). This will enhance the clarity of legislation on local wildlife protection and ensure that enforcement is more effective (as a result of the extension of powers). A distinction is made in this connection between the fauna and flora on Aruba that are seriously threatened (see paragraph 1) and those that are less seriously threatened (see paragraph 2 (a)), in keeping with the distinction made in appendices I and II to CITES. As provision is also made for the possibility of protecting locally or individually valuable plants (see paragraph 2 (b)), this paragraph may be regarded as a supplement to article 10, which regulates the establishment of nature reserves.

The government is in fact aware that application of paragraphs 1 and 2 may result in a limitation on the right of ownership in respect of trees or plants on private land. However, it considers that conservation of Aruba's scarce flora is a sufficient justification for the inclusion of these provisions. In addition, their application must be preceded by a proper study and a fair assessment of the different interests involved. Paragraph 3 therefore provides for the committee to be consulted about a proposal for a national decree of this kind.

A designation by national decree as referred to in paragraph 1 of a seriously threatened species of fauna or flora occurring on Aruba (mention was made of this above in § 4 of the general commentary) may also result in worldwide regulation of the trade in living specimens of such species coming from Aruba and of the trade in parts or products thereof. The danger that the provisions of the bill, in particular the export prohibition in article 5, paragraph 1, may be evaded can be considerably reduced by inclusion of such species in Appendix III to CITES (as has become evident in practice).

On the other hand, the government considers it desirable not only to limit the export of designated species but also to make provision in this bill (see paragraph 4) for the introduction of other rules (in addition to the prohibitions in articles 5, 6 and 7), which must naturally be in keeping with the aim of this bill, i.e. they must be intended for the protection and welfare of the species. For example, article 10 (4) of the SPAW Protocol provides that parties must formulate policies for the management of captive breeding of protected fauna and propagation of protected flora. It is possible that the adoption of rules specifically adapted to the situation on Aruba may be necessary in this context; paragraph 4 provides a statutory basis for this.

Experience of nature management in general and the management of flora and fauna in particular throughout the world has in any event shown that it is much more difficult and expensive to repair damage than to prevent it. The government therefore considers that it has a duty to intervene promptly and swiftly; waiting for the adoption of rules by national ordinance could be tantamount to shutting the stable door after the horse has bolted.

Articles 5, 6 and 7

Further to the regulations laid down by or pursuant to article 4 and in implementation of article 10 (3) of the SPAW Protocol, these articles list the acts that constitute criminal offences in

respect of flora and fauna of a species included in a national decree as referred to in article 4, paragraphs 1 and 2.

For example, article 5, paragraph 1 contains a general prohibition on the export of designated animals and plants. Needless to say, the introduction of an import prohibition would not be desirable: an increase in the existing protected populations would, if anything, be welcome. The protection of biodiversity also means that protection of dead specimens is pointless. As Aruba has no species of fauna or flora which are so valuable that dead specimens too command a high price, this paragraph is intended only to cover live animals and plants. Likewise, paragraph 2 covers eggs, since they constitute potential future living specimens.

Article 6, paragraphs 1 and 2, contains specific prohibitions of acts relating to all designated animals, whether living in captivity or in the wild; paragraph 3 contains an exemption from all prohibitions for veterinary surgeons and public servants acting in the course of their duties (e.g. a police officer who puts an animal out of its misery). The article does not contain an exception for emergencies; save for one exception, Aruba's wild animals are incapable of causing damage to property or injury to people. The exception is the Aruban rattlesnake, but this will generally bite a human being only in self-defence. The victim may not in that case kill the snake. The danger posed by a rattlesnake, unlike that posed by large predators, is not in its bite but in the poison injected into the blood of the victim. The position of the victim is not improved by killing the snake; on the contrary he or she would lose valuable time in seeking medical assistance. There is therefore no reason for including a ground for exculpation here.

Article 7 contains prohibitions specifically covering acts against animals living in the wild.

Article 8

As it is conceivable that breaches of articles 5, 6 and 7 may have to be committed in special circumstances (e.g. scientific research), this article regulates the subject of exemptions. As is evident from the wording of paragraph 1, the killing or injuring of protected animals is excluded. The same applies to the limitation imposed in respect of the prohibition in article 7, paragraph 3. The possible exemptions will be laid down by national decree containing general measures. The government proposes a very limited provision, which is broadly speaking in keeping with the rules that apply under CITES for exemptions in respect of the trade in animals and plants

referred to in Appendices I and II. Reference may also be made here to the explanatory notes on article 11, paragraph 2.

Paragraph 2 stipulates that there must be an assessment before an exemption can be granted. It may be assumed that this assessment will often result in the imposition of limitations as provided for in paragraph 3. Paragraph 4 contains the standard cancellation clause for permits.

Article 9

The government considers it desirable to create the possibility of introducing rules on objects that can cause suffering to animals. Not only has it become apparent that the habitat of wild animals on Aruba is under threat from factors such as the growth of water-based tourism, creeping urbanisation and the greater popularity of outdoor recreational pursuits, it is also evident that wild animals are at increasing risk from objects such as catapults and light airguns and air rifles, which are not covered by the Weapons and Firearms Ordinance. Although the National Ordinance on the Protection of Useful Species of Fauna made it a criminal offence to kill or injure certain animals, the means to kill or injure are, regrettably, still freely on sale in shops. The present article has therefore been worded sufficiently broadly to allow, for example, the import of such objects to be banned by national decree containing general measures.

The government has seen fit to introduce rules governing not only objects that can kill or injure animals but also objects used to capture them. The government's aim is, after all, not simply the conservation of animals as such but in particular the conservation and well-being of animals (and plants too) in their natural habitat. The government therefore proposes to ban either totally or partially (by reference to the criteria of time, place or species) or regulate the use of objects such as lime twigs and other means of capturing animals. Under this article, the use of certain types of fishing net or other means of catching fish can be prohibited – or permitted only in certain periods – if this is necessary to ensure the survival of certain types of marine fauna and flora. As already explained above in § 3 of the general commentary, the Fisheries Ordinance would not be an appropriate vehicle for promulgating rules of this kind.

Article 10

This article will make it possible to establish protected areas in order to ensure that Aruba's areas of natural beauty and above all the wildlife they contain can be preserved for posterity.

The scope created here can also be used to provide special protection for designated nature reserves in compliance with international treaty obligations (i.e. article 4 of the Ramsar Convention, articles 4 and 8 of the SPAW Protocol and article III (4) (a) of the Bonn Convention). This article could also be used to fulfil the obligations resulting from the Bonn Convention to provide protection and resting areas for migratory birds.

It should also be noted that paragraph 1 merely provides for the designation of state-owned property, i.e. sites or areas belonging to the Aruban government. The bill does not provide, in any event directly, for privately owned land to be designated as a nature reserve. If this were necessary, the site concerned would have to be bought or expropriated by the State before it could be designated under this article. However, private property could be affected by protective measures taken under article 4, paragraph 2 (b) (i.e. by the designation of individual plants as protected); on this subject, see also the commentary on that article.

It is evident from the wording of paragraph 2 that the designation of an area as a nature reserve is not an isolated act. Article 6 of the SPAW Protocol requires, after all, that when an area is designated provision should be made at the same time for its management and use. This includes enforcement measures.

Article 11

This article forms the core of the protection afforded to endangered or threatened species of non-indigenous wildlife as required by CITES (appendices I and II) and the SPAW Protocol (annexes I and, II and III). Although both conventions permit trading in the specimens (see articles III and IV of CITES and articles 10 and 11 of the SPAW Protocol), albeit subject to restrictions, the government has opted for a total ban on the import and export of these animals and plants. This is contained in paragraph 1 of article 11. The reasons for this seemingly drastic step are twofold: ethical and practical. After all, the removal of fauna and flora from their natural habitat solely for profit disturbs the ecosystem in which they function and, in the case of fauna, is also detrimental to their well-being. The government considers that on ethical grounds such action is so unacceptable that, even if it happens elsewhere in the world, it should be combated by the introduction for Aruba of a total ban on trade in such fauna and flora rather than by the adoption of the strictly regulated system of permits provided for in CITES. A system of permits would imply recognition or, in any event, toleration of acts that the government actually considers to be ethically unacceptable. It should be noted that CITES itself makes provision for

views of this kind, because its article XIV (1) states that the parties may adopt stricter measures than those that are mandatory under the Convention.

However, there are also practical reasons why the government prefers a prohibition to a system of permits, namely administrative efficiency. The wording of article 11, paragraph 1, has been chosen by the government both because of the sheer volume of work involved in introducing and maintaining a system of permits under CITES and on account of its limited knowledge of flora and fauna (although the differences between animals and plants on lists I and II are sometimes small, they have a major effect on the granting of a permit).

Paragraph 2 creates the possibility of making exceptions to the import and export ban contained in article 15, paragraph 1. Although the government will try to avoid granting exemptions in practice, the article provides for the possibility of exemption because CITES explicitly mentions compulsory exceptions, for example in article VII (5) and (6). In the government's view, however, the exceptions mentioned above belong in a national decree containing general measures rather than in the present bill. This is because of the legal complexity and highly specific, technical nature of the wording of the provisions for exceptions.

Article 12

This article concerns restrictions imposed on the trade in specimens included in appendix III to CITES by Parties. Article V of CITES requires a special system of certificates (see paragraph 1) and permits (see paragraph 2). Owing to the technical nature of the CITES requirements, it has also been decided in respect of these two paragraphs that the conditions for the issue of these documents should not be regulated in the present bill. Instead, these matters are delegated to the Minister concerned since they are of a less far-reaching nature than the regulation of the conditions for exemption referred to in article 11, paragraph 2.

Article 13

As a complement to article 6, paragraph 1, the government considers it desirable to include an express ban on killing or injuring non-indigenous animals too, if they are threatened with extinction either worldwide or at a particular place. It believes that in this case the provisions of article 477 of the Criminal Code are insufficient to achieve the goals set both nationally and internationally in respect of animals threatened with extinction.

Article 14

This article is the final element in the prohibitions contained in articles 11, 12 and 13. Even after specimens have been illegally imported, the Aruban authorities must have the means of taking action against a person who owns, possesses or holds the specimen.

Article 15

After its accession to CITES, Aruba may find itself in the position of having to return specimens confiscated and declared forfeit by it to the country of origin and of receiving back animals or plants protected on Aruba which are returned by other countries to Aruba. Naturally, the import and export procedures of articles 11 and 12 should not apply in such cases. Article 15 makes provision for this.

Article 16

Both CITES (article VIII (7)) and the SPAW Protocol (article 19) require their Parties to prepare annual reports on the implementation of the relevant conventions and hence on the application of this national ordinance. CITES also explicitly requires (see articles VI and VIII (6)) the registration of the information referred to in parts (a), (c) and (d) of article 16, paragraph 1. Part (b) is included as a complement to part (a), namely with regard to species of fauna and flora threatened with extinction on Aruba.

If these registers are to function, rules on this subject are naturally required. This is the purpose of paragraph 2. Paragraph 3 puts it beyond doubt that the registers will be public.

Article 17

The prohibition in paragraph 1 is necessary not only to obtain a general idea of the number and species of protected fauna on Aruba through the registers regulated in article 16, paragraph 1, but also to be able to comply with the obligation under CITES to ascertain whether an animal or plant may be exported. The special provisions of article VII of that convention may be relevant to the import or export procedure, for example whether an animal had been acquired before CITES came into force for the country of export and whether the case concerns an animal bred in captivity or a plant artificially propagated. This is why a prohibition of this kind is necessary.

Paragraph 2 contains an exception to the prohibition in paragraph 1. Under article 20, paragraph 1, animals, plants and parts or products thereof may be confiscated and declared forfeit. Until a decision has been taken on what will happen to living specimens after confiscation, these specimens will be handed over to a management authority qualified for this purpose. In view of the shortness of the period of management, the authority need not arrange for registration.

Articles 18 and 19

Even without the requirement in article VIII (1) (a) of CITES and article 10 (3) of the SPAW Protocol, the government would have provided that infringement of the various orders and prohibitions in the bill is a criminal offence. This is the purpose of the present article. The prohibited acts are classified according to three degrees of criminality, which is why the present article has the same number of paragraphs.

Breaches of the prohibitions of article 18, paragraph 1, are viewed by the government as so serious as to warrant their classification as serious offences. This is reflected in article 19, and hence in the corollary that the other punishable acts will be treated as lesser offences.

Article 20

This article too results directly from the text of CITES, in this case article VIII (1) (b). The aim of the Convention is to regulate the trade by means of a coherent system of permits, certificates and exemptions. If the relevant provisions have been infringed, it would be contrary to the spirit of CITES for the fauna or flora concerned to be returned to free circulation. It follows that it must be possible to confiscate the specimens in question and subsequently declare them forfeit. Paragraph 1 of article 20 provides for this.

Naturally, priority must be given to the welfare of living specimens of fauna and flora. Once they have been confiscated, measures must immediately be taken to arrange for their proper care. Paragraph 2 therefore provides for them to be handed over to a qualified authority.

Once living specimens of fauna and flora have been confiscated, it should be decided as quickly as possible whether they can be returned to their original habitat, in other words whether and, if

so, how they can be transferred to the country of origin, except in the case of fauna and flora included in a national decree as referred to in article 4, paragraph 1 or 2 (this is the subject of paragraph 3 of article 20). If this is not possible, it will be necessary to consider whether they could be transferred to another Party which has a comparable natural habitat. If this is not possible either, the government will look for suitable permanent care on Aruba itself for the animal or plant concerned (although the government considers that this is unlikely to be necessary) and arrange for entry in the register referred to in article 16 (a). Naturally, the relevant animal or plant will not be killed and/or destroyed, since it is, after all, a rare specimen. This is reflected in paragraphs 3 and 4.

The position is different, however, with regard to dead specimens of fauna and flora and parts and products thereof. Their preservation is permissible only in very exceptional cases. In principle, the trade in these objects or goods should be made impossible in compliance with Aruba's obligations under CITES. In practice, this can be achieved effectively only by providing for their destruction. The market value of these goods should in any event play no role whatever in such a decision. It was entirely in keeping with this principle that a very sizeable consignment of ivory, which would have been very valuable if sold illegally, was recently incinerated in eastern Africa. An exception to the basic rule should be possible only if the goods concerned are unique from a scientific point of view. Paragraph 6 of article 20 makes provision for this. The government proposes that the minister concerned should exercise this power only if he receives confirmation (for example in the form of a ruling of the committee or the CITES secretariat) that efforts should be made to arrange for the temporary or permanent preservation of the item in question by a scientific institute. In any event, the minister should satisfy himself in such a case that there will be no further trade in the goods.

Article 21

This article has been included because the government considers it desirable for the costs it incurs in looking after and returning an animal or plant or destroying dead specimens and parts or products thereof to be recovered as simply as possible from those on whose behalf the costs are incurred.

Article 22

This article contains the standard wording of the rules on enforcing the provisions of the bill.

Articles 23 and 24

These articles regulate the consequences of the bill for other legislation and regulations. Before the bill enters into force, the government will naturally arrange for the necessary implementing legislation so that no gaps occur in the legislation as a result of the repeal of, for example, the national ordinances referred to in parts (a) and (b) of article 24.

Article 97 (c) of the Import, Export and Transit National Ordinance can be repealed because the original reason for its inclusion in 1947, namely to prevent the spread of the disease psittacosis (which can also infect humans), is no longer valid in health terms and there will also no longer be any nature conservancy grounds for maintaining it after the entry into force of the bill. Provision for this is made in article 23.

As the Endangered Fauna and Flora (Import and Export Prohibition) National Decree (AB 1991 no. 102) was introduced specifically in preparation for the introduction of the present Bill and its contents are now regulated in article 11 of the present bill, article 24 (see (d)) provides for its repeal.

Article 25

The provisions of this article regulating the entry into force of the ordinance take account both of the fact that the government still requires time (probably not more than a month) to adopt the implementing regulations, which are already being prepared, and of the fact that private individuals on Aruba are very likely to still have various living specimens of animals and plants (and also parts and products thereof) listed in the appendices to CITES and the annexes to the SPAW Protocol. These persons are given three months in which to register the specimens, parts or products.

Article 23 is given retroactive effect as a consequence of the decision of the Minister of Finance to suspend the ban on the import of parrots and parakeets from 1 April 1992, pending the introduction of this bill and subject, in the intervening period, to the Endangered Fauna and Flora (Import and Export Prohibition) National Decree. In the period since 1 April 1992 various consignments of parrots and parakeets bred by official breeders have been imported; this will continue to be possible even after the entry into force of this bill as the import of artificially

propagated and bred specimens will be a ground for an exemption from the import ban, provided that they come from official breeders.

The Minister of Public Works and Health

The Minister of Finance

The Minister of Justice

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