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## Joint Meeting of the Bern Convention Network of Special Focal Points on Eradication of Illegal Killing, Trapping and Trade in Wild Birds and the CMS Intergovernmental Task Force on Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean

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### MODEL LAW PROVISIONS ON ILLEGAL KILLING, TAKING, AND TRADE OF WILD BIRDS (IKB)

*(Prepared by the Global Law Alliance for Animals and the Environment of the Lewis & Clark Law School on behalf of CMS Secretariat)*

#### Summary:

The present Model Law provisions are offered as examples legislative ideas and options, informed by best practices, that can be deployed to combat IKB.

MIKT members are encouraged to review and comment on the document.

The Bern Convention Network of Special Focal Points on Eradication of Illegal Killing, Trapping and Trade in Wild Birds is invited to support the submission of the document to the Standing Committee at its 42<sup>nd</sup> meeting.



The European Union was recognized as Champion Plus for their generous support and commitment towards addressing Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean for the period 2018 - 2023. This activity has been funded with the contribution granted by the European Commission under the Migratory Species Champion Programme and through the Global Public Goods and Challenges (GPGC Programme) Cooperation Agreements with UNEP.



## MODEL LAW PROVISIONS ON ILLEGAL KILLING, TAKING, AND TRADE OF WILD BIRDS (IKB)

Drawing upon the Legislative Guidance Materials Relating to the Illegal Killing, Taking and Trade of Wild Birds (Legislative Guidance), the following model provisions are offered as examples to regulate the hunting and capture of wild birds and associated activities and to combat the illegal killing, taking, and trade of wild birds (IKB).

### Section 1: Object and Purpose

The purpose of this Act is to protect wild birds by regulating take, trade, and associated activities.

### Section 2: Definitions

1. “Bird” means individuals of the class *Aves*, naturally occurring in the wild.
2. “Competent authority” means the [agency] [ministry] [minister] responsible for implementing and enforcing this Act.
3. “Enforcement officers” means [identify relevant enforcement bodies, including, for example, national police, national wildlife officers, park rangers, game wardens, customs officers, etc.].
4. “Exception” means any departure from the otherwise applicable rules governing take and trade of wild birds.
5. “Harassing” means to disturb, pursue, injure, feed, or otherwise intentionally disrupt.
6. “Non-Schedule I birds” or “non-huntable birds” means birds that are not listed in Schedule I to this Act.
7. “Person” means
  - a. an individual, corporation, partnership, trust, association, or any other private entity, including a vessel subject to the jurisdiction of the [State];
  - b. any officer, employee, agent, department, or instrumentality of the [State] [federal government], of any [provincial] [state], municipality, or political subdivision of a State, or of any foreign government; or
  - c. any [province] [state], municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the [State].
8. “Prohibited gear” means non-selective gear, such as lime sticks, glue sticks, and types of nets, traps, snares, and hooks, as specified in Schedule II to this Act.
9. “Relevant evidence” includes but is not limited to electronically stored information, including videos, photographs, audio recordings, and text messages, including those posted or circulated on social media or through other electronic means.
10. “Schedule I birds” or “huntable birds” means birds listed on Schedule I.

11. "Specimen" means any individual or egg, whether dead or alive, or nest, or any part or derivative of any individual, egg, or nest of a bird that has been removed from the wild.
12. "Take" or "taking" means taking, hunting, fishing, capturing, trapping, harassing, or deliberate killing, or attempting to engage in any such conduct.
13. "Trade" or "trading" means possession, donation, use, movement, transfer, offer for sale, advertisement, consumption, import, introduction from the sea, transit, and export.

### **Section 3: Criteria for Schedule I and Non-Schedule I Birds**

1. Schedule I to this Act shall comprise those birds that the competent authority has determined are huntable with a hunting license, subject to hunting laws and regulations, including restrictions related to season, method, gear, bag limits, and other like measures.
2. Non-Schedule I birds shall include all bird species not listed in Schedule I to this Act. Bird species that may not be listed in Schedule I include:

- a. CMS Appendix I species;

*OPTIONAL:*

- [b. CMS Appendix II species;

- c. species designated for protection under [other multilateral environmental agreements to which the country is a party, if relevant]; and

- d. any other bird species that the competent authority has designated as not huntable and requiring protection.]

### **Section 4: Role and Responsibilities of the Competent Authority**

*DRAFTER'S NOTE: In some countries, separate hunting legislation may render duplicative portions of the following content. If found in other relevant legislation, at a minimum, the such legislation should identify the competent authority, define the scope of its authority, and articulate the substance of the below provisions.*

1. The competent authority shall
  - a. maintain and update the list of Schedule I birds, ensuring that any birds included in Schedule I do not meet any of the criteria for identification as a non-Schedule I bird;
  - b. maintain and update the list of prohibited gear in Schedule II as necessary and appropriate;
  - c. adopt a national IKB action plan, if appropriate, or other relevant documents, implementation tools, or mechanisms which include actions to address IKB;
  - d. establish quotas, using best available science and taking a precautionary approach, for all Schedule I birds to ensure that any authorized hunting or trade does not disadvantage the species;
  - e. identify appropriate time frames and locations for authorized hunting of Schedule I birds;

- f. issue hunting licenses for the hunting of Schedule I birds pursuant to Section 7 of this Act;
  - g. [regulate post-capture activities of Schedule I birds pursuant to Section 6 of this Act;]
  - h. issue regulations or permits authorizing exceptions from the provisions otherwise governing hunting and other activities related to Schedule I birds as authorized pursuant to Section 8 of this Act;
  - i. issue permits for the exceptional take and/or trade of non-Schedule I birds as authorized pursuant to Section 6 of this Act;
  - j. collect data on actual takes and trade, authorized takes and trade, population estimates, and any other information that is necessary to ensure that quotas and assessments are data-driven and adaptive;
  - k. publish annual reports of all data and information collected pursuant to Section 4.1(j) and assessments of such data and information in the context of the IKB action plan or other relevant documents; and
  - l. report to the CMS Secretariat and relevant international bodies, as appropriate.
2. The competent authority shall promulgate [subsidiary legislation] [regulations] [decrees] as necessary to implement and enforce this Act.

### **Section 5: Take and Trade Prohibitions for Non-Schedule I Birds**

1. The following activities are unlawful, except as permitted by Section 6 of this Act:
  - a. hunting or capturing a specimen of a non-Schedule I bird;
  - b. deliberately killing a specimen of a non-Schedule I bird;
  - c. removing, destroying or damaging a specimen of a non-Schedule I bird;
  - d. harassing a specimen of a non-Schedule I bird; and
  - e. attempting any of the foregoing.
2. It is unlawful for any person to trade a specimen of a non-Schedule I bird, unless lawfully taken and subject to any conditions included in a permit issued pursuant to Section 6.

### **Section 6: Exceptions to Prohibitions for Non-Schedule I Birds**

*DRAFTER'S NOTE: In this section, some countries may wish to distinguish between CMS Appendix I species, CMS Appendix II species, and other species protected under national law. While the CMS treaty authorizes only narrow exceptions for take of Appendix I species, Parties have considerable latitude to consider different or broader exceptions for other species and for activities not covered by the treaty. By way of example, this Section includes bracketed text that would, if adopted, authorize otherwise prohibited take or trade for non-Schedule I birds other than CMS Appendix I species in circumstances that go beyond the limited treaty-based exceptions pertaining to take of Appendix I species.*

1. The competent authority may permit, under such terms and conditions as the competent authority shall prescribe and include in any permit issued, an act otherwise prohibited by Section 5.1 or Section 5.2 only if the take or trade is
  - a. for scientific purposes;
  - b. for the purpose of enhancing the propagation or survival of the affected species;
  - c. to accommodate the needs of traditional subsistence users of such species; or
  - d. extraordinary circumstances so require.

[e. In the case of non-Schedule I species other than CMS Appendix I species, other circumstances to be established by the competent authority through separate decree or regulation or as deemed necessary based on national context.]
2. No permit may be issued by the competent authority authorizing any take or trade referred to in Section 6.1 unless the applicant submits to the competent authority an application that specifies
  - a. the species of bird, the type of specimen (e.g., whole bird, feathers, eggs, etc.), and the number of specimens;
  - b. the purpose for which the bird will be taken;
  - c. the method of take; and
  - d. any other measures, including but not limited to the location and timing of take, that the competent authority may require as being necessary or appropriate for determining whether to issue a permit under Section 6.1.
3. When a person, acting out of self-defense, defense of a third person, or to render assistance to a specimen at risk of harm, takes a specimen of a non-Schedule I bird prior to the issuance of a permit under this Section, the person shall notify the competent authority within 7 days of the taking and submit the following information:
  - a. the circumstances that the person believes justifies the taking of the animal; and
  - b. the information in Section 6, paragraphs 2(a)-(d).
4. A person who takes a specimen under the circumstances described in paragraph 3 has not committed an offense.
5. A permit issued under this Section shall contain such terms and conditions as the competent authority deems necessary to ensure that the take or trade is limited in space and time, to ensure the take or trade does not disadvantage the species involved, or to carry out the purposes of this Section, including but not limited to
  - a. the species of bird and the type of specimen (e.g., whole bird, feathers, eggs, etc.), and the number of specimens;
  - b. the purpose for which the bird will be taken;
  - c. the method of take;
  - d. the time period for which the permit is valid;

- e. any other terms or conditions, including but not limited to terms and conditions relating to the location of take and monitoring requirements, the competent authority deems necessary to ensure that the taking is consistent with Section 6.1.; and
  - f. such reporting requirements as the competent authority deems necessary for determining whether such terms and conditions are being honored.
6. The competent authority shall revoke or suspend a permit issued under this Section if the permit holder does not comply with the terms and conditions of the permit.
  7. Any permit issued under this Section is not transferable.
  8. Any permit issued under this Section involving a bird species listed on Appendix I of the CMS shall be communicated within 30 days to the CMS Secretariat in a manner that describes how the permit meets the conditions of Section 6.1.

### **Section 7: Regulation of Schedule I Birds**

*DRAFTER'S NOTE: In some countries, separate hunting legislation may render duplicative portions of the following content. Ultimately, while national legislation should assign the following roles and responsibilities to a competent authority, the placement of such directives in one law or another matters less than their existence. The following clauses articulate the general lines that national legislation ought to embody, whether in IKB-specific legislation or elsewhere.*

1. Unless authorized under this Section, it is illegal for any person to hunt or otherwise take a Schedule I bird.
2. The competent authority shall, within [insert reasonable number of days, e.g., 90] issue a regulation establishing, for each Schedule I species or groups of species [e.g., ducks, geese, partridges, etc.], closed and open hunting seasons, annual or seasonal quotas, individual bag limits, permissible methods and gear (which may not include prohibited gear set forth in Schedule II to this Act), and any other parameters necessary to ensure the sound management and sustainable use of all Schedule I birds.
3. Persons may apply for a hunting license for Schedule I birds by submitting an application, along with any permit fee and other required documents or information, including but not limited to, proof of completion of any necessary training courses and/or exams, to the competent authority.
4. The competent authority is authorized to issue a hunting license for Schedule I birds if the application is complete.
5. The competent authority shall not issue a hunting license for Schedule I birds if the applicant has been convicted of a criminal violation or assessed a civil or administrative penalty [within the past X years] under this Act or other laws or regulations relating to hunting.
6. The hunting license shall be subject to those terms and conditions that the competent authority has established pursuant to paragraph 2 of this Section, including but not limited to
  - a. the species of bird and the number of specimens;
  - b. any daily bag limit;

- c. the time period, whether measured in terms of an open season, authorized hours during the day, or both, for which the permit is valid;
  - d. [the area or hunting grounds for which the permit is valid] [prohibited areas or hunting grounds];
  - e. authorized gear and methods; and
  - f. any other information or limitations that the competent authority deems necessary to ensure sustainable management of the Schedule I species.
7. All persons holding a hunting license for Schedule I birds shall report such take to the competent authority within [insert reasonable number of days, e.g., 15 to 30] days of the take through reporting means established by the competent authority.
8. It is illegal for any person to use prohibited gear or methods of hunting.

*OPTIONAL CLAUSES TO REGULATE POST-CAPTURE ACTIVITIES:*

*Option 1: Authorize competent authority to regulate post-capture activities*

[9. The competent authority may issue regulations providing for the control of commercial and non-commercial activities involving specimens of Schedule I birds lawfully taken.]

*Option 2: Prohibition of all commercial activities involving specimens of Schedule I birds*

[9. Persons shall not trade specimens of Schedule I birds for commercial purposes.]

*Option 3: Prohibition of all commercial activities involving specimens of Schedule I birds absent express permission*

[9. Persons shall not trade specimens of Schedule I birds for commercial purposes, absent express authorization in a permit issued by the competent authority.]

*Option 4: Select post-capture activities legal with a certificate of ownership*

[9. Any person who takes possession of a specimen of a Schedule I bird under a hunting license issued under this Section shall, except in the case of non-commercial human consumption, present the specimen together with the license to the competent authority. If the person wishes to retain or use the specimen for any purpose other than non-commercial human consumption, the person shall at that time apply for a certificate of ownership in respect thereof. Where the competent authority is satisfied that the applicant is in lawful possession of the specimen, the competent authority shall issue a certificate of ownership to the applicant.

10. Any person who transfers or purports to transfer ownership of any specimen of a Schedule I bird, whether by gift, sale, or otherwise, shall, at the time of the transfer or purported transfer, possess a certificate of ownership in respect of the specimen.

11. Upon the transfer of any specimen of a Schedule I bird, the transferor shall surrender the certificate to the competent authority, who in turn shall issue a new certificate to the new owner. The competent authority shall retain the surrendered certificate.]

## **Section 8: Exceptions Regarding Schedule I Birds**

1. As concerns the hunting of birds listed in Schedule I to this Act, the competent authority may, upon its own initiative or following petition by a third party, authorize exceptions to the provisions of Section 7, where there is no other satisfactory solution, for the following reasons:
  - a. in the interests of public health and safety;
  - b. in the interests of air safety;
  - c. to prevent serious damage to crops, livestock, forests, fisheries, and water;
  - d. for the protection of flora and fauna; and
  - e. for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes.
2. When the competent authority exercises its exception authority under paragraph 1, it shall issue a regulation, in the case of a broad authorization applicable to all licensed hunters, or a permit, in the case of an individualized authorization limited to a single person, specifying the nature of the exception and any associated terms or conditions. Such regulation or permit shall, at a minimum, include the following information:
  - a. the species of bird with respect to which the exception applies;
  - b. the time period for which the exception is valid;
  - c. the activity authorized under the exception (e.g., hunting beyond other otherwise applicable quotas or bag limits, taking juvenile species, eggs, or nests, etc.);
  - d. authorized gear and methods; and
  - e. any other information or limitations that the competent authority deems necessary to ensure proper management of the exception system.
3. The competent authority shall publish an annual report describing all exceptions authorized under this Section.

## **Section 9: Enforcement Powers**

1. Power to enforce this Act is vested in enforcement officers.
2. Enforcement officers are authorized to detect and respond to potential violations of this Act [depending on national circumstances, this may need to include a standard of proof or other criteria], including by taking the following actions:
  - a. detaining persons and vehicles;
  - b. verifying the possession of a valid license or permit, as relevant;
  - c. searching persons, vehicles, electronic devices, buildings, and dwellings;
  - d. conducting surveillance, including through covert means such as hidden cameras and drones;

- e. interrogating suspects and questioning witnesses;
  - f. arresting persons; and
  - g. seizing and taking into custody
    - i. specimens, gear, electronic devices, and other instruments associated with a violation of this Act;
    - ii. the proceeds of any violation of this Act; and
    - iii. and any other evidence relevant to establishing a violation of the Act.
3. All enforcement powers shall be exercised in conformity with the national constitution and other binding law [as appropriate, identify any other laws or legal authority that may cabin the scope of enforcement powers].

***OPTIONAL CLAUSE FOR COUNTRIES WISHING TO ESTABLISH TIPSTER AND REWARD MECHANISMS:***

[4. Government bodies exercising enforcement powers under this Act are authorized [or directed] to establish mechanisms for the solicitation of tips, denunciations, and other information, including the presentation of photographs, audio recordings, and video recordings, whether given anonymously or eponymously, that may lead to the detection and prosecution of violations of this Act. The same government bodies are authorized to issue financial rewards or similar incentives for the provision of information leading to the detection and prosecution of violations of this Act.]

***OPTIONAL CLAUSE FOR COUNTRIES WISHING TO AUTHORIZE SPECIAL INVESTIGATION TECHNIQUES IN CASES INVOLVING ORGANIZED CRIMINAL GROUPS:***

[4. When enforcement officers have [reasonable grounds, a reasonable suspicion—choose language appropriate to national context] to believe that organized criminal groups are involved in the illegal take or trade of [birds/non-Schedule I birds], the following investigative powers are authorized [insert condition if appropriate in national context—e.g., “subject to prior court approval”]:

- a. telephonic and other electronic interception;
- b. review of otherwise confidential bank records and other financial information;
- c. controlled deliveries;
- d. review of otherwise confidential telephone records (e.g., identification of telephone numbers); and
- e. the use of undercover agents.]

**Section 10: Offenses and Penalties**

1. Any violation of this Act’s provisions shall give rise to either or both administrative and criminal liability.
2. The competent authority is authorized to assess the following administrative penalties for violations of this Act [following notice and an opportunity for hearing, in accordance with

regular procedures established in [administrative procedure statute or similar], or similar language as appropriate in national context]:

- a. monetary fines;
  - b. community service;
  - c. permanent forfeiture of specimens;
  - d. temporary or permanent forfeiture of gear and any other instruments of the offence, with the understanding that categorically illegal gear and instruments should always be subject to permanent forfeiture; and
  - e. loss of privileges, including both loss of currently held permits and licenses and prohibition of applying for the same for a fixed time period or a permanent ban.
3. When assessing administrative penalties, the competent authority shall bear in mind any aggravating circumstances associated with the offense. Aggravating circumstances include but are not limited to the following:
- a. recidivism;
  - b. the conservation and legal status of the species, including under both national and international instruments;
  - c. the use of prohibited or non-selective gear or methods;
  - d. the ecosystem impact risk;
  - e. risk of public endangerment;
  - f. commercial motivation;
  - g. potential or actual financial gain;
  - h. any professional duty owed by the offender;
  - i. the scale of the offense, measured by the number of specimens involved; intent or recklessness;
  - j. the prevalence of the offense and the need for deterrence;
  - k. evidence of planning; and
  - l. attempts to conceal the offense or to otherwise obstruct the enforcement apparatus.
4. Enforcement officers may assess penalties for administrative offenses [of a minor character] using a ticket system [to be further defined, depending on and if appropriate under national circumstances].
5. The assessment of administrative penalties may be appealed [further define this process according to national law].

*OPTIONAL CLAUSES TO FURTHER DEFINE ADMINISTRATIVE PENALTIES:*

*Option 1: Direct the competent authority to define administrative penalties with precision through subsequent regulations*

[6. The competent authority shall, within [a reasonable time period, e.g., 90 days], issue regulations further defining the administrative penalties authorized above. These regulations shall, at a minimum, establish a range or fixed figure for the monetary fines corresponding to violations of the Act. In preparing the regulations, the competent authority shall be guided by the principle of proportionality and the need for deterrence.]

*Option 2: Set forth a range of administrative penalties in the Act or as an annex to the Act*

[6. The competent authority shall assess penalties in accord with the following schedule:

OFFENSE	FINE	COMMUNITY SERVICE	FORFEITURE	LOSS OF PRIVILEGES
<i>Illegal take of Schedule I bird</i>	<i>[reasonable figure or range, capable of achieving deterrence]</i>	<i>None</i>	<i>Specimen and gear if unauthorized gear was used in commission of offense</i>	<i>Loss of hunting license; loss of ability to apply for hunting license for 2 years</i>
<i>Illegal take of non-Schedule I bird</i>	<i>[reasonable figure or range, capable of achieving deterrence; should normally be higher than in case of illegal take of Schedule I bird]</i>	<i>X days' of service assisting competent authority with educational outreach [appropriate form will vary with national context]</i>	<i>Specimen and gear if unauthorized gear was used in commission of offense</i>	<i>Loss of ability to apply for hunting license for 5 years [even though illegal take of a non-Schedule I bird does not entail the use of a hunting license, this prohibition may generate deterrence and prevent related offenses]</i>
<i>[Continue to enumerate offenses as appropriate]</i>				

]

6. When the violation of the Act is a criminal offense (determination of when a violation amounts to a criminal offence depends on national circumstances), all necessary data, information, evidence, and cooperation shall be provided to [insert name of criminal prosecution service—e.g., Public Ministry, Prosecutor’s Office, Department of Justice].
7. Upon criminal conviction, a court may assess the following criminal penalties for violations of this Act:
  - a. between [X] and [Y] years of incarceration;
  - b. monetary fines up to [insert reasonable number];

- c. community service;
- d. permanent forfeiture of specimens;
- e. permanent forfeiture of gear and any other instruments of the crime;
- f. permanent forfeiture of the proceeds of the crime, if any; and
- g. loss of privileges, including both loss of currently held licenses or permits and prohibition of applying for the same for a fixed time period or permanently.

*OPTIONAL APPROACH FOR COUNTRIES WISHING TO FINE-TUNE CRIMINAL PENALTIES TO DISTINGUISH BETWEEN OFFENSES INVOLVING SCHEDULE I AND NON-SCHEDULE I BIRDS:*

[8. Upon criminal conviction, a court may assess the following criminal penalties for violations of this Act involving Schedule I birds and other offences other than those described in paragraph 9:

- a. between [X] and [Y] years of incarceration;
- b. monetary fines up to [insert reasonable number];
- c. community service;
- d. permanent forfeiture of specimens;
- e. permanent forfeiture of gear and any other instruments of the crime;
- f. permanent forfeiture of the proceeds of the crime, if any; and
- g. loss of privileges, including both loss of currently held licenses or permits and prohibition of applying for the same for a fixed time period or permanently.

9. Upon criminal conviction, a court may assess the following criminal penalties for violations of this Act involving non-Schedule I birds:

- a. between [X] and [Y] years of incarceration [should be higher than corresponding provision for Schedule I birds];
- b. monetary fines up to [insert reasonable number; should be higher than corresponding provision Schedule I birds];
- c. community service;
- d. permanent forfeiture of specimens;
- e. permanent forfeiture of gear and any other instruments of the crime;
- f. permanent forfeiture of the proceeds of the crime, if any; and
- g. loss of privileges, including both loss of currently held permits or licenses and prohibition of applying for the same for a fixed time period or permanently.]

8. When assessing criminal penalties, the competent authority shall bear in mind any aggravating circumstances associated with the offense. Aggravating circumstances include but are not limited to the following:
  - a. recidivism;
  - b. the conservation and legal status of the species, including under both national and international instruments;
  - c. the use of prohibited or non-selective gear or methods;
  - d. the ecosystem impact risk;
  - e. risk of public endangerment; commercial motivation;
  - f. potential or actual financial gain;
  - g. any professional duty owed by the offender;
  - h. the scale of the offense, measured by the number of specimens involved;
  - i. intent or recklessness;
  - j. the prevalence of the offense and the need for deterrence;
  - k. evidence of planning; and
  - l. attempts to conceal the offense or to otherwise obstruct the enforcement apparatus.

### **Section 11: Citizen Suits**

1. Any person may commence a civil suit on his own behalf to enjoin any person, including the government or government official, alleged to be in violation of any provision of this Act or regulation issued hereunder.
2. A court shall award to a prevailing party other than the Government fees and other expenses incurred by that party in any civil action under this Section, including proceedings for judicial review of agency action, brought by or against the Government in any court having jurisdiction of that action, unless the court finds that the position of the Government was substantially justified or that special circumstances make an award unjust.
3. A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.
4. For the purposes of this subsection,
  - a. "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished,

except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the Government; and (ii) attorney fees shall not be awarded in excess of [some amount consistent with the hourly rate of an attorney] unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

- b. “prevailing party,” means a party who obtains a final judgment (other than by settlement) in their favor.