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Report of the

EXPERT CONSULTATION ON LEGAL ISSUES RELATED TO CITES AND COMMERCIALLY-EXPLOITED AQUATIC SPECIES

Rome, 22–25 June 2004

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PREPARATION OF THIS DOCUMENT

This is the report of the Expert Consultation on Legal Issues related to CITES and Commercially-exploited Aquatic Species, held at FAO headquarters from 22 to 25 June 2004.

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Directors of Fisheries
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ABSTRACT

This document contains the report of the Expert Consultation on Legal Issues Related to CITES and Commercially-exploited Aquatic Species. The Consultation was held in Rome, Italy, from 22 to 25 June 2004 in response to the agreement by the twenty-fifth session of the FAO Committee on Fisheries (COFI) that an expert consultation should be convened to address the two issues, related to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The issues concerned primarily: (i) applications of the phrase "introduction from the sea" in the definition of trade in article I of the CITES Convention text; and; (ii) an analysis of the legal implications of the existing CITES listing criteria and the CITES Convention itself in relation to the UN Convention on the Law of the Sea ("the 1982 Convention") and related international law covering fisheries. A number of working documents, *inter alia*, two papers prepared by an FAO Legal Consultant, Prof. E. Franckx, served as primary sources of references for the work of the Expert Group. While recognizing a divergence of views on the respective roles of the different bodies, the Consultation agreed that it was necessary to look for synergies between FAO, regional fishery management organizations (RFMOs) and CITES with complementary mandates with respect to commercially-exploited aquatic species. It further considered it important to look at the general relationship between CITES, the 1982 Convention and related international law covering fisheries before considering the more specific legal implications of the application of CITES in relation to commercially-exploited aquatic species including "introduction from the sea". For purposes of clarifying the latter phrase it elaborated firstly on the term "introduction" and secondly on the term "from the sea". While dealing with the legal issues arising from the Criteria and CITES Listing Proposals, the experts acknowledged the potential flexibility of CITES and considered also the relationship between CITES and the 1982 Convention, the relationship between CITES and illegal, unreported and unregulated (IUU) fishing, the legal aspects of the Look-Alike and Split-Listing Provisions as well as the relationship between CITES and regional fisheries management organizations. The Expert Consultation agreed on the list of recommendations that draws attention to actions that it considered would lead to improvements in the legal interpretation and implementation of CITES in relation to commercially-exploited aquatic species. The recommendations emphasize close consultation between FAO and CITES to address the issues and possible actions discussed among the experts. The Expert Consultation invited FAO to consider this list and possible follow-up action where appropriate.

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BACKGROUND AND PURPOSE OF THE EXPERT CONSULTATION

1. The Expert Consultation was held in response to the agreement by the Twenty-fifth Session of the FAO Committee on Fisheries (COFI) that an Expert Consultation should be convened to address the following issues, related to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES):

- applications of the phrase "introduction from the sea" in the definition of trade in article I of the CITES Convention text, including consideration of the administrative costs associated with the various interpretations of this term;
- an analysis of the legal implications of the existing CITES listing criteria and the CITES Convention itself in relation to the UN Convention on the Law of the Sea and related international law covering fisheries, and of any changes in those implications resulting from adoption of the proposals included in Appendix F to the Report of the FAO Second Technical Consultation.

THE EXPERT CONSULTATION

2. The Expert Consultation was held in Rome, Italy, from 22 to 25 June, hosted by FAO with funding from the FAO Regular Programme and the Governments of Japan, Norway and the United States of America.

3. The meeting was attended by 9 experts reflecting a good geographic balance, with expertise covering the terms of reference for the Consultation, and by a member of the CITES Secretariat (see Appendix B). The Agenda adopted for the meeting is included as Appendix A. The working documents provided as resource material for the meeting are listed in Appendix D.

4. The meeting was opened by Mr Ichiro Nomura, Assistant Director General, Fisheries Department who welcomed the participants and provided some background to the work undertaken by FAO in relation to CITES and commercially-exploited aquatic species. Mr Ali Mekouar, Chief, Development Law Service also welcomed the participants on behalf of the Legal Counsel. The text of the statement by Mr Nomura is reproduced in Appendix C.

5. Mr Martin Tsamenyi was elected Chair of the Consultation and Ms Anniken Krutnes was elected Vice-Chair. Mr Erik Franckx and Mr Colin McIff were elected Rapporteurs.

OUTCOME OF THE MEETING

A. INTRODUCTION

6. The Consultation emphasized that legal rights and obligations of States with respect to fisheries are regulated by various fisheries specific international agreements, beyond the United Nations Convention on the Law of the Sea of 10 December 1982 (the1982 Convention). These include CITES and several others, for example the United Nations Convention on Biological Diversity (CBD), the RAMSAR Convention on Wetlands and the International Convention for the Prevention of Pollution from Ships (MARPOL Convention). Despite a difference of views among FAO Member States on the respective roles for FAO, regional fishery management organizations (RFMOs) and CITES with respect to commercially-exploited aquatic species, the Consultation agreed that it was necessary to look for synergies between regimes with complementary mandates. FAO Member States have recalled that CITES cannot replace traditional fisheries management, and noted the fundamental importance of national fisheries management agencies, RFMOs and FAO in this regard.

7. The Consultation considered it important to look at the general relationship between CITES, the 1982 Convention and related international law covering fisheries before considering the more specific legal implications of the application of CITES in relation to commercially-exploited aquatic species including "introduction from the sea".

CITES and its relationship with the 1982 Convention and related international law covering fisheries

8. The Consultation recognized that the application of successive treaties relating to the same subject-matter in general international law is a central theme when trying to analyze the legal implications of CITES in relation to the 1982 Convention and other international instruments relating to fisheries management. In general, treaties are interpreted and applied so as to be compatible with each other. Should questions of compatibility arise, international law provides a number of rules to try to resolve them, such as later treaties taking precedence over earlier treaties, and more specific treaties taking precedence over general ones. Since CITES (1973) predates most of these agreements, the application of a later treaty in relation to a previous one covering the same subject-matter is of special importance. States can always agree to derogate from these rules in resolving questions about the application of successive treaties relating to the same subject-matter.

9. The Consultation noted that the use of conflict (compatibility) clauses is of great importance when considering the relationship between international treaties. General international law provides that Parties can use such clauses to determine the relationship between a treaty they create and other relevant international agreements. The conflict clauses of a number of agreements of relevance were considered by the Consultation.

10. The 1982 Convention in article 311 provides a specific rule which regulates this relationship in general. It implies the priority of the 1982 Convention in relation to all other treaties in the event they are incompatible, but this is tempered by the fact that the 1982 Convention itself can, and does, derogate from this rule. Thus the 1982 Convention contains a simple set of provisions, which seem to apply to a very wide spectrum of different eventualities.

11. CITES shows much more deference to previously concluded agreements by a State Party. In article XIV (2) the convention subordinates itself to any other treaty, already concluded or still to be concluded, by a State Party to CITES in relation to "trade, taking, possession or transport of specimens". This article further regulates the relationship between CITES and other international treaties already concluded by State Parties relating to marine species included in Appendix II (article XIV (4) and (5)).

12. The UN Fish Stocks Agreement[1] includes a clause similar to the 1982 Convention providing that the provisions of this Agreement, in the event of incompatibility, will take precedence over all other agreements, existing or future, but gives deference to the 1982 Convention.

13. The Consultation noted that various rules exist in contemporary international law regulating the relationship between the different treaties concerned with the conservation and management of commercially-exploited aquatic species. Much will depend on the conflict clauses to be found in these different instruments. The Consultation noted that no fundamental difficulties are raised by the

[1] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

different conflict clauses encountered in the respective founding documents governing the mutual relationship between CITES on the one hand, and the other agreements considered by the Consultation on the other. Possible areas of conflict will have to be analyzed and evaluated on their own merits, taking into account all the relevant circumstances, in order to arrive at the highest possible common denominator acceptable to the States Parties to the agreements in question. Since all systems have their strong and weak points, a closer co-operation could significantly enhance the global level of conservation of commercially-exploited aquatic species.

14. The Consultation did not try to distinguish a hierarchical structure between regimes related to conservation and management of commercially-exploited aquatic species, but rather focused on looking for synergies and complementarity between these regimes taking into account their respective competences and strengths. When a global comparison is made, all systems have their strengths and weaknesses, combining elements like number of participants and whether concrete or general obligations are prescribed in different ways. These differences could be easily used to strengthen instead of weaken the level of over-all conservation of commercially-exploited aquatic species. Concrete forms of co-operation could be worked out where one system supplements the other if need be.

B. INTRODUCTION FROM THE SEA

15. The Consultation looked at the applications of the phrase "introduction from the sea" in accordance with its Terms of Reference. However it did not consider it was possible to address any administrative costs associated with the different interpretations of this term with the information available. Making use of its power to make recommendations for improving the effectiveness of CITES, the Conference of the Parties adopted Resolution Conf. 2.8 (1979) (now included in Conf. 11.4 (2000)) giving further guidance by providing in a preambular paragraph that the jurisdiction with respect to marine resources in maritime areas adjacent to the coast of States Parties "is not uniform in extent, varies in nature and has not yet been agreed internationally". Even though this resolution is strictly speaking to be considered a mere recommendation, and therefore not legally binding, it nevertheless constitutes an interpretation of the founding document by the representative organ in which all member States are represented, and therefore seems to carry special weight.

16. The negotiating history of CITES reveals that the inclusion of this notion "introduction from the sea" did not pass unnoticed. The working paper which served as negotiating text incorporated a similar provision, but used the phrase "beyond the territorial sea", rather than "not under the jurisdiction of any State". Ultimately, agreement was reached that the marine environment would be included in the field of application of CITES, while at the same time agreements in existence at that time, such as the International Convention for the Regulation of Whaling and the International Convention for the Northwest Atlantic Fisheries, would not be interfered with.

17. The Consultation considered that the phrase could be clarified by first elaborating the term "introduction", followed by an elaboration of the term "from the sea".

Introduction

18. With respect to the term "introduction", the Consultation considered whether introduction occurs when a fishing vessel takes a specimen of a species of fish on board (thus making the flag State the State of introduction), or whether that only happens when the fish is landed in a port and cleared by customs (thus making the port State the State of introduction). The Consultation considered that a normal reading of the founding document of CITES, which uses the term "transportation into", points to the latter situation. This interpretation is consistent with recent developments in international

fisheries law which increases the emphasis on port States in this respect. It was agreed that this constitutes the default position. At the same time the Consultation took note that in addition to this default position, the use of flag State competence could be useful from a practical point of view in some cases, consistent with enhanced emphasis on flag State responsibility under recent international fisheries law. In each case, practices such as transhipment, on board processing and treatment of catch taken partly from waters under national jurisdiction and partly outside on the same fishing trip, raise complex issues which will need to be addressed on a case-by-case basis.

19. The Consultation also considered whether an export or re-export permit is required after "introduction" has taken place. If the port State is the State of introduction, the Consultation considered, in view of the definition of re-export in article I of CITES, that any transport outside of the country of introduction, i.e. the country of first landing and customs clearance, is an export.

From the sea

20. The Consultation considered that the main issue to be addressed under this section relates to the interpretation of the phrase "not under the jurisdiction of any State". As a starting point, the Consultation addressed the fundamental problem of the appropriate time frame to be taken into consideration when interpreting this definition. Should this time frame be the situation *ex nunc*, i.e. the time of application of this provision, or is it rather the situation *ex tunc*, meaning the time frame surrounding the conclusion of CITES. General international law on this topic adopts the *ex tunc* approach as a matter of principle as the default regime, from which the Parties can freely derogate if they so wish.

21. When applied to CITES, the question arises whether article XIV (6) is a provision by which the contracting Parties to that convention wanted to put aside the default regime just described. The Consultation considered that article XIV (6) is not such an article. The purpose of this article was simply to provide that nothing in CITES could have an influence, neither positive nor negative, on the development of the law of the sea, which at that time, 1973, was on the verge of being renegotiated at the third United Nations Conference on the Law of the Sea. The finding of the Consultation is supported by a grammatical interpretation of article XIV (6) and by the use of almost identical provisions in a good number of other treaties.

22. When considering article XIV (6) of CITES in this broader perspective, the Consultation noted that, although arguments continue to be raised that article XIV (6) provides some ongoing basis for clarifying the relationship between the 1982 Convention and CITES, it agreed that the relevance of this article was specific to the third United Nations Conference on the Law of the Sea negotiations, and so did not provide any such basis.

23. Further, the Consultation pointed out that article 311 (2) of the 1982 Convention by itself may also be inadequate for providing clarification of the term "not under the jurisdiction of any State" because other provisions of the 1982 Convention might come into play as well.

24. Based on the above, the Consultation considered that, *de lege lata*, i.e. under the law as it stands at present, the term "not under the jurisdiction of any State" would have to be interpreted in light of the international law as it existed at the time of the conclusion of CITES. However, the Consultation considered that such an interpretation would be inconsistent with State practice, especially the manner in which fisheries management is pursued under the 1982 Convention whereby fisheries jurisdiction is generally exercised over commercially-exploited aquatic species in the exclusive economic zone, or equivalent zones of national jurisdiction. The Consultation therefore considered that CITES Parties

might wish to consider adopting a resolution clarifying this point. Different options are possible in this respect. Three options are provided which could guide the States Parties.

a. Marine environment not under the jurisdiction of any State shall be considered in the light of international law in force at the time of application or interpretation of the present Convention. For the purpose of this Convention this means, at present, all parts of the marine environment excluding the exclusive economic zone, or equivalent zones of national jurisdiction over fisheries, the continental shelf, the territorial sea, or the internal waters of a State, or the archipelagic waters of an archipelagic State.

b. Marine environment not under the jurisdiction of any State shall be considered in the light of international law in force at the time of application or interpretation of the present Convention.

The advantages of this definition are its simplicity and flexibility. It is moreover comprehensive, in the sense that no aspect is excluded from its scope of application and it helps the Convention to develop hand in hand with international law, without further need for adaptations.

The disadvantages of this definition are that it remains rather abstract for the concrete content will have to be filled in at the time of application. It is therefore more burdensome to apply in practice for those concerned, who might not be in a position themselves to give content to this definition.

c. For the purpose of the present Convention marine environment not under the jurisdiction of any State shall be considered to be all parts of the marine environment excluding the exclusive economic zone, or equivalent zones of national jurisdiction over fisheries, the continental shelf, the territorial sea, or the internal waters of a State, or the archipelagic waters of an archipelagic State.

The advantages of this definition are that it is specific and clear, and therefore straightforward to interpret and easy to apply in practice for those concerned. It also takes the concept of fishing zone into account.

The disadvantages of this definition are that it will reflect the law as it stands at the time of adoption. It can also exclude particular aspects which, from a more general point of view, i.e. not restricted to commercially-exploited aquatic species, might not be wanted.

The first definition of these three received the preference of the members of the Consultation for it combines the advantages of the other two proposals, while restricting the disadvantages to a minimum.

Legal Issues Arising from the Criteria and CITES Listing Proposals

Criteria

25. The Consultation agreed that the listing of commercially-exploited aquatic species falls within the competence of CITES. Some participants noted that there are differences of opinion within FAO and CITES concerning whether the primary purpose for listing on Appendix II is to prevent a species from becoming endangered or to promote sustainable use thereof. Some participants suggested that may have legal consequences.

26. Historically, the current CITES criteria have been applied on a case-by-case basis and their application has evolved over time, as evidenced by recent progress in talks within CITES to amend the listing criteria. The Consultation noted that in the revised criteria to be considered at CoP 13, there was

reference to consideration of socio-economic factors in decisions to amend the appendices and considered this to be a positive development.

Consultative processes

27. The Consultation underlined the need for improved consultation between CITES and FAO and relevant RFMOs and other relevant organizations. In respect of improving evaluations of CITES proposals to amend Appendices I and II under article XV of CITES, the Consultation emphasized that FAO and relevant RFMOs should respond by providing timely and relevant information and advice. The establishment by the 25th Session of COFI of an ad hoc review panel to consider relevant listing proposals is an important and welcome development. Participants considered it important that Parties proposing species for CITES listing conduct comprehensive and timely range State consultations and identify any relevant regional fisheries organizations with a mandate to manage that species (as required by CITES Resolution Conf. 9.24 (Rev. CoP12)). Identification of RFMOs would then assist the CITES Secretariat in undertaking more effective consultations under article XV. The Consultation also stressed the need to conclude the proposed MOU between FAO and CITES. It noted the call for consultation in article 8 (6) of the UN Fish Stocks Agreement as an example of the mandated consultation with inter-governmental bodies.

Application of precaution

28. Differing applications of precaution were considered as a possible area of concern and FAO members had expressed concern that existing wording in CITES Resolution Conf. 9.24 (Rev. CoP12) could lead to extreme interpretations. In this regard, reference was made to the report of the Expert Consultation on implementation issues[2]. It was noted that the proposed draft revised listing criteria have addressed the problem of extreme interpretations and the Consultation re-emphasized the need for the revised listing criteria currently being considered by CITES to be adopted at CoP 13 and also drew attention to the importance of CITES Resolution Conf. 8.3 on the recognition of the benefits of trade in wildlife, a key consideration for any commercial fish stocks that may be listed.

Legal Issues Arising from CITES Implementation

Potential flexibility of CITES

29. The practice of Parties to CITES to interpret the Convention through resolutions allows for considerable flexibility in implementation. Participants agreed that this potential flexibility presents both opportunities and challenges for implementation with respect to commercially-exploited aquatic species.

30. Management flexibility has meant that within CITES a number of actions are being taken to improve implementation including the already mentioned review of listing criteria, a review of the current appendices, and discussions to formalize cooperation with FAO. The Consultation strongly encouraged such attempts to improve implementation. Also on the positive side, both present and proposed criteria for listing on Appendix II (the most relevant for commercially-exploited aquatic species), when applied in accordance with best scientific information, are flexible enough to prevent species for which there is no conservation concern from being listed under Article II (2a).

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[2] FAO. 2004. Report of the Expert Consultation on Implementation Issues Associated with Listing Commercially-exploited Aquatic Species on CITES Appendices, Rome, 25–28 May 2004. *FAO Fish.Rep*. **741**. (in press).

31. The Consultation asked the question – "why are fisheries managers nervous of CITES involvement despite such actions?" One important explanation was that FAO members have consistently raised problems associated with down-listing and de-listing of species. Elephants are a good example to illustrate the concerns where healthy populations exist but problems persist in down-listing. In future application to commercially-exploited aquatic species, the problem may not be mainly going from Appendix I to Appendix II, but more likely going from Appendix II to de-listing. This has already been identified as a major administrative burden, but it is also a legal problem where the language of the criteria to down-list or de-list is more restrictive than the language used to list species, due to the application of the precautionary approach. The Consultation recommended that FAO and CITES should consult on perceived problems associated with down-listing (transfer) and de-listing (deletion) of species arising from, for example, application of the precautionary approach.

32. Some challenges posed by a perceived lack of flexibility of CITES procedures were identified by several participants to the Consultation. The requirement for a two thirds majority in favour of a proposal for adoption by CITES was identified as an important cause of inflexibility, frequently hindering both listing and de-listing. Some participants drew attention to the fact that the two thirds voting procedure could also facilitate decision-making within CITES. It was also important to note the equally valid concerns relating to other decision-making procedures. For example, consensus-based decision-making common to RFMOs can result in an impasse which prevents needed management decisions from being taken.

33. The recently adopted 3-year cycle of holding CoPs was also identified as a potential hindrance to effective use of CITES with respect to listing, down-listing, and de-listing commercially-exploited aquatic species, as changes in stock levels could often occur more quickly than the CoP cycle would allow. On paper, CITES should be flexible enough to handle this situation through the intersessional amendment process, but in practice, except for non-controversial species, this procedure has proven difficult to implement. It was noted that for Appendix-II species this does not prevent countries from adapting management measures while the species remains in that Appendix.

CITES and the 1982 Convention

34. The Consultation considered whether the way CITES is implemented could potentially be in conflict with provisions of the 1982 Convention. Article 61 (2) of the 1982 Convention calls in part for the determination of catch levels based on the best scientific evidence available. Article 61 (3) includes the concept of maximum sustainable yield (MSY) and economic considerations in setting allowable catch levels. With respect to the application of non-detriment findings and the significant trade review under CITES, the Consultation found that there should be no conflict with the 1982 Convention or related fisheries instruments given that CITES cannot prevent a Party from harvesting a listed species within its own EEZ, but acts only to regulate international trade in that species. However, in looking at the allowance under CITES for Parties to implement stricter domestic measures and in particular where such stricter domestic measures challenge the non-detriment findings made by other CITES Parties, the Consultation agreed that these measures may be inconsistent with the 1982 Convention and related fisheries law, in particular concerning the right provided exclusively to coastal States (articles 61 and 297) to set allowable catch limits within the EEZ. The Consultation recommended that COFI take note of this potential conflict and consider appropriate follow-up with CITES.

35. The Consultation raised a concern with the listing of species on Appendix II with a zero quota from a legal perspective. Concern was expressed because in practice, an Appendix-II with zero quota listing is even more restrictive than an Appendix-I listing, unless it is restricted to wild-caught

specimens for commercial purposes, because it would preclude, for example, a personal use exemption and non-commercial use such as international movement of fishing trophies. It was noted that Appendix II with a qualified zero quota is already being applied to one marine species (Black Sea bottlenose dolphin *Tursiops truncatus*). As Parties have bound themselves to the CITES treaty which lays out specific rights and obligations concerning Appendix I and Appendix II, this new development could be seen to diminish those rights and obligations.

36. There is also potential for conflict in a CITES listing of a commercially-exploited aquatic species resulting from the stock structure of the population. As a result, it is possible to envision a situation where one State's stock under its jurisdiction is healthy, and thus open to use under the 1982 Convention and related fisheries instruments but, due to a listing on Appendix I, is unavailable for international trade. The expert consultation on implementation issues identified the need for CITES to revise its practice, and in some cases implementing language, with respect to split-listings and the use of look-alike provisions. From a legal perspective, these changes will be important to avoid possible future conflicts in the event of commercial fish listings.

37. It was noted that CITES has a number of built-in safeguards that attempt to prevent extreme precaution or over-exploitation, including personal use exemptions, the opportunity to take and withdraw reservations on a particular listing, and the ability of Parties to implement stricter domestic measures.

38. When considering the potential listing of commercially-exploited aquatic species on CITES appendices, one issue of concern that has been raised within FAO is whether a CITES listing, particularly for Appendix I or Appendix II, would contravene the 1982 Convention and related instruments by restricting the freedom to fish on the high seas, as stated in article 116 and elsewhere. The specific area considered was related to an Appendix-I species whereby it could be harvested on the high seas but could not subsequently be introduced into the port of a CITES Party. The Consultation agreed that article 311 para 5 and article 116 of the 1982 Convention are clear that the freedom to fish on the high seas has never been an unconstrained right and, taking note of the broad application and participatory nature of the CITES regime, was of the view that such CITES listings would not contravene the 1982 Convention.

CITES and IUU fishing

39. Implementation of a CITES listing could potentially address some sources of illegal, unreported and unregulated fishing (IUU fishing). When considering the possible utility of CITES for addressing IUU fishing problems, it is most useful to separate out illegal, from unreported and unregulated fishing, and to recognize that there may be differing degrees of effectiveness for each of these problems. It was noted that illegal fishing, including for international trade, is a major threat to the sustainability of many commercially-exploited aquatic species and CITES may assist in restricting access to international markets of illegally harvested product. The Consultation noted that it is important to remember the species-based focus of CITES which may limit its effectiveness in some cases.

40. Within CITES, Appendix III listings have a specific role in helping a country to prevent or restrict the exploitation for trade of a domestically managed resource, especially where that resource is subject to illegal fishing. This approach allows CITES Parties to seek cooperation from other Parties in support of its national regulations.

41. The recent listing on Appendix III of a sea cucumber species *Isostichopus fuscus* by Ecuador is an example of this type of approach with a commercially-exploited aquatic species, where the species is suffering from overexploitation due to poaching. Appendix III provides flexibility to Parties

compared with Appendices I or II in that it allows for limited application to some subset of the species or derivative products, and a Party can include a species in Appendix III or remove it at its own initiative. It is important to note that there is no provision for introduction from the sea permits for Appendix III listings and as a result, application may be more limited for species occurring primarily on the high seas.

42. Though most fisheries instruments adopted over the past 15 years, including the UN Fish Stocks Agreement, the FAO Code of Conduct for Responsible Fisheries (the Code of Conduct) and its associated International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA–IUU), include specific provisions for capacity building and other assistance to developing countries, that assistance has not materialized in a way that would promote long-term change in many regions. As IUU fishing problems in many instances come down to the ability of States to develop and enforce their laws, CITES and FAO need to cooperate to promote capacity building in developing countries. One area of capacity building where CITES could potentially provide assistance is in law development and enforcement and monitoring of trade in listed species. Concerning law enforcement capacity building, CITES as an organization also has strong links with Interpol and the World Customs Organization, which could prove helpful in fisheries law enforcement coordination.

Legal aspects of look-alike and split-listing provisions

43. As noted earlier here and in the Expert Consultation on implementation issues, minimizing the use of look-alike listings and increasing the possibility of split-listings is critical in increasing the efficacy of CITES as a tool for conservation of commercially-exploited aquatic species, both from a legal and implementation perspective. For look-alike issues, to facilitate increased flexibility from a legal perspective, the Consultation took note of the proposal to be considered by CoP 13 to amend the wording in CITES Resolution Conf. 9.24 (Rev. CoP12) Annex 2b from "…should …" to "…may be included…" The Consultation encouraged the adoption of this change.

44. With respect to split-listing provisions, the participants referred to the relevant paragraphs of the expert consultation on implementation issues in noting implementation concerns. The Consultation suggested that it would be useful to review the text covering split-listing to determine if there is adequate flexibility for commercially-exploited aquatic species. The Consultation agreed with the recommendation of that expert consultation that CITES Parties may want to give consideration to FAO's concern that inflexible adherence to the guidance on split-listing could result in aquatic species or stocks that would not otherwise qualify for listing being placed in Appendix II.

45. There was discussion about the inclusion of the new text in Annex 2b paragraph B in the draft revised listing criteria: "There are compelling reasons other than those given in criterion A above to ensure that control of trade in currently listed species is achieved". The Consultation noted that concerns have been expressed that this criterion could be interpreted as providing a basis for target species to be listed in order to protect listed species taken incidentally in some fisheries. The Consultation agreed that the wording being proposed in revising Conf. 9.24 (Rev. CoP12), "to control effective trade" is precise and should not lead to excessively broad interpretation of this paragraph.

46. The Consultation recognized the enforcement difficulties that would probably result from fewer look-alike listings and more split-listings in the appendices and urged that creative implementation solutions would need to be found. This is particularly the case with respect to commercially-exploited aquatic species taken on the high seas, where introduction from the sea certificates may not have to be

granted even though the product may have been transhipped, changed hands and nature and crossed several national jurisdictions.

Relationship between CITES and regional fisheries management organizations

47. As mentioned in the expert consultation on implementation issues, if States fully discharge their obligations under the 1982 Convention and regional fishery organizations and implement the Code of Conduct, incidence of CITES listings (or proposals) would be reduced significantly, thus reducing the potential for legal conflict between the two systems. The basic context of discussions under this item is the need for overall harmonization of practices and closer cooperation between RFMOs and CITES. A general view held by many in the Consultation was that many developments concerning trade monitoring, stricter management measures, and trade-measures to promote compliance are developing along parallel tracks within both systems. This can be seen as a positive development for sustainable utilization of fisheries resources and should be encouraged.

48. Were a species under the mandate of an RFMO to be listed, the Consultation considered that there would be opportunities for cooperation between CITES and RFMOs in the harmonization of documentation schemes, including CITES permitting requirements. The Consultation agreed that there are no legal impediments to harmonization of documentation schemes, noting that this would need to be consistent with CITES rights and obligations. However, the Consultation noted that, in practice, CITES has not listed RFMO-managed species and these types of listings are likely to remain rare in the future.

49. Under appropriate circumstances, the requirement for a legal acquisition and non-detriment finding for Appendix II could help to supplement the effectiveness of RFMOs as the CITES regulations could extend to CITES Parties either not bound by the RFMO in question or not fully implementing agreed management measures. RFMOs and CITES may wish to consider the advantages of cooperation particularly as it relates to addressing the ongoing problem of IUU fishing (para 39).

50. When considering the relationship between CITES and relevant RFMOs, a legal issue arises concerning the status of any particular RFMO with respect to article XIV of CITES. Article XIV (4) and (5) provides that States Parties to CITES also Parties to any other treaty, convention or international agreement (establishing a RFMO) in force prior to entry into force of CITES (1975), shall be relieved of obligations imposed by CITES listing for marine species included in Appendix II, in certain circumstances. On the other hand, article XIV (2) provides that for RFMOs, established by treaties, conventions or international agreements entering into force after 1975, States Parties to both CITES and such RFMOs will need to fully implement the obligations of both treaties. Some RFMOs will fall clearly into one or the other category, but the status of those bodies whose founding document has been re-negotiated since entry into force of CITES may be in question. This is an issue that will require further consideration and reflection.

RECOMMENDATIONS

51. The Expert Consultation agreed on the list of recommendations below that draws attention to actions that it considered would lead to improvements in the legal interpretation and implementation of CITES in relation to commercially-exploited aquatic species. FAO may wish to consider this list and possible follow-up action where appropriate.

a. With respect to the identified need for clarifying the phrase “introduction from the sea” the Consultation recommended that:

i. as a general rule, introduction occurs when the commercially-exploited aquatic species is landed in a port and is cleared by customs (thus making the port State the State of introduction), also noting that in addition to this rule the use of flag State competence could be useful in some cases;

ii. interpretation of the term "not under jurisdiction of any State" should be brought in line with current State practice under a resolution as discussed in paragraph 24.

b. The Consultation recommended that FAO and CITES should consult on perceived problems associated with down-listing (transfer) and de-listing (deletion) of aquatic species, arising from, for example, application of the precautionary approach.

c. The Consultation recommended that COFI may wish to take note of the finding of the Consultation that where CITES Parties adopt stricter domestic measures and in particular where such measures challenge the non-detriment findings made by other CITES Parties, these measures may be inconsistent with the 1982 Convention and related fisheries law, in particular concerning the sovereign right provided exclusively to coastal States to set allowable catch limits within the EEZ.

d. The Consultation recommended that, given its experience, CITES could potentially contribute to strengthening capacity building in legislative development and enforcement as well as monitoring of trade for listed species.

e. The Consultation recommended that CITES CoP should be encouraged to adopt the revised listing criteria, which include FAO recommended changes.

f. The Consultation agreed with the recommendation of the expert consultation on implementation issues that CITES Parties may want to give consideration to FAO’s concern that inflexible adherence to the guidance on split-listing could result in aquatic species or stocks being listed in Appendix I or II that would otherwise not qualify for listing.

g. The Consultation recommended that the status of each regional fisheries management organization should be clarified to determine which organizations are covered by the provisions in CITES article XIV (4).

h. For international trade, the Consultation recommended that, where substantial problems with IUU fishing are being encountered, FAO members may wish to consider the potential utility of CITES in assisting to address these problems.

APPENDIX A

Agenda

Tuesday, 22 June 2004

1. Arrival and registration
2. Welcome by Mr Ichiro Nomura, Assistant Director-General, FAO Fisheries Department
3. Welcome by Mr Giuliano Pucci, Legal Counsel
4. Introduction of participants
5. Nomination of chairperson and vice chairperson of the meeting
6. Adoption of the Agenda
7. Presentation of first background paper
8. Presentation of second background paper
9. Deliberation on structure of discussions and election of rapporteurs
10. Discussion on “introduction from the Sea”

Wednesday, 23 June 2004

10. Discussion on “introduction from the Sea”
11. Conclusions and recommendations of discussion on “Introduction from the Sea”
12. Discussion on legal implications

Thursday, 24 June 2004

12. Discussion on legal implications
13. Conclusions and recommendations on discussion on legal implications

Friday, 25 June 2004

14. Discussion and finalization of draft report
15. Finalization and adoption of draft report

APPENDIX B

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APPENDIX C

Welcome speech by Mr Ichiro Nomura, Assistant Director-General, FAO Fisheries Department

Distinguished Experts,

It is my pleasure to welcome you to this Expert Consultation on "Legal Issues Related to CITES and Commercially-exploited Aquatic Species".

FAO has been actively involved in CITES in relation to commercially-exploited aquatic species since the ninth meeting of the CITES Conference of the Parties in 1994 when sharks were discussed. Following this, a proposal was made at the tenth Session of the CITES Conference of Parties in 1997 in Harare, Zimbabwe. There, a proposal was tabled for the creation of a CITES working group for marine fisheries. The proposal was motivated by concerns that some commercially-exploited fish species might qualify to be listed on the CITES Appendixes.

Some FAO Members were concerned that the CITES criteria and evaluation process might not be appropriate to deal with exploited and managed fishery resources and brought the matter to the COFI Sub-Committee on Fish Trade in Bremen, Germany in June 1998. There it was proposed that FAO should consider the suitability of the CITES listing criteria for commercially-exploited aquatic species and the need for amendments to or appropriate interpretation of the CITES criteria in relation to such species.

Since then, FAO has been working extensively on the listing criteria and the Organization has proposed some significant improvements to the listing criteria for application to commercially-exploited aquatic species. Those recommendations have, so far, been well accepted by CITES and included in their draft, revised criteria for consideration by the 13th Conference of the Parties in October. In the same field, in July this year FAO will, for the first time, undertake a formal scientific evaluation of listing proposals for four taxa of marine fish and invertebrates that have been submitted for consideration by Cop-13. Again, that contribution from FAO is being encouraged by CITES.

This Experts Consultation, together with the Expert Consultation on "Implementation Issues Associated with Listing Commercially-exploited Aquatic Species on CITES Appendices", held four weeks ago, marks a new direction in FAO work on CITES. With these two Expert Consultations, the Organization is now going beyond the criteria and listing process. Focus is now put also on administrative and monitoring implications of listing commercially-exploited aquatic species on the CITES Appendices and on the legal implications of the CITES listing criteria and of the CITES Convention itself in relation to relevant international law covering fisheries. The first Expert Consultation addressed a number of implementation issues, and made valuable recommendations that could be considered by FAO Members and possibly by CITES as well. This Consultation is intended to address the legal issues, building on the recommendations of the first Consultation, where appropriate. In addressing the legal implications of CITES in relation to international law covering fisheries the Consultation is addressing issues that have not yet received much attention internationally.

The particular issue identified by COFI for consideration at this Consultation include:

- Applications of the phrase “introduction from the sea” in the definition of trade in Article I of the CITES Convention text, including consideration of the administrative costs associated with the various interpretations of this term.
- An analysis of the legal implications of the existing CITES listing criteria and the CITES Convention itself in relation to the UN Convention on the Law of the Sea (UNCLOS) and related international law covering fisheries, and of any changes in those implications resulting from adoption of the proposals included in Appendix F to the Report of the FAO Second Technical Consultation.

You have been selected in your individual capacities, not as a representative of the organization you belong to, on the basis of your particular expertise in one or more of these topics and FAO is looking to you to help us to advise and inform Members on the issues, the understanding of CITES in the context of international law relating to fisheries, and how to develop, where necessary, this relationship. The report from this meeting will, I am sure, be received with considerable interest by the 26th Session of the COFI early next year. Finally, I would like to thank you all for giving up your time to help us in this important task. I would also like to thank the governments of Norway, Japan and the United States for their budgetary contribution which made the convening of this important consultation possible. We look forward to receiving the results of your deliberations.

I wish you a fruitful and enjoyable meeting.

APPENDIX D

Working documents provided as resource material to the Consultation

1. Applications of the Term “Introduction from the sea” by Professor E. Franckx;
2. Legal and Institutional Implications of Listing Commercially-exploited Aquatic Species by Professor E. Franckx;
3. Draft Report of the Expert Consultation on Implementation Issues Associated with Listing Commercially-exploited Aquatic Species on CITES Appendices, FAO, Rome, 25 to 28 May 2004;
4. The Fundamental Principles of CITES;
5. The Administrative and Monitoring Implications of Listing and Down-listing.

This document contains the report of the Expert Consultation on Legal Issues related to CITES and Commercially-exploited Aquatic Species. The Consultation was held in Rome, Italy, from 22 to 25 June 2004 in response to the agreement by the twenty-fifth session of the FAO Committee on Fisheries (COFI) that an Expert Consultation should be convened to address the two issues, related to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The issues concerned primarily: (i) applications of the phrase "introduction from the sea" in the definition of trade in article I of the CITES Convention text; and (ii) an analysis of the legal implications of the existing CITES listing criteria and the CITES Convention itself in relation to the UN Convention on the Law of the Sea ("the 1982 Convention") and related international law covering fisheries. Two papers prepared by an FAO Legal Consultant, Prof. E. Franckx, served as primary sources of references for the work of the Expert Group. While recognizing a divergence of views on the respective roles of the different bodies, the Consultation agreed that it was necessary to look for synergies between FAO, regional fishery management organizations (RFMOs) and CITES with complementary mandates with respect to commercially-exploited aquatic species. It further considered it important to look at the general relationship between CITES, the 1982 Convention and related international law covering fisheries before considering the more specific legal implications of the application of CITES in relation to commercially-exploited aquatic species including "introduction from the sea". The Expert Consultation agreed on the list of recommendations that draws attention to actions that it considered would lead to improvements in the legal interpretation and implementation of CITES in relation to commercially-exploited aquatic species. The recommendations emphasize close consultation between FAO and CITES to address the issues and possible follow-up actions discussed during the Expert Consultation. It invited FAO to consider this list and possible follow-up action where appropriate.

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