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THE RELATIONSHIP BETWEEN CITES, FAO AND RELATED AGREEMENTS: LEGAL ISSUES

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Cover photograph: Purse seine in the Mediterranean Sea. Courtesy of M. Barone, “CITES and Commercially-exploited Aquatic Species, Including the Evaluation of Listing Proposals".

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THE RELATIONSHIP BETWEEN CITES, FAO AND RELATED AGREEMENTS: LEGAL ISSUES

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PREPARATION OF THIS DOCUMENT

This paper is an updated version of two legal advisories requested by the Legal Office of the Food and Agriculture Organization of the United Nations (FAO) in preparation for an expert consultation on legal issues related to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), held at FAO headquarters, Rome, 22–25 June 2004. The first advisory, "Legal and Institutional Implications of Listing Commercially Exploited Aquatic Species in the CITES Appendices", was later reworked and served as the basis for participation in a conference entitled "The Law of the Sea Convention – 10th Anniversary Symposium" (22–23 September 2005, London, United Kingdom), organized by the University of Hull, together with the United Kingdom Society of Legal Scholars, the British Academy and the British Institute of International and Comparative Law. This resulted in the following publication: Franckx, E. 2006. The protection of biodiversity and fisheries management: issues raised by the relationship between CITES and the United Nations Convention on the Law of the Sea (LOSC). *In* D. Freestone, R. Barnes & D. Ong, eds. *The law of the sea: progress and prospects*, pp. 210–32, Oxford, UK, Oxford University Press. A second legal advisory, "Applications of the Term 'Introduction from the Sea'", was later reworked and served as basis for participation in a conference entitled "The Exercise of Jurisdiction over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction" (27 April 2007, Brussels, Belgium), organized by the *Université Catholique de Louvain* and the *Vrije Universiteit Brussel*. This resulted in the following publication: Franckx, E. 2010. The exercise of jurisdiction over vessels: legal issues raised by the relationship between CITES, FAO and the UN Convention on the Law of the Sea. *In* E. Franckx & P. Gautier, eds. *The exercise of jurisdiction over vessels: new developments in the fields of pollution, fisheries, crimes at sea and trafficking of weapons of mass destruction,* pp. 57–79, Brussels, Bruylant. Please note that the referencing style used does not follow standard FAO editorial guidelines but general legal citation practices.

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ABSTRACT

Overexploitation of fisheries has led to significant action on the international level to better govern and protect living marine resources. Among the actions taken were the adoption and implementation of various fisheries-related binding and non-binding international instruments for conservation and management of living marine resources, including initiatives to address the issue of overfishing. The modest results achieved so far suggest the need for an examination of other non-fisheries instruments to determine their utility for the conservation and management of fisheries resources. One of the non-fisheries international instruments, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) warrants particularly close scrutiny. The inevitable overlap of CITES, whose primary initial focus clearly did not concern marine species, and a number of FAO legal instruments has generated a series of international legal issues. This article addresses two such issues: 1) the legal relationship between CITES and other relevant international agreements, and 2) the competence of CITES with respect to commercially-exploited aquatic species. The analysis demonstrates that the relationships between CITES and other agreements are not uniform, but vary with the circumstances. In particular, the conflict clauses which govern interactions between treaties are crucial for determining whether CITES takes precedence, or subjects itself to another treaty. In more general terms, however, the law is far from settled in this regard and parties continually debate the proper course to take. Nonetheless, continued dedication to cooperation can eventually resolve these entangling interactions and allow for progress in the use of these agreements as protection against overfishing. In this context, FAO has and will continue to play a significant role in the conservation and management of living marine resources as well as in the application of CITES.

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The author holds teaching assignments at the Vesalius College (V.U.B.), Université Libre de Bruxelles, the Brussels School of International Studies (University of Kent at Canterbury), the Program on International Legal Cooperation (Institute of European Studies, V.U.B.), and the Université Paris-Sorbonne Abu Dhabi. He has been appointed by Belgium as member of the Permanent Court of Arbitration, The Hague, The Netherlands; as expert in marine scientific research for use in special arbitration under the 1982 United Nations Convention on the Law of the Sea; as legal expert in the Advisory Body of Experts of the Law of the Sea of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization; and as expert in maritime boundary delimitation to the International Hydrographic Organization. The author is very much indebted to the CITES Secretariat, and especially Willem Wijnstekers, former Director General, and Marceil Yeater, Chief of Unit of the Legal Affairs and Trade Policy Unit, for having made a short research visit during the spring of 2004 a most productive venture.

CONTENTS

ABBREVIATIONS AND ACRONYMS

ANCORS	Australian National Centre for Ocean Resources and Security
CBD	Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CITES-FAO MoU	Memorandum of Understanding between FAO and the CITES Secretariat
CMS	Convention on Migratory Species
Commission Regulation EU 709/2010	Commission Regulation EU 709/2010 amending Council Regulation EC 338/97 on the protection of species of wild fauna and flora by regulating trade therein of 22 July 2010
Conf.	Conference
CoP	Conference of the Parties
Council Regulation EC 338/97	Council Regulation EC 338/97 on the protection of species of wild fauna and flora by regulating trade therein of 9 December 1996
Doc.	Document
EC	European Community
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
FFA	South Pacific Forum Fisheries Agency
GATT	General Agreement on Tariffs and Trade
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
IDI	Institut de Droit International
ILC	International Law Commission
Intervention Convention and Protocol	Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and its Protocol of 29 November 1969 and 2 November 1973 respectively
IOTC	Indian Ocean Tuna Commission
IUCN	International Union for Conservation of Nature
IWC	International Whaling Commission
LOSC/UNCLOS	United Nations Convention on the Law of the Sea of 10 December 1982
MARPOL	International Convention for the Prevention of Pollution from Ships
MoU	Memorandum of Understanding
MHLC	Multilateral High Level Conference

NAFO	Northwest Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
RFMO	Regional fisheries management organization
SEAFO	South East Atlantic Fisheries Organization
TRAFFIC	Wildlife Trade Monitoring Network
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS III	United Nations Conference on the Law of the Sea
USA	United States of America
VUB	Vrije Universiteit Brussel
WTO	World Trade Organization
1946 Whaling Convention	Convention for the Regulation of Whaling of 2 December 1946
1951 Abu Dhabi Case	*Petroleum Development Ltd v. Sheikh of Abu Dhabi*, arbitration held at Paris between 21–28 August 1951
1969 Vienna Convention	Convention on the Law of Treaties of 23 May 1969
1972 London Dumping Convention	Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter of 29 December 1972
1974 Helsinki Convention	Convention on the Protection of the Marine Environment of the Baltic Sea Area of 22 March 1974
1986 Award	*Tribunal Arbitral institué par le compromis du 23 octobre 1985 entre le Canada et la France: différend concernant le filetage à l'intérieur du Golfe du Saint-Laurent*, arbitration held at Geneva between 3–13 June 1986
1992 Helsinki Convention	Convention on the Protection of the Marine Environment of the Baltic Sea Area of 9 April 1992
1993 FAO Compliance Agreement	Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993
1993 Torremolinos Protocol	1993 Protocol to the Convention for the Safety of Fishing Vessels of 2 April 1977
1995 UN Fish Stocks Agreement	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 of 8 September 1995
2009 FAO Port State Measures Agreement	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 22 November 2009

I. INTRODUCTION

The international law of high seas fishing has changed substantially during the last few decades. The negotiations leading up to the 1982 United Nations (UN) Convention on the Law of the Sea[1] (CLOSC or, in quoted material, UNCLOS) focused mainly on fishing inside the 200-mile limit by creating the novel concept of the exclusive economic zone (EEZ). This is quite understandable given that the principle of the EEZ allowed coastal States to claim sovereign rights over about 90 percent of all commercially-exploited fish stocks within their sovereignty that were previously subject to relatively ungoverned exploitation by all nations on the high seas. As a consequence, the issue of fishing on the high seas remained somewhat on the backburner of international consciousness.[2] Distant water fishing nations soon redirected their attention to the few remaining fish stocks to be found on the high seas.[3] Although Hugo de Groot could convincingly argue in the 17th century that restrictions on high seas fishing were intolerable because of the inexhaustible nature of the resources,[4] one could not do so now in view of overcapacity and dwindling stocks. Today the concept of overfishing has definitively found its place in contemporary international law.[5] As such, the international community has promoted further action in a bid to protect heavily-targeted species from this novel threat.

A. Instruments directly related to the conservation and management of living marine resources

The international community has used different tools in trying to reach the goal of protecting against overfishing. The United Nations Convention on the Law of the Sea (LOSC) emphasizes optimum utilization it is true, but in respect of certain stocks and especially the high seas, it merely provides for coordination and cooperation amongst States for conservation and management. A number of legally-binding agreements have been adopted to complement the LOSC in this respect, such as the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High

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[1] United Nations Convention on the Law of the Sea of 10 December 1982. This Convention, signed on 10 December 1982, entered into force on 16 November 1994. At the time of writing, 159 States together with the European Community are party to the Convention.

[2] Casado Raigon, R. 1994. L'application des dispositions relatives à la pêche en haute mer de la Convention des Nations Unies sur le droit de la mer. *Espaces et Ressources Maritimes*, 8: 214.

[3] Meltzer, E. 1994. Global overview of straddling and highly migratory fish stocks: the nonsustainable nature of high seas fisheries. *Ocean Develop. & Int'l L. J.*, 25(3): 255–328. See also Hayashi, M. 1994. United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: an analysis of the 1993 session. *Ocean Yearbook*, 11: 20–21.

[4] "If in a thing so vast as the sea a man were to reserve to himself from general use nothing more than mere sovereignty, still he would be considered a seeker after unreasonable power. If a man were to enjoin other people from fishing, he would not escape the reproach of monstrous greed." L.B. Sohn & J.E. Noyes. 2004. Cases and materials on the law of the sea, p. 47, Ardsley, USA, Transnational Publisher.

[5] See the definition of "surexploitation et surpêche". 2001. *In* J. Salmon ed. *Dictionnaire de droit international public*, p. 1066, Brussels, Belgium, Bruylant. It is noteworthy to stress that the predecessor of this dictionary, published in 1960, did not contain such entries. See 1960. *Dictionnaire de la terminologie du droit international*, pp. 589–590, Paris, France, Sirey.

Seas,[6] and the so-called 1995 UN Fish Stocks Agreement.[7] Even though both had the same ultimate goal, i.e. to tackle the problem of overfishing on the high seas, their approaches were quite different.[8] To this list one might add the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, an agreement concluded under the auspices of FAO in 2009 focussing specifically on the role of the port State.[9] At the same time, a number of non-binding legal instruments have emerged within the framework of FAO, such as the Code of Conduct on Responsible Fisheries[10] and the voluntary instruments elaborated in its framework, such as the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.[11] All these instruments constitute what one author has called the internationalization of conservation policies on the high seas,[12] departing from the traditional one-species maximum yield approach characterizing LOSC and shifting the emphasis to concepts like marine ecosystems[13] and biodiversity.[14]

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[6] Concluded under the auspices of the Food and Agriculture Organization (FAO). FAO. 1993. FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. This agreement, approved by Resolution 15/93 on 24 November 1993, entered into force on 24 April 2003. Hereinafter 1993 FAO Compliance Agreement. At the time of writing 38 States and the European Community are party to the agreement.

[7] 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. Hereinafter 1995 UN Fish Stocks Agreement. This agreement, signed on 8 September 1995, entered into force on 11 December 2001. At the time of writing 76 States and the European Community are party to the agreement.

[8] To list a few salient differences in this respect: 1) The 1993 FAO Compliance Agreement is not restricted to particular species of fish, while the 1995 UN Fish Stocks Agreement only concerns straddling and highly migratory fish stocks (but see note 277 below, indicating that the practical effects of this theoretical distinction may well remain minimal); 2) small vessels are not normally exempted from the 1995 UN Fish Stocks Agreement, but they are under the 1993 FAO Compliance Agreement; 3) record keeping on board is much more developed in the 1993 FAO Compliance Agreement than in the 1995 UN Fish Stocks Agreement; 4) although the 1993 FAO Compliance Agreement focuses on flag States to reach its ultimate goal, the 1995 UN Fish Stocks Agreement involves other actors as well, such as coastal States and port States; 5) boarding and inspecting of vessels on the high seas by certain vessels flying another flag is a cornerstone of the 1995 UN Fish Stocks Agreement, while these features are totally absent in the 1993 FAO Compliance Agreement; 6) this is similar with respect to port-State jurisdiction. See Franckx, E. 2001. *Fisheries enforcement related legal and institutional issues: national, subregional or regional perspectives*, Rome, FAO Legislative Study #71, pp. 3-6. (ftp://ftp.fao.org/docrep/fao/007/y2776e/y2776e00.pdf).

[9] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Multilateral, 22 November 2009 (available at www.fao.org/Legal/treaties/037t-e.pdf www.fao.org/Legal/treaties/037t-e.pdf). This agreement has not yet entered into force. Hereinafter 2009 FAO Port State Measures Agreement.

[10] Code of Conduct on Responsible Fisheries. Adopted by consensus at the twenty-eighth Session of the FAO Conference on 31 October 1995 (available at: www.fao.org/docrep/005/v9878e/v9878e00.HTM).

[11] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Adopted by consensus at the twenty-fourth Session of the FAO Committee on Fisheries on 2 March 2001 and endorsed by the one hundred and twentieth Session of the FAO Council on 23 June 2001 (available at: www.fao.org/docrep/003/y1224e/y1224e00.htm).

[12] Vignes, D. 1997. L'internationalisation des politiques de conservation en haute mer et le rôle des commissions régionales de pêche. *Annuaire du droit de la mer*, 1: 143–149.

[13] Hubold, G. 2002. Fishery and sustainability. *In* P. Ehlers, E. Mann Borgese & R. Wolfrum, eds. *Marine issues: from a scientific, political and legal perspective*, p. 187. The Hague, The Netherlands, Kluwer Law International.

B. The potential role of CITES

Despite this improved framework, compliance and enforcement remain notable weak spots of the present-day international legal system. Indeed, international law is still mainly based on consensualism.[15] In this quest for more reliable enforcement mechanisms, convention regimes with wide participation and enforcement mechanisms that have proven their effectiveness look very tempting, even if they are less focused on the law of the sea. The Convention on International Trade in Endangered Species of Wild Fauna and Flora[16] (CITES) merits consideration in this regard.[17] It therefore comes as no surprise that the issue of the legal and institutional implications of listing commercially exploited aquatic species in the Appendices has lately been placed on the international agenda as a conservation and management tool.

This somewhat belated interest is likely explained by the fact that the parties to CITES probably did not contemplate applying its provisions to commercially exploited aquatic species until quite recently. The situation changed at the beginning of the 1990s when the continuing decline of several such species led some States to turn to CITES in an attempt to reverse this trend.

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[14] C. Frid, C., O. Paramor, O. & C. Scott, C. 2005. Ecosystem-based fisheries management: progress in the North Est Atlantic. *Marine Policy*, 29(5): 461, 465–466 (linking the ecosystem approach to biodiversity).

[15] The non-legally binding agreements mentioned above are only persuasive authority. But it should always be noted that even the legally-binding instruments can only be enforced against the States party to those agreements. For a detailed study on the enforcement provisions of the 1995 UN Fish Stocks Agreement emphasizing their strictly conventional nature at present, see Franckx, E. 2000. *Pacta Tertiis* and the 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, FAO Legal Papers Online # 8, 28 pp. (also available at www.fao.org/Legal/prs-ol/lpo8.pdf). See also Franckx, E. 2000. *Pacta Tertiis* and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea. *Tul. J. Int'l & Comp. L.*, 8(1): 49–81.

[16] CITES. This convention, signed on 3 March 1973, entered into force on 1 July 1975. At the time of writing 175 States are party to the Convention.

[17] See A.-C. Kiss, A.-C. & D. Shelton, D. 2007. *Guide to international environmental law*, p. 186, Leiden, The Netherlands Holland, Nijhoff, who stresses the wide participation of States in this convention. One author remarked that this organization possesses "a particularly effective and established compliance system." Reeve, R. 2004. The CITES treaty and compliance: progress or jeopardy? Briefing Paper #BP 04/01, p. 2, Chatham House, (available at www.chathamhouse.org.uk/publications/papers/download/-/id/228/file/9267_bp0904cites.pdf). This is not to say that the compliance system is perfect, as the latter same author remarked in an earlier and more substantive work of hers, "Enforcement is the Achilles' heel of CITES." R. Reeve, R. 2002. *Policing international trade in endangered species: the CITES treaty and compliance*, pp. 249, 328,. London, UK, Earthscan, 2002, pp. 249, 328. With respect to commercially exploited aquatic species in particular, the control of import and export on a global scale – the novel approach introduced by CITES in the 1970s (see note 43 below) – opens new perspectives that shift the focus away from enforcement at sea and towards enforcement on land. This approach has only affected the international instruments directly related to conservation and management of marine living resources at a much later stage, and only with great difficulty. See chapter I, A, above, which mentions that the legally-binding instrument with the greatest potential in this respect has yet to enter into force. See also note 9 above.

At the eighth Conference of the Parties in Tokyo, Japan, a Swedish proposal to list western Atlantic bluefin tuna in Appendix I and eastern Atlantic tuna in Appendix II[18] triggered the issue for the first time with respect to a high seas resource commercially exploited on a large scale, the conservation and management of which had been explicitly entrusted to a specialized regional fisheries management organization (RFMO). The Secretariat advised rejection of the proposal, first because, according to the International Commission for the Conservation of Atlantic Tunas (ICCAT), as well as individual scientists, neither of these species were threatened with extinction or were likely to become so threatened.[19] But on the more fundamental question of whether the CITES was the appropriate forum to treat such questions, the Secretariat walked a tightrope by referring back to an argument it developed with respect to another commercially exploited living resource, herring:

> "The inclusion of fish species subject to commercial fisheries in the CITES appendices is perfectly compatible with the Convention. However, it would raise serious problems of implementation for many Parties. An international agreement other than CITES exists to regulate the fisheries of herring, and it does not appear, for the time being, that this species should be included in the CITES appendices. However, if its status becomes of serious concern, because its use is not sustainable and its conservation is threatened, then it would deserve to be listed in the CITES appendices."[20]

Japan argued that involving CITES was neither necessary nor appropriate.[21] In view of opposition to the proposal, especially by States like Canada, Japan and the United States of America, which are particularly concerned with this fishery, Sweden eventually withdrew its proposal.[22]

Since then similar issues have arisen at subsequent conferences of the parties. In 2002, for instance, Australia proposed to list the Patagonian toothfish under Appendix II,[23] not because the relevant RFMO – the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)[24] – failed to did not take the matter seriously, but rather because of the relatively few member States adhering to CCAMLR, and the fact that many vessels fishing for Patagonian toothfish were flagged to non-contracting CCAMLR parties. Clearly this was a measure designed to complement rather than supplant CCAMLR efforts.[25] Instead of listing

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[18] CITES. Eighth meeting of the Conference of the Parties, Kyoto, Japan, 2 to 13 March 1992, Consideration of proposals for amendment of Appendices I and II. Doc. 8.46 (Rev.), Annex I, p. 13 and Annex II, p. 21. Hereinafter CoP 8, Doc. 8.46 (Rev.).

[19] CoP 8, Doc. 8.46 (Rev.), note 18 above, Annex 3, p. 30.

[20] Idem.

[21] Idem, Annex 4, p. 41.

[22] CITES. Eighth meeting of the Conference of the Parties, Kyoto, Japan, 2 to 13 March 1992, Summary report of the committee I meeting, 10 March 1992. Com.I 8.10 (Rev.), pp. 34–35.

[23] CITES. Consideration of proposals for amendment of Appendices I and II, proposal by Australia. Prop. 12.39 (available at www.cites.org/eng/cop/12/prop/E12-P39.pdf). Hereinafter Australian Prop. 12.39.

[24] CCAMLR. As established by Article 7 of the Convention on the Conservation of Antarctic Marine Living Resources. This Convention, signed on 20 May 1980, entered into force on 7 April 1982. At the time of writing 33 States together with the European Community are party to the Convention.

[25] Australian Prop. 12.39, note 23 above, p. 2.

the Patagonian toothfish under CITES Appendix II, the parties decided, acting upon an initiative of Chile,[26] that the CCAMLR Commission should continue to remain the main actor in managing and conserving the Patagonian toothfish, with CITES playing second fiddle.[27] A resolution was adopted by consensus recommending that CITES member States not only adopt the CCAMLR catch document with respect to this species and implement requirements for verification on their territory, but also adhere to the CCAMLR or at least with its conservation measures on a voluntary basis.[28] All the elements in the draft resolution concerning direct CITES involvement, such as the requirement that member States report to the Secretariat their use of the catch document in question, the related verification requirements, and the Secretariat's compiling and transmission of this information to, *inter alia*,, the CCAMLR Commission, had specific time-frames attached to them and were put into a separate draft decision.[29] Australia subsequently withdrew its proposal for listing towards the end of the Conference.[30]

These two examples may suffice to illustrate the delicate nature of the relationship between CITES on the one hand, and entities that have been entrusted with specific fisheries conservation and management mandates including RFMOs competent for conservation and management of particular commercially exploited species on the other. Even though all Conferences of the Parties following the one held at Santiago, Chile, in 2002, have been characterized by attempts to list commercially exploited aquatic species, the degree of the acceptance cannot be described as a success story. The crescendo pattern in the number of listing attempts contrasts sharply with the opposing trend of non-acceptance by the Conference of the Parties.[31] If over the years some of the proposals for listing of such species have met with success, these instances presently appear to be the exception to the rule. Indeed, of all such proposals during the last Conference of the Parties in Doha, Qatar, not a

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[26] CITES. Twelfth meeting of the Conference of the Parties, Santiago, Chile, 3–15 November 2002, Strategic and administrative matters, cooperation with other organizations, cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) regarding trade in the toothfish, Proposal by Chile. CoP12 Doc. 16.1, 4 pp.

[27] CITES. Twelfth meeting of the Conference of the Parties, Santiago, Chile, 3–15 November 2002, Committee I meeting, thirteenth session, 13 November 2002. CoP 12 Com. I Rep. 13, p. 3. Hereinafter Cop 12 Com. I Rep.

[28] CITES. Twelfth meeting of the Conference of the Parties, Santiago, Chile, 3–15 November 2002, Resolution on the cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources regarding trade in toothfish. Conf. 12.4 (available at www.cites.org/eng/res/index.shtml). This resolution is still in force at the time of writing.

[29] CITES. Twelfth meeting of the Conference of the Parties, Santiago, Chile, 3–15 November 2002, Decisions on trade in toothfish (Decisions 12.57 to 12.59). None of these decisions remains operative at the time of writing.

[30] CoP 12 Com I Rep, note 27 above, p. 3. See also CITES, Twelfth meeting of the Conference of the Parties, Santiago, Chile, 3–15 November 2002, Plenary meeting, ninth session, 15 November 2002. CoP 12 Plen. 9, p. 3.

[31] See Sky, M.B. 2010. Getting on the list: politics and procedural maneuvering in CITES Appendix I and II Decisions for Commercially Exploited Marine and Timber Species. *Sustainable Develop. L. & Pol'y*, 10(3): 35, who concludes: "Despite increased consideration of proposals to regulate trade in commercially valuable species since CITES COP-12 in 2002, any past trends in their acceptance are waning."

single one was accepted. Neither the Atlantic bluefin tuna (Appendix I listing proposal),[32] nor the four shark species of great commercial value (Appendix II listing proposals) – the scalloped hammerhead shark,[33] the oceanic whitetip shark,[34] the porbeagle shark[35] and the spiny dogfish[36] – were able to secure sufficient votes for listing. As a consequence, all these proposals were rejected.[37]

This chequered history of applying CITES to commercially-exploited aquatic species is partly explained by legal uncertainties surrounding the application of the notion of "introduction from the sea" as used in its founding document. This issue will be addressed below in Chapter IV. Some viewed the CITES system of trade restrictions implemented by State parties through a system of import and export permits and certificates as an attractive alternative for reversing the so-called tragedy of the commons. The extant broad-based participation in CITES enhances its appeal in this respect. Practice, however, indicates that many difficulties remain.

Since the 1990s, the relationship between instruments directly related to the conservation and management of living marine resources on the one hand, and CITES on the other, has drawn increased attention, both within and outside of the CITES framework convention. Some voiced concerns that the applicable CITES listing criteria may not be appropriate to deal with aquatic species harvested on a large-scale commercial basis. International organizations established to discuss international fisheries issues or to regulate fisheries, be they global like FAO, or regional like CCAMLR, have therefore become more and more involved.

This study focuses on two main legal issues arising from the relationship between CITES and FAO. The first issue involves a thorough analysis of the exact competence of CITES with

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[32] CITES. Fifteenth meeting of the Conference of the Parties, Doha, Qatar, 13–25 March 2010, Proposal of inclusion of *Thunnus thynnus* (Atlantic bluefin tuna) in Appendix II, submitted by the Principality of Monaco. CoP 15 Prop. 19 (available at www.cites.org/eng/cop/15/prop/E-15-Prop-19.pdf).

[33] CITES. Fifteenth meeting of the Conference of the Parties, Doha, Qatar, 13–25 March 2010, Proposal of inclusion of *Sphyma lewini* (scalloped hammerhead shark) in Appendix II, submitted by Palau and the United States of America. CoP 15 Prop. 15 (available at www.cites.org/eng/cop/15/prop/E-15-Prop-15.pdf).

[34] CITES. Fifteenth meeting of the Conference of the Parties, Doha, Qatar, 13–25 March 2010, Proposal of inclusion of *Carcharhinus longimanus* (oceanic whitetip shark) in Appendix II, submitted by Palau and the United States of America. CoP 15 Prop. 16 (available at www.cites.org/eng/cop/15/prop/E-15-Prop-16.pdf).

[35] CITES. Fifteenth meeting of the Conference of the Parties, Doha, Qatar, 13–25 March 2010, Proposal of inclusion of *Lamna nasus* (porbeagle) in Appendix II, submitted by Sweden on behalf of the European Community's mMember sStates acting in the interest of the European Community. CoP 15 Prop. 17 (available at www.cites.org/eng/cop/15/prop/E-15-Prop-17.pdf).

[36] CITES. Fifteenth meeting of the Conference of the Parties, Doha, Qatar, 13–25 March 2010, Proposal of inclusion of *Squalus acanthias* Linnaeus, 1758 in Appendix II, submitted by Sweden on behalf of the European Community's mMember sStates acting in the interest of the European Community. CoP 15 Prop. 18 (available at www.cites.org/eng/cop/15/prop/E-15-Prop-18.pdf).

[37] CITES. Fifteenth meeting of the Conference of the Parties, Doha, Qatar, 13–25 March 2010, Final decisions on the proposals of amendment of Appendices I and II (available at www.cites.org/eng/cop/15/prop/results.shtml). To this list, one could moreover add the rejection of the proposal to list red and pink coral. But because the focus of this study is on commercially-exploited aquatic species for human consumption, these corals were not included in the above listing.

respect to commercially exploited aquatic species. The second issue requires examination of the legal relationship between CITES and other relevant international agreements.

After explaining the emergence of these issues (chapter III), this study will concentrate on the application of the term “introduction from the sea”. This requires an introduction to the CITES framework convention (chapter IV), followed by an appraisal of the term “introduction from the sea” *de lege lata* (chapter V) and *de lege ferenda* (chapter VI). Subsequently, the study addresses the application of successive treaties relating to the same subject matter (chapter VII), followed by a chapter describing the relationship between CITES and other treaties (chapter VIII). A brief section precedes these analyses explaining the salient features of CITES (chapter II).

II. INTRODUCTION TO THE FUNCTIONING OF CITES

CITES aims to protect wild fauna and flora through the regulation of international trade. Beginning with the premise that States are the best protectors of their own wild fauna and flora,[38] the treaty acts by issuing permits and certificates for the export, re-export and import of live and dead animals. Given that not all species are threatened to the same extent, the treaty differentiates between three categories: those species that are threatened with extinction whose trade must be strictly regulated-meaning that trade can be authorized only in exceptional circumstances; those that are not necessarily threatened at the moment with extinction, but may become so unless trade is restricted to ensure their survival; and, finally, those that, in the eyes of the State that has jurisdiction over their exploitation, need the cooperation of other States to prevent or restrict their exploitation.[39] The treaty separates these categories into three different lists, i.e. Appendices I, II, and III, respectively, to which different regimes for export and import apply. The most stringent controls apply to Appendix I species, requiring both an export and an import permit.[40] Appendix II species also require an export permit, but no import permit.[41] Trade in Appendix III species is involves the least regulation, and while such trade also requires an export permit, there are fewer conditions attached than in export permits for Appendices I an II.[42]

Three elements need to be highlighted. First, the approach of CITES to control *import* and *export* was certainly not new in 1973, but the fact that this convention applied it on a global scale was innovative.[43] Second, CITES places the essence of the regulatory power on the

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[38] CITES, Preamble, recital 3.

[39] CITES, Art. II.

[40] The export permit requires a scientific authority of that State to advise that export will have no negative impact on the survival of that species, and a management authority of that same State to be satisfied that first, the specimen was not obtained in contravention of its nature protection laws, second, that the live specimen will be shipped with a minimum of risk as to injury, damage to health or cruel treatment, and third, an import permit has been delivered. The import permit requires a scientific authority of that State first, to advise that import will have no negative impact on the survival of that species and second to be satisfied that the live specimen will find a suitable home, and a management authority of that same State to be satisfied that the specimen is not used for primarily commercial purposes. CITES, Art. III (2) and (3).

[41] The export permit requires a scientific authority of that State to advise that export will have no negative impact on the survival of that species, and a management authority of that same State to be satisfied that first, the specimen was not obtained in contravention of its nature protection laws, and second, that the live specimen will be shipped with a minimum of risk as to injury, damage to health or cruel treatment. The importing country only needs to verify whether such an export permit is present. CITES, Art. IV (2) and (4).

[42] The export permit only requires that the management authority of the State that listed the species to be satisfied that first, the specimen was not obtained in contravention of its nature protection laws, and second, that the live specimen will be shipped with a minimum of risk as to injury, damage to health or cruel treatment. CITES, Art. V (2).

[43] P.W. Birnie, A.E. Boyle,, & P. Redgwell. 2009. *International law and the environment*, p. 686, Oxford, UK, Oxford University Press. It should be stressed that in principle CITES does not require specific permits or certificates for transit States. See CITES, Art. VII (1). But the potential for abuse has led the parties, en cours de route, to interpret this provision in such a way that transit States have certain obligations imposed on them in order to fight illegal trade. See W. Wijnstekers. 2003. *The evolution of CITES*, pp. 139–140, Geneva, Switzerland, CITES Secretariat.

export side of the coin, rather than on the import side.[44] Third, CITES regulates *international* trade. This means that CITES is not concerned with what happens within the boundaries of its member States. To give but one prominent example illustrating the consequences of this approach, consider the developments within the European Community which adopted a new Regulation (EC 338/97) on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein at the end of 1996.[45] This regulation, which harmonizes the laws of the different member States on this subject, abolishes internal borders and stresses the need for stricter controls at external borders.[46]

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[44] S. Lyster. 1985. *International wildlife law: an analysis of international treaties concerned with the conservation of wildlife,* p. 479, Cambridge, UK, Grotius Publications.

[45] European Community. Regulation on the protection of species of wild fauna and flora by regulating trade therein. EC 338/97, 3 March 1997, pp. 1–69. Hereinafter Council Regulation EC 338/97. This regulation entered into force on 1 June 1997. It has been amended several times, most recently by Commission Regulation EU 709/2010 of 22 July 2010 amending Council Regulation EC 338/97 on the protection of species of wild fauna and flora by regulating trade therein, 12 August 2010, pp. 1–59. Hereinafter Commission Regulation EU 709/2010.

[46] European Community. Council Regulation EC 338/97, note 45 above, Preamble, recital 2.

III. THE EMERGENCE OF ISSUES ARISING FROM THE CITES AND FAO RELATIONSHIP

Interaction between CITES and FAO began around the turn of the century. At the request of the FAO Committee on Fisheries Sub-Committee on Fish Trade, gathered in Bremen, Germany, in June 1998, an ad hoc group was created to make suggestions concerning the application of CITES listing criteria to commercially-exploited aquatic species. The ad hoc group in turn proposed to hold a technical consultation on the issue, which took place in Rome, Italy, during the month of June 2000. This consultation stressed the potential synergy between CITES and FAO but could not conclude its work. A second technical consultation convened in Windhoek, Namibia, in November 2001. This meeting concluded that important improvements could be made to the existing CITES criteria.[47]

The results of this second consultation were subsequently endorsed by the Sub-Committee on Fish Trade at its eighth session, held at Bremen, Germany, during the month of February 2002. In its Recommendations on Developing a Workplan for Exploring CITES Issues with respect to International Fish Trade and a Process for Scientific Evaluation of Relevant CITES Listing Proposals, it was recommended to the Committee on Fisheries that expert consultations should be convened on a number of issues, including "the application of the phrase 'introduction from the sea' in the definition of trade in Article 1" and the "analysis of the legal implications of the existing CITES listing criteria in relation to the UN Convention of the Law of the Sea (LOSC) 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 Second Technical Consultation."[48]

At its twenty-fifth session, the Committee on Fisheries complied with the request by adopting the terms of reference for such consultations.[49] Two consultations convened the following year.[50] CITES has acted upon these developments as indicated by Decisions 13.18 and 13.19 adopted at the Bangkok Conference of the Parties, held from 2 to 14 October 2004.[51] In 2002

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[47] FAO. Recommended comments on CITES notification to the parties no. 2001/037. This study was attached as Appendix F to the Report of the second technical consultation on the suitability of the CITES criteria for listing commercially-exploited aquatic species. Windhoek, Namibia, 22–25 October 2001, FAO Fisheries Report No. 667 FAO Doc. FIRM/R667(Tri), pp. 54–64.

[48] FAO. Report of the eighth session of the Sub-Committee on Fish Trade. Bremen, Germany, 12–16 February 2002, FAO Fisheries Report No. 673. FAO Doc. FIIU/R673 (Tri), para. 21.

[49] FAO. Report of the twenty-fifth session of the Committee on Fisheries, Rome, 24-28 February 2003, FAO Fisheries Report No. 702. FAO Doc. FIPL/R702(En), para. 48 and Appendix F.

[50] For the first consultation, see FAO. Report of the Expert Consultation on Implementation Issues Associated with Listing Commercially-exploited Aquatic Species on CITES Appendices. Rome, Italy, 25-28 May 2004. FAO Fisheries Report. No. 741. Rome, FAO. 2004. 248 pp. A second consultation convened the next month. FAO. Report of the Expert Consultation on Legal Issues Related to CITES and Commercially-exploited Aquatic Species. Rome, Italy, 22–25 June 2004. FAO Fisheries Report. No. 746. Rome, FAO. 2004. 21 pp.

[51] CITES. Thirteenth meeting of the Conference of the Parties, Bangkok, Thailand, 2–14 October 2004, Decisions 13.18 to 13.19. (available at www.cites.org/eng/dec/valid13/13-18&19.shtml). Hereinafter Dec. 18 & 19. These decisions direct the Standing Committee of CITES to convene a workshop to consider implementation and technical issues "taking into consideration the two Expert Consultations of the Food and Agriculture Organization of the United Nations on implementation and legal issues". They also direct the

a decision was made within CITES, directing its Standing Committee to open negotiations with FAO on the conclusion of a Memorandum of Understanding.[52] It took more than four years for the parties to work out a nine short-paragraph document that has regulated the relationship between the organizations since 2006: the Memorandum of Understanding between FAO and the CITES Secretariat (CITES-FAO MoU).[53] Despite the conclusion of this CITES-FAO MoU, only part of the legal issues have so far been settled within CITES, requiring it to continue the work.[54]

Secretariat to assist the Standing Committee in this task. two CITES participated by sending an expert in the area of concern for each consultation. Therefore, it should not come as a surprise that the decision discussed here stipulates that two representatives from FAO will be invited to participate in the proposed workshop.

[52] CITES, Twelfth meeting of the Conference of the Parties, Santiago, Chile, 3–15 November 2002, Establishment of a Memorandum of Understanding between CITES and the Food and Agriculture Organization of the United Nations (FAO) (Decision 12.7).

[53] FAO & CITES. Memorandum of Understanding between the Food and Agriculture Organization of the United Nations (FAO) and the CITES Secretariat (available at www.cites.org/eng/disc/sec/FAO-CITES-e.pdf). Concerning the *prolegomenae*, note that the FAO Committee on Fisheries was unable to reach consensus on a proposed draft Memorandum of Understanding during the month of February 2003. See Report of the twenty-fifth session of the Committee on Fisheries, Rome, 24–28 February 2003, note 49 above, para. 48, where it is Stated that no consensus could be reached, and Appendix G, where the text of the proposed Memorandum of Understanding can be found. This point was discussed further at the Ninth Meeting of the Sub-Committee on Fish Trade of the Committee on Fisheries of FAO in early 2004. See FAO. CITES Issues with Respect to International Fish Trade and the CITES/FAO MoU, Bremen, Germany, 10–14 February 2004, Agenda Item 5. FAO Doc. COFI:FT/IX/2004/3 (available at ftp://ftp.fao.org/docrep/fao/meeting/013/j1226e.pdf). For an overview of the steps already undertaken in the framework of CITES, see CITES. Thirteenth Conference of the Parties, Bangkok, Thailand, 2–14 October 2004, Cooperation with the Food and Agriculture Organization of the United Nations (FAO), proposal by Japan. Doc. 12.4, p. 2, paras 3–8 (available at www.cites.org/common/cop/13/raw-docs/JP02.pdf).

[54] See note 69 below, listing these later actions taken by CITES.

IV. "INTRODUCTION FROM THE SEA": THE CONVENTIONAL FRAMEWORK OF CITES

A. The Convention itself

CITES uses the term "introduction from the sea" in its 25 articles only four times. Two times in the article on definitions[55] and, substantively, in the fundamental articles dealing with the regulation of trade in specimens of species included in either Appendices I or II.[56] These provisions read as follows:[57]

First, the definition of the term "trade":

> "'Trade' means export, re-export, import and *introduction from the sea*."[58]

Second, the definition of the term "introduction from the sea":

> "'Introduction from the sea' means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State."59

Third, relating to Appendix I specimen of species:

> "The *introduction from the sea* of any specimen of a species included in Appendix I shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:
>
> (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;
>
> (b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
>
> (c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes."[60]

Fourth, relating to Appendix II specimen of species:

> "The *introduction from the sea* of any specimen of a species included in Appendix II shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

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[55] CITES, Art. I.
[56] CITES, Arts III and IV respectively.
[57] Our emphasis.
[58] CITES, Art. I (c).
[59] CITES, Art. I (e).
[60] CITES, Art. III (5).

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and

(b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment."[61]

For the sake of completeness, the last paragraph of Article IV can be added, as it is directly linked to the paragraph just mentioned:

> "Certificates referred to in paragraph 6 of this Article may be granted on the advice of a Scientific Authority, in consultation with other national scientific authorities or, when appropriate, international scientific authorities, in respect of periods not exceeding one year for total numbers of specimens to be introduced in such periods."[62]

Since a definition is given for the expression "introduction from the sea" in the founding document of CITES,[63] one could be tempted to stop the analysis there. To do so would be premature, for, as counselled by the former Secretary-General of CITES in his book on the functioning of the convention: "The text of the Convention itself contains only very few definitions and most of them have been refined through Resolutions."[64]

B. Resolutions adopted by the Conference of the Parties

a) State practice

These resolutions are adopted based on the convention article that allows the Conference of the Parties, i.e. the biennial gatherings of States for which CITES has entered into force,[65] to make "recommendations for improving the effectiveness" of that convention.[66] Since the first meeting in 1976, these recommendations have taken the form of resolutions.[67] Besides the resolutions, which today tend to have a more permanent nature, these recommendations have also taken the form of decisions since the ninth Conference of the Parties, held at Fort Lauderdale, United States of America, in 1994 . Decisions are normally more more specific than resolutions and are either implemented, or over time simply become redundant or obsolete.[68] Consequently, the resolutions deserve special attention in the present study.[69]

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[61] CITES, Art. IV (6).

[62] CITES, Art. IV (7).

[63] See note 59 above.

[64] Wijnstekers, note 43 above, p. 19.

[65] See CITES, Arts I (h) and XI (2).

[66] CITES, Art. XI (3)(e).

[67] More than 262 such resolutions have been adopted over the years, even though only 82 of them remain valid today. CITES. 2010. CITES Resolutions: Introduction. Official webpage of CITES (available at www.cites.org/eng/res/intro.shtml).

[68] CITES. 2010. Decisions of the Conference of the Parties. Official webpage of CITES (available at www.cites.org/eng/dec/intro.shtml).

To correctly understand the definition of the expression “introduction from the sea,” one must turn, not only to the founding document itself, but also to the resolutions adopted by subsequent conferences of the parties.[70] Many of them clarify specific provisions *expressis verbis* used in the convention,[71] provide definitions of terms not to be found in the convention itself but that are encountered in its implementation,[72] directly interpret articles of the convention or paragraphs thereof,[73] and even clarify[74] or refine[75] procedures in view of the difficulties ran into trough daily practice.

With respect to the term under consideration five resolutions, in effect at present, must be mentioned, of which the first four will be discussed here. First, Resolution Conf. 5.10[76] explicitly mentions “introduction from the sea” but has only an indirect influence on the correct understanding of the term. In fact, by providing a definition for the term “primarily commercial purposes”, it has an impact on Appendix I species introduced from the sea

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[69] Indeed, the term “introduction from the sea” did not appear once in the decisions that were in effect after the twelfth meeting of the Conference of the Parties, held at Santiago, Chile, 3–15 November 2002. It was only at the thirteenth Conference of the Parties, held at Bangkok, Thailand, 2–14 October 2004, that two decisions related to this topic were adopted. One directed to the Standing Committee, concerning the convening of a workshop on the issue (Decision 13.18, note 51 above) and one directed to the Secretariat, urging it to assist in obtaining funds and in preparing for that workshop (Decision 13.19, idem). Because this workshop, held at Geneva, Switzerland, between 30 November and 2 December 2005 (hereinafter CITES 2005 Workshop), was only able to lead to a partial conclusion at the fourteenth Conference of the Parties, held at The Hague, The Netherlands, 3–15 June 2007, a new decision was adopted directing the Standing Committee to continue the work on the definition of the notion “transportation into a State” primarily through electronic means (Decision 14.48, available at www.cites.org/eng/dec/valid14/14_48.shtml). A workshop was nevertheless convened in Geneva, Switzerland, 14–16 September 2009, but this effort failed to clear the air and thus enable the fifteenth Conference of the Parties, held at Doha, Qatar, 3–25 March 2010, to resolve this issue. As a consequence, Decision 11.48 was revised at the conference in Doha to authorize continuation of the work (Decision 14.48 (Rev. CoP 15), available at www.cites.org/eng/dec/valid15/15_50-14_48.shtml). A new decision directed the Secretariat to convene two meetings of the working group before the sixty-second meeting of the Standing Committee (Decision 15.50, available at www.cites.org/eng/dec/valid15/15_50-14_48.shtml). The latter two decisions are the only ones still presently in effect.

[70] All resolutions still presently in effect can be found at www.cites.org/eng/res/index.shtml.

[71] See, e.g. CITES. Conf. 5.10 Definition of ‘primarily commercial purposes’. Adopted at the fifth Conference of the Parties, held at Buenos Aires, Argentina, 22 April–3 May 1985, as revised by the fifteenth Conference of the Parties, held at Doha, Qatar, 13–25 March 2010.

[72] See, e.g. CITES. Conf. 11.10 Trade in stony corals. Adopted at the eleventh Conference of the Parties held at Gigiri, Kenya, 10–20 April 2000, as revised by the fifteenth Conference of the Parties, held at Doha, Qatar, 13–25 March 2010, where concrete definitions of terms like coral sand, coral fragments, coral rock, dead coral and live coral can be found in the Annexes.

[73] See, e.g. CITES. Conf. 4.27 Interpretation of Article XVII, paragraph 3, of the Convention. Adopted at the fourth Conference of the Parties, held at Gaborone, Botswana, 19–30 April 1983. Faced with ambiguity, the resolution resolved to adhere to the narrow interpretation.

[74] See, e.g. CITES. Conf. 4.25 Effects of reservations. Adopted at the fourth Conference of the Parties, held at Gaborone, Botswana, 19–30 April 1983. Here too, parties had given different interpretations to the relevant convention provisions, as revised at the fourteenth Conference of the Parties, held at The Hague, The Netherlands, 3–15 June 2007.

[75] See, e.g. CITES. Conf. 9.5 Trade with States not party to the Convention. Adopted at the ninth Conference of the Parties, held at Fort Lauderdale, United States of America, 7–18 November 1994, as revised by the fifteenth Conference of the Parties, held at Doha, Qatar, 13–25 March 2010.

[76] See note 71 above.

because the management authority of the state of introduction will have to be satisfied that the purposes for the introduction are not primarily commercial before granting a certificate.[77] The same can be said with respect to Resolution Conf. 10.3, which clarifies the designation and role of the scientific authorities.[78] Because the scientific authority of the state of introduction has to advise that the introduction will not be detrimental to the survival of the species for both Appendix I and Appendix II species,[79] this resolution only indirectly clarifies the concept under consideration here. It should be noted that Article IV (7),[80] which touches on international scientific authorities that can assist the scientific authorities of States of introduction in formulating their advices, are not covered by this resolution.[81] Resolution Conf. 12.8 falls into a similar category.[82] This resolution further clarifies and simplifies the Review of the Significant Trade procedure of Appendix II species to be followed by the Animals and Plants Committees, as first regulated by resolution in 1992. Because this procedure is not specific to Appendix II species introduced from the sea, but also applied to Appendix II export permits and exports in general, one must conclude that this resolution also has only an indirect impact on the term "introduction from the sea."

The only resolution deserving special attention here because of its direct impact on the clarification of the term "introduction from the sea," is Resolution Conf. 11.4.[83] In the operative part of this resolution where the term "introduction from the sea" appears, it is again simply used to urge parties not to issue certificates for introduction from the sea for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling if that introduction is primarily intended for commercial purposes. Recitals 7 and 8 are quite relevant for the present analysis:

> "RECOGNIZING that the jurisdiction of the Parties with respect to marine resources in their adjacent seas is not uniform in extent, varies in nature and has not yet been agreed internationally;
>
> DESIRING that the maximum protection possible under this Convention be afforded to the cetaceans listed in the Appendices ...."[84]

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[77] CITES, Art. III (5)(c).

[78] CITES. Conf. 10.3 Designation and role of the Scientific Authorities. Adopted at the tenth Conference of the Parties, held at Harare, Zimbabwe, 9–20 June 1997.

[79] CITES, Arts III (5)(a) and IV (6)(a) respectively.

[80] As reprinted note 62 above.

[81] The third preamble of this resolution, listing the concerned articles of the Convention, omits making reference to Art. IV (7).

[82] CITES. Review of Significant Trade in specimens of Appendix-II species. Adopted at the twelfth Conference of the Parties, held at Santiago, Chile, 3–15 November 2002, as revised by the thirteenth Conference of the Parties, held at Bangkok, Thailand, 2–14 October 2004.

[83] CITES. Eleventh Conference of the Parties, Gigiri, Kenya, 10–20 April 2000, Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission. Conf. 11.4 (hereinafter Resolution Conf. 11.4), as revised at the twelfth Conference of the Parties, held at Santiago, Chile, 3–15 November 2002. The revision however, besides a few cosmetic changes, involved only the introduction of a new section relating to cooperation in monitoring illegal trade in whale parts and derivatives. As a consequence, this revision has no impact on the issue here at hand.

[84] CITES. Resolution Conf. 11.4, note 83 above, recitals 7 & 8.

It is important to recall Resolution Conf. 2.8 – which is explicitly repealed by this just-cited Resolution Conf. 11.4 in fine – because that is where these recitals find their origin. This resolution, adopted in 1979, stated as follows:

> "RECOGNIZING that Articles III, paragraph 5 and IV, paragraph 6, of the Convention prohibit the transportation into a Party State of specimens (including any readily recognizable part or derivative thereof) of any species listed in Appendix I or II to the Convention which were taken in the marine environment not under the jurisdiction of any state without prior grant of a certificate from a Management Authority of the State of introduction;
>
> RECOGNIZING that the jurisdiction of the Parties with respect to marine resources in their adjacent seas is not uniform in extent, varies in nature and has not yet been agreed internationally;
>
> DESIRING that the maximum protection possible under this Convention be afforded to cetaceans listed on the appendices;
>
> CONSIDERING that the International Whaling Commission has asked for the support of the Parties in protecting certain stocks and species of whales.
>
> THE CONFERENCE OF THE PARTIES TO THE CONVENTION
>
> RECOMMENDS that the Parties use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans."[85]

The former Secretary-General of CITES relies upon the wording of these two resolutions when explaining the notion "introduction from the sea" in his book on the functioning of the convention. After citing the definition provided in Article I (e)[86] he continues,

> "**Resolution Conf. 11.4 (Rev. CoP 12)** (ex Resolution Conf. 2.8) recognizes that the jurisdiction of the Parties with respect to marine resources in their adjacent seas is not uniform in extent, varies in nature and has not yet been agreed internationally, but recommends that the Parties use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans."[87]

This overview of relevant CITES resolutions does not include Resolution Conf. 14.6,[88] as amended during the fifteenth Conference of the Parties in Doha, Qatar, in 2010,[89] for this fifth resolution of the present overview, together with its amendment, are the direct consequence of developments described in chapter V, and will consequently be treated in their proper context there.

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[85] CITES. 1980. Conf. 11.4 Introduction from the sea. Adopted at the second meeting of the parties, held at San José, Costa Rica, 19–30 March 1979. In proceedings of the second meeting of the Conference of the Parties, San José, Costa Rica, 19–30 March 1979, Vol. I, p. 44.

[86] See note 59 above.

[87] Wijnstekers, note 43 above, p. 24. The first and fourth recital of Resolution Conf. 2.8 are also found in Resolution Conf. 11.4. See recitals 6 and 9 respectively. The former was slightly expanded when the words "of specimens which" were replaced by "into a party State of specimens (including any readily recognizable parts or derivative thereof) of any species listed in Appendix I or II to the Convention that". It was only the operative part of this Resolution Conf. 2.8 which did not find its way into Resolution Conf. 11.4.

[88] See note 234 below.

[89] See note 241 below.

b) Legal effect of resolutions on the interpretation of CITES

Regarding the authentic interpretation of the provisions of CITES, it should be noted that, as a matter of principle, state parties do posses the authority to make definitive interpretations of the terms of the treaty. In this respect, the World Court's jurisprudence is well-established:

> "According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted 'in their context and in the light of its object and purpose' and there shall be
>
> 'taken into account, together with the context:
>
> …
>
> (b) any subsequent practice in the application of the treaty which establishes *the agreement of the parties* regarding its interpretation'.
>
> The Court has had occasion to apply this rule of interpretation several times (see *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal), Judgment of 31 July 1991*, *I.C.J. Reports 1991*, pp. 69-70, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992*, *I.C.J. Reports 1992*, pp. 582-583, para. 373 and p. 586, para. 380; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, pp. 21-22, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18, para. 33)."[90]

The question remains, however, whether the procedure followed by the Conference of the Parties under CITES to adopt resolutions represents an agreement of the parties, as emphasized in the just-mentioned excerpt of the 1969 Vienna Convention on the Law of Treaties.[91] Even though the present rules of procedure provide that draft resolutions will, as far as possible, be adopted by consensus,[92] it is also specified that if this is not possible, a vote will be taken.[93] Such vote requires a two-thirds majority of the representatives present and voting.[94] This has, however, not always been the case, because CITES itself provides that

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[90] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion. *I.C.J. Reports* 1996, p. 75, para. 19. Our emphasis. See also, LaGrand Case (Germany v. United States), Judgment. *I.C.J. Reports* 2001, para. 99.

[91] 1969 Vienna Convention on the Law of Treaties. This Convention, signed on 23 May 1969, entered into force on 27 January 1980. Hereinafter 1969 Vienna Convention. At the time of writing 111 States are party to the Convention. The number of States party to this convention as well as the fact that the Convention only applies to treaties concluded after its entry into force (see Art. 4) are both immaterial for present purposes because the International Court of Justice is clearly of the opinion that this particular rule of interpretation reflects customary international law.

[92] CITES. Rules of Procedure. Rule 21 (1), (available at www.cites.org/eng/cop/E14-Rules.pdf). Hereinafter Rules of Procedure. Their most recent amendment dates back to the fourteenth Conference of the Parties, held at The Hague, The Netherlands, 3–15 June 2007.

[93] CITES. Rules of Procedure, Rule 21 (2).

[94] CITES. Rules of Procedure, Rule 26 (1).

the parties may, at any meeting, determine and adopt rules of procedure for the meeting.[95] Up until the fifth Conference of the Parties these rules of procedure provided that a simple majority was sufficient.[96]

Resolution Conf. 11.4 was adopted by a vote of show of hands by 41 in favour, five against and 31 abstentions.[97] Two countries clarified their concerns. Japan stressed that new scientific findings with respect to cetaceans were not taken into account and therefore rendered the proposed resolution obsolete. Japan and Australia, both had difficulties with recital 19 which implied the acceptance by the Conference of the Parties in 2000 of a text adopted by the International Whaling Commission in 1978. However, there is no indication that recitals 7 and 8 caused any particular difficulty for the parties. Resolution Conf. 2.8 was adopted by simple majority,[98] without any substantial discussion in Plenary, upon a proposition initiated by the United Kingdom that emphasized that its main purpose was to draw attention to the implementation of CITES to cetaceans.[99]

The rules of procedure do not qualify the legal nature of the resolutions so adopted, but because their legal basis is to be found in Article XI (3)(e) of CITES,[100] they should be considered mere recommendations to the States for which the convention has entered into force. This is probably also the reason for the absence of any reservation procedure. In contrast, such a procedure exists with respect to the adoption of amendments to Appendices I and II,[101] which otherwise enter into force 90 days after the meeting of parties for *all* States for which the convention has entered into force.[102] The possibility of making reservations has also been provided with respect to Appendix III listings, which take effect 90 days after their communication to the parties by the Secretariat.[103] This describes the general CITES policy of disallowing general reservations, and only allowing specific ones that are strictly limited to the two articles just mentioned.[104]

As such, this system very much resembles the powers of the General Assembly of the United Nations, where it has become recognized that non-binding resolutions,[105] especially when

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[95] CITES. Art. XI (5).

[96] Wijnstekers, note 43 above, p. 343.

[97] Within the CITES framework, parties abstaining are not normally counted when calculating the qualified majority. This is the case with respect to amendments to Appendices I and II, as well as concerning amendments to the Convention itself. See CITES, Arts XV (3) and XVII (1) respectively. The rules of procedure follow this lead. See CITES. Rules of Procedure, Rule 26 (2).

[98] See note 96 above.

[99] CITES. 1980. Proceedings of the Second Meeting of the Conference of the Parties, San José, Costa Rica, 19–30 March 1979, Vol. I, p. 170. The original British proposal can be found idem, Vol. II, p. 1123.

[100] See note 66 above.

[101] CITES, Art. XV (1)(c), (2)(e & f), and (3).

[102] As provided in CITES, Art. XV (1)(c). Our emphasis.

[103] CITES, Art. XVI (2).

[104] CITES, Art. XXIII (1), referring back to Arts XV and XVI.

[105] Some recommendations relating to the internal working of the organization do create direct legal obligations, such as the approval of the budget, elections to various organs, or the creation of subsidiary organs (Charter, Arts 17, 18 and 22 respectively). The vast majority of the recommendations adopted by the

interpreting the body's own constitution, carry a special weight.[106] Or, as noted by the International Court of Justice in 1996:

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value."[107]

A similar evaluation can be found in the literature about the legal nature of CITES resolutions. Having mentioned the non-legally binding nature of such resolutions as one of the structural weaknesses of CITES, Birnie, Boyle and Redgwell nevertheless added that this weakness is not insurmountable because member States have the competence to clarify textual ambiguities.[108] In practice, even though it is occasionally questioned, real controversy over the legal nature of resolutions of the Conference of the Parties has so far been avoided.[109]

This power of the Conference of the Parties under CITES to make recommendations is very broad, since it is only tied to the goal of improving the effectiveness of that document.[110] What the Conference of the Parties can not formally do by way of recommendations is to amend the founding document itself, as that would run contrary to the provision specifically regulating the procedure for amending CITES.[111] This procedure is much more cumbersome and guarantees the rights of the parties that reject a proposed amendment, because an amendment will only enter into force for the parties which have accepted it by depositing their instrument of acceptance.[112]

General Assembly, however, have no legally binding-effect.

[106] See generally P.J. Sands & P. Klein. 2009. *Bowett's law of international institutions*, p. 295, London, UK, Sweet & Maxwell, where further references can be found. For a somewhat more critical analysis, see J.A.M. Klabbers. 2009. An introduction to international institutional law, pp. 189–190, Cambridge, UK, Cambridge University Press.

[107] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports* 1996, p. 826, para. 70, relying on the customary nature of certain norms so enunciated to come to this conclusion.

[108] Birnie, Boyle & Redgwell, note 43 above, p. 690. See also Sands, P.J. & Bedecarré, A.P. 1989. Convention on International Trade in Endangered Species: the role of public interest non-governmental organizations in ensuring the effective enforcement of the ivory trade ban. *B.C. Envtl. Aff. L. Rev.*, 17(1): 814 n. N.113, who note: "It is an interesting question, however, whether a resolution of the Conference of the Parties containing an authoritative interpretation of a provision of CITES can be applied to specimens acquired prior to its adoption", apparently accepting their legal validity. But in the following sentence they immediately add: "Determining the legal status of a Conference resolution lies beyond the scope of this Article."

[109] Reeve, R. 2002, note 17 above, p. 42. The author is of the opinion that this issue remains undecided. Idem, p. 41.

[110] CITES, Art. XI (3)(e).

[111] CITES, Art. XVII.

[112] Idem. An extraordinary meeting of the Conference of the Parties is needed, to be convened by the Secretariat at the request of at least one-third of the parties. Amendments are adopted by two-thirds majority. They only enter into force after two-thirds of the parties, to be counted at the date of their adoption, have deposited an instrument of acceptance of the amendment, and only for the parties that have deposited such an instrument. So far only one amendment has entered into force, and it took almost 10 years after its adoption to do so. This is the so-called Bonn amendment, adopted on 22 June 1979, which entered into force on 13 April 1987. This amendment added the words ", and adopt financial provisions" at the end of Art. XI (3)(a). A second amendment, attempting to open up CITES to regional economic integration organizations, was adopted already on 30 April 1983. But this so-called Gaborone amendment is presently still awaiting its

Moreover, as stressed by Liwo, parties that do not wish to abide by the proposed amendments always retain the possibility of denouncing CITES in its entirety.[113]

Therefore, the conclusion appears justified that recitals 7 and 8 of Resolution Conf. 11.4, despite the way in which the resolution containing them was adopted,[114] seem to provide a valid tool to interpret the term "introduction from the sea". The fact that a book on the functioning of CITES, written by its former Secretary-General, relies on these particular recitals in the section of the work on definitions in order to explain the exact content of the term "introduction from the sea," and that this is apparently uncontested by the States for which CITES has entered into force, further sustains this submission.[115]

entry into force almost 30 years later. This languishing can be partially attributed to the success of CITES, especially regarding the important growth in membership since its inception. Only 34 States were needed for the Bonn amendment to enter into force; this number had already increased to 54 for the Gaborone amendment.

[113] Liwo, K.J. 1991. The continuing significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora during the 1990s. *Suffolk Transnat'l L. J.*, 15(1): 135.

[114] See note 97 above.

[115] See note 87 above. Even though a disclaimer on the cover page warns that "[t]he opinions expressed in the book do not necessarily represent the opinion of the CITES Secretariat", it seems hardly imaginable that State parties would not react to manifestly unacceptable propositions. This particular Statement was already present in a previous version of this book.

V. "INTRODUCTION FROM THE SEA" *DE LEGE LATA*

The literature is not very helpful in trying to clarify the meaning of "introduction from the sea" as used and defined in CITES. The sporadic references to this term simply take over the convention provisions of the convention without any attempt at further clarification, as if the meaning of the term were crystal clear.[116] Only very rarely can one find an author willing to give more substance to these words.[117]

In order to better understand this concept, it might be instructive to briefly examine the genesis of CITES, especially considering the fact that the inclusion of this particular term in the convention's text did not pass unnoticed. The working paper, which served as the basis for the conference and had been prepared by the International Union for Conservation of Nature and Natural Resources (IUCN),[118] already contained this concept and provided the following definition:

> "'Introduction from the sea' means the transportation into a State of a specimen taken in the marine environment beyond the territorial sea."[119]

This provision had been included at the suggestion of the United States of America, but the preliminary comments on this working paper by IUCN already indicated that fundamental difficulties remained.[120] The opening statements of the different delegates made it abundantly clear that the issue of whether or not to include marine species would become a hot topic of

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[116] See, e.g. Alagappan, M. 1990. United States' enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. *Nw. J. Int'l L. & Bus.*, 10(1): 547 n. 36; Burns, W.C. 1990. CITES and the regulation of international trade in endangered species of flora: a critical appraisal. *Dick. J. Int'l L.*, 8(1): 209 n. 40; Gillespie, A. 2002. Forum shopping in international environmental law: the IWC, CITES, and the management of cetaceans. *Ocean Develop. &and Int'l L.*, 33(1): 30; Molenaar, E.J. 2001. CCAMLR and southern ocean fisheries. *Int'l J. Marine & Coastal L.*, 16(3): 473 n. 43; Nichols, P.M. 1996. Corruption in the World Trade Organization: discerning the limits of the World Trade's Organization. *N.Y.U. J. Int'l L. & P.*, 28(4): 748 n. 124; and Vice, D. 1997. Implementation of biodiversity treaties: monitoring, fact-finding, and dispute resolution. *N.Y.U.J. Int'l L. & P.*, 29(4): 581 n. 18, 582 n. 20, and 609 n. 181.

[117] See, e.g. Burns, W.C. & Mosedale, C.T.D. 1997. European implementation of CITES and the proposal for a Council Regulation (EC) on the protection of species of wild fauna and flora. *Geo. Int'l Envtl. L. Rev.*, 9(2): 401 n. 96, stating: "With the creation of 200 mile Exclusive Economic Zones as part of the negotiation of the United Nations Convention on the Law of the Sea, these areas do not appear to be beyond the jurisdiction of any State."

[118] Three previous drafts had already been circulated to governments in September 1967, August 1969 and March 1971.

[119] Plenipotentiary conference to conclude an international convention on trade in certain species of wildlife, held at Washington, United States of America, 16 February–3 March 1973 (hereinafter CITES, *travaux préparatoires*), Working Paper. Doc. 3, 21 November 1972, p. 3. Hereinafter IUCN Working Paper.

[120] CITES, *travaux préparatoires*. Memorandum concerning the working paper for the endangered species conference containing the text of draft convention on international trade in threatened species of wildlife. Submitted by the International Union for Conservation of Nature and Natural Resources. Doc. 4, 10 November 1972, p. 3.

the conference.[121] These opposing views led the Chairman to rule that the discussion in plenary on this point should be delayed until more progress had been made.[122] The plenary discussion on this point resumed a week later, but the positions remained diametrically opposed.[123] This time the Chairman ruled that an ad hoc subcommittee would be established to try to solve the issue.[124] Another week passed before the Chairman could finally announce that an agreement had been reached, resulting, with minor drafting changes later, in the present form of Art. 1 (e).[125]

As explained below,[126] the final breakthrough with respect to the inclusion of marine species in the founding document of CITES is closely linked to the inclusion of two new paragraphs, namely 4 and 5, into Article XIV of the IUCN Working Paper, which served as the basis for the discussions in 1973. This carefully crafted compromise, suggested by Australia, linked the incorporation of marine species to provisions detailing the effect of CITES on already existing international agreements, and proved key to finally quieting the objections of those who opposed the inclusion of marine species in the framework convention.

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[121] See, e.g. the opening statements of the United Kingdom (against), the United States of America (in favour), Canada (in favour), CITES, *travaux préparatoires*. Summary record for the second plenary session, Monday, February 12, 1973. Doc. SR/2 (Final), p. 3; and Japan (against), CITES, *travaux préparatoires.* Summary record for the third plenary session, Tuesday, February 13, 1973. Doc. SR/3 (Final), 24 February 1973, p. 3. See also the statements submitted by Kenya (in favour), CITES, *travaux préparatoires.* Introduction from the sea. Statement submitted by the delegation of Kenya. Doc. 12, 21 February 1973, p. 1, and Sweden (in favour), CITES, *travaux préparatoires*. Introduction from the sea. Statement submitted by the Delegation of Sweden. Doc. 14, 23 February 1973, p. 1. Japan submitted one proposed amendment to the Working Paper and made two more statements for the record: CITES, *travaux préparatoires*. Proposed amendment to the working paper. Doc. 3. Submitted by the delegation of Japan. Doc. PA/Gen/1, 17 February 1973, p. 1 (its content simply read: "Delete all the provisions relating to 'introduction from the sea' throughout the present draft"); General statement by Mr T. Yamazaki, delegate of Japan, February 13, 1973. Doc. PR/10, 21 February 1973, p. 2; and Statement by Mr T. Yamazaki, Delegate of Japan on "Introduction from the sea". Doc. PR/11, 21 February 1973, 3 pp.

[122] CITES, *travaux préparatoires*. Summary record of the third plenary session, Tuesday, February 13, 1973. Doc. SR/3 (Final), 24 February 1973, p. 3.

[123] CITES, *travaux préparatoires*. Summary record of the tenth plenary session, Tuesday, February 20, 1973. Doc. SR/10 (Final), 5 March 1973, pp. 1–3. Two opposing blocs formed: one supporting the position of the United States of America, the initiator of this inclusion, consisting of Canada, the Federal Republic of Germany (see also CITES, *travaux préparatoires*. Position regarding the inclusion of "introduction from the sea" into the Convention. Submitted by the Delegation of the Federal Republic of Germany. Doc. PA/Gen/2, 20 February 1973, p. 1), Kenya and Sweden, and another bloc the othersupporting the strongly negative attitude of Japan, consisting of France, South Africa, the United Kingdom–though its position shifted over time, (see also CITES, *travaux préparatoires*. Comments and suggested improvements to Doc. PA/I/11 – introductions from the sea. Submitted by the Delegation of the United Kingdom. Doc. PA/I/12, 19 February 1973, p. 1). Mexico stated that even though it had first supported Japan, it was later inclined to follow the United States' approach. The United States' group basically argued that three-fourths of the world's surface would otherwise be excluded, while Japan's group emphasized that unnecessary duplication with other conventions would result.

[124] CITES, *travaux préparatoires*. Summary record for the tenth plenary session, Tuesday, February 20, 1973. Doc. SR/10 (Final), 5 March 1973, p. 4.

[125] CITES, *travaux préparatoires*. Summary record of the eighteenth plenary session, Tuesday, February 27, 1973. Doc. SR/18 (Final), 6 March 1973, p. 1.

[126] See chapter VII, C, a below.

A. The term "introduction"

The difficulties which have surfaced in the practice of States with respect to this term mainly touch upon two different aspects. The first question, put in simple terms, is whether introduction occurs when a fishing vessel takes a specimen of a species of fish included in Appendices I or II of CITES on board, or whether introduction only occurs when the fish is landed in the port of one of the member States. A second question is whether, after "introduction from the sea", shipping to another member State constitutes export, or re-export.

a) Flag State versus port State competence

i. Theoretical analysis

As to the first question, a literal reading of the convention conveys the impression, by means of the word "transportation into," that the founders of CITES had the second alternative in mind when drafting the convention.[127] This point of view is found in the specialized legal literature.[128] It is also held by the former Secretary-General of CITES.[129] This perspective seems to fit logically into the overall set-up of CITES. Since implementation is left to the member States,[130] border controls constitute a quintessential element of the system.[131] Nevertheless, specifically with respect to commercially-exploited aquatic species, the

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[127] One might note that Council Regulation (EC 338/97), note 45 above, changed the definition of "introduction from the sea" by not using the words "transportation into". See Art. 2 (e): "'Introduction from the sea' shall mean the introduction into the Community of any specimen which was taken in, and is being introduced directly from, the marine environment not under the jurisdiction of any State, including the air-space above the sea and the sea-bed and subsoil beneath the sea." Nevertheless, splitting up the actions of taking and introducing produces a similar result. Reading this definition together with other definitions contained in the same article, such as "Member State of destination" (Art. 2 (h)) or "trade" (Art. 2 (u)) leaves the same impression. This regulation entered into force on 1 June 1997. It has been amended onat several occasions, the last time by Commission Regulation (EU 709/2010), note 45 above. These definitions, however, remained unchanged.

[128] D.S. Favre. 1989. *International trade in endangered species: a guide to CITES*, p. 89, Dordrecht, The Netherlands, Nijhoff.

[129] Wijnstekers, note 43 above, p. 24, stating: "There has been some discussion about whether the boarding of specimens of a vessel is considered to be an introduction from the sea. I have always been of the opinion that this was not intended to be the case. 'Transportation into a State' is clearly something different from 'entering the territory of a State' and I therefore believe that a specimen is only introduced from the sea when it is landed." This personal opinion was not included in the previous version of this book, which appeared in 2001.

[130] As already emphasized, CITES starts from the premise that States are the best protectors of their own wild fauna and flora. See note 38 above. It should therefore come as no surprise that this convention stands out amongst other multilateral environmental agreements in that it lacks specific provisions dealing with the development of compliance control procedures. See Reeve, R. 2007. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). *In* G. Ulfstein, T. Marauhn & A. Zimmermann, eds. *Making treaties work: human rights*, environment and arms control, p. 134, 136, Cambridge, UK, Cambridge University Press.

[131] See CITES. Conf. 10.30 & 10.118 Control and checking of shipments of CITES specimens. (available at www.cites.org/eng/dec/valid12/10-30more.shtml), stating "In order to improve enforcement, Parties should take the necessary measures to develop a comprehensive strategy for border controls, audits and investigations ...." This decision is no longer in effect.

argument has been made that certificates for the introduction from the sea of Appendix II species could be issued by the Management Authority of the flag State in certain circumstances.[132] Since the flag State is often in a better position to ascertain whether the vessel in question was allowed to fish for the species harvested under its national law as well as by RFMOs to which the flag State may be a party, such a scheme would be more in line with contemporary international agreements, such as the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement.[133]

Placed in a broader context, this question seems to reflect the duality of flag and port State jurisdiction in the enforcement of fishing activities taking place beyond national jurisdiction. If the 1993 FAO Compliance Agreement indeed focuses on flag State implementation, the 1995 UN Fish Stocks Agreement diversifies and also includes and emphasizes the use of port-state jurisdiction in the area of fisheries.[134] The initiatives taken afterwards by FAO in this particular direction seem to confirm this trend.[135] The newly adopted agreement on port State measures especially stands out in this respect.[136] This document, which still recognizes the primary responsibility of the flag State, nevertheless builds on port States' jurisdiction to provide an effective economic tool to enforce international fisheries management rules.[137] Europe is also moving in a similar direction.[138] One might conclude that the founders of CITES might well have created an *avant-garde* system for the regulation of "introduction from the sea" which has simply remained dormant for a good number of years because most commercially exploited aquatic species had been kept outside of the system. It is therefore submitted that, as far as introduction from the sea is concerning CITES, port State jurisdiction offers an added boost in order to arrive at a more efficient system.

ii. State practice within CITES and FAO

Nevertheless, it was at the insistence of the expert from the United States of America that the FAO consultation held on the subject in 2004 added to the general conclusion, asserting the central role played by the coastal State in this respect, that "the use of the flag State could be useful from a practical point of view in some cases."[139] This country later the same year

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[132] CITES. Thirteenth meeting of the Conference of the Parties, Bangkok, Thailand, 2–14 October 2004. Interpretation and implementation of the Convention, trade control and marking issues, introduction from the sea: interpretation and implementation of Article I, Article III, paragraph 5, and Article IV, paragraphs 6 and 7. Proposal by the United States of America. Doc. 41, pp. 2–3, paras 9–13 (available at www.cites.org/eng/cop/13/doc/E13-41.pdf). Hereinafter CoP 13 Doc. 41.

[133] Both agreements focus on the flag State, even though the latter implies other actors as well. See note 8 above.

[134] Franckx, note 8 above, pp. 3–6.

[135] T. Lobach, T. 2002., Port State Control of Foreign Fishing Vessels. *In* FAO Legal Papers Online #29, pp. 3–6 (available at www.fao.org/Legal/prs-ol/lpo29.pdf).

[136] 2009 FAO Port State Measures Agreement, note 9 above.

[137] Idem, recitals 3 and 2 respectively.

[138] European Community. Commission Regulation EC 1010/2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. 22 October 2009, pp. 5–41.

[139] FAO. Report of the expert consultation on legal issues related to CITES and commercially-exploited aquatic species. FAO Fisheries Report No. 746. FAO Doc. FIR/R746 (EnN), p. 4 (also available at http://www.fao.org/docrep/007/y5807e/y5807e00.HTM). Because the report does not name countries, this is based on the recollection of the present author, who together with the expert from the United States of

further elaborated this reasoning by introducing a draft resolution on the interpretation and implementation of the notion "introduction from the sea".[140] With respect to commercially exploited aquatic species, the resolution argued that certificates for the introduction from the sea of Appendix II specimen of species could be issued by the Management Authority of the flag State of the vessel that caught the specimen, if the Management Authority of the State of first landing had previously so agreed with the Management Authority of the flag State. If not, the former would remain competent to issue these certificates.[141] This proposal was not acted upon at that time since the issue was believed to be in need of further study.

Such study was undertaken at a workshop organized in Geneva in late 2005. At this time, myriad possibilities were advanced as to how one should interpret "transportation into a State". One group considered the port State to be competent to issue the introduction from the sea certificate under the CITES; a second group believed the flag State to be competent;[142] a third group designated the port State as being in the default position, to be occasionally complemented by the flag State on the basis of a previously concluded agreement with the port State; a fourth group was of the opinion that a distinction needed to be made with regard to the Appendix in question, in that the port State would be competent for Appendix I listings whereas either the port or the flag State could be competent for Appendix II listings; a fifth group favoured the involvement of the port and the flag States, but articulated a distinct understanding of the different steps in the overall process; and a sixth group proposed that competent RFMOs were to be considered as the competent management authority to issue certificates for introduction from the sea.[143] A similar division existed with respect to the competence for making the required non-detrimental finding.[144]

Given the divergent positions of the participants, the workshop was obliged to conclude that further work on this issue remained.[145] Contrary to the "from the sea" issue, where a draft resolution for adoption at the next Conference of the Parties had been agreed upon,[146] only a draft decision was proposed by the CITES Secretariat on the issue of "introduction" for adoption at the June 2007 Conference of the Parties, held at The Hague, The Netherlands.[147] The draft decision only directed the Standing Committee to continue its work. As can be inferred from the analysis of the relevant CITES decisions already made above, some of

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America, served as Rapporteur of this expert consultation (idem, p. 1).

[140] Cop. 13 Doc. 41, note 132 above, pp. 2–3.

[141] Idem, p. 2.

[142] This is also the preferred option of a study undertaken jointly by the Wildlife Trade Monitoring Network (TRAFFIC) and the Australian National Centre for Ocean Resources and Security (ANCORS). See Meere, F., Geen, G., Hanich, Q., Lack, M., Sant, G. & Tsamenyi, M. 2008. CITES 'introduction from the sea' – a practical way forward: proceedings of a joint TRAFFIC/ANCORS Workshop. *TRAFFIC Bulletin*, p. 135 (also available at www.traffic.org/traffic-bulletin/traffic_pub).

[143] CITES 2005 Workshop, note 69 above. For the report of that Workshop, see CITES, Notification to the parties concerning introduction from the sea, 6 April 2006. Notification no. 2006/023, pp. 6–7 (available at www.cites.org/eng/notif/2006/E023.pdf). Hereinafter cited as CITES 2005 Report.

[144] Idem, pp. 7–8.

[145] Idem, p. 11.

[146] See note 233 below.

[147] CITES 2005 Workshop Report, note 143 above, p. 26.

which are still applicable, this particular issue remains on the CITES agenda at present.[148] A glance at the latest document prepared by the Secretariat for the last Conference of the Parties held at Doha, Qatar, in 2010, clearly indicates that the positions of parties have hardly converged.[149]

b) Export versus re-export

The second question is whether after "introduction from the sea" an export or re-export permit is required if the state of introduction intends to transship specimens of listed species to another contracting party. Provisions for each permit type require distinct criteria, with export permits always requiring somewhat more stringency than re-export.[150] Despite the fact that the CITES system places the essense of the regulatory power on the export side of the coin,[151] in cases of introduction from the sea, the State of introduction will normally be the same as the State of export or re-export. Therefore, the practical consequences of this difference seem rather minimal because the scientific authority of that state will already have been involved in advising that the introduction of both Appendix I and II species will not be detrimental to the survival of other species prior to the introduction itself.[152]

B. The term "from the sea"

When read together with the definition given by CITES itself, which limits this concept to the parts of the oceans beyond national jurisdiction,[153] the main issue to be addressed under this section relates to the fundamental problem of the appropriate time frame to be taken into consideration when interpreting that definition. Is the situation *ex nunc* determining, or is the situation *ex tunc*, meaning the time frame surrounding the conclusion of CITES? Given the fundamental changes which have occurred in the international law of the sea between 1973 and today, the practical importance of this question can hardly be overestimated. In international law the answer to this question is provided by the doctrine of intertemporal law.[154] It seems therefore appropriate to analyse this doctrine in a general manner before trying to apply it to CITES. A further differentiation will be made with respect to CITES between the convention itself and the later practice developed by the Conference of the Parties.

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[148] See note 69 above.

[149] CITES. Fifteenth meeting of the Conference of the Parties, Doha, Qatar, 13–25 March 2010. Interpretation and implementation of the Convention; trade control and marking; introduction from the sea (Doc. 27), 26 pp. (available at www.cites.org/eng/cop/15/doc/E15-27.pdf).

[150] Compare CITES, Arts III (2 & 4), IV (2 & 4), and V (2 & 4) relating to Appendix I, II or III species respectively. With respect to Appendix I and II species, the most important for present purposes, the critical difference is that the scientific authority of the State of re-export will not have to advise that such re-export will not be detrimental to the survival of that species, as distinguished from the CITES rules relating simply to export for those categories.

[151] See note 44 above.

[152] CITES, Arts III (5)(a) and IV (6)(a) concerning Appendix I and II species respectively.

[153] See note 59 above.

[154] This concept has been defined in Salmon, note 5 above, p. 388, as: "Ensemble de principes ou de règles qui, dans un ordre juridique, précisent les conditions d'application des normes dans le temps, tant pour déterminer à quel moment une norme donnée est applicable que pour déterminer l'époque à laquelle il faut se placer pour en déterminer le sens, lorsque ce dernier a évolué."

a) In international law generally

The intertemporal law regulates the application in time of legal acts and rules in international law.[155] To this day, the proceedings of the *Institut de droit international* remain a basic point of reference in this domain. In August 1975 this scientific body adopted a resolution based on the reports of its rapporteur, Max Srensen, concerning the issue of intertemporal law. The basic rule, to be found in paragraph 1, reads as follows:

> "A défaut d'une indication en sens contraire, le domaine d'application dans le temps d'une norme de droit international public est déterminé conformément au principe général de droit, d'après lequel tout fait, tout acte et toute situation doivent être appréciés à la lumière des règles de droit qui en sont contemporaines."[156]

As clearly indicated by the introductory words, States are free to depart from this rule in common agreement.[157]

The 1928 Islands of Palmas (Miangas) Case before the Permanent Court of Arbitration is often referenced with respect to this issue.[158] After having stated the above-mentioned rule,[159] the sole Arbitrator in this case continued his reasoning in the following way:

> "However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be efficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical."[160]

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[155] See P. Tavernier. 1970. *Recherches sur l'application dans le temps des actes et des règles en droit international public (problèmes de droit intertemporel ou de droit transitoire)*, Paris, France, Librairie générale de droit et de jurisprudence, 351 pp.

[156] Institut de droit international. 1975. *Annuaire de l'Institut de droit international*, 56: 536–541 (the French text is authoritative). The English translation reads as follows: "Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it." Hereinafter 1975 IDI Resolution. For the preliminary as well as the final report of the rapporteur, containing a wealth of information, see Institut de droit international. 1973. *Annuaire de l'Institut de droit international*, 55: 1-116.

[157] This rule, in other words, does not form part of *ius cogens*. A special paragraph was devoted to it in the resolution of the *Institut de droit international* just mentioned. See 1975 IDI Resolution, para. 4.

[158] Island of the Palmas (Miangas) Case. *Rep. of Int'l Arb. Awards*, 2(1949): 829–871.

[159] Idem, p. 845. The case concerned conflicting sovereignty claims between the Netherlands and the United States of America over a particular island. The United States of America relied on Spain's cession to the United States after the American-Spanish War in 1898. The Netherlands, on the other hand, relied on the peaceful display of authority during the period following this cession. The Arbitrator stated that the Spanish claim based on discovery, which the United States argued to have acquired by means of the cession, had to be judged on the basis of the international law as it existed in the 16th century when the discovery was made.

[160] Idem, pp. 839–845, where these ideas are further developed. In other words, it was necessary according to the Arbitrator to find out whether the United States still complied with the requirements of international law as they existed at the time of the cession, i.e. 1898.

Even at the time of the rendering of this judgment, one could hear strong warnings concerning the dangerous implications such reasoning might have,[161] and such critical readings of the second part of the judgment of 1928 still persist today. As a former President of the International Court of Justice warned:

> "Some have interpreted this second limb as providing that a right, even if lawfully obtained by reference to the law of the era, will be lost if a later rule of international law evolves by reference to which the basis of the 'right' would no longer be lawful. But to give such an understanding to the second limb of the Huber *dictum* would often wipe out the legal consequences of the first. Our understanding of it should flow from the realisation that it was a *dictum* offered in the context of establishing and maintaining territorial title… It has, however, been read in the most remarkable extensive fashion, as providing obligatory rules in circumstances that it never addressed, with consequences that it never intended."[162]

The better conclusion is that the basic rule formulated by the 1975 IDI Resolution still remains valid today.[163] Besides the derogations agreed upon by the parties,[164] there are certain types of agreements that have been held to form automatic exceptions to the rule. These mostly concern human rights instruments and provisions in conventions through which States subject themselves to the jurisdiction of an international court or tribunal.[165] Additionally, concepts or generic terms embodied in treaties have been said to have a tendency to evolve with time.[166] But in its 1978 judgement on the jurisdiction in the case between Greece and Turkey relating to the Aegean Sea, the International Court of Justice clearly stated that the transfer of property rights was not covered by this exception relating to the use of generic terms.[167] The particular case, which formed the basis for the Court to make this assessment, even though unsuccessfully relied upon by the Greek government *in casu*, is nevertheless worth mentioning because of its particular relevance to the issues under consideration.

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[161] Jessup, P.C. 1928. The Palmas Island Arbitration. *Am. J. Int'l L.*, 22(4): 739–740.

[162] Higgins, R. 1997. Time and the Law: International Perspectives on an Old Problem. *Int'l & Comp. L.Q.*, 46(3): 516.

[163] See, e.g. R.Y. Jennings, & A.D. Watts, eds. 1992. *Oppenheim's international law*, Vol. 1, pp. 1281–1282, London, UK, Longman, where further references to the literature can be found in note 31. These authors formulate the rule of interpretation as follows: "[A] juridical fact must be appreciated in the light of the law contemporary with it. Similarly, a treaty's terms are normally to be interpreted on the basis of their meaning at the time that the treaty was concluded, and in the light of circumstances then prevailing."

[164] See note 157 above.

[165] Higgins, note 162 above, pp. 516-518. See also Elias, T.O. 1980. The doctrine of intertemporal law. *Am. J. Int'l L.*, 74(2): 285, concluding that the second limb will always have to be applied with great care.

[166] Higgins, note 162 above, p. 518. See also Jennings & Watts, note 163 above, p. 1282. The 1975 IDI Resolution, note 156 above, already provided this exception in its para. 4: "Lorsqu'une disposition conventionnelle se réfère à une notion juridique ou autre sans la définir, il convient de recourir aux méthodes habituelles d'interprétation pour déterminer si cette notion doit être comprise dans son acception au moment de l'établissement de la disposition ou dans son acception au moment de l'application. Toute interprétation d'un traité doit prendre en considération l'ensemble des règles pertinentes de droit international applicables entre les parties au moment de l'application."

[167] Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgement, *I.C.J. Reports 1978*, p. 33, para. 77.

The *Petroleum Development Ltd v. Sheikh of Abu Dhabi* case concerned a concession agreement in which the Sheikh had granted the oil company the right to explore and exploit the oil in its territory.[168] The case concluded before the continental shelf notion had crystallized in international law and the company later argued that the agreement automatically covered the continental shelf once this notion became part of international law. Lord Asquith, disagreeing with this line of reasoning, sustained his position by arguing that

> "it would seem a most artificial refinement to read back into a contract the implications of a doctrine not mooted till seven years later."[169]

b) With respect to CITES in particular

i. Analysis based on the founding document

The object and purpose of CITES do not seem to warrant the automatic exception mentioned above.[170]

However, the question needs to be addressed as to whether, when drafting the convention, the parties agreed between themselves to make a derogation to the rule that the law at the time of signature prevails. Consider the last paragraph of the CITES article on the effect on domestic legislation and international conventions:

> "Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction."[171]

This paragraph has been argued by some to justify such a derogation from the normal rule discerned above, for it would:

> "anticipate the development of an agreement such as UNCLOS in the process of the codification and development of the international law of the sea."[172]

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[168] 1951. I.L.R., 18: 144. Hereinafter 1951 Abu Dhabi Case.

[169] Idem, p. 152, as mentioned by Higgins, note 162 above, p. 519.

[170] See notes 165–166 above. The use of the concept of jurisdiction in Art. I (e) of CITES seems to be fully covered by the "territory" argument as explained in the 1951 Abu Dhabi Case. See notes 168–169. Indeed both the concepts of territory and jurisdiction are intimately linked to state sovereignty. See M.N. Shaw. 2008. *International law*, pp. 487 and 645, Cambridge, UK, Cambridge University Press .

[171] CITES, Art. XIV (6).

[172] CITES, Eleventh Conference of the Parties, Gigiri, Kenya, 10–20 April 2000, Interpretation and implementation of Article III, Paragraph 5, Article IV, Paragraphs 6 and 7 and Article XIV, Paragraphs 4, 5 and 6, relating to introduction from the sea, proposed by Australia. Doc. 11.18, p. 2, para. 10 (available at www.cites.org/eng/cop/11/doc/18.pdf). Hereinafter Doc. 11.18. The relevant paragraph of the draft resolution proposed by this country reads: "RECOGNIZING that Article XIV, paragraph 6, of the Convention addresses the relationship between the Convention and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and that the provisions of UNCLOS concerning areas beyond national jurisdiction are relevant to the interpretation and implementation of the provisions of the Convention relating to introduction from the sea." Idem, p. 9.

This would imply that the phrase "the marine environment not under the jurisdiction of any State"[173] must be interpreted in line with LOSC, *i.e.* excluding the EEZ.[174] In its comments to this draft resolution,[175] which the CITES Secretariat considered unnecessary since it doubted whether the problem that the draft resolution tried to solve existed,[176] the Secretariat did not touch upon this particular issue.[177] Nevertheless, in his book on the functioning of CITES, the former Secretary-General of CITES enigmatically states with regard to Article XIV (6):

> "This provision is of relevance to the introduction of specimens from the sea as defined in Article I (e)."[178]

The question therefore is whether indeed Article XIV (6) holds the clue for the proper interpretation of the definition of the term "introduction from the sea" as found in Article I (e).

A textual interpretation of this article based on the ordinary meaning to be given to the terms[179] seems to indicate that there is a definite one-way direction in the obligation not to exhibit prejudice imposed on CITES to the advantage of the negotiations leading up to LOSC.[180] Nothing in CITES, in other words, could have an influence, positively or negatively, on the development of the law of the sea, which in 1973 was on the verge of being renegotiated at the third United Nations Conference on the Law of the Sea (UNCLOS III).[181] Indeed, the CITES contracting parties were very much aware of the fact that the General Assembly of the United Nations had just requested the Secretary-General of that organization to convene the first and second sessions of UNCLOS III,[182] the first of which was planned for later that year.[183] By drafting CITES, in other words, the parties did not want to prejudice the outcome of these negotiations in any way nor did its conclusion tie the hands of the parties with regard to the positions they would be taking during the negotiations at UNCLOS III. This provision does not provide any information on the influence of the outcome of these negotiations, i.e. what influence LOSC might have on CITES. If it did, a similar reasoning would also be logically applied to the second part of Article XIV (6) following the word "nor", which would imply that CITES should be influenced by the unilateral claims any state may wish to make in the future concerning the law of the sea and the nature and extent of their jurisdiction. It is believed that very few States would be willing to subscribe to such a proposition.

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[173] CITES, Art. I (e), as already cited note 59 above.

[174] Doc. 11.18, note 172 above, p. 2, para. 11, and p. 9.

[175] This draft resolution was not adopted, but resulted in the formation of a working group, chaired by Australia. CITES. Summary report of committee II of the Conference of the Parties held at Gigiri, Kenya, in 2000, p. 7, para. 18 (available at www.cites.org/eng/cop/11/other/Com_II.pdf). Hereinafter 2000 Summary Report of Committee II.

[176] Idem, p. 4, para. A.

[177] Idem, pp. 4-5.

[178] Wijnstekers, note 43 above, p. 356.

[179] 1969 Vienna Convention, Art. 31 (1).

[180] See also the argument developed in note 192 below.

[181] This conference lasted from 1973 until 1982 and finally resulted in the adoption of LOSC.

[182] GA Res. 3029 (XXVII), 18 December 1972.

[183] The first session of UNCLOS III was held from 3–14 December 1973.

This interpretation is further sustained when the terms of Article XIV (6) are interpreted in a broader context. The latter, as just described in the previous paragraph, was not peculiar to CITES, but was in fact a problem encountered by many conventions, relating in one way or another to the law of the sea, drafted during this long period of UNCLOS III negotiations, the outcome of which, it should be remembered, remained highly unpredictable until the very end of the process. It should therefore not come as a surprise that the formula used in Article XIV (6) is not unique to CITES. In fact, it represents a standard clause which was entirely, or at least very closely, reproduced in many other agreements that touch upon law of the sea issues and which were concluded in this period of high uncertainty in this particular area of international law.[184] Reference can be made to the following examples:[185]

- the 1976 Convention on the Protection of the Mediterranean Sea against Pollution.[186] Article 3 (2) contains an almost identical provision;[187]
- the 1977 Convention for the Safety of Fishing Vessels.[188] Article 8 contains an almost identical provision;[189]
- the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers.[190] Article V (4) contains an almost identical provision;[191]
- the 1979 Convention on Maritime Search and Rescue.[192] Article 2 (1) contains an almost identical provision;[193]
- the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS).[194] Article XII (1) contains an almost identical provision;[195]

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[184] Standard works on the law of the sea published during this time period are extremely scarce.

[185] When comparing provisions in the next paragraph, differences in punctuation are not taken into consideration.

[186] Convention on the Protection of the Mediterranean Sea against Pollution. This Convention, signed on 16 February 1976, entered into force on 12 February 1978.

[187] The words “the present” are replaced by “this”.

[188] Convention for the Safety of Fishing Vessels. (available at www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/seldoc/1977/2521.html?query=%7e+torremolinos). This Convention, signed on 2 April 1977, never entered into force. It was superseded by a 1993 Protocol which, together with the Regulations Annexed to the Convention as modified by the Annex to the Protocol, formed the framework convention (available at wetten.overheid.nl/BWBV0001531/geldigheidsdatum_12-11-2010). Hereinafter 1993 Torremolinos Protocol.

[189] The words “the present” are replaced by “this”.

[190] Convention on Standards of Training, Certification and Watchkeeping for Seafarers. This Convention, signed on 7 July 1978, entered into force on 28 April 1984.

[191] The word “present” in the beginning of the article is deleted.

[192] Convention on Maritime Search and Rescue. This Convention, signed on 27 April 1979, entered into force on 22 June 1985. See Frederick, F.J. & Tasikas, V. 2003. The Tampa incident: IMO perspectives and responses on the treatment of persons rescued at sea. *Pac. Rim L. & Pol’y J.*, 12(1): 157 n. 64, who have relied on this clause in order to ascertain whether the content of this agreement does not impinge upon LOSC, thus indicating the one-way direction in which this provision is intended to work, as mentioned in note 180 above.

[193] The words “the present” are replaced by “this”.

[194] CMS. This convention, signed on 23 June 1979, entered into force on 1 November 1983.

- the 1981 Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region.[196] Article 3 (3) contains an almost identical provision;[197]
- the 1982 Protocol concerning Mediterranean Specially Protected Areas.[198] Article 1 (2) contains an almost identical provision.[199]

Moreover it should be stressed that the copyright for this provision of Article XIV (6) can not even be attributed to the drafters of CITES, for it had already been used in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.[200] It is clear that the founders of CITES took Article XIII of the 1972 London Dumping Convention as the starting point when drafting Article XIV (6) a few months later, for both articles are almost identical.[201] But what is even more noteworthy is that the founding fathers must have knowingly deleted the second sentence which this 1972 London Dumping Convention appended to the formulation of this principle:

> "The Contracting Parties agree to consult at a meeting to be convened by the Organisation after the Law of the Sea Conference, and in any case not later than 1976, with a view to defining the nature and extent of the rights and the responsibilities of a coastal State to apply the Convention in a zone adjacent to its coast."[202]

It is clear from the preceding paragraph that the interpretation of Article XIV (6) must not be strictly tied to CITES, but can be viewed in a larger context given its wide use in other agreements. It is important to note that all these agreements relate to a definite period of 10 years preceding the conclusion of LOSC, roughly corresponding to the UNCLOS III. It is clear therefore that this provision is much more closely linked to the process of UNCLOS III,

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[195] The words "the present" are replaced by "this".

[196] Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region. This Convention, signed on 12 March 1981, entered into force on 5 August 1984. (available at www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/En/TRE000547.txt).

[197] The words "State concerning the law of the sea and" are replaced by "Contracting Party concerning".

[198] Protocol concerning Mediterranean Specially Protected Areas. This protocol, signed on 3 April 1982, entered into force on 23 March 1986.

[199] The words "the present Convention" are replaced by "this Protocol".

[200] 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter. This convention, signed on 29 December 1972, entered into force on 30 August 1975. Hereinafter 1972 London Dumping Convention.

[201] The 1972 London Dumping Convention uses "this" instead of "the present". It also explains why most later agreements differed from CITES on this point. See notes 187, 189, 193, 195 & 199 above. Consulting the *travaux préparatoires* of CITES confirms this. The IUCN Working Paper, which served as the basis for the negotiations, did not contain such a provision (see IUCN Working Paper, note 119 above, p. 18 (Art. XII)). When the United Kingdom, in support of a United States proposal to include present Art. XIV (6), also argued in favour of its inclusion, it specifically referred in its explanation to the 1972 London Dumping Convention. See CITES, *travaux préparatoires*. Comments and suggested improvements to Doc. PA/I/11 – introductions from the sea. Submitted by the Delegation of the United Kingdom. Doc. PA/I/12, 19 February 1973, p. 1, stating: "The suggested additional paragraph to Article XII (or new Article) is the same as that suggested by the USA Delegation in PA/I/11. It has the same source (the Ocean Dumping Convention, 1972) and the same object, of avoiding any prejudice to the work of the Law of the Sea Conference."

[202] 1972 London Duping Convention, Art. XIII.

than to the outcome of it. Once LOSC was adopted in 1982, the use of such a provision became redundant, for its purpose had clearly been fulfilled. Even though LOSC only entered into force in 1994, the use of similar provisions no longer continued, and this despite the fact that even though the law of the sea was not yet settled during that period, and even took some more time thereafter before all geographical regions in the world joined the move towards its general acceptance. This period, which is much longer than that covered by UNLOSC III, did not see a similar development, clearly indicating that this clause had a very precise purpose and did not attempt to ensure that the outcome of the law of the sea developments triggered by this event would find its way into the framework of the CITES convention.[203]

That the latter was indeed not the purpose of an Article XIV (6) style clause can best be illustrated by the fact that the conventions seeking to tackle that particular problem did so by means of a specific provision different from, and in addition to, the one today found in Article XIV (6) of CITES. The 1972 London Dumping Convention tried to provide an answer by obligating the parties to reconvene at a later date to try to decide this issue once the law had crystallized.[204] However, this example was not followed by any of the later agreements listed above.[205]

Another and apparently more fruitful approach was the one followed by the 1973 Convention for the Prevention of Pollution from Ships (MARPOL Convention).[206] In a section entitled "Other Treaties and Interpretation" containing three paragraphs, this convention provided the following after having stated that the 1954 International Convention for the Prevention of Pollution of the Sea by Oil would be superseded after its entry into force:

> 2. Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.
> 3. The term 'jurisdiction' in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention."[207]

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[203] The only exception to this line of argument is the 1993 Torremolinos Protocol. Because UNCLOS III had concluded its work more than 10 years ago, the protocol adapted the provision in question by deleting its first part, but retaining the following: "Nothing in the present Protocol shall prejudice the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction." 1993 Torremolinos Protocol, Art. 8. The exact meaning of this provision is not immediately clear, especially not in a framework convention which focuses on port State control and where the word "jurisdiction", besides in the article just mentioned, is not even used.

[204] 1972 London Dumping Convention, Art. XIII, as already cited note 202 above.

[205] See notes 186–199 above.

[206] MARPOL Convention. This Convention, signed on 2 November 1973, was later absorbed by a 1978 Protocol. Together with the latter, this convention system entered into force on 2 October 1983. Idem, pp. 62-265.

[207] Idem, Art. 9.

Paragraph 3 is a perfect example in practice of the right States have in theory not to subject themselves to the basic rule of intertemporal law.[208] It also indicates how this can be done by means of a simple, concise and clear provision.[209] It can hardly be contested that paragraph 3 is redundant if paragraph 2 already implies that national jurisdiction provided in LOSC determined the content of the MARPOL Convention.[210] Or as recently opined by I. Sinclair, Article 9 (2) of the latter convention

> "does not appear, as such, to give priority to the future Law of the Sea Convention."[211]

This last example relating to the MARPOL Convention also illustrates that specific provisions of the convention could easily have been crafted had the founding fathers of CITES in 1973 really wanted to make sure that the term "introduction from the sea" evolved hand in hand with international law in force at the time of application. Once again, provisions such as the one found in Article 9 (3) of the MARPOL Convention, are not unique. In the 1970s, when States did not know what the international law of the sea would look like in the future, such a clause was indeed a very simple tool to make sure that provisions of a particular convention would be able to evolve with the developing international legal framework.[212] It is noteworthy that this kind of provision is encountered in the post UNCLOS

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[208] See note 157 above.

[209] It is striking that scholars, when arguing about the exact content of the term jurisdiction found in Art. 4 (2) of the MARPOL Convention, do not rely on Art. 9 (2), but only on Art. 9 (3). See, e.g. R.M. MacGonigle & M.W. Zacher. 1979. *Pollution, politics and international law: tankers at sea*, p. 208, Berkeley, USA, University of California Press, writing when this provision merely contained a promise for coastal States; Boyle, A.E. 1985. Marine pollution under the Law of the Sea Convention. *Am. J. Int'l L.*, 79(2): 361 n. 79, arguing that this notion most likely included the EEZ at that time; and Carlson, J. 2001. Presidential Proclamation 7219: extending the United States' Contiguous Zone – didn't someone say this had something to do with pollution? *U. Miami L. Rev.*, 55(3): 504, concluding: "This foresight [i.e. Art. 9 (3)] allows MARPOL 73/78 to be seamlessly integrated into the 'umbrella' LOSC; note that LOSC Article 56(1)(b) uses the term 'jurisdiction' when referring to the scope of authority the coastal State may exercise within its EEZ".

[210] As contended with respect to CITES by those who are of the opinion that Art. XIV (6) implies that the provisions of LOSC concerning areas beyond national jurisdiction are relevant to the interpretation of the term "introduction from the sea" in CITES. See note 172 above.

[211] Sinclair, I. 1995. Preliminary Exposé. *Institute of International Law Yearbook*, Part I, Lisbon Session, 66: 55. But see S.A. Sadat-Akhavi. 2003. *Methods of resolving conflicts between treaties*, pp. 116–117 n. 62, Leiden, The Netherlands, Nijhoff, who finding this view "hardly acceptable". In support of this submission, this author refers back to the 1972 London Dumping Convention, where there is an identical provision, in respect of which the consultative meeting agreed that LOSC should have priority. This argument, however, loses sight of the fact that the 1972 London Dumping Convention contained a separate provision dealing specifically with this problem. See note 202 above. Consequently, the priority of LOSC in this respect seems to result not from the Convention itself, but rather from the later state practice of the parties, which is of course a totally different matter. See C. Redgwell, C. 2006. From permission to prohibition: the 1982 Convention on the Law of the Sea and protection of the marine environment. *In* D. Freestone, R. Barnes and D. Ong eds. *The law of the sea: progress and prospects*, p. 180, 184, Oxford, UK, Oxford University Press, making such a distinction between the two separate provisions to be found in the 1972 London Dumping Convention as well as in the MARPOL Convention.

[212] A similar clause was used by the drafters of the Convention on the Protection of the Marine Environment of the Baltic Sea Area. This Convention, signed on 22 March 1974, entered into force on 3 May 1980. Hereinafter 1974 Helsinki Convention. Annex IV on the Prevention of Pollution from Ships provided in Regulation 3 (5): "The term 'jurisdiction' shall be interpreted in accordance with international law in force at

III period as well. For instance, the convention which superseded the just-mentioned 1974 Helsinki Convention, namely the Convention on the Protection of the Marine Environment of the Baltic Sea Area concluded in 1992,[213] had no difficulty in retaining exactly the same provision.[214]

ii. Analysis based on later state practice of the Conference of the Parties

Next the intertemporal aspects related to the relevant resolutions of the Conference of the Parties need to be briefly addressed in view of the conclusion reached above that these resolutions remain valid tools of interpretation today.[215]

Even though Resolution Conf. 2.8[216] has been repealed, it is important to notice the time frame in which it was adopted. The late 1970s was a period where UNCLOS III was still in development and its outcome far from certain. The statement included in the resolution by the Conference of the Parties that the jurisdiction claimed by States in maritime areas adjacent to their coasts was "not uniform in extent, varies in nature and has not yet been agreed internationally", as incorporated in the preamble of that resolution fully reflected this reality.

On the other hand, the incorporation of these same words in Resolution Conf. 11.4 adopted in 2000[217] appears far less in touch with reality. In that year the Secretary-General of the United Nations, stated:

> "a comprehensive 'constitution for the oceans' dealing with all aspects of man's interaction with the oceans and seas is in place."[218]

With more than three-fourths of the total number of coastal State parties representing all the different regions of the world, a sound argument could have been made that coastal State jurisdiction had indeed been agreed upon internationally. Because this resolution was revised in 2002 without any changes to this particular wording,[219] the contrast only becomes more accentuated as evidenced by the Secretary-General's statement at the occasion of the 20th anniversary of LOSC that the objective of universal participation was looming around the corner.[220]

The only plausible explanation one can advance to justify such an apparent anomaly is that these recitals formed part of the preamble of a resolution which related specifically to cetaceans and the relationship with the International Whaling Commission. An in-depth study undertaken by the present author in 1995 entitled The Limits of International Law

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the time of application or interpretation of this Annex."

[213] Convention on the Protection of the Marine Environment of the Baltic Sea Area. This convention, signed on 9 April 1992, entered into force on 17 January 2000. Hereinafter 1992 Helsinki Convention.

[214] Idem, Annex IV, Regulation 3 (4).

[215] See note 115 above.

[216] See note 85 above.

[217] See note 83 above.

[218] United Nations. Oceans and the law of the sea: report of the Secretary-General. U.N. Doc. A/55/61, New York, United Nations, p. 4, para. 5, 20 March 2000.

[219] See note 83 above.

[220] United Nations. Oceans and the law of the sea: report of the Secretary-General. U.N. Doc. A/57/57, New York, United States, p. 8, para. 3, 7 March 2002.

Concerning the Laws and Regulations a Coastal State May Adopt for Its Exclusive Economic Zone in the Exercise of Its Sovereign Rights to Explore, Exploit, and Conserve and Manage the Living Resources, i.e. the Exploitation of Cetaceans, revealed that tensions do remain in this particular area, as a majority of States oppose the views taken by a minority.[221]

If this is the correct understanding of these recitals, however, their interpretative value in obtaining a correct understanding of the phrase "introduction from the sea" becomes very limited with respect to the possibility that other commercially exploited aquatic species could become listed.

iii. Impact of LOSC

One cannot conclude this analysis of the intertemporal law without having a look at LOSC itself, for this treaty explicitly regulates its relationship with other international treaties. A quick reading of Article 311 (2) could well lead one to conclude that this so-called conflict clause of LOSC subordinates CITES provisions to those of LOSC if the former affect the enjoyment of rights or performance of obligations of States parties under the latter.

However, a more profound analysis shows that the situation is not that simple.[222] To raise but a few issues: Do CITES and LOSC cover the same subject-matter? *Quid* concerning the States that are a party to CITES but not to LOSC?[223] How are the terms of Article 311 (2) to be interpreted in the absence of any clear jurisprudence on the issue? Does CITES adversely affect the enjoyment of rights or the performance of obligations of States parties to LOSC?

The object and purpose of CITES should be emphasized, namely international cooperation for the protection of certain species of wild fauna and flora against over-exploitation through international trade.[224] As argued by R. Churchill and V. Lowe with respect to the Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and its Protocol,[225] a reasoning *per analogiam* could be made with respect to CITES. These authors claim that, even though it is clear that at the time of their conclusion that the term "high seas" did not have to take the EEZ concept into account, this would change if an *ex nunc*

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[221] Franckx, E. 1995. Legal Opinion Commissioned by Stichting Greenpeace, Nederland. 15 January 1995. See also S. Andresen, S. 1995. The international whaling regime: order at the turn of the century? *In* D. Vidas & W. Ostreng, eds. *Order for the oceans at the turn of the century*, pp. 215–228, The Hague, The Netherlands, Kluwer Law International, answering the question in the title in the negative. LOSC did not bring relief either in this respect. See Birnie, P.W. 2006. Marine mammals: exploiting the ambiguities of Article 65 of the Convention on the Law of the Sea and related provisions: practice under the International Convention for the Regulation of Whaling. *In* Freestone, Barnes & Ong, eds. note 211 above, pp. 261–280. This tension recently resulted in the institution of proceeding a case before the International Court of Justice on 31 May 2010: Whaling in the Antarctic (Australia v. Japan).

[222] See chapter VII, B below.

[223] This is an important issue, since a country like the United States of America, one of the main importers of fauna and flora listed by CITES, is as of present not a party to LOSC.

[224] CITES, recital 4.

[225] Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and its Protocol. This convention, signed on 29 November 1969, entered into force on 6 May 1975. This Protocol, signed on 2 November 1973, entered into force on 30 March 1983. Hereinafter Intervention Convention and Protocol.

interpretation were to be applied.[226] These authors continue:

> "Since the EEZ concept did not exist at the time the Intervention Convention and its Protocol were drafted, it would seem not unreasonable to consider that the phrase 'high seas' should be read to mean 'beyond the territorial sea'. This position is reflected in the legislation of a number of States."[227]

Because the inclusion of the EEZ would undermine the very object and purpose of the Intervention Convention and Protocol, one could argue that it also would undercut the effectiveness of CITES. As stressed earlier, CITES lacks jurisdiction over for whatever happens within the boundaries of the member States.[228] Also with respect to CITES, one could argue that "not under jurisdiction of any State" should be read to mean "beyond the territorial sea".[229] Recital 8 of Resolution Conf. 11.4,[230] as based upon recital 3 of Resolution Conf. 2.8,[231] may well be understood as pointing in this direction as well.

c) Settlement of the issue through a resolution of the Conference of the Parties

As the result of the work accomplished during a CITES workshop, held at Geneva, Switzerland, between 30 November and 2 December 2005,[232] and the further refinement through the work of the Standing Committee, the Secretariat was able to draw up a draft resolution for the fourteenth Conference of the Parties in 2007, of which the operational part read as follows:

> "[AGREES that 'the marine environment not under the jurisdiction of any State' means those areas beyond the waters and the continental shelf, comprising the seabed and subsoil, subject to the sovereign rights or sovereignty of any State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea.]
> *Alternative definition proposed by a majority of the SC54 working group:*
> AGREES that 'the marine environment not under the jurisdiction of any State means those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea."[233]

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[226] LOSC, Art. 86, clearly stating that the provisions of Part VII of the Convention (High Seas) "apply to all parts of the sea that are not included in the exclusive economic zone ...."

[227] R. Churchill & V. Lowe. 1999. *The law of the sea*, p. 354, Manchester, UK, Manchester University Press.

[228] A good example illustrating this point concerns the developments that took place within the European Community around the end of the 1990s. By harmonizing the laws of the different European Member States relating to the protection of species of wild fauna and flora by regulating trade, the Regulation abolished the internal borders and stressed the need for stricter controls at the external borders. See notes 45–46 above.

[229] One should remember that the IUCN Working Paper which served as the basis for the CITES negotiations began that way. See note 119 above. An amendment proposed by the United Kingdom even sought to replace "territorial sea" with "the internal waters of States". CITES, *travaux préparatoires*. Comments and suggested improvements to Doc. PA/I/11 – introductions from the sea. Submitted by the delegation of the United Kingdom. Doc. PA/I/12, 19 February 1973, p. 1.

[230] See note 84 above.

[231] See note 85 above.

[232] CITES 2005 Workshop, note 69 above.

[233] CITES. Fourteenth Conference of the Parties, The Hague, The Netherlands, 3–15 June 2007. Interpretation

The alternative definition proposed by the Standing Committee finally carried the day, and the issue was settled by means of Resolution Conf. 14.6, entitled "Introduction from the Sea":

> "TAKING INTO ACCOUNT the CITES Workshop on Introduction from the Sea Issues (Geneva, 30 November–2 December 2005) held pursuant to Decision 13.18 of the Conference of the Parties;
> RECALLING that 'introduction from the sea' is defined in Article I, paragraph e), of the Convention as "transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State";
> RECALLING ALSO that Article XIV, paragraph 6, of the Convention provides that "Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea";
> RECALLING FURTHER that Article III, paragraph 5, and Article IV, paragraphs 6 and 7, of the Convention, provide a framework to regulate the introduction from the sea of specimens of species included in Appendices I and II, respectively;
> RECOGNIZING the need for a common understanding of the provisions of the Convention relating to introduction from the sea in order to facilitate the standard implementation of trade controls for specimens introduced from the sea and improve the accuracy of CITES trade data;
> THE CONFERENCE OF THE PARTIES TO THE CONVENTION
> AGREES that 'the marine environment not under the jurisdiction of any State' means those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea."[234]

Given the legal argument developed above,[235] it is highly unfortunate that the third recital of this resolution still refers to Article XIV, paragraph (6).[236] This is not only unnecessary, but simply wrong as to its substance.

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and implementation of the Convention; trade control and marking issues; introduction from the sea, prepared by the Secretariat. Doc. 33, Annex 1, p. 4 (available at www.cites.org/eng/cop/14/doc/E14-33.pdf).

[234] CITES. Fourteenth Conference of the Parties, The Hague, The Netherlands, 3–15 June 2007, "Introduction from the sea". Conf. 14.6 (available at www.cites.org/eng/res/14/14-06.shtml). This resolution was amended during the next meeting of the parties, but it only added elements, leaving the substance of the issue "from the sea" unchanged. See note 241 below.

[235] See chapter V, B, b above.

[236] However, some authors seem to agree with this proposition. See, e.g. Little, L. & Orellana, M.A. 2004. Can CITES play a role in solving the problem of IUU fishing: the trouble with Patagonian toothfish. *Colo. J. Int'l Envtl. L. & Pol'y*, 16(Yearbook): 94–95.

VI. "INTRODUCTION FROM THE SEA" *DE LEGE FERENDA*

CITES has managed, through the adoption of a resolution by the Conference of the Parties to solve part of the "introduction from the sea" enigma. The wording "from the sea" has received a long-awaited clarification, though from a legal point of view, the resolution could still be improved by deleting the present third recital for reasons explained above.

As far as the "introduction" part is concerned, this has proven to be a much more complicated endeavour. Not so much *de lege lata*, but rather *de lege ferenda*. The involvement of a multitude of actors, whether port States, flag States, or RFMOs, often creates more new problems than it solves. This multitude of actors more often than not raises delicate issues when members of CITES are not parties to these RFMOs.[237] Additionally, if the scientific authorities of countries, whether port or flag States, would like to rely on the scientific expertise of these organisations for the basis of their non-detriment findings, a long list of delicate legal issues comes to the fore.[238] The involvement of FAO in this respect, through the 2006 Memorandum of Understanding concluded with CITES,[239] has been described as problematic in practice based on the short history thus far.[240]

Whatever the preferred solution, keen legal problems are bound to surface. A workable and efficient solution can only be reached through a closer cooperation of these different actors, a solution which in turn might open new avenues for CITES and its parties to reconsider the possibility of listing commercially exploited aquatic species in the future. The amendment of Resolution 14.6 at the occasion of the fifteenth meeting of the parties in Doha, Qatar, in 2010 clearly hinted at this possibility. As it stands today, this resolution reads:

> "TAKING INTO ACCOUNT the CITES Workshop on Introduction from the Sea Issues (Geneva, 30 November – 2 December 2005) held pursuant to Decision 13.18 of the Conference of the Parties and the meeting of the Standing Committee Working Group on Introduction from the Sea (Geneva, 14–16 September 2009) held pursuant to Decision 14.48 of the Conference of the Parties;
> RECALLING that 'introduction from the sea' is defined in Article I,

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[237] E. Franckx, E. 2010. The Exercise of jurisdiction over vessels: legal issues raised by the relationship between CITES, FAO and the UN Convention on the Law of the Sea. *In* E. Franckx &and P. Gautier, eds. *The exercise of jurisdiction over vessels: new developments in the fields of pollution, fisheries, crimes at sea and trafficking of weapons of mass destruction*, p. 57, 78, Brussels, Belgium, Bruylant.

[238] See, e.g. Little & Orellana, note 236 above, pp. 102–103, trying to envisage the application of the CCAMLR catch documentation scheme to CITES members. See also Murphy, J.B. 2006. Alternative approaches to the CITES non-detriment finding for Appendix II species. *Envtl. L.*, 36(2): 554–555, addressing the same difficulties.

[239] CITES-FAO MoU, note 53 above. Under point 6 it is stated: "In order to ensure maximum coordination of conservation measures, the CITES Secretariat will respect, *to the greatest extent possible*, the results of the FAO scientific and technical review of proposals to amend the Appendices, and technical and legal issues of common interest and the responses from all the relevant bodies associated with management of the species in question." Emphasis added.

[240] Sky, note 31 above, pp. 36 and 40. This author emphasizes that recommendations of CITES and FAO often do not correspond and should therefore be harmonized.

> paragraph e), of the Convention as "transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State";
> RECALLING ALSO that Article XIV, paragraph 6, of the Convention provides that “Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea";
> RECALLING FURTHER that Article III, paragraph 5, and Article IV, paragraphs 6 and 7, of the Convention, provide a framework to regulate the introduction from the sea of specimens of species included in Appendices I and II, respectively;
> NOTING that ‘State of introduction’ is not defined in the Convention and that Article III, paragraph 5, Article IV, paragraph 6, and Article XIV, paragraph 5, place certain obligations on the State of introduction;
> DESIRING that both flag States and port States cooperate in a manner that supports and complies with the provisions of the Convention related to introduction from the sea;
> DESIRING ALSO that States consult and cooperate with relevant Regional Fisheries Management Organizations when issuing certificates of introduction from the sea;
> NOTING the progress made through the Food and Agriculture Organization of the United Nations on measures to promote responsible fisheries, in particular, the adoption of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing;
> RECOGNIZING the need for a common understanding of the provisions of the Convention relating to introduction from the sea in order to facilitate the standard implementation of trade controls for specimens introduced from the sea and improve the accuracy of CITES trade data;
> THE CONFERENCE OF THE PARTIES TO THE CONVENTION
> AGREES that ‘the marine environment not under the jurisdiction of any State’ means those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea; and
> RECOMMENDS that Parties respond in a timely manner to a request for information necessary for issuing a certificate of introduction from the sea or verifying the authenticity and validity of such a certificate.”[241]

Recitals 6 and 7 especially, and recital 8 to a lesser degree, stand out as drawing attention to the 2009 FAO Port State Measures Agreement.

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[241] CITES, Fifteenth Conference of the Parties, Doha, Qatar, 13–25 March 2010, “Introduction from the sea.” Conf. 14.6 (Rev. CoP 15) (available at www.cites.org/eng/res/all/14/E14-06R15.pdf).

VII. APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT-MATTER

The central theme when trying to analyse the institutional implications of listing commercially exploited aquatic species in the CITES Appendices in relation to LOSC, the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement, the 2009 FAO Port State Measures Agreement and other international instruments relating to fisheries management, is the application of successive treaties that address the same subject-matter under general international law.[242] This part will first examine the general provisions on the law of treaties, followed by an analysis of the relationship between LOSC and other international agreements in order to uncover whether LOSC had an impact *a posteriori* on the content of CITES. The third topic of discussion will be the relationship between CITES and the other international instruments relative to fisheries management, including the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement and the 2009 FAO Port State Measures Agreement. Since CITES predates most of these agreements, we will focus on the influence of a later treaty on a previous one's treatment of the same subject-matter.

A. The law of treaties

Contemporary international law is characterized by the conclusion of a growing number of treaties. This quite naturally increases the possibility that successive treaties may be dealing with related, or similar, or sometimes even exactly the same, subject-matter, at times even between the same contracting parties.[243] The natural point of departure is the 1969 Vienna Convention. The basic rules contained therein concerning the application of successive treaties relating to the same subject-matter, are as follows:

> "2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
> 4. When the parties to the treaty do not include all the parties to the earlier one:
> a) as between States parties to both treaties the same rule

[242] Indeed, the regulation of Atlantic bluefin tuna on the high seas, seems to be an issue which is covered simultaneously by LOSC, the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement and, once operational, the 2009 FAO Port State Measures Agreement. Moreover, if the resource should become threatened with extinction, CITES could possibly become relevant, as indicated by the first attempt in 1992 by Sweden (see CoP 8, Doc. 8.46 (Rev.), note 18 above) to list this species under the Appendices of that convention. If a dispute should arise between two States that are parties to all these instruments, the question is, which of these instruments, if any, should take precedence.

[243] See, e.g. Shaw, note 170 above, p. 927, indicating that the problem raised by successive treaties is becoming a serious one under present-day international law.

> applies as in paragraph 3;
> b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."[244]

Because very few governments reacted in a critical manner to this draft article when it was first proposed by the International Law Commission, it has been argued that the article reflected pre-existing customary law at the time of codification.[245] On the other hand, three consecutive special rapporteurs of the International Law Commission in charge of this issue all held different positions:[246] Lauterpacht started out by claiming that later treaties should be considered void if their implementation would breach earlier treaty commitments, i.e. the rule of the *lex prior*. Fitzmaurice abandoned this lead, arguing that no priority should be assigned. Finally, Waldock reintroduced the principle of priority into the draft articles, but this time in reverse order by proposing the *lex posterior* rule instead.

Reuter seems to doubt whether Article 30 of the 1969 Vienna Convention today forms part of customary law:

> "Mais, en-dehors ... [d]es déclarations de compatibilité, il n'existe pas 'de principe général de priorité' mais de 'simples directives d'interprétation'."[247]

Others, seem to be in favour of the proposition that Article 30 of the Vienna Convention does form part of customary law.[248]

In the specialized literature, however, Article 30 of the 1969 Vienna Convention has been described as "not entirely satisfactory".[249] For example, the question of how to date a treaty, in order to be able to determine the earlier and later treaty, remains unsettled.[250] The fiction of legislative intent may be of help in this respect, but is certainly not fault-proof.[251] A good number of fundamental problems therefore remain that the article does not resolve.[252]

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[244] 1969 Vienna Convention, Art. 30.

[245] Mus, J.B. 1998. Conflicts between treaties in international law. *Netherlands Int'l L. Rev.*, 45(2): 213.

[246] Idem, pp. 227–231. See also Fox, G.H. 2001. International organizations: conflicts of international law. *Am. Society Int'l L. Proceedings*, 95: 185. Further references may be found in these two sources.

[247] P. Reuter. 1983. *Droit international public*, p. 55, Paris, France, Presses Universitaires de France.

[248] A. Aust. 2007. *Modern treaty law and practice*, pp. 227–228. Cambridge, UK, Cambridge University Press; Mus, note 245 above, p. 213; I.M. Sinclair., 1984. *The Vienna Convention on the Law of Treaties*, p. 98, Manchester, UK, Manchester University Press (available at www.idi-iil.org/idiE/resolutionsE/1995_lis_01_en.pdf). The last author, who served as rapporteur to the *Institut de Droit International*, seems to restate this position with respect to Art. 30 in his 1995 report on the problems arising from a succession of codification conventions on a particular subject, even though some doubts may persist (available at www.idi-iil.org/idiE/resolutionsE/1995_lis_01_en.pdf).

[249] Aust, note 248 above, p. 218; Sinclair, note 248 above, p. 98.

[250] For a thorough analysis, see Vierdag, E.W. 1988. The time of the 'conclusion' of a multilateral treaty: Article 30 of the Vienna Convention on the Law of Treaties and related provisions. *Brit. Y.B. Int'l L.*, 59: 82–103. This author makes a further distinction between conflicts between concrete rights on the one hand, and between abstract norms on the other. Idem, p. 94. See also Mus, note 245 above, pp. 220–222.

[251] For a detailed analysis, see J. Pauwelyn. 2003. *Conflict of norms in public international law: how WTO law relates to other rules of international law*, pp. 367–381, Cambridge, UK, Cambridge University Press.

[252] Or, as concluded by Fox, note 246 above, p. 185: "the failure to fix a precise date would seem to doom

Furthermore, Article 30 of the 1969 Vienna Convention does not give expression to the principle of *lex specialis derogat generali*,[253] which seems nevertheless well established in case law[254] as well as in the specialized literature.[255] But there are still other points of criticism: the question of conflicting obligations towards different States is not covered, regional treaties are not taken into account, *erga omnes* obligations are left out of the picture, and the term "treaty" does not even appear crystal clear.[256]

Whatever the correct answer is, the fact remains that even if Article 30 of the 1969 Vienna Convention were to be considered part of customary international law today, the rules contained in that article remain residual in nature.[257] It remains therefore of the greatest importance to respect the will of the parties, especially when it is reflected in conventional provisions which *expressis verbis* regulate the relationship with other treaties. The International Law Commission has called such provisions "conflict clauses".[258] The following sections will focus on conflict clauses found in a number of global and regional fisheries management conventions.

B. LOSC

Making use of the possibility discussed above under general international law for parties to determine the relationship between a treaty they create and other relevant international agreements,[259] the drafters of LOSC did conceive a specific rule, to be found in Article 311, which regulates this relationship in general. Of specific importance for the present study are the following paragraphs:

> "2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or performance of their obligations under this Convention.
>
> ...

Article 30 to chronic indeterminacy."

[253] This has been defined in the *Dictionnaire de droit international public*, Salmon, note 5 above, p. 652, as: "Principe de solution à un conflit entre une norme générale et une norme particulière, selon lequel la loi spéciale l'emporte."

[254] See idem, for the examples provided there.

[255] Jennings &and Watts, note 163 above, p. 1280.

[256] Sadat-Akhavi, note 211 above, pp. 70–84, also making reference to the difficulty of distinguishing between prior and later treaties.

[257] Sinclair, note 248 above, p. 97. See also Reuter, note 247 above, arguing right from the start of his reasoning that the rules are subjected to what parties may have provided themselves. See also the 1969 Vienna Convention, Art. 30 (2), as reprinted in note 244 above, which precedes the paragraph giving expression to the *lex posterior* principle.

[258] International Law Commission. 1966. Reports of the International Law Commission. *ILC Yearbook*, 2: 214. The following definition is provided: "A clause [in a treaty] intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals."

[259] See note 257 above.

> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention."[260]

Even though paragraph 2 has been said to be derived from Articles 30 (3) and (4) of the 1969 Vienna Convention,[261] it is rather far-reaching and appears to go well beyond those provisions, implying the priority of LOSC in relation to all other treaties already concluded or still to be concluded by States parties to LOSC.[262] The universalism of LOSC has been said to be a relevant factor in applying other related instruments.[263] One author even compared this particular paragraph to Article 103 of the Charter of the UN,[264] since it seeks to prevail over all other treaties concluded in the area of the law of the sea that alter the rights and duties of States parties under LOSC.[265]

This provision is a clear departure from the situation that existed under the four law of the sea conventions of 1958. Not only was there no general rule on the subject, but the only provision addressing the issue had the reverse effect by giving priority to the previously concluded agreements.[266] Consequently, one cannot deny the innovative character of Article 311 (2).

Nevertheless, the conflict clause's practical application is very much tempered in at least two respects. First, the negotiators at UNCLOS III did not want the article to result in automatic abrogations, especially of the many technical treaties adopted under the auspices of the International Maritime Organization, fearing this result might eventually create a legal vacuum.[267] Secondly, concern over too strict an application is alleviated by the provision that LOSC itself can derogate from this rule.[268] This latter provision is relied upon frequently. Indeed, in not less than one sixth of the total number of articles contained in LOSC,

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[260] LOSC, Art. 311.

[261] Oxman, B.H. 1980. The Third United Nations Conference on the Law of the Sea: the ninth session. *Am. J. Int'l L.*, 75(2): 249.

[262] Anon. 1989. Article 311. *In* S. Rosenne & L.B. Sohn, eds. *United Nations Convention on the Law of the Sea*, 1982: a commentary, Vol. 5., p. 243, Dordrecht, The Netherlands, Martinus Nijhoff, arguing that paragraph 2 of this article implies "a measure of priority for LOSC in the sense that it provides a yardstick against which the compatibility of those other agreements is to be measured."

[263] Idem, p. 241. See also Sadat-Akhavi, note 211 above, p. 131, stressing the package deal nature of LOSC, which would be negated if pre-existing treaties would trump the specific provisions constituting an integral part of that package.

[264] This article reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[265] Vukas, B. 1998. The Law of the Sea Convention and the law of treaties. *In* V. Götz, P. Selmer & R. Wolfrum, eds. *Liber amicorum Günther Jaenicke: zum 85. Geburtstag*, p. 649, Berlin, Germany, Springer.

[266] This provision concerns the Convention on Fishing and Conservation of the Living Resources of the High Seas. This Convention, signed on 29 April 1958, entered into force on 20 March 1966. At the time of writing 38 States are party to the Convention. Art 1 (1) reads: "States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations ...."

[267] Sadat-Akhavi, note 211 above, p. 127 n.ote 97.

[268] LOSC, Art. 311 (5), as reprinted in note 260 above.

derogations of this kind are included.[269] Some of them even subtract whole parts of LOSC from the application of the general rule contained in Article 311 (2).[270] For our present purpose, it is important to note that so-called "straddling" stocks,[271] anadromous stocks[272] and catadromous stocks[273] all fall under the application of Article 311 (5), and that with respect to highly migratory species[274] and marine mammals,[275] LOSC mentions cooperation through appropriate international organizations, which in the case of marine mammals is expressly allowed to take more restrictive measures than those provided in the convention itself. Also, Article 116 falls under the application of Article 311 (5) since it rephrases Article 1 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.[276] The vast majority of the commercially-exploited aquatic species which members of CITES might want to protect do actually fall under the rule of Article 311 (5) rather than Article 311 (2) of LOSC.[277]

At least one adjudicatory proceeding has so far been confronted with the application of Article 311 (2) in practice. It concerns the conflict between Canada and France of 1986, concerning a French fishing vessel, *La Bretagne*.[278] The Canadian authorities had refused to grant this vessel an authorization to fish in the Gulf of St. Lawrence. According to Canada, the filleting of fish on board vessels, an activity which it had prohibited on its own vessels, could also be prohibited aboard French vessels on the basis of an agreement concluded between both parties in 1972. The fundamental question of particular concern here was whether the term "fishery regulations" as used in that agreement was restricted to catch

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[269] For a listing, see Anon, note 262 above, p. 240.

[270] See LOSC, Art. 237, excluding the 45 articles of Part XII, Protection and Preservation of the Marine Environment, from its application. For an analysis of this article, see Sadat-Akhavi, note 211 above, pp. 131–133.

[271] LOSC, Art. 63.

[272] LOSC, Art. 66.

[273] LOSC, Art. 67.

[274] LOSC, Art. 64.

[275] LOSC, Art. 65.

[276] See note 266 above.

[277] Since the Conference of the Parties of CITES came to accept that the expression "not under the jurisdiction of any State" excludes the EEZ from falling under the application of CITES (see note 234 above), this becomes particularly relevant. One should indeed remember that most of the so-called high seas species cross the 200-mile limit at some stage of their life cycles and can therefore be considered, biologically, to be "straddling" stocks. See Hayashi, M. 1995. The role of the United Nations in managing the world's fisheries. *In* G. Blake, W. Hildeslay, M. Pratt, R. Ridley, & C. Scholfield, eds. *The peaceful management of transboundary resources*, p. 374, London, UK, Graham and Trotman, stressing this point, and by the same author, note 3 above, pp. 21–22, both of which refer to a study by FAO. 1993. World review of high seas and highly migratory fish species and straddling stocks, Rome, FAO Fisheries Circular 868. Preliminary version. Beyond the field of application of the 1995 UN Fish Stocks Agreement, therefore, not many other living resources may in principle remain on the high seas. See L. Lucchini & M. Voelckel. 1996. *Droit de la mer.*, Vol. 2, p. P. 690, Paris, France, Peédone; Momtaz, D. 1995. L'accord relatif à la conservation et la gestion des stocks de poissons chevauchants et grands migrateurs. *Annuaire Français de droit international*, 41: 681. The 1995 UN Fish Stocks Agreement accords precedence to LOSC in the relationship between these two documents. See note 309 below.

[278] 1986. Tribunal Arbitral institué par le compromis du 23 octobre 1985 entre le Canada et la France: différend concernant le filetage à l'intérieur du Golfe du Saint-Laurent. *Revue Générale de Droit International*, 90: 1986. pp. 713-786. Hereinafter 1986 Award.

regulations, or whether it also covered the processing of fish, especially the filleting at sea by freezer-trawlers. Canada argued that the law had changed substantially between 1972 and 1986 because of UNCLOS III and the signing of LOSC. France opposed this view. Even though both States ratified LOSC well after the judgment,[279] the tribunal was of the opinion that the concepts of the fishing zone, as claimed by Canada, and the EEZ, as claimed by France, as well as the rights exercised therein with respect to the living resources, were equivalent and formed part of international law.[280]

The tribunal explicitly referred to Article 311, but then decided not to apply it. It justified this approach by emphasizing that LOSC had not yet entered into force. Unless the provisions in question reflected customary international law applicable to the parties before it, the tribunal could not take them into account.[281] Since the tribunal was of the opinion that provisions regulating the powers of coastal States in fishery zones or EEZs did not form part of customary international law,[282] it concluded that LOSC did not trump the 1972 Agreement *in casu*. The tribunal moreover reasoned that even if LOSC would have governed the relationship between the two parties to the dispute, *quod non*, the 1972 Convention would have prevailed anyway.[283] Burke, in an unusually sharp criticism of this decision, believed that the rules in question had in the mean time crystallized into customary international law, and therefore had this to say about the decision:

> "The Tribunal ultimately and specifically held that provisions of the LOS Convention are inconsistent with the 1972 Agreement and that the latter prevails!"[284]

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[279] Both countries had signed LOSC before the rendering of the award, but Canada ratified that document only on 7 November 2003, while France ratified it on 11 April 1996.

[280] 1986 Award, para. 49.

[281] Idem, para. 51.

[282] Idem. See also Arbour, J.M. 1986. L'Affaire du chalutier-usine 'la Bretagne' ou les droits de l'État côtier dans sa zone économique exclusive. *Can. Y.B. Int'l L.*, 24(1): 72, stressing this distinction that the tribunal accepted the concept of the EEZ, but not its content codified in LOSC, as forming part of international law; Colliard, C.-A. 1988. Le differend Franco-Canadien sur le 'filetage' dans le Golfe du Saint-Laurent: sentence arbitrale du 17 juillet 1986. *Revue Générale de Droit International*, 92: 285, arguing that there exists a difference in methodology between the approach of the tribunal in this case and the International Court of Justice.

[283] 1986 Award, para. 51. The tribunal stated: "Même si la Convention des Nations Unies sur le droit de la mer faisait actuellement droit entre les deux Parties, le Tribunal note qu'elle ne porterait cependant pas atteinte au régime conventionnel établi par l'Accord de 1972, en raison de la clause contenue dans son article 311, paragraphe 2" before quoting the latter *in extenso*. See also Appolis, G. 1987. La sentence arbitrale du 17 juillet 1986 dans le differend Franco-Canadien relatif au filetage dans le Golfe du Saint-Laurent. *Espaces et Ressources Maritimes*, 2: 209, specifically mentioning this passage; McDorman, T.L. 1989. French fishing rights in Canadian waters: the 1986 *La Bretagne* Arbitration. *Int'l J. Estuarine & Coastal L.*, 4(1): 57, explaining this reasoning by the fact that the tribunal considered that the term management used in LOSC did not include processing. The dissenting opinion of D. Pharand does not touch upon the interpretation of Art. 311 (2). 1986 Award, pp. 757–786.

[284] Burke, W. 1986. Coastal State fishery regulation under international law: a comment on *The Bretagne* award of July 17, 1986 (The Arbitration between Canada and France). *San Diego L. Rev.*, 25(3): 518. According to this author "the decision by the Tribunal in the *La Bretagne* case has little substance that makes it worthy of consideration or adoption. The majority opinion does not merit emulation either for the process of legal analysis, for its approach to treaty interpretation, for its use of prior decision, or for its views about

This tribunal, in other words, even though it specifically addressed Article 311 (2) of LOSC, was not willing to apply it in the case at hand since that convention had not yet entered into force. Nevertheless, authors have implied from the reasoning of the tribunal that, because of this article, LOSC "should be used as the yardstick against which the compatibility of other agreements are to be measured."[285]

As was the case with the 1969 Vienna Convention,[286] one must conclude that LOSC contains a general set of provisions, which seem to apply to a very wide spectrum of different eventualities. However, Article 311 (2) has been criticized for the clumsy manner in which it established priority of LOSC over all other conventions, existing or future.[287] Legal scholars have already predicted that this particular innovative paragraph may well give rise to disputes in the future.[288]

C. CITES and other relevant international instruments relative to fisheries management

a) CITES

Unlike LOSC, CITES shows much more deference to agreements previously concluded by a state party. In general, the convention subordinates itself to any other treaty, already concluded or still to be concluded, by a state party to CITES:

> "2. The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields."[289]

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substantive international law for fisheries" (idem, p. 500); "the opinion and underlying rationale are flawed, deliver general pronouncements which raise serious questions, and reach conclusions unsupported by international law" (idem, p. 502); and "the Award is not reliable authority for the process of treaty interpretation, the substantive positions it holds regarding the specific issues in dispute, or the general implications of the propositions offered in support of its conclusions. The opinion is flawed not only in its general approach to coastal State fishery management authority, but also as a dependable source of guidance for smooth fishery relations between Canada and France" (idem, p. 533).

[285] McLaughlin, R.J. 1997. Settling trade-related disputes over the protection of marine living resources: UNCLOS or the WTO? *Geo. Int'l Envtl. L. R.*, 10(1): 58. See also Anon, note 263 above, p. 243, using almost identical wording. The exact content of the yardstick *in casu* was, however, far from clear. Compare the opinion of the tribunal (note 283 above) with the way others have understood the essence of the case (note 284 above).

[286] See Sinclair, note 248 above, pp. 94-95, who writes: "Indeed, it is their very simplicity which may occasion some concern, given the varying types of situations which they are designed to cover."

[287] Vukas, note 265 above, p. 650. It does not make any distinction between agreements concluded between all parties of two consecutive agreements, and the eventuality that the contracting parties to the two instruments differ.

[288] Anon, note 262 above, p. 243.

[289] CITES, Art. XIV.

Of particular importance for the present study are the specific paragraphs in this article relating to other international treaties already concluded by States parties relating to marine species included in Appendix II:

> "4. A State party to the present Convention, which is also a party to any other treaty, convention or international agreement which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement.
> 5. Notwithstanding the provisions of Articles III, IV and V, any export of a specimen taken in accordance with paragraph 4 of this Article shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement in question."[290]

It is clear that, even in this case, CITES strives to accommodate the existence of such previously concluded instruments into the CITES system. But unlike paragraph 2, paragraphs 4 and 5 only relate to previously concluded agreements.

It might be important here to elaborate on the genesis of these particular paragraphs of Article XIV of CITES in order to clarify the intention of the drafters when including these provisions in the article on international conventions. Although the precursor of Article XIV (2) was already present in the working paper which served as the basis for the conference, the present paragraphs 4 and 5 were not.[291] The inclusion of these two paragraphs was closely linked to the final inclusion of the much-contested concept of "introduction from the sea."[292] It turned out to be the central feature of a compromise formula devised by Australia in order to find some middle ground between those in favour of inclusion of marine species under CITES and those objecting to such inclusion because it would ensure that "marine species not the subject of other international agreements, e.g. dugongs and turtles, would be given protection."[293]

The explanation attached to the Australian proposal stated that its objective was to ensure that other international agreements concerning the survival of marine species would not be adversely affected.[294] According to this proposal, the treaties in question would be listed in an appendix to the convention.[295] Although Japan had proposed the deletion of all references to

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[290] Idem.

[291] IUCN Working Paper, note 119 above, p. 18, concerning Art. XII of these draft articles).

[292] See note 126 above. This point was also developed in some detail by the present author at the occasion of a contribution to the Annual Conference of the Society of Legal Scholars, held at Sheffield, United Kingdom, on 14 September 2004.

[293] CITES, *travaux préparatoires*. Summary record of the tenth plenary session, Tuesday, February 20, 1973. Doc. SR/10 (Final), 5 March 1973, p. 3.

[294] CITES, *travaux préparatoires*. Proposals relating to Article XII of the working paper. Doc. 3. Submitted by the delegation of the Australia. Doc. PA/XII/3, 20 February 1973, p. 1.

[295] Idem.

"introduction from the sea" in the working paper,[296] it nevertheless believed the relationship with other treaties to be an entirely different matter and proposed an amendment of the article dealing with other conventions that explicitly excluded international conservation measures which were already in force.[297] The Japanese proposal would also have listed the relevant agreements in an appendix.[298] The relevant ad hoc committee also retained the idea of a special appendix in its draft, but this proposal did not find its way into the final version of CITES.[299]

This short parenthetical on the *travaux préparatoires* can be concluded by noting that the insertion of paragraphs 4 and 5 of Article XIV is not unrelated to the fact that CITES finally was able to include marine species as a matter of principle within the scope of its application. Even though Japan's concerns clearly related to whaling and it was contemplating only one other convention at the time,[300] the idea of listing such relevant treaties by name in an appendix, which floated for some time during the negotiations, was not retained in the end.

Finally, for the sake of completeness, reference should also be made within the framework of the present study to the paragraph in this article concerning the relationship between CITES and UNCLOS III, namely paragraph 6.[301] As has already been argued in some detail above, this provision is nigh bereft of meaning.[302]

b) 1993 FAO Compliance Agreement

The 1993 FAO Compliance Agreement, unlike CITES and LOSC, does not contain a specific article regulating the relationship between the agreement and other possible treaty obligations of its States parties. Nevertheless, its foundational definition of the term "international conservation and management measures" forms a link with LOSC, because all such measures are to be "adopted and applied in accordance with the relevant rules of international law as reflected in" LOSC, whether they are formalized by global, regional or sub-regional fishery organizations or directly by treaty between the parties involved.[303]

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[296] As already cited *in extenso* in note 121 above.

[297] Statement by Mr T. Yamazaki, delegate of Japan on "introduction from the sea". Doc. PR/11, 21 February 1973), pp. 2–3, indicating: "We have in mind two Conventions at this moment. These are the International Convention for the Northwest Atlantic Fisheries and the International Whaling Convention."

[298] CITES, *travaux préparatoires*. Proposed amendment to Article XII of the working paper. Doc. 3. Submitted by the delegation of Japan. Doc. PA/XII/4, 16 February 1973, p. 1, making reference in the explanation to the same two Conventions.

[299] CITES, *travaux préparatoires*. Article XII. Submitted by ad hoc Committee. Doc. Ad Hoc Cmte./1, 23 February 1973, p. 1, para. 4.

[300] See notes 297–298 above. These were also the only two examples Japan relied on during its oral intervention in plenary. See CITES, *travaux préparatoires*. Summary record of the tenth plenary session, Tuesday, February 20, 1973. Doc. SR/10 (Final), 5 March 1973, pp. 2–3.

[301] As already cited *in extenso* note 171 above.

[302] See chapter V, B, b above.

[303] 1993 FAO Compliance Agreement, Art. 1 (b).

c) 1995 UN Fish Stocks Agreement

This agreement also contains a specific provision entitled "Relation to other agreements". Its content, however, is an exact copy of similar provisions which appeared in LOSC.[304] Reference to what has already been said with respect to Article 311 (2) of LOSC may therefore suffice.[305] One should remember that the content of Article 44 of the 1995 UN Fish Stocks Agreement is quite far-reaching, for it provides that the provisions of this agreement will trump all other agreements, existing or future, not compatible with it and affecting the rights and obligations of other States parties to it. If this seems arguable in LOSC, a convention that has been called the "constitution for the oceans,"[306] its mere "copy and paste" into an agreement that apparently has had much more difficulty in establishing itself as an international standard for the States directly concerned[307] seems to make this line of reasoning somewhat more difficult to sustain.[308]

But in a situation where two agreements claim precedence over all other agreements, as is the case with both LOSC and the 1995 UN Fish Stocks Agreement, delicate problems arise in the relationship between these two instruments themselves because both cannot simultaneously take precedence over the other. This is probably why the 1995 UN Fish Stocks Agreement included a special article outlining its relationship with LOSC.[309]

d) 2009 FAO Port State Measures Agreement

Even though the 2009 FAO Port State Measures Agreement has not yet entered into force, it seems nevertheless appropriate to briefly mention this document because, just like the 1995 UN Fish Stocks Agreement,[310] it contains a specific provision entitled "Relationship with international law and other international instruments."[311] Its overall purpose, however, seems different from the 1995 UN Fish Stocks Agreement.

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[304] The only changes concern punctuation and the replacement of the term Convention by Agreement. 1995 UN Fish Stocks Agreement, Art. 44 (1), (2) and (3) correspond to LOSC, Art. 311 (2), (3) and (4).

[305] See notes 260–288 above.

[306] As coined by the President of UNCLOS III, T. Koh (available at www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf). See also notes 1 (large number of States parties to LOSC) & 218 (comments of Secretary-General of the UN) above.

[307] Edeson, W. 2003. Soft and hard law aspects of fisheries issues: some recent global and regional approaches. *In* M. Nordquist, J. Moore & S. Mahmoudi, eds. *The Stockholm Declaration and law of the marine environment*, p. 172, The Hague, The Netherlands, Martinus Nijhoff Publishers, making a comparison with the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. This agreement also entered duly into force, but was never very effective, nor did it ever reach the threshold necessary to become part of general international law, because some major fishing nations remained outside the system.

[308] See note 7 above (relatively small group of States parties).

[309] 1995 UN Fish Stocks Agreement, Art. 4, which reads: "Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention." For a more detailed analysis of this particular aspect, see Sadat-Akhavi, note 211 above, pp. 117–118.

[310] See note 304 above.

[311] 2009 FAO Port State Measures Agreement, Art. 4.

Instead of providing for general priority over other incompatible agreements,[312] the 2009 FAO Port State Measures Agreement simply states that it

> "shall be interpreted and applied in conformity with international law taking into account applicable international rules and standards, including those established through the International Maritime Organization, as well as other international instruments."[313]

Interestingly, this particular conflict clause, when compared with the others here discussed, for the first time tries to tackle the delicate problem of the agreement's relationship with RFMOs.[314] It provides, first, that parties have the right to adopt more stringent measures in their ports than those provided by the agreement;[315] second, when applying the agreement, parties do not automatically become bound by measures or decisions of RFMOs of which they are not members, nor must they recognize such RFMOs;[316] and third, parties will never be obliged to give effect to measures or decisions adopted by a RFMO if they commenced in a manner contrary to international law.[317]

e) Other international instruments relating to fisheries management

It is not feasible for this chapter to give an exhaustive overview of all the agreements setting up RFMOs despite the fact that this might be the only manner in which to determine the exact legal relationship that exists between each one of them and the above-mentioned treaties and agreements, as well as between the RFMOs *inter se*. A FAO Legislative Study which appeared in 2001 provides a more detailed analysis of a number of these agreements, at least with regard to their relationship with the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement.[318]

Only CCAMLR is addressed here in detail due to the affinity of its catch documentation scheme with that of the CITES permit system.[319] Closer cooperation with CCAMLR was apparently a *quid pro quo* for the Australian withdrawal of its June 2002 proposal to nominate

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[312] See chapter VII, C, c above.

[313] 2009 FAO Port State Measures Agreement, Art. 4 (4).

[314] As far as the difficult relationship between CITES and RFMOs is concerned, see note 237 above.

[315] 2009 FAO Port State Measures Agreement, Art. 4 (1)(b).

[316] Idem, Art. 4 (2).

[317] Idem, Art. 4 (3).

[318] Franckx, note 8 above, 180 pp. The RFMOs covered by this study were CCAMLR, the European Community, the South Pacific Forum Fisheries Agency (FFA), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (hereinafter IOTC), the North East Atlantic Fisheries Commission (NEAFC), the Northwest Atlantic Fisheries Organization (NAFO), the Multilateral High Level Conference (MHLC), and the South East Atlantic Fisheries Organization (SEAFO). See respectively pp. 60–63 (CCAMLR); pp. 73–74 (European Community); p. 78 (FFA); pp. 83–84 (ICCAT); pp. 86–87 (IOTC); p. 95 (NEAFC); pp. 104–105 (NAFO); pp. 117-122 (MHLC); and pp. 131–135 (SEAFO).

[319] Bialek, D. 2003. Sink or swim: measures under international law for the conservation of Patagonian Toothfish in the Southern Ocean. *Ocean Develop. & Int'l L. J.*, 34(2): 128–129. With respect to compatibility issues between both systems, see note 238 above.

the Patagonian toothfish for consideration as a possible Appendix II species.[320] The founding document of CCAMLR was very selective in determining the relationship with other treaties. Given the specific setting in which it was created, a special relationship exists with the Antarctic Treaty.[321] Because membership does not necessarily overlap in all cases, parties to CCAMLR which are not a party to the 1959 Antarctic Treaty are required at least to be bound by the obligations contained in Arts I, V, IV and VI of the latter.[322] Furthermore, such States must acknowledge the special obligations and responsibilities of the so-called consultative parties under the 1959 Antarctic Treaty and commit themselves to observe measures concerning the conservation of Antarctic fauna and flora recommended by these consultative parties.[323] The resources covered specifically exclude whales and seals, since CCAMLR provides:

> "Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals."[324]

The Commission set up under CCAMLR should also, according to its founding document, try to develop cooperation with intergovernmental and non-governmental organizations, of which the International Whaling Commission is, *inter alia*, mentioned by name.[325]

VIII. INTERNATIONAL COOPERATION: CITES AND ITS RELATION TO OTHER TREATIES

A. Listing

The main technique CITES relies on to protect wild fauna and flora from over-exploitation through international trade – the listing of species – is certainly not unique. In fact, it has been described as "a basic technique of fisheries and marine mammal conventions."[326] As such it seems compatible with the modern law of international fisheries which includes a species-based approach, as introduced by LOSC.[327]

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[320] Idem, p. 127. See also notes 23–30 above and note 367 below.

[321] 1959 Antarctic Treaty. This Treaty, signed on 1 December 1959, entered into force on 23 June 1961. At the time of writing 48 States are party to the Treaty.

[322] CCAMLR, Arts III and IV.

[323] CCAMLR, Art. V.

[324] CCAMLR, Art. VI; Sadat-Akhavi, note 211 above, p. 124, explaining this conflict clause by the fact that the prior conventions contain much more detailed provisions for the particulars with which resource they are concerned with.

[325] CCAMLR, Art. XXIII (3).

[326] Birnie, Boyle & Redgwell, note 43 above, p. 663.

[327] F. Orrego Vicuña. 1999. *The changing international law of high seas fisheries*, pp. 31–32, Cambridge, UK, Cambridge University Press.

B. Cooperation with FAO and RFMOs

This section will concentrate on the five other institutions with which CITES has formal cooperation, or is at least in the process of establishing cooperation.

a) FAO

The conflict clauses to be found in CITES, as argued before,[328] show considerable deference to previously concluded agreements. Article VIII of the FAO Constitution, on the other hand, entitled 'cooperation with organizations and persons', seems broad enough to allow for cooperation with convention systems like CITES.[329] Because none of these documents tries to impose itself upon the other, a flexible form of cooperation seems perfectly possible, as evidenced by the recent steps undertaken in this direction which finally resulted in the adoption of a Memorandum of Understanding.[330] As indicated above, this cooperation might not function optimally at present,[331] but given its nascent nature, there is still plenty of room for improvement. The fact that Article V of CITES – which deals with Appendix II and is therefore of particular importance for commercially exploited aquatic species – allows for the possibility of involving "international scientific authorities", certainly helps to frame these initiatives.[332]

b) International Whaling Commission (IWC)[333]

CITES has a very specific conflict clause relating to marine species[334] which grants relief from requirements relating to Appendix II on the condition that the provisions of the other treaty granting protection have been complied with. As has been pointed out, the references to Articles III and V in Article XIV (5) constitute a drafting error, since only Appendix II species can be included.[335] Moreover, the concrete application of the specific conflict clause relating to marine species contained in Article XIV (4-5) is far from simple.[336]

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[328] See notes 289–290 above.

[329] FAO Constitution, Art. VIII (available at www.fao.org/DOCREP/003/X8700E/x8700e01.htm#13).

[330] CITES-FAO MoU, note 53 above. See also note 239 above.

[331] See note 240 above.

[332] CITES, Art. IV (7).

[333] Convention for the Regulation of Whaling, 161 United Nations Treaty Series 72–110. This convention, signed on 2 December 1946, entered into force on 10 November 1948. At the time of writing 88 States are party to this convention. Hereinafter 1946 Whaling Convention.

[334] See note 290 above. As stated there, this conflict clause relating to marine species only applies to already existing agreements.

[335] Wijnstekers, note 43 above, p. 343.

[336] Bowman, M. 2008. 'Normalizing' the International Convention for the Regulation of Whaling. *Mich. J. Int'l L.*, 29(3): 356–358. Bowman notes the absence of Appendix I species in this rule, thus implying that the exemptions provided in paragraphs 4 and 5 of Art. XIV do not apply to them–a remarkable consequence because most of the species protected under the 1946 Whaling Convention are listed in CITES Appendix I. But then again, since most whaling States have formulated reservations to these particular listings in accordance with either Art. XXIII (2) or Art. XXIII (1) *juncto* Art. XV (3), they are exempt from any obligation underto this provision. Concerning reservations within CITES, see notes 101–104 above. On the detrimental effect on listed endangered species of the frequent use made by parties of such possible reservations, certainly not foreseen by the drafters of the CITES convention, see P.J. Sands. 2003. *Principles*

The 1946 Whaling Convention does not have an express provision regulating its relationship with other treaties[337].

Cooperation started in 1997 and has been a story of ups and downs, resulting in a delicate relationship between the two.[338] Whether CITES has the obligation to play second fiddle, as argued in the literature,[339] is far from settled.[340]At present, the relationship with IWC is regulated by means of Resolution Conf. 11.4,[341] which again appears to depict the relationship in terms of complementarity rather than subordination.

c) Convention on the Conservation of Migratory Species of Wild Animals[342]

This Convention was signed a few years after CITES. Therefore, it is the first in the list to which only Article XIV (2) of CITES applies. CMS itself has an article containing three paragraphs on the effect of international conventions and other legislation.[343] The first paragraph is almost identical[344] to Article XIV (6) of CITES.[345] Not much attention should be given to it since it has been argued that its present day importance is rather doubtful.[346] Paragraph 3 also very much resembles a corresponding provision of CITES, but because it has to do with the relationship between CMS and national legislation, it needs no further comment.[347] Only paragraph 2 remains to be addressed. It reads:

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of international environmental law, p. 512, Cambridge, UK, Cambridge University Press. At present, Iceland, Japan, Norway, Palau and St. Vincent and the Grenadines have entered reservations with respect to cetaceans. The effective list as of 23 June 2010 is available at www.cites.org/eng/app/reserve_index.shtml.

[337] 1946 Whaling Convention, recital 6 refers back to a number of previouswhaling agreements, but without giving any indication as to their relationship with the 1946 document.

[338] Gillespie, note 116 above, pp. 31–42.

[339] Idem, pp. 38–41.

[340] Gillespie relies on 1946 Whaling Convention, Art. XV (2)(b) to drive home his argument that CITES must follow the lead of IWC as far as cetaceans are concerned (idem, pp. 31, 39, and 40), but on examination, this provision does not appear very relevant. First of all, if it was supposed to create a hierarchy, it should have been included in Art. XIV which specifically treats this problem. Secondly, the Secretariat is not the decision-making body under CITES. This article can therefore hardly be interpreted as imposing a legal obligation on the States parties through the medium of the Secretariat. And finally, Resolution Conf. 12.4 ("Cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources regarding trade in toothfish", note 28 above), formalizing the cooperation between CITES and CCAMLR with respect to toothfish, explicitly refers in recital 3 to this provision, whereas the subordination of CITES to CCAMLR does not seem to be implied by this resolution. See also Bowman, note 336 above, p. 358, who concludes: ("While the relationship between CITES and the [1946 Whaling Convention] is therefore theoretically fairly complex, it is currently unlikely to have a significant bearing in practice as far as the call for normalization is concerned."

[341] See note 83 above.

[342] See note 194 above. At the time of writing 113 States and the European Community are party to this convention.

[343] CMS, Art. XII.

[344] See note 195 above.

[345] See note 171 above.

[346] See chapter V, B, b above.

[347] Compare CMS, Art. XII (3) with CITES, Art. XIV (1).

> "The provisions of this Convention shall in no way affect the rights or obligations of any Party deriving from any existing treaty, convention or agreement."[348]

Since chances are high that parties to CMS are also parties to CITES, and given the fact that the group of parties to the latter is much larger than that of the former,[349] this clause seems to imply that CITES will generally have precedence over CMS. But because CITES subordinates itself not only to already existing, but also to possible future treaties, one is confronted in this case with two conventions giving priority to each other, or, in other words, both subjecting themselves to each other.[350]

Cooperation between CMS and CITES, the need for which would seem obvious,[351] became concrete only recently. It took more than 20 years for it to become clear that both systems could benefit from joint action. This cooperation was at first governed within CITES by Decisions 12.5 and 12.6,[352] as later incorporated in Resolution Conf. 13.3.[353] Most of the species which received special attention in this cooperation programme are of particular interest here, since they concern marine species like marine turtles, the whale shark and great white shark, as well as sturgeons. Both secretariats finally concluded a Memorandum of Understanding during the month of September 2002.[354]

d) CCAMLR

Because CCAMLR is posterior to CITES, only Article XIV (2) is applicable.[355] On the other hand, CCAMLR only subjects itself to the 1946 Whaling Convention and the Convention for the Conservation of Seals.[356] Once again therefore, no restrictive clauses hamper possible cooperation between the two conventions.

Cooperation is recent and is directly tied to the dramatically increased commercial exploitation of Patagonian and Antarctic toothfish since the late 1980s. After trying several

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[348] CMS, Art. XII (2).

[349] Compare notes 16 (CITES) & 342 (CMS), where present-day membership is given.

[350] CITES, Art. XIV (2).

[351] Both systems, having indeed their own strong and weak points, would logically benefit from cooperation. See Zuardo, T. 2010. Habitat-based conservation legislation: a new direction for sea turtle conservation. Animal Law, 16(): 318–319, 340, suggesting such an argument with respect to the protection of sea turtles. This author also asks the following rhetorical question and asking: "Are agreements such as CITES and CMS meant to be complementary since the former addresses the very specific threat of international trade while the conservation of sea turtles domestically?" (idem, p. 340).

[352] Memorandum of Understanding between CITES and the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (available at www.cites.org/eng/dec/valid12/12-05_6.shtml).

[353] Cooperation and synergy with the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (available at www.cites.org/eng/res/13/13-03.shtml).

[354] Memorandum of Understanding between CITES and the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (available at www.cites.org/common/disc/sec/CITES-CMS.pdf). This document was complemented by an annex concluded in 2005 (available at www.cites.org/common/disc/sec/CMS_annex.pdf).

[355] See note 289 above.

[356] See note 324 above.

means at its disposal (catch limits, inspection, prohibition of landings, and vessel monitoring systems), a catch documentation scheme[357] was introduced in 1992. The system became operational on 7 May 2000[358].

The drafters tried to make the scheme compatible with the World Trade Organization General Agreement on Tariffs and Trade (WTO/GATT) standards. This explains why non-parties to CCAMLR can become parties to it, why parties as well as subscribing non-parties have to comply with exactly the same requirements, and why non-conforming shipments of toothfish are targeted, not particular countries.[359] Whether this careful approach will be able to withstand WTO/GATT scrutiny remains to be tested. Some are confident,[360] but potential difficulties still remain.[361] Others have argued that what remained after negotiations was an emasculated version which would have no difficulty in standing the test.[362] But since such a system will probably be ineffective, the obvious argument is that CCAMLR should have flexed its muscles by introducing a scheme applicable to all.[363] It has been argued that a strong version would still have been able to withstand the WTO/GATT test.[364]

At present the relationship between CCAMLR and CITES is governed by Resolution Conf. 12.4.[365] But unlike the cooperation with Convention on Biological Diversity (CBD),[366] this one was somewhat forced on CITES. It served as a *quid pro quo* for the Australian withdrawal of its June 2002 proposal to nominate the Patagonian toothfish for consideration as a possible Appendix II species.[367]

e) Convention on Biological Diversity

Since CBD postdates CITES, again only Article XIV (2) is applicable.[368] The conflict clauses contained in CBD do not claim priority. Instead this convention subjects itself to the law of the sea.[369] Furthermore, it gives precedence to all previously concluded agreements, except in

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[357] See Notes 238 & 319 above. The relevant documents relating to the catch documentation scheme are available at www.ccamlr.org/pu/e/cds/cds-ops.htm.

[358] For a clear overview, see Agnew, D.J. 2000. The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme. *Marine Policy*, 24 (5): 365:368.

[359] Idem, p. 370.

[360] Idem.

[361] Bialek, D., note 319 above, pp. 122-126. See also S.M. Kaye. 2001. *International fisheries management*, pp. 439–442, The Hague, The Netherlands, Kluwer Law International.

[362] Popick, I.J. 2001. Are there really plenty of fish in the sea? The World Trade Organization's presence is effectiveley frustrating the international community's attempts to conserve the Chilean Sea Bass. *Emory L. J.*, 50(3): 975–981.

[363] Idem, p. 985.

[364] Idem, pp. 981–984.

[365] See note 28 above.

[366] CBD. This convention, signed on 5 June 1992, entered into force on 29 December 1993. At the time of writing 192 States and the European Community are party to the Convention.

[367] See notes 23–30 & 320 above.

[368] See note 289 above.

[369] See note 383 below.

very exceptional circumstances.[370] But given the nature of the exceptions, it is hardly imaginable that this will ever be applied in the relationship with CITES. The two entities have built a very fruitful cooperation over the years.[371] At present this relationship is regulated by Resolution Conf. 10.4.[372] As indicated by this resolution, Memorandum of Understanding has linked the two secretariats[373] since 1996[374].

[370] CBD, Art. 22 (1): "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity." See also note 403 below.

[371] For a detailed description, see Wijnstekers, note 43 above, pp. 349–350.

[372] CITES, Tenth Conference of the Parties, Harare, (Zimbabwe), 9–20 June 1997, Co-operation and Synergy with the Convention of Biological Diversity (Conf. 10.4).

[373] Idem, recital 1.

[374] Memorandum of Cooperation between the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 1973) and the Sectretariat of the Convention on Biological Diversity, Nairobi, 1992 (available at www.cites.org/common/disc/sec/CITES-CBD.pdf). This documents was slightly amended in 2001 (available at www.cites.org/common/disc/sec/CITES-CBD-amend.pdf).

IX. CONCLUSIONS

The brief overview of conflict clauses found in a number of global and regional fisheries management organizations demonstrates that the latter normally heed the advice of scholars that drafters should always take the time to elaborate such a clause in line with the will of the parties.[375] Such a clause can take different forms, as indicated by the definition given to it by the International Law Commission.[376] In the present study, the examples concern instances of prior treaties, which CITES either tries to adapt to[377] or subject itself to;[378] instances of future treaties to which CITES subjects itself;[379] and finally instances covering past as well as future treaties which CITES either subjects itself to[380] or over which it tries to exert priority.[381] A combination of all these possible inter-linkages, and others not covered in the overview presented here,[382] will easily lead to situations which might become rather confusing, especially if one includes still further complicating factors like different States parties to the two instruments or difficulties related to distinguishing prior from later treaties. Some of these situations might simply be unresolvable.[383] But if they are, Mus provides the following road map:

> "One should look for conflict clauses in both conflicting treaties for resolving the conflict and, in the absence of any clause whatsoever, one should try to interpret both treaties, especially the later one, on the basis of Articles 31 and 32 of the 1969 Vienna Convention, in order to see which treaty should take priority. When a treaty interpretation appears to be inconclusive, the *lex*

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[375] Mus, note 245 above, p. 232, concludes: "This contribution shows that including conflict clauses in treaties may be of great value in determining priority between conflicting treaties."

[376] The definition, reprinted in note 258 above, continues: "Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometimes to any treaty past or future."

[377] CITES, Art. XIV (4) and (5), note 290 above.

[378] CCAMLR, Arts III, IV, V, and VI, notes 322–324 above.

[379] 1993 Compliance Agreement, Art. 1 (b), note 303 above. At the time of the adoption of this Agreement, LOSC had not yet entered into force.

[380] CITES, Art. XIV (2), note 289 above.

[381] LOSC, Art. 311 (2) and 1995 UN Fish Stocks Agreement, Art. 44 (1), notes 260 & 304 above respectively.

[382] Sadat-Akhavi, note 211 above, pp. 87-96, distinguishing, in a much more complete overview, between two broad categories (those clauses giving priority to the treaty in which they are incorporated, and those giving priority to other treaties) with three subcategories each (priority over/of existing treaties, future treaties or both).

[383] Ideally, conflict clauses in different treaties are complementary to one another. Consider the relationship between CBD and LOSC. CBD, Art. 22 (2), which requires the Convention to be implemented "with respect to the marine environment consistently with the rights and obligations of States under the law of the sea", and Art. 311 of LOSC both seem to indicate that in case of conflict LOSC takes precedence over CBD. See Allen. C.H. 2001. Protecting the oceanic Gardens of Eden: international law issues in deep-sea vent resource conservation and management. *Geo. Int'l Envtl. L. R.ev.*, 13(3): 607–608; Lehmann, F. 2007. Legal status of genetic resources of the deep seabed. *N.Z. J. Envtl. L.*, 11(1): 57 (but see note 403 below for a more careful analysis of this relationship). On the other hand, one could imagine two treaties, each of them subjecting themselves to the other, or vice versa, both claiming priority over the other. The relationship between CMS and CITES exemplifies the a case of the former. See CMS, Art. XII (2) and CITES, Art. XIV (2), respectively.

posterior rule should be applied in the last resort."[384]

In order to illustrate how much the intention of the parties still permeates the legal rules developed for settling disputes relating to the application of successive treaties concerning the same subject- matter, it might be instructive to consider their application before and after the creation of the Word Trade Organization (WTO) in 1994 and its relation to CITES and other multinational environmental agreements.[385] Before 1994 authors had, in principle, no difficulty with the application of the *lex posterior* principle. Because the norms of CITES and those of the GATT proved inconsistent given that subsections (b) and (c) of Article XX of the GATT have been found to have no application to natural resources situated outside the jurisdiction of the trade-restricting State,[386] States parties to both agreements would nevertheless have to apply CITES on the basis of Article 30 (3) of the 1969 Vienna Convention.[387] But even then, Article 30 (4)(b) created a problem if a particular state was not party to CITES, because then GATT provisions would remain operational.[388] This was not a negligible problem, for the majority of trade restricting provisions of CITES would most likely be challenged by non-parties. Because States parties to CITES have freely committed themselves, one could expect that they would not normally challenge such provisions before GATT. Non-parties, on the other hand, have not consented and, moreover, are very often the prime target of such restrictive measures.[389]

This tone drastically changed after 1994 because, by resetting the date from 1947 to 1994,[390] the new WTO Agreement leapfrogged over most environmental treaties using trade measures,

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[384] Mus, note 245 above, p. 231. See also Sadat-Akhavi, note 211 above, p. 249, finding a similar list of steps to follow.

[385] Agreement Establishing the World Trade Organization. This agreement, signed on 15 March 1994, entered into force on 1 January 1995. Hereinafter WTO Agreement. At the time of writing 153 members together with the European Community are party to the Agreement. This organization was created during the Uruguay Round of trade negotiations held within the framework of the General Agreement on Tariffs and Trade (GATT), established in 1947. The WTO Agreement is an umbrella agreement which, in addition to creating the WTO, also brought GATT within its structure. For a succinct description, see Sands & Klein, note 106 above, pp. 116-118. For a good overview of the conflict of norms existing between WTO and other rules of international law in general, see Pauwelyn, note 251 above, 522 pp.

[386] Although CITES allows States parties to protect non-domestic species through trade restrictions, doing so would seem to violate GATT because such actions would be considered quantitative restrictions. See Houseman, R. & Zaelke, D. 1992. Trade, environment, and sustainable development. *Hastings Int'l & Comp. L. Rev.*, 15(4): 582.

[387] See Cameron, J. & Robinson, J. 1992. The uses of trade provisions in international environmental agreements and their compatibility with the GATT. Y.B. *Int'l Envtl. L.*, 2: 16; Schoenbaum, T.J. 1992. Free international trade and protection of the environment. *Am. J. Int'l L.*, 86(4): 720; Mayer, D. & Hoch, D. 1993. International environmental protection and the GATT: the tuna/dolphin controversy. *Am. Bus. L. J.*, 31(2): 219–221. Rare were those authors that made reference in this framework to CITES, Art. XIV (2) (see note 289 above), indicating that this could possibly undermine this reasoning. Caldwell, D.J. 1994. International environmental agreements and the GATT: an analysis of the potential conflict and the role of a GATT 'waiver resolution'. *Maryland J. Int'l L. & Trade*, 18(2): 188 n. 99.

[388] Schoenbaum, note 387 above, p. 720, suggesting an implied modification of GATT, or better still its amendment.

[389] Caldwell, note 387 above, p. 188.

[390] See note 385 above.

including CITES.[391] In a mode akin to a *volte face*, the approach based on Article 30 (3) of the 1969 Vienna Convention was thereafter said to be "out of place";[392] "difficult to reconcile with the expectations of nations";[393] to "not offer a desirable solution";[394] to possibly "provide a convenient solution in a specific case, but not in general where the conflict between multilateral environmental agreements and GATT rules emerges";[395] and to "arbitrarily apply the principle of *lex posterior*".[396] Solutions were found, *inter alia*, in the *lex specialis* principle,[397] which was believed to offer relief since multilateral environmental agreements in general, and CITES in particular, are much more specific than the general provisions of the WTO Agreement.[398] Some have even looked at Article 311 of LOSC as an antidote, in order to conclude that

> "it is reasonable to believe that a future international tribunal could choose to disregard WTO/GATT if the implementation of its provisions are found to be incompatible with the object and purpose of UNCLOS."[399]

But if Article 311 of LOSC can come in handy when trying to downgrade the impact of the WTO leapfrogging effect, the other side of the coin is that this same article can play a similar role with respect to the treaties it tries to protect from WTO. Indeed, in the same way that the prior versus later treaty is essential in the determination of the relationship between WTO/GATT and multilateral environmental agreements, Article 311 (2) governs the relationship between LOSC and other international agreements relating to law of the sea issues by providing, in principle, precedence of the former over the latter.[400] This precedence

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[391] Schultz, J. 1995. The GATT/WTO Committee on Trade and the Environment: toward environmental reform. *Am. J. Int'l L.*, 89(2): 434. See also Ahn, D. 1999. Environmental disputes in the GATT/WTO: before and after US-Shrimp Case. *Mich. J. Int'l L.*, 20(4): 855–856, arguing that the application of Art. 30 of the 1969 Vienna Convention after 1994 results in the fact that "most international environment agreements that included trade provisions will be judged by the WTO on their merit".

[392] Fox, note 246 above, p. 186.

[393] Winter, R.L. 2000. Reconciling the GATT and WTO with multilateral environmental agreements: can we have our cake and eat it too? *Colo. J. Int''l Envtl. L. & Pol'y*, 11(1): 237. See also Voon, T. 2000. Sizing up the WTO: trade-environment conflict and the Kyoto Protocol. *J. Transnat'l L. & Pol'y*, 10(1): 77, using almost identical language.

[394] Winter, note 393 above, p. 237.

[395] Brunner, A.E. 1997. Conflicts between international trade and multilateral environmental agreements. *Ann. Surv. Int'l Comp. L.*, 4(1): 88; Reeve, 2002, note 17 above, p. 314, juxtaposing this principle of customary international law and the *lex posterior* principle of the 1969 Vienna Convention.

[396] Hicks, B.L. 1999. Treaty congestion in international environmental law: the need for greater international coordination. *U. Rich. L. Rev.*, 32(5): 1661.

[397] See note 253 above.

[398] See Brand, R.A. 1997. Sustaining the development of international trade and environmental law. *Vt. L. Rev.*, 21(3): 868; Brunner, note 395 above, pp. 88–89; Voon, note 393 above, p. 77, arguing that Art. 30 of the 1969 Vienna Convention potentially conflicts with this rule; and Winter, note 393 above, pp. 237-238.

[399] McLaughlin, note 285 above, pp. 58-59.

[400] See Young, A. 1985. Antarctic jurisdiction and the law of the sea: question of compromise. *Brook. J. Int'l L.*, 11(1): 63-65, trying to restrict the powers of the parties under the Antarctic Treaty system with respect to carrying out commercial enterprises there; Walker, G.K. 1996. The interface of criminal jurisdiction and actions under the United Nations Charter with admiralty law. *Tul. Mar. L. J.*, 20(2): 224–255, arguing that older conventions relating to shipping should also be checked against LOSC.

also covers international environmental agreements,[401] including CITES. Here the main defence has been to insist that LOSC itself relies on treaties such as CITES for more specific rules and enforcement, because such specialized fora are best suited for this task.[402]

It seems safe to conclude from the analysis above that no hard-and-fast rule exists 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, but even then, disregarding for a minute the many difficulties encountered when trying to apply these provisions in practice,[403] a certain teleological approach appears to be present in State practice that enables the most desired end result.[404] Each case, therefore, will have to be analysed and evaluated on its 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.[405]

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[401] Burke, W.T. 1995. Implications for fisheries management of U.S. acceptance to the 1982 Convention on the Law of the Sea. *Am. J. Int'l L.*, 89(4): 800, arguing that in theory the 1992 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, prohibiting high seas salmon fishing there, might be contrary to LOSC, Art. 66 (3)(a), which permits such fishing if prohibiting it would cause economic dislocation.

[402] Vice, note 116 above, p. 619.

[403] Some conflict clauses are simply badly drafted and leave room for interpretation. A quick reading of CBD, Art. 22 (2) might indeed lead one to reach the conclusion that LOSC assumes superiority over CBD (note 383 above). But this is not necessarily the case, as aptly demonstrated by an in-depth study by R. Wolfrum & N. Matz. 2003. *Conflicts in international environmental law*, pp. 124-125, Berlin, Germany, Springer, indicating not only the difficulties with paragraph 2, but also with paragraph 1. Furthermore, the exact interrelationship between both paragraphs is far from clear. Wolfrum, R. & Matz, N. 2000. The interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity. *Max Planck Yearbook of United Nations Law*, 4(1): 475. The fact that one encounters Problems when trying to find the correct interpretation of CBD, Art. 22 is not surprising given the temporal constraints negotiators faced when trying to develop a well-considered conflict clause during the CBD negotiations. See Chandler, M. 1993. The Biodiversity Convention: selected issues of interest to the international lawyer. *Colo. J. Int'l Envtl. L. & Pol'y*, 4(1): 148-150. If combined with Art. 311 LOSC, the situation might be more complex than envisaged in note 383 above, since both conflict clauses are in fact "not fully coherent". Matz, N. 2002. The interaction between the Convention on Biological Diversity and the UN Convention on the Law of the Sea. *In* Ehlers, Mann Borgese & Wolfrum, eds., note 13 above, pp. 203, 218-219; Wolfrum & Matz, The interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity, above, p. 477. They are also "not fully compatible". Wolfrum & Matz. *Conflicts in international environmental law*, above, p. 125) .

[404] A striking example is the relationship between CBD and LOSC. As mentioned in note 383 above, one reading could be that both agreements point to the priority of LOSC over CBD. But if the application of this supremacy would lead to the general principles of the law of the sea endangering biological diversity, authors are less certain and offer a "better reading." See Rieser, A. 1997. International fisheries law, overfishing and marine biodiversity. *Geo. Int'l Envtl. L. Rev.*, 9(2): 257–258. Given the difficult relationship between the conflict clauses of both conventions (note 403 above), this "better reading" does not seem *a priori* to be excluded. See also Redgwell, note 211 above, p. 185.

[405] As such, the 1969 Vienna Convention does not seem to have substantially changed the situation as it existed before. As Jenks concluded in 1953 in a chapter on the early discussions of the conflict of treaties: "No particular principle or rule can be regarded as of absolute validity. There are a number of principles and rules which must be weighed and reconciled in the light of the circumstances of the particular case." See

Increased international cooperation is "the most urgent and overarching need" in this area.[406] Even though Birnie, Boyle and Redgwell discuss CITES in a chapter on land-based species, a similar consideration is certainly not out of place with respect to living marine resources.[407] Because all systems have their strong and weak points,[408] closer cooperation could significantly enhance the global level of protection. At the same time, such a cooperative attitude between conventional systems would make it possible to further promote and incorporate novel tendencies, such as the ecosystem approach and biological diversity, into the much needed global toolkit available to States in order to try to tackle the problem of overfishing on the high seas.

In order to be able to further such cooperation in an effective manner, CITES first needs to bring some order into its own house. After having clarified the expression "from the sea" by means of a resolution of the Conference of the Parties in 2007,[409] there is an urgent need to also give concrete meaning to the terms "introduction from" that precede the words just clarified. This turned out to be a far more complicated exercise than originally conceived by the former Secretary-General of that organization.[410] It even reopened a discussion which had kept the adoption of the founding document of CITES in suspense until the very last days of the negotiations, resulting in the adoption of its founding document in 1973. The question of whether the organization should, as a matter of principle, concern itself with commercially exploited aquatic species created opposing factions.[411] In the on-going discussions on the wording "introduction from," one still finds countries arguing on record that the management of commercially-exploited aquatic species should be squarely left within the competence of FAO. Given the fact that the term "introduction from" has hardly been narrowed since the detailed discussions held in 2005,[412] it is to be expected that the road ahead will continually prove to be long and winding.

But in order to end on a somewhat positive note, it seems nevertheless appropriate to highlight the fact that the recent amendment of Resolution Conf. 14.6 at the occasion of the latest Conference of the Parties, held at Doha, Qatar, in 2010, at least introduced a couple of new recitals stressing the need for cooperation, not only between flag and port States, but also

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Jenks, W.C. 1953. The conflict of law making treaties. *Brit. Y.B. Int'l L.*, 30: 407, 453, asserting that a number of principles can certainly be discerned, but "they have to be weighed and reconciled in the light of circumstances on the basis of gradually growing experience until the law on the subject reaches a more developed stage of maturity than it has yet attained" (idem, p. 453). This quest for maturity still seems ongoing.

406 Birnie, Boyle &and Redgwell, note 43 above, p. 697.

407 Churchill, R.R. & Ulfstein, G. 2000. Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law. *Am. J. Int'l L.*, 94(4): 658-659.

408 Koester, V. 2002. The five global biodiversity-related conventions: a stocktaking. *Rev. of European Community & Int'l Envt'l L.*, 11(1): 96–103, including CITES in his overview. See also note 351 above.

409 As already emphasized, it is highly unfortunate that the resolution still refers to Art. XIV (6). See notes 235-236 above. It is also regrettable that those amending Resolution Conf. 14.6 in 2010 failed to seize the occasion and correct this flaw, thus leaving the third recital unchanged. See note 241 above.

410 See note 129 above.

411 See notes 119–125 above.

412 For an overview of these 2005 discussions see chapter V, A, a, ii above. Compare with the situation in 2010, note 149 above.

between States and RFMOs.[413] It is to be hoped that new additions reflect an understanding between the CITES members of, at the very least, the general direction that the road ahead must take.

[413] See note 241 above, and especially recitals 6 and 7.

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