(Via email)

October 4, 2002

Division of Management Authority
U.S. Fish & Wildlife Service
4401 North Fairfax Drive
Room 700
Arlington, VA 22203
email: cites@fws.gov

Re: Comments from IELP Concerning CITES COP12

Management Authority:

The International Environmental Law Project (IELP) of Lewis & Clark Law School submits these comments pertaining to resolutions, proposed decisions and agenda items for the Twelfth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). 67 Fed. Reg. 53962 (Aug. 20, 2002).

IELP submits two separate sets of comments. Part I includes recommendations with respect to all draft resolutions other than the resolutions relating to marine species or organizations. Part II focuses on the documents, draft resolutions, and other issues associated with marine species and organizations, because many of those resolutions invoke similar provisions of CITES, such as Article XV(2)(b) on cooperation with inter-governmental organizations with competence over marine species.

In addition, IELP urges the United States to pay special attention to marine issues. In particular, several draft resolutions, such Australia's proposals concerning CCAMLR and Patagonian toothfish, raise significant legal issues. While IELP generally supports the goals of Australia's draft resolution, the legal issues must be resolved before the CITES Parties adopt a scheme by which another convention's quotas or management scheme substitutes for the CITES permit system. IELP has provided some guidance, particularly with respect to "introduction from the sea." However, IELP continues to develop ideas for increased cooperation between CITES and regional fisheries management organizations because of the importance of this issue.

If you have any questions concerning these comments, please contact Prof. Chris Wold, Director of IELP, at (503) 768-6734 or wold@lclark.edu.

best regards,

Chris Wold
Clinical Professor of Law &
Director, IELP

Part I—Comments of International Environmental Law Project (IELP) on Non-Marine-Related Draft Resolutions to CITES COP12 (October 4, 2002)

Rules of Procedure (Doc. 1.1)

Rule 2 — Observers. IELP urges the United States to oppose and seek the deletion of the last sentence of Draft Rule 2, paragraph 2(b) which allows the Parties to withdraw the right of observers to participate by a one-third vote. Article XI(7) of CITES grants the Parties the opportunity to reject the participation of observers *only* at the beginning of a meeting. Article XI(7) states:

> Once admitted, these observers shall have the right to participate but not to vote.

Moreover, Draft Rule 2, paragraph 2(b) does not provide any limitations on the Parties for withdrawing an observer's right to participate. Such unfettered discretion creates a chilling effect on the right of observers to participate openly and honestly. Without guidelines that limit the discretion of the Parties or guidelines for participation by observers, IELP finds Draft Rule 2, paragraph 2(b) totally objectionable. (IELP, however, does not feel any guidelines for observers are necessary. IELP Director Chris Wold has participated in 4 CITES COPs and has not witnessed any behavior that warrants guidelines for observers).

Rule 12 — Publicity of Debates. The presumption at previous CITES COPs has been that the chair of the working group has discretion to choose the membership of the working group. IELP recognizes, however, that the chair of Committee I or II (the "Presiding Officer") has sometimes determined and limited the membership of a working group. As such, Draft Rule 12, paragraph 2 could be read as reflecting the different situations that have arisen at CITES COPs. Nonetheless, Draft Rule 12, paragraph 2 switches the presumption. Now, the Presiding Officer, not the chair of the working group, is presumed to determine the composition of a working group.

IELP objects to this change in presumption and urges the United States to oppose it. The floor plan and size of many meeting rooms for Committees I and II frequently make it difficult to see, much less identify, observers. As a result, the Secretariat has frequently used binoculars to try to identify observers who have raised their name plates in order to speak or participate in a working group. In many cases, neither the Presiding Officer nor the Secretariat has seen observers wishing to speak or participate in a working group. As such, the presumption that the Presiding Officer will determine the composition of a working group unless he or she specifically grants the chair of the working group such authority greatly disadvantages participation by observers. IELP recommends the retention of Rule 12, paragraph 2 as adopted at COP11.

Rule 17, paragraph 3 — Right to Speak. Draft Rule 17, paragraph 3 should be amended to make clear that a delegate may make a point of order without being called upon by the Presiding Officer. IELP recommends the following language:

> A delegate or observer shall speak only if called upon by the Presiding Officer, except that a delegate may make a point of order without being called by the Presiding Officer. The Presiding Officer may call a speaker to order if his/her remarks are not relevant to the subject under discussion.

Rule 20, paragraph 2 — Submission of Draft Resolutions and Other Documents. IELP urges the United States to clarify the requirements for circulating documents pursuant to Draft Rule 20, paragraph 2 by requiring that such documents be circulated to the Parties more than 24 hours prior to their consideration by the Parties. Draft Rule 20, paragraph 2 allows for the consideration of urgent draft resolutions and other documents arising after the 150-day period for submission of documents, provided that they have been circulated "as above." However, the meaning of "as above" is unclear because the only means for circulating documents "above" paragraph 2 includes a time requirement of 150 days *and* a requirement to circulate the documents in the three working languages of the Convention. Obviously, since the documents were submitted after the 150-day period, the documents referred to in paragraph 2 cannot be circulated "as above."

Nor is it reasonable to allow the circulation of these documents only pursuant to the language requirements. An "urgent draft resolution" that emerges 149 days before the meeting should certainly be circulated more than one minute before consideration of the document at the meeting.

This ambiguity likely is the result of taking this provision from a different place in the rules adopted for COP11 in which the phrase "as above" had a clear meaning. IELP recommends that Rule 20, paragraph 2 require the submission of these documents more than 24 hours before their consideration in addition to circulation in the working languages of the Convention.

Rule 20, paragraph 3 — Submission of Draft Resolutions and Other Documents. IELP urges the United States to oppose the provision in Rule 20, paragraph 3 for the consideration of documents circulated "no later than during the session preceding the session at which they are to be discussed." Many delegations, especially small delegations and those who do not speak English, Spanish, or French as a first language, already struggle to read and assess the vast quantities of documents arising out of the meeting under the existing rule, which requires that documents be circulated "no later than the day preceding the session" at which they will be considered. Under the Draft rule, delegations and observers would be required to read, understand, and assess a document in as little as two hours.

For this reason, IELP urges the rejection of Draft Rule 20, paragraph 3. IELP supports either the retention of the "preceding day" rule, as adopted in the Rule 20, paragraph 2 of the Rules of Procedure for COP11, or the adoption of the Chilean proposal in Doc. 1.2 for a 24-hour period between circulation and consideration.

IELP recognizes, however, that on the last day of the meeting it is impossible for a document to be submitted "the day preceding the session" or 24 hours prior to consideration of

the document. IELP recommends a limited exception for resolutions and other documents arising on the last day of the meeting.

Rule 22, paragraph 2 — Submission of Proposals for Amendment to Appendices I and II. IELP agrees that the substitution of the phrase "scope of effect" with "scope" clarifies the meaning of Rule 22, paragraph 2.

IELP urges the United States to further clarify Rule 22, paragraph 2 by making clear that once a proposal has been amended, only the amended proposal can be considered; the original proposal becomes void or withdrawn. This issue caused much confusion at COP11. The issue first arose with respect to an amendment to a whale proposal. The Secretariat ruled that both the original and the amended proposals could be put to a vote. Later in the meeting, the Secretariat reversed itself and interpreted the rule in conformity with the Secretariat's own document, *A Guide for Participants at the 11th Meeting of the Conference of the Parties to CITES* (CITES Inf. 11.1, p. 9). The rule that the original proposal is void once amended is consistent with Robert's Rules of Order and rules of efficiency and fairness. In the absence of such a rule, the Parties could endlessly amend a proposal, thus allowing two or more "bites at the apple."

To make this rule clear, IELP proposes the addition of the following sentence to the end of Rule 22, paragraph 2:

> Once a proposal has been amended to reduce its scope, the original proposal is considered withdrawn and cannot be voted upon. If an amended proposal is subject to additional amendments, only the amended proposal most reduced in scope may be voted upon.

Rule 26 — Majority. IELP urges the United States to seek clarification of what constitutes a two-thirds majority. Given the large number of CITES Parties, the number of votes required for a two-thirds majority may differ depending on whether two-thirds constitutes 0.66, 0.67, 0.667 or some other derivation of "two-thirds." The use of one number versus another may determine whether a vote passes or not. For example, assume the total number of votes is 104.

> 104 multiplied by 0.66 = 68.64. Thus, 69 votes in favor are needed.
> 104 multiplied by 0.666 = 69.33. Thus, 70 votes in favor are needed.

Even carrying two-thirds to more decimal places does not resolve the problem. Assume that the total number of votes is 120.

> 120 multiplied by 0.666 = 79.92. Thus, 80 votes in favor are needed
> 120 multiplied by 0.667 = 80.4. Thus, 81 votes in favor are needed.

IELP does not care which number is used. It merely wants the same number to be used for each vote and for all Parties to know which number is being used. Similarly, the Parties should define "one-third."

Rule 28 — Submission of Informative Documents. IELP urges the United States to oppose the elimination of the right of observers to distribute documents through the "pigeon holes." Document distribution through the pigeon holes is the most effective means for getting documents to delegates and other observers. Although Rule 28 allows observers to distribute documents on tables, most meetings have provided too few tables for effective distribution.

Establishment of Committees (Doc 13.1, Doc. 13.2, Doc. 13.3)

IELP supports consistent regional representation in all committees, as articulated in Doc. 13.1. IELP also supports the creation of an Implementation Committee. The trend in international environmental agreements, including regional fisheries organizations, is towards the establishment of implementation and compliance committees. The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and the Inter-American Tropical Tuna Commission/Agreement for an International Dolphin Conservation Program (IATTC/AIDCP) have found significant success through their implementation committees. Significantly, the implementation committees of both the Montreal Protocol and the IATTC/AIDCP rely on sanctions. The Montreal Protocol's Implementation Committee has achieved much success by threatening to withhold financing from the Multilateral Fund or by eliminating a Party's "Article 5" status, including its "grace periods" for implementing the Protocol's requirements. The IATTC/AIDCP uses the threat of reductions of dolphin mortality quotas to ensure compliance.

The use of sanctions has also been applied successfully within CITES. The national implementation project of CITES provides an excellent example of the use of "carrots" and "sticks." CITES Parties are put on notice that their legislation does not meet the requirements of CITES. They are offered assistance in order to ensure their legislation meets the requirements of CITES. If, after a fixed period of time, the Party fails to improve its legislation, the Standing Committee recommends the use of stricter domestic measures—a ban on trade in CITES-listed specimens—with that Party until its legislation meets the requirements of CITES. IELP believes that such a system of "carrots and sticks" should be included in the terms of reference for a new Implementation Committee.

Sustainable Use and Trade in CITES Species (Doc. 17)

IELP urges the United States to oppose the draft resolution found in Doc. 17. First, CITES already supports sustainable use in a number of ways (quotas, annotations, captive-breeding, ranching). However, the Parties to CITES must elaborate its mechanisms that support sustainable use within the framework of CITES. Thus, any definition of sustainable use must be based on the requirements of Articles III, IV, and V. The requirements of Articles III-V of CITES are not found in the Convention on Biological Diversity (CBD), FAO, or any other international institution. Thus, it will be impossible to "harmonise the implementation of CITES with the objective of sustainable use in the CBD and other relevant international management organizations," as recommended by paragraph (a) of this Draft Resolution.

Moreover, paragraph (a) of the draft resolution identifies another crucial distinction that makes the goals of this resolution impossible if not extremely difficult to implement: CITES

relates to trade whereas the other institutions identified in this resolution relate to management. While CITES should seek to cooperate with and complement such institutions, it cannot do so under the proposed scheme, because sustainable use is a management concept and CITES regulates trade.

Paragraph (b) must also be rejected. The listing criteria for CITES are based primarily on the biological status of species, as required by Article II of CITES. Article II of CITES provides that Appendix I shall include species "threatened with extinction which are or may be affected by trade." Appendix II includes "all species which although not necessarily threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival." These definitions make clear that the biological status of the species as well as the trade status of the species determines whether or not a species should be included in the appendices. To the extent that CITES supports sustainable use, it cannot do so through the listing criteria, because a species' sustainable use is not solely a function of its biological status. It is a function of management measures in relation to a species' biological status. If CITES Parties want to support sustainable use, it must do so through other parts of CITES, such as the requirements for captive-breeding or ranching.

From a purely practical point of view, the proposal to support sustainable use through the listing criteria asks the Parties and the Secretariat to reinitiate and complete the process by COP13. However, the Parties have been reviewing the listing criteria for several years now and that process may be completed at COP12. The draft resolution thus is untimely and further review of the criteria is unjustified at this time.

IELP also urges the United States to oppose paragraph (c). CITES already reviews the appendices through the significant trade process. Moreover, to the extent that Parties believe that Appendix I specimens do not meet the criteria for inclusion in Appendix I, a Party will no doubt submit a proposal to transfer it to Appendix II. For all species, Article XV *requires* a Party to submit a proposal for the transfer of the species. Thus, a "sunset clause" violates the express provisions of CITES.

Economic Incentives and Trade Policy (Doc. 18)

Although IELP generally supports the use of well-designed economic incentives for achieving environmental benefits, it finds Doc. 18 and its accompanying draft resolution overly simplistic in describing the costs of command and control legislation and the benefits of economic incentives.

Although paragraph 3 correctly states that economic incentives can provide an "important contribution" to achieving the goals of CITES, the tone and language of Document 18 suggests that economic incentives are the *only* way to achieve the goals of CITES. For example, paragraph 7 identifies "laws or customary practices governing the use of wild fauna and flora (e.g. laws mandating species protection in private land without compensation) as a "perverse incentive." If true, then *all* regulation, including the Magnuson-Stevens Fishery Management and Conservation Act, that regulates fish and wildlife constitutes a perverse incentive. Such

cannot be true. Governments have regulated businesses generally and the taking and use of wildlife since the earliest of times, often with great benefits to populations of wildlife.[1]

IELP urges the United States to bring some balance to paragraphs 3-12 of this document. Moreover, IELP urges the United States to help focus Doc. 18 on CITES-related issues of international trade, not national implementation of economic incentives for management purposes unrelated to CITES.

In that regard, IELP is interested in exploring a link between economic incentives and other conservation strategies to the CITES permitting process, as suggested by paragraph 9. For example, CITES can be a tool for encouraging sustainable trade as well as a tool for prohibiting unsustainable trade by linking non-detriment findings to ecolabeling certification by an accredited and reputable organization. The accreditation and certification process of the Forest Stewardship Council (FSC) provides one example, and organizations accredited by FSC have certified eleven mahogany logging operations as meeting applicable principles and guidelines for timber exploitation. Under CITES, a certification body could certify that a particular logging operation meets the organizations principles and guidelines, which generally equate to sustainable management practices. The Scientific Authority in that country and other Parties to CITES could assume that trade from that operation is not detrimental to the survival of the species, unless other evidence suggests the contrary. Such a system is similar to quotas for Appendix I species through which the Parties approve a quota presumed to represent a non-detrimental take of the species. The Parties could retain additional control of the process by formally approving particular certifying bodies to make the certifications and establishing procedures for gathering information from the public on proposed approvals.

The FSC is currently the largest accrediting agency in the world that promotes environmentally responsible forest management. The FSC has developed Principles and Criteria to promote "environmentally responsible, socially beneficial, and economically viable management of the world's forests." The FSC itself does not certify logging operations as meeting these criteria. Rather, the FSC accredits other certification organizations to certify logging operations as meeting FSC Principles and Criteria. The FSC and its accredited organizations often prepare more detailed standards for forest management at national and local levels.

FSC accredited organizations have certified logging operations covering 29,630,255 hectares in 56 countries as meeting the Principles and Criteria. Certified forests include those on

[1] *See, e.g.,* Thomas A. Lund, *British Wildlife Law Before the American Revolution: Lessons From the Past*, 74 MICH. L. REV. 49, 64 & 67 (1975) (reporting that the English government enforced take limitations and engaged in habitat development for wild game); *Migratory Bird Treaty Reform Act: Hearing before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans of the Comm. on Resources*. 105th Cong. 5 (1996) (noting that the restrictions on killing birds has had a beneficial impact on migratory bird populations for many years.). *See generally* IRA N. GABRIELSON, WILDLIFE CONSERVATION 187-188 (1941) (noting "even reasonable protection, not always entirely enforceable, has brought these birds [egret, snowy heron, and roseate spoonbill] back, sometimes in great numbers", and that the Migratory Bird Treaty Act, which prohibits unregulated taking of migratory birds, caused increases in populations of upland plover, Hudsonian curlew, black-bellied plover, and golden plover). *See generally* EDWARD J. KORMONDY, CONCEPTS OF ECOLOGY 102 (1976) (Stating that equilibrium levels of populations of various animals sometimes depend on human management or regulation).

private and public land, large-scale forests and communal lands, and plantation forests as well as natural forests. They include forests in Sweden and Zimbabwe, as well as Croatia, Argentina, Honduras, and Malaysia.[2]

Because of the FSC's recognized expertise in environmentally-sound forest management, the Parties should consider linking FSC certification to the non-detriment finding. FSC-certified forests probably represent the best examples of logging practices for any timber species. They should also explore the use by CITES of other certification schemes, provided that those schemes are developed by organizations without any conflict of interest in the production, consumption, marketing or use of the species at issue.

Doc. 18 Recommendations.

Doc. 18, Annex I: Draft Resolution. The Draft Resolution attached to Doc. 18 is unacceptable in its current form, because it lacks balance between the use of economic incentives and command and control management measures. The first paragraph should encourage Parties to use "any effective measures, including economic incentives and other wildlife management measures, in their national policies …." Because the goal of CITES is to prevent the overutilization of species due to international trade, the focus of the resolution should not exclude effective measures merely because they are not economic incentives.

In addition, the second paragraph is unacceptable as written because of its relation to paragraph 7 of the background document, which includes all regulation that fails to compensate landowners as a perverse economic incentive. In effect, this paragraph is asking the United States to remove its entire scheme of wildlife conservation, including the Endangered Species Act and the Magnuson-Stevens Fishery Management and Conservation Act, among others, because they govern the taking and use of fish and wildlife.

Moreover, paragraph 3 of the draft resolution, which urges the Parties to avoid the use of stricter domestic measures, fails to acknowledge the effective use of stricter domestic measures by the Parties through the Standing Committee. The Standing Committee acts as a de facto implementation committee by reviewing CITES implementation problems in specific countries. Where those Parties are unable or unwilling to improve their implementation, the Standing Committee has requested that Parties use stricter domestic measures, including a ban on trade in CITES-listed wildlife, with the Party whose implementation fails to meet the standards imposed by CITES. At a minimum, this paragraph must distinguish between the use of stricter domestic measures within the CITES implementation scheme and stricter domestic measures unilaterally imposed.

Paragraph 3 also establishes an imbalance in the use of "carrots" and "sticks." While CITES should use incentives to encourage compliance and conservation, it must also use the threat of sanctions to encourage compliance and conservation. The history of CITES and the Montreal Protocol illustrate that sanctions and penalties for noncompliance contribute significantly to compliance. For example, despite assistance or offers of assistance from CITES

[2] Forest Stewardship Council, Forests Certified by FSC-Accredited Certification Bodies, DOC. 5.3.3 (August 30, 2002), *available at* http://www.fscoax.org/principal.htm.

Parties and the Secretariat, many countries have failed to bring their national legislation into conformity with CITES. These incentives, however, did not yield compliance. Only when the Parties adopted trade bans in CITES-listed species with Parties with nonconforming legislation did these Parties bring their legislation into conformity with CITES.

The Implementation Committee of the Montreal Protocol has also found that sanctions help "encourage" compliance. For example, it has proposed withdrawing funds and Article 5 status (which allows a grace period for compliance with the Protocol's requirements) for failure to supply required baseline data.[3] Within days of the recommendation's adoption by the Parties, Mauritania supplied the missing data.[4] Later, 17 Parties submitted missing data when the Implementation Committee recommended that they lose their Article 5 status.[5]

Doc. 18, Annex I: Draft Decision. IELP supports the goals of the draft Decision. However, it questions the expenditures necessary to implement the study in paragraph (d), especially when the Parties to CITES struggle to fund existing work in the Animals and Plants Committees. The comprehensive nature of the study proposed in paragraph (d) will no doubt be very expensive to prepare and divert resources from key implementation and enforcement issues.

IELP urges the United States to oppose paragraph (d). IELP would support a study that investigates how the CITES permitting regime can implement or support economic incentives, such as ecolabeling.

Resolutions to Be Repealed (Doc. 21.1.1, Annex I)

IELP supports the ongoing work of the Secretariat to clarify, consolidate, and, where appropriate, repeal resolutions. IELP supports this work because it makes the extant resolutions more binding in character, if not binding in law, and thus more susceptible to widespread implementation. As such, IELP prefers resolutions that assist the Parties in the implementation of the CITES.

Resolution Conf. 1.3. While IELP agrees that Resolution Conf. 1.3 should be deleted, it disagrees with the Secretariat's rationale for doing so. The definition of "species" as well as the practice of the Parties, supports the view that a "species" may be included in more than one appendix. In fact, the Parties have frequently done so. What is clear is that the smallest taxonomic group listed under CITES cannot be listed in more than one appendix. This distinction is important because "split listing" of species, such as elephants, rhinos, and vicuña, among others, have led to increased flexibility in the implementation of CITES.

Resolution Conf. 1.5 (Rev.). IELP agrees that Resolution Conf. 1.5 (Rev.) can be repealed without any substantive impact on implementation of CITES.

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[3] David G. Victor, *The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 137, 141 (DAVID G. VICTOR, KAL RAUSTIALA, & EUGENE B. SKOLNIKOFF EDS., 1998).
[4] *Id.*
[5] *Id.*

Resolution Conf. 1.6 (Rev.). IELP notes that paragraph (a) relates to an important policy statement from the CITES Parties regarding non-CITES management measures. As such, it does not help implement CITES and should be repealed.

Paragraph (b), however, provides an important policy statement relating specifically to CITES matters: to what extent should Parties use animals bred in captivity instead of animals collected from the wild. While the recommendation is general and fails to reflect the full range of options available to the Parties, the Parties must determine whether this statement accurately reflects their views. It should not be repealed simply because the Secretariat views the restriction of the pet trade to captive bred animals as "too general and not appropriate today."

Resolution Conf. 2.10 (Rev.). IELP strongly urges the United States to reject the repeal of Resolution Conf. 2.10 (Rev.). While it is true that certain exceptions in Article VII have specific resolutions, some of those resolutions make implementation of the exception more difficult or fail to simplify the implementation of the exception. Other exceptions do not have implementing resolutions. Moreover, the relatively recent amendment at COP9 (1994) of this resolution suggests that the Parties continue to believe that stricter domestic measures are an ineffective means for overcoming problems associated with implementing and enforcing the Article VII exceptions. Because this policy statement helps the Parties implement their CITES obligations, it should be retained.

Resolution Conf. 8.22 (Rev.). IELP urges the United States to reject the repeal of Resolution Conf. 8.22 (Rev.) based on the reasons provided by the Secretariat. The Secretariat asserts that Resolutions Conf. 8.15, 10.16 and 11.14 adequately address the issue of captive-breeding and no other resolutions are needed to address captive-breeding of crocodilians. However, the Parties have included two conditions relating to captive-breeding not found in those resolutions. The first operative paragraph of Resolution Conf. 8.22 (Rev.) recommends that the Parties "not allow wild-caught animals to form the breeding stock unless justified in a national management plan demonstrating conservation value." This substantive requirement is not found in other resolutions on captive-breeding. The Parties may agree that such a restriction is no longer necessary. As this issue is not covered by other resolutions, it is incorrect to assert that other resolutions address captive-breeding of crocodiles adequately.

In addition, the second operative paragraph includes a condition for registration of a captive-breeding operation for crocodiles not found in other resolutions. This paragraph directs the Secretariat to include a new captive-breeding operation in the Register only "when it is proved that the breeding stock has been established in a manner not detrimental to the survival of the species in the wild within its area of natural distribution." Again, the Parties may agree that such a restriction is no longer necessary. However, as this issue is not covered by other resolutions, it is incorrect to assert that other resolutions address captive-breeding of crocodiles adequately.

Resolution Conf. 10.4. IELP agrees that Resolution Conf. 10.4 can be repealed. To the extent that any items have not been completed, they should be considered Decisions.

Resolution Conf. 10.11. IELP agrees that Resolution Conf. 10.11 should be repealed because it is unrelated to any CITES-related issues.

Resolution Conf. 10.19. IELP disagrees that paragraph (b) of Resolution Conf. 10.19 should be repealed until its meaning is clarified. Doc. 21.1.1 implies that paragraph (b) of Resolution Conf. 10.19 calls on the Parties to control trade in all parts and derivatives of species used for healing purposes, regardless of whether they are listed by CITES. If that is correct, IELP agrees that the provision is perhaps too broad given the focus of CITES on international trade (as opposed to all trade) in listed species (as opposed to all species).

However, Resolution Conf. 10.19 may implicitly relate only to CITES-listed species and international trade, given the nature of CITES. If that is the case, then Resolution Conf. 10.19 seems to call on Parties to define "parts and derivatives" expansively to include all parts and derivatives of CITES-listed species used for healing purposes. As such, Resolution Conf. 10.19 is calling on Parties to harmonize their interpretations of "readily recognizable part or derivative" with respect to a specific category of CITES-listed species. If this is the intent of Resolution Conf. 10.19, it adds meaning to the implementation of CITES and should be retained.

IELP agrees that paragraph (d), while providing a useful statement of policy with respect to threatened and endangered species, is perhaps too broad and could be repealed without any substantive impact on CITES implementation.

Resolutions to Be Repealed (Doc. 21.1.1, Annex 2)

IELP generally supports the ability of the Secretariat to make corrections to the texts of resolutions to ensure all references to other resolutions are accurate. However, given the reasons for repealing certain substantive provisions of Resolutions made in Doc. 21.1.1, Annex 1, IELP urges that the Secretariat notify the Parties of any corrections it intends to make, seek comments on such corrections, and, to the extent that there is disagreement over the necessity of the corrections, require the Secretariat to withdraw those corrections until they can be addressed by the Conference of the Parties.

Enforcement Matters (Doc. 27).

IELP appreciates the issue-specific organization of Doc. 27. IELP notes that the country-specific focus also deserves merit, because this may increase enforcement efforts to avoid mention in the country-specific section of the enforcement/infractions report. IELP supports the recommendation to convene a meeting of enforcement experts to improve the flow of enforcement-related data.

Conservation of *Swietenia Macrophylla:* Report of the Mahogany Working Group (Doc. 47)

IELP appreciates the work of the Mahogany Working Group and the funding provided by the United States for the October 2001 meeting. IELP supports an extension of the Mahogany Working Group through COP13. IELP believes that the terms of reference of the Mahogany Working Group should be expanded to include a review of legal but unsustainable trade (in

addition to the valuable work on illegal trade that already is part of the Working Group's mandate).

However, IELP also believes that work within the Mahogany Working Group should not defer consideration of including *Swietenia macrophylla* in Appendix II if information indicates that such a listing is warranted. IELP notes that the work of the Center for International Environmental Law indicates *Swietenia macrophylla* meets the criteria for inclusion in Appendix II throughout much of its range.[6] Moreover, Nicaragua's proposal contains sufficient information to include *Swietenia macrophylla* in Appendix II, and IELP supports that proposal.

National Export Quotas (Docs. 49, 50.1, 50.2)

IELP agrees that export quotas are a valuable means for ensuring trade in CITES-listed species is sustainable and non-detrimental to the survival of species. Nonetheless, IELP agrees that a mechanism is needed to govern the use of export quotas and supports the creation of an Export Quota Working Group, as proposed in Doc. 50.2.

IELP also supports, in principle, the proposed rules included in Doc. 50.1. IELP is concerned, however, that the absence of information can be used to rollover existing quotas (paragraph g). That provision is inconsistent with the need to link the export quotas to non-detriment findings, a need acknowledged by Doc. 49 (paragraphs 9-13) and Doc. 50.1 (paragraph 2; Annex, proposed operative paragraph X.a.). If a country fails to provide information on an annual basis, it is difficult to understand how the Parties can ensure that trade is in fact non-detrimental. This problem is exacerbated by the failure of many Parties to report information required by CITES (*see, e.g.,* Resolution Conf. 11.17, noting that "many Parties" have not followed recommendations concerning the timely submission of annual reports).

As such, any rules governing export quotas should require that export quotas revert to zero in the absence of an annual finding that the proposed quota is non-detrimental to the survival of the species. In the alternative, a quota could rollover for a maximum of one year or some other fixed period. IELP has a clear preference for the first alternative. It strongly opposes a rollover of indefinite length, because of the need to link export quotas to non-detriment findings, especially in light of the growing use of export quotas.

IELP also encourages the United States to seek further discussion among the Parties on paragraph (f) of the proposed resolution in Doc. 50.1. That draft provision would allow some use of unused quotas in the following year. IELP sees some potential value in this provision as it may eliminate pressure to target the unused portion of the quota at the very end of the calendar year to ensure that the quota is fully used.

However, IELP also sees potential problems with allowing such a rollover. If a quota is not fully used for a particular species for successive years, then a species could be subject to a

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[6] Center for International Environmental Law, *Comments Supporting the Proposal of Swietenia macrophylla for Listing in Appendix II of CITES and Other Options for Encouraging Sustainable Trade* (Submitted to the United States Fish and Wildlife Service, September 7, 1999).

much larger harvest in a given year to fill the existing quota as well as unused quotas from previous years. The harvest of this larger number of individuals could be detrimental to the survival of the species. Moreover, because paragraph (g) does not currently require an annual non-detriment finding, the harvesting of this larger number of individuals will not be subject to an adequate non-detriment finding. The problems associated with paragraph (f) could, of course, be remedied by requiring an annual non-detriment finding that incorporates the proposed quota for the next calendar year as well as the number of individuals from unused quotas in previous years.

Travelling Live-Animal Exhibitions (Doc. 57)

IELP urges the United States to reject this resolution. The proposed definition of "traveling exhibition" is far broader than contemplated by Article VII(7) of CITES. Moreover, proposed operative paragraph (a) is patently inconsistent with Article VII(7). Whereas Article VII(7) limits the use of the "traveling exhibition exception" to pre-convention or captive-bred individuals, the proposed resolution applies to "*each live animal of species included in Appendix I, II, or III of the Convention*" (emphasis added).

Part II—IELP Comments on the Draft Resolutions on Sharks, Sea Turtles, Toothfish, and Whales (October 4, 2002)

Background

Although the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) clearly covers marine species, the Parties to CITES have listed only a few marine species, such as corals and certain cetaceans, in Appendix I or Appendix II. The Parties have been reluctant to list marine species, in part, because many marine species are managed by regional fisheries management organizations.

While the existence of regional fisheries management organizations does not prevent the Parties from listing a species in the Appendices, they do trigger specific legal obligations:

- **Article XV(2)(b)** requires the Secretariat to consult with inter-governmental bodies having a function in relation to marine species with respect to proposals to amend the Appendices. The Secretariat must seek to obtain scientific data that these bodies may have and ensure coordination with any conservation measures enforced by such bodies. The Secretariat must communicate these views, as well as its own views, to the Parties.
- **Goal 5 of the Strategic Plan** challenges the Parties to "increase cooperation and conclude strategic alliances with international stakeholders." Objective 5.2 specifically requests that Parties act "to ensure close cooperation and coordination with related conventions, agreements and associations."
- **Article XIV(4)** relieves a CITES Party of its CITES obligations with respect to a marine species included in Appendix II, provided that the CITES Party is also a Party to, and complies with the requirements of, another international agreement that affords protection to the marine species at issue. However, Article XIV(4) applies only to those treaties that entered into force before CITES entered into force on July 1, 1975.

Because some populations of marine species continue to decline, some Parties have become more interested in formal cooperation and consultation between the trade regime of CITES and the management regimes of regional fisheries management organizations. For example, illegal, unreported, and unregulated fishing for Patagonian toothfish has significantly undermined the rigorous management scheme for toothfish in the Southern Ocean created by members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). As a result, Australia and Chile have submitted draft resolutions to enhance cooperation between CITES and CCAMLR (Doc. 16.1, Doc. 44). Other CITES Parties have submitted draft resolutions that define cooperation and consultation between CITES and —

- the UN Food and Agriculture Organization (FAO) generally (Doc. 16.2.1, Doc. 16.2.2) and specifically with respect to sharks (Doc.41.1, Doc. 41.2);
- the International Whaling Commission (Doc. 16.4, Doc. 38; and
- the Inter-American Convention for the Protection and Conservation of Sea Turtles (Doc. 16.3).

These comments assess the draft resolutions in light of the Parties' legal obligations and with an understanding of the practical necessities of marine species conservation.

Appropriate Cooperation Between CITES and FAO (Doc. 16.2.1, Doc. 16.2.2)

Background

The FAO has participated in the Listing Criteria Review and contributed expert opinion on the applicability of CITES criteria to fish stocks. Because FAO addresses issues with respect to fisheries as well as timber management and trade, the CITES Secretariat and CITES should maintain a strong relationship with FAO. That relationship must recognize the roles each institution has with respect to management and trade issues, with CITES maintaining primacy over CITES matters, including listing decisions. For that reason, the Parties should:

- **reject Japan's draft resolution (Doc. 16.2.1), because it violates Article II of CITES and gives FAO's views priority over those of the CITES Parties; and**

- **support the U.S. draft decision (Doc. 16.2.2) because it seeks to review the MOU proposal to ensure the CITES/FAO relationship constitutes an information sharing relationship that abides by CITES.**

The Draft Resolution in Doc. 16.2.1 Violates Article II of CITES

Japan's draft resolution in Doc. 16.2.1 rewrites CITES listing criteria by creating two new criteria for listing species on CITES Appendices. The draft resolution proposes, in effect, that a commercially-exploited fish species could be listed only when a species meets *both* of Japan's narrowly defined criteria: (1) "Where there is no responsible fisheries management organization," *and* (2) "Where trade is having a significant negative impact on conservation." In other words:

- if there is a *responsible* fisheries management body for commercial fish, then the CITES Parties may not list the species, even if trade has a *significant* negative impact on the conservation of a species;

- if no fisheries management body exists, then the CITES Parties may list the species *only* if trade has a *significant negative impact* on conservation.

To the extent that the draft resolution intends to establish criteria for listing commercially-exploited fish species, Japan's draft resolution contravenes the plain language of Article II of CITES. First, CITES places no limit on the listing of commercially-exploited fish species. Instead, Article II contemplates listing *any* species, regardless of its commercial value or the existence of a responsible fisheries management organization, that is threatened with extinction *or* may become so. In addition, Article II only requires that trade either "affect" or "may affect" a species. It does not require a significant negative impact on conservation, a finding that would cripple the recovery of a species. The

obvious inconsistencies between this draft resolution and the express language of CITES cannot be resolved. The draft resolution must be rejected, because it is inconsistent with CITES.

The Draft Resolution in Doc. 16.2.1 Inappropriately Defers CITES Decisionmaking to FAO

While Article XV(2)(b) of CITES and Goal 5 of the Strategic Plan encourage cooperation, they also ensure that the Parties to CITES play the primary role in the CITES decisionmaking process. Japan's draft resolution, however, inappropriately limits the role of the CITES Parties in CITES decisionmaking by deferring to FAO. For example, it "instructs" the CITES Secretariat to establish a process for evaluating marine aquatic species proposals "along the lines suggested by FAO." It directs an examination of the CITES Appendices based on recommendations of FAO and directs the work of the FAO Second Consultation to be "fully reflected" in further work of CITES to revise the listing criteria. While the FAO's suggestions and participation at CITES has been valuable, any process must involve equal participation from CITES Parties and the CITES Secretariat. Thus, the draft resolution in Doc.16.2.1 must be rejected.

Doc. 16.2.2 Requires the Parties to Examine the FAO/CITES Relationship before Codifying an MOU in Draft Resolution 16.2.1

The draft decision submitted by the United States recognizes the benefits of inter-governmental collaboration and of considering the scope of the CITES-FAO relationship before entering into an MOU. Doc. 16.2.2 proposes to include *all* CITES specific issues under review by FAO and does not limit the potential scope of a CITES-FAO MOU, as Doc. 16.2.1 does. Establishing a broad MOU promotes better policy by encouraging communication with a comparable authority. The extra time spent charting a clear course of action better serves the interests of the Parties. Thus draft decision 16.2.2 should be adopted to deliberate over whether an MOU is needed, and if so, to what extent.

CITES and Sea Turtles
(Doc. 16.3)

The Parties should adopt the draft resolution in Doc. 16.3 with the amendments proposed below, because it fosters effective cooperation between CITES and The Inter-American Convention for the Protection and Conservation of Sea Turtles (the IAC).

Background

Sea turtles' migratory nature complicates their regulation and management. A sea turtle may travel over 1000 kilometers in its lifetime—often swimming in the territorial seas and exclusive economic zones of several countries. Despite receiving the highest level of protection from several international treaties, including CITES, many sea turtle populations remain dangerously low.

Thus, effective and successful sea turtle conservation depends on the ability of international organizations to coordinate their regulatory and management practices. Fortunately, both CITES and the IAC recognize the complex, regional nature of sea turtle conservation and emphasize cooperation as a means to improve conservation and trade strategies. Article XV(2)(b) of CITES promotes coordination and consultation and Article IV(2)(b) of the IAC directs its members to comply with CITES rules that apply to sea turtles.

Document 16.3 Embodies the Cooperative Approach Envisioned by CITES and the Strategic Plan and Could Lead to More Effective Conservation Strategies for Sea Turtles

Increasing cooperation between CITES and the IAC would serve as an important tool for gathering scientific data, coordinating conservation strategies, and improving the conservation status of sea turtles. Article VII of the IAC establishes a scientific committee responsible for researching sea turtle "biology and population dynamics" as well as evaluating the environmental impact on turtles from a range of sources. The information collected by the IAC's scientific committee would prove valuable when CITES evaluates import, export and re–export permit applications. Indeed, the combined knowledge of the IAC's scientific committee and CITES own scientific authorities will likely result in more effective regulation of the sea turtle trade. More complete information, obtained from an expert committee, would help CITES Parties make better decisions concerning sea turtles, such as decisions to transfer sea turtle populations to a different Appendix or approve ranching operations.

Document 16.3 Could Be Made More Effective by Including Specific Goals for Cooperation

Although Document 16.3 mirrors language contained in Resolution Conf.10.4 concerning cooperation and synergy with the Convention on Biological Diversity, it would be improved by directing the Secretariat or the Conference of the Parties to undertake specific actions. For example, the sixth paragraph directs the Secretariat to transmit "relevant Resolutions and Decisions" adopted at COP12 to the IAC. The specificity of this request makes for effective implementation and ensures accountability.

In contrast, other provisions are too general for effective implementation. For example, the second paragraph directs the Secretariat to study opportunities for cooperation, coordination and synergy, but does not provide any guidance on the scope of the project.

IELP recommends that the Parties combine and amend the second, third and sixth paragraphs of the draft resolution as follows:

REQUESTS the CITES Secretariat to develop cooperation between the conventions by:

(a) inviting the IAC Secretariat to observe future meetings of CITES and by informing the IAC Secretariat of opportunities for cooperation when they arise;

(b) establishing an information clearing-house for sharing databases, reports and other materials between the conventions;

(c) exploring opportunities for preparing joint work plans that address threats to sea turtle populations on a regional level;

(d) coordinating its activities with regard to sea turtles and their habitats in the western hemisphere, including future dialogue meetings among range States, with the Parties and Secretariat of the IAC;

(e) transmitting to the IAC this and other relevant Resolutions and Decisions adopted at the 12th meeting and at future meetings of the Conference of the Parties to CITES; and

(f) submitting a report documenting the progress in implementing the provisions of this resolution at the 13th and at future meetings of the Conference of the Parties to CITES with the intention of evaluating cooperative development and generating new ideas for synergy.

Effective Coordination between CITES and the International Whaling Commission (Doc. 16.4, Doc. 38)

Background

A uniform and coordinated conservation management regime for the harvest and trade in whale products is essential to ensuring that these practices do not result in detrimental impacts to whale populations. For this reason, the CITES Parties have supported the moratorium on commercial whaling of the International Whaling Commission (IWC) by recommending that CITES Parties not issue any import or export permits or certificates for introduction from the sea (Resolution Conf. 11.4). A regime that conflicts with the IWC's regime would undermine the moratorium, and, thus, conflict with the goal of Article XV(2)(b) of CITES to coordinate international conservation measures for marine species and fail to comply with the precautionary measures of Resolution Conf. 9.24. To ensure appropriate coordination of conservation measures between CITES and the IWC, the CITES Parties should:

- **support Mexico's draft resolution (Doc. 16.4), because it ensures coordination of CITES and IWC conservation strategies; and**

- **reject Japan's draft resolution (Doc. 38), because it undermines the IWC's efforts to control commercial whale harvests effectively and conflicts with goals of Article XV(2)(b) and Resolution Conf. 9.24.**

Mexico's Draft Resolution Ensures Effective Coordination (Doc. 16.4)

Mexico's draft resolution in Doc. 16.4 reaffirms the relationship between CITES and the IWC by ensuring coordinated efforts to establish an enforceable conservation management scheme. This draft resolution calls for the retention of whale species in their current Appendices due to the ongoing progress and undetermined nature of the Revised Management Scheme (RMS) and the lack of adequate population estimates to insert into the Revised Management Procedure (RMP). Without adequate population estimates, the RMP—even with its margins for error—cannot guarantee harvest quotas that will not be detrimental to species. Without adequate supervision and control measures, legal harvest and trade in whales and whale products cannot be ensured.

Mexico's draft resolution, however, creates a tension between the coordination provisions of CITES and the procedure for amending the Appendices under Article XV of CITES and Resolution Conf. 9.24, because some species of whale may meet the scientific criteria for inclusion in Appendix II. However, as the following comments regarding Japan's draft resolution make clear, the lack of an adopted RMS means that an appropriate or effective enforcement scheme is not yet in place, as required by Resolution Conf. 9.24. Adoption by CITES of enforcement controls different from the IWC's would seriously undermine efforts to complete the RMS. Still, Mexico's draft resolution should be amended to include a "sunset" provision that requires repeal of the resolution upon completion of the RMS by the IWC.[7]

[7] In addition, the ninth preambular paragraph must be amended to define introduction from the sea consistently with Article I(e) of CITES: the "*transportation* into a State of specimens of any species which were taken in the marine

Japan's Draft Resolution (Doc. 38) Must Be Rejected Because It Conflicts with Resolution Conf. 9.24 and the RMS

The draft resolution in Doc. 38 would fracture coordination between CITES and the IWC by adopting a regulatory scheme based on measures that may undermine completion of the RMS. Japan's draft resolution proposes to transfer certain whale stocks from Appendix I to Appendix II based on CITES criteria, including the precautionary measures of Resolution Conf. 9.24. Under the precautionary measures set forth in Resolution 9.24 Annex 4(B) a species cannot be transferred from Appendix I to Appendix II if, among other things, the transfer may cause enforcement problems or until appropriate or effective enforcement controls are in place.[8]

The National DNA Register. Yet, Japan's proposed enforcement controls—trade only with countries having a national DNA register system—directly conflict with a proposal for an international DNA register system now under consideration by the IWC. By transferring whale populations to Appendix II subject to a national DNA register, CITES would undermine the IWC's discussions concerning an international DNA register. Decisions that undermine efforts in other international marine fora are contrary to the intent of Article XV(2)(b). Approval of a national DNA register under these circumstances would certainly be inappropriate and potentially ineffective, and, thus, inconsistent with Resolution Conf. 9.24.

Moreover, if the IWC adopts an international DNA registry and CITES adopts a national DNA registry, members of the IWC and CITES would be required to establish two potentially counterproductive regimes. Not only would this situation create an inefficient allocation of human resources, it would place CITES in an antagonistic relationship with the IWC.

In addition, if the IWC adopts an international DNA registry that shows that whales were taken illegally while CITES' national registry shows a legal taking, a Party would be in compliance with CITES even though evidence of illegal practices exists. This would place CITES in the position of allowing trade in whales that were harvested inconsistently with the IWC's RMS.[9] This situation highlights the inappropriateness of adopting Japan's resolution and the need for CITES to cooperate with the IWC to ensure that the regimes for monitoring trade and harvest are compatible.

Encouraging Noncompliance with of the RMS. Adoption of Japan's draft resolution could encourage noncompliance with IWC regulations and undermine its ability to manage whale harvests effectively. The draft resolution allows trade in whale meat between "signatories" to the International Convention for the Regulation of Whaling (ICRW). This

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environment not under the jurisdiction of any State." Finally, the operative paragraph concerning adherence to the IWC should be deleted because it is already included in Resolution Conf. 11.4.

[8] Resolution Conf. 9.24, Annex 4, paragraph B(2) establishes five alternatives under which a species may be transferred from Appendix I to Appendix II. All but one alternative requires, among other conditions, an inquiry into potential enforcement problems or the effectiveness or appropriateness of enforcement controls. The alternative that does not include an inquiry into enforcement, ranching, does not seem to apply to whale species.

[9] Neither the provisions for export nor introduction from the sea require a finding that the specimen was obtained in compliance with an international management regime. Instead, a management authority, for purposes of export only, must show that the specimen was not obtained in contravention of the laws of the State of export.

provision may encourage noncompliance with the RMS because an IWC member could harvest whales subject to an existing objection to the moratorium on commercial whaling, a future objection to the RMS, or conduct scientific research whaling and still trade in whale products subject only to CITES requirements. Thus, whales would be harvested without compliance with the measures that the IWC considers effective and appropriate, such as on-board observers, a vessel monitoring system (VMS), vessel registration, inspections, and compliance mechanisms.

Second, the draft resolution allows trade among "signatories" to the ICRW. Presumably, Japan did not use "signatory" in its strict international law meaning, because Japan is not a signatory to the ICRW.[10] If Japan used "signatory" to mean any country that has acceded to or otherwise formally indicated its intent to be bound by the ICRW, then the draft resolution would allow trade between "signatories" to the ICRW that no longer participate in the IWC. It would also allow trade with Iceland, which recently submitted a letter of accession to become a Party to the ICRW. Consistently with international law, however, the IWC rejected Iceland's letter of accession, and thus Iceland's membership in the ICRW and IWC, because Iceland objected to the commercial whaling moratorium. Because Japan's draft resolution would permit trade with such countries, it encourages noncompliance with IWC regulations. It would also discourage IWC Members from reaching consensus on the final RMS because they could resume commercial whale meat trade under CITES while maintaining uncompromising positions in the IWC. As such, this draft resolution establishes inappropriate and ineffective mechanisms that conflict with the goals of Article XV(2)(b) and Annex 4 of Resolution Conf. 9.24.

Other provisions do not contribute to the implementation of CITES. The first paragraph merely restates the obligations of the Parties to list species based on the criteria of Resolution Conf. 9.24, and it fails to mention that such decisions must also be made consistently with Article XV. The two statements in the third operative paragraph are too general to be accurate. Because they do not contribute to the implementation of CITES, they should not be adopted.

Also, the third paragraph of the preamble asserts that the RMS has not been adopted because a few IWC members oppose the resumption of commercial whaling on any terms. In truth, the RMS has not been completed because of disputes over the specific provisions to include in the RMS. Some disputed issues are accepted international practice in fisheries management organizations. For example, several fisheries organizations, with support from Japan, the United States, and Norway, require a vessel monitoring system (VMS). Several fisheries organizations also require observers, vessel registration, and compliance regimes. While the IWC has made progress towards adopting a VMS and an observer program, other issues must still be resolved, such as the extent of observer coverage (most fisheries are moving towards 100% coverage).

Lastly, it is well known that the resumption of commercial whaling requires completion of both the RMP (the statistical model that calculates safe harvest quotas from reliable

[10] Although these terms do not have fixed meanings, "signature" means the act of signing a treaty at the conclusion of a negotiation or within the time period authorized by the treaty. A country ratifies a treaty that it has signed. Acceptance, accession, adherence, or approval occurs when a State did not sign a treaty but formally accepts its provisions. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 612 (5th ed. 1998). Japan acceded to the ICRW, but did not sign it. 161 UNTS 72.

population estimates) and the RMS (which is designed to provide effective supervision and control of whaling). Thus, it is irrelevant that the RMP is completed so long as the RMS's appropriate and effective supervision and control scheme remains uncompleted.

CITES and Sharks
(Docs. 41.1, 41.2)

The Parties should **adopt** the draft resolutions contained in Doc. 41.1 and Doc. 41.2, because they promote cooperation between CITES and other international organizations for the effective conservation of shark species. They include provisions that strengthen our understanding of populations and sustainable management of sharks. They also encourage dialogue between Management Authorities and Custom Authorities to establish a classification system for the collection of detailed shark data.

Shark Conservation and CITES

The mid-1980s saw an increase consumption of shark products in certain regions of the world. By 1995, world exports more than doubled from 22,203 tonnes to 47,687 tonnes; the number of exporting nations increased from 18 to 37, while importing countries increased from 12 to 36; international shark fin trade increased more than tenfold, from 3,011 metric tons in 1980 to 7,048 metric tons[11]; one country imported 52 tonnes of shark liver oil annually for seven years, representing 130,000 to 156,000 sharks[12]; more than 435,000 metric tons of shark was landed in the Americas; and by 1999, countries reported combined shark landings totaling over 694,220 annual tons.[13] The World Conservation Union's (IUCN) 2000 Red List includes 75 shark taxa on its Threatened Species List. The FAO warns that "unless efforts are undertaken promptly to halt growing catches, the future of many more shark populations is very bleak."[14]

To limit over-exploitation of sharks, some States have enacted stricter conservation laws to protect sharks,[15] and other States are collaborating with international organizations to implement more effective national conservation measures.[16] Australia and the United Kingdom have placed the Great White Shark and the Basking Shark, respectively, in Appendix III of CITES.

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[11] At least 125 countries are involved in shark fin trade. TRAFFIC, AN OVERVIEW OF WORLD TRADE IN SHARKS AND OTHER CARTILAGINOUS FISHES, TRADE IN SHARK FINS, http://www.traffic.org/factfile/factfile_sharks_fins.html (Dec. 1996).

[12] TRAFFIC reports that one tonne could require the liver of 2,500 to 3,000 sharks. *Id*.

[13] Five countries landed 312,172 of the 694,220 tonnes of shark landed annually. IUCN Shark Specialist Group & TRAFFIC, *The Role if CITES in The Conservation and Management of Sharks* (June 2002)(revised and updated from AC18 Doc. 19.2). Moreover, 50% of the global Chondrichthyan catch is bycatch that is largely unmanaged and unreported. Terence I. Walker, *Can Shark Resources Be Harvested Sustainably? A Question Revisited with a Review of Shark Fisheries*, 49 MARINE AND FRESHWATER RESEARCH 553-572 (1998).

[14] FAO, *FAO Concerned about Severe Declines in Shark Stocks: International Plan of Action Calls for Sustainable Management*, Press Release 98/61(Oct. 21, 1998).

[15] Ecuador bans shark finning and fishing within the Galapagos Marine Reserve; Australia has listed the whale shark as nationally threatened under the Environment Protection and Biodiversity and Conservation Act and currently bans finning; India provides "Schedule 1" protection to the Whale Shark; the United States bans finning.

[16] For example, China's CITES Management Authority recently established a Memorandum of Understanding with IFAW which allows IFAW to assist China with various national shark conservation techniques that strengthen China's capacity to enforce CITES. *International Fund for Animal Welfare*, *Press Release,* http://www.ifaw.org/page.asp?id=637 (June 27 2002).

Nonetheless, because of the volume of international trade in shark products and the "bleak" future of many shark species, the need for greater cooperation between CITES and FAO is clear. The Parties to CITES have passed Resolutions and Decisions that called for a review of existing biological, trade, and management information relating to sharks (Resolution Conf. 9.17 and Decision 10.48). Decision 10.48 called for the collection of species-specific data, management of shark fisheries at a national level, as well as establishing international and regional bodies to coordinate the management of shark fisheries. Decision 11.94 directed the Chair of the Animals Committee to liaise with FAO.

In addition, although FAO adopted the voluntary International Plan of Action-Sharks (IPOA-Sharks) in 1999 and encouraged States to develop a National Plan of Action (NPOA-Sharks) for shark conservation, the Chairman of the CITES Animal Committee stated that the FAO's progress in implementing the voluntary IPOA-Sharks has been "negligible" and appeared to be "less advanced than described by a previous COFI report." As of May 2002, 113 States reported shark landings to FAO, but only 29 States reported any progress on implementing IPOA-Sharks. Of these, only five States had prepared Shark Assessment Reports or NPOAs.[17] In addition, although CITES Decision 11.151 sought to establish tariff classifications that distinguished various shark products, the World Customs Organization reported that no opportunity exists for further elaboration of identification codes within the Harmonized System of Standard Tariff Classifications, other than including a single code for all species "listed" on CITES Appendices.[18] In practice, the effective implementation of IPOA-Sharks and NPOAs has been minimal and has not addressed a major concern of Parties to CITES: unregulated landings of sharks that supply a growing, predominately unregulated international trade that continues to deplete the shark species. Clearly, the need remains strong for more action by CITES and increased cooperation between CITES and FAO.

The Draft Resolutions Support Cooperation

Australia and Ecuador have proposed draft resolutions that call for more direct, consistent participation by CITES in monitoring shark trade and closer cooperation with FAO. The draft resolutions recommend that the CITES Animal Committee critically review progress towards IPOA-Sharks implementation (NPOA-Sharks) by major fishing and trading nations, by a date one year before COP 13 to CITES. This action directly involves CITES and its members in advancing efforts to gain necessary data about sharks and encouraging pertinent States to develop NPOA-Sharks within a specific time frame.

In addition, the draft resolutions recommend that the Animals Committee examine Shark Assessment Reports (SARs) for the purpose of identifying specific species for CITES listing. This action could encourage Parties to develop SARs and keeps CITES directly involved with current, global information concerning over-exploitation of sharks due to trade.

The draft resolutions also recommend that CITES Parties obtain information on IPOA–Sharks from their fisheries departments and report directly on progress at future meetings

[17] IUCN Shark Specialist Group & TRAFFIC, *The Role if CITES in The Conservation and Management of Sharks* (June 2002)(revised and updated from AC18 Doc. 19.2).
[18] *See id.*

of the Animal Committee. This action encourages direct participation by CITES Parties that will provide each Party a more comprehensive understanding of its role and effect in shark conservation. It also encourages the development of a demographical analysis of shark species, which should facilitate proper CITES listings. Also, by encouraging regular reports directly to the Animals Committee, CITES may more readily determine and assist countries having difficulty in implementing shark conservation programs;

However, IELP is concerned with the following paragraph proposed by Ecuador:

> DIRECTS the Secretariat, in liaison with FAO, to commission the preparation of a report to be presented 150 days prior to each Conference of the Parties, on the biological, fishery and trade status of the highly migratory and straddling stocks of sharks listed in the UN Fish Stocks Agreement and to focus on 10 species at a time for consideration at each meeting of the Animals Committee.

This report is likely to be very expensive and draw resources away form other important CITES implementation needs. Other aspects of the draft resolutions should help ensure that the same or complementary data is obtained. However, to the extent that the Parties believe such a report is warranted, this paragraph should refer to the list of highly migratory species included in Annex I of the UN Convention on the Law of the Sea. The references to straddling stocks and the Fish Stocks Agreement are incorrect.

With that exception, IELP supports both draft resolutions. However, it believes that the resolutions should be merged, because of their similarities. Moreover, it believes that certain actions included in the resolutions are more accurately characterized as Decisions. Thus, IELP has proposed a merged text, based largely on Ecuador's text, and divided the various actions into a Resolution and a Decision. IELP urges the United States to work with Ecuador and Australia to adopt this text.

DRAFT RESOLUTION OF THE CONFERENCE OF THE PARTIES

Conservation of and trade in sharks

RECOGNIZING that sharks are particularly vulnerable to over-exploitation owing to their late maturity, longevity and low fecundity;

CONCERNED that some shark species are heavily utilized around the world for international trade in their fins, skins and meat, and that shark stocks remain unmanaged and their utilization unmonitored;

RECOGNIZING that unregulated fishing of sharks, including bycatch, is the most important threat to shark conservation;

NOTING that levels of exploitation in some cases are unsustainable and may be detrimental to long-term survival of shark species;

RECOGNIZING that there is growing international concern about the conservation threats to sharks, which has been addressed through unilateral action, as well as by multilateral agreements and organizations;

NOTING that the World Conservation Union's (IUCN) Red List of Threatened Species (2000) lists 79 shark taxa (from the 10 percent of taxa for which Red List assessments have been made);

NOTING that the United Nations Convention of the Law of the Sea (UNCLOS) has called for international cooperation for conservation and utilization of sharks listed on Annex I of UNCLOS;

CONSIDERING that the Conference of the Parties has competence to consider any species subject to international trade;

NOTING that two shark species are currently listed in Appendix III of CITES;

NOTING that Parties to CITES have previously recognized the conservation threat international trade poses to sharks through Resolution Conf. 9.17 and Decisions 10.48, 10.73, 10.74, 10.93, 10.126, 11.94, and 11.151;

NOTING that, at the 23rd session of the Food and Agriculture Organization Committee on Fisheries (COFI), held in February 1999, the Code of Conduct for Responsible Fisheries and the International Plan of Action (IPOA) on the Conservation and Management of Sharks (IPOA-Sharks) were agreed;

NOTING that States were encouraged to have prepared NPOAs for sharks by COFI 24th session held in 2001, but there has been a significant lack of progress with the development and implementation of NPOAs;

OBSERVING that, of the 113 FAO member countries that report their shark landings to the FAO, just 29 have reported any progress with IPOA implementation, and only five of these have provided documentation of such progress in the form of Shark Assessment Reports or National Plans of Action;

CONCERNED that insufficient progress has been made in achieving shark management through the implementation of IPOA-Sharks except in States where comprehensive shark assessment reports and NPOA-Sharks have been developed;

CONCERNED that, despite these efforts, sharks continue to be poorly managed and over-exploited for international trade;

WELCOMING a decision adopted at the 18th meeting of the CITES Animal Committee that CITES should continue to contribute to international efforts to address shark conservation and trade concerns, including by assisting FAO Parties in the implementation of the IPOA-Sharks, particularly with respect to international trade in sharks and parts and derivatives thereof;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

AGREES that a lack of progress in the development of the FAO IPOA-Sharks is not a legitimate scientific justification for a lack of further substantive action on shark trade issues within the CITES forum;

URGES Regional Fisheries Management Organizations to take steps to undertake, on a regional basis, the research, training, data collection, data analysis and shark management plan development outlined by FAO as necessary to implement the IPOA-Sharks;

DIRECTS the Animals Committee to:

(a) maintain liaison with FAO COFI in monitoring the implementation of the IPOA−Sharks;

(b) critically review progress towards IPOA−Sharks implementation (NPOA−Sharks) by major shark fishing and trading nations and report the findings to each meeting of the Conference of the Parties;

(c) examine information provided by range States in shark assessment reports and other available relevant documents, with a view to identifying key species and examining these for consideration and possible listing under CITES;

(d) recommend actions for improving the regulation of international trade in shark species and specimens thereof based on the information obtained in paragraphs (a)-(c) to each meeting of the Conference of the Parties;

REQUESTS Management Authorities to collaborate with their national customs authorities to expand their current classification system to allow for the collection of detailed data on shark trade including, where possible, separate categories for processed and unprocessed products, for meat, cartilage, skin and fins, and to distinguish imports, exports and re-exports. Wherever possible these data should be species-specific.

DRAFT DECISION OF THE CONFERENCE OF THE PARTIES

DIRECTS the Parties to report to the Secretariat on progress made to comply fully with the FAO IPOA-Sharks by the 13th meeting of the Conference of the Parties;

DIRECTS the Secretariat to raise with FAO concerns over the significant lack of progress implementing the IPOA–Sharks and to urge FAO to take steps to encourage the implementation of the IPOA;

DIRECTS the Animals Committee, in the event that any shark species are listed in Appendix II at the 12th meeting of the Conference of the Parties, to prioritize species within the Review of Significant Trade.

CITES and Toothfish
Effective Cooperation between CITES and CCAMLR
(Doc. 16.1, Doc. 44)

Background

Chile and Australia have proposed greater cooperation between CITES and the Convention for Conservation of Antarctic Marine Living Resources ("CCAMLR") to conserve Patagonian toothfish. Greater cooperation is needed because, although CCAMLR has succeeded in reducing unregulated and unreported ("IUU") toothfish catches, IUU catches continue to result in serious over-harvesting of toothfish. In 2001, 20,820 tons of toothfish were caught inside the Convention Area, and 7,500 tons, or 34% of the total catch, were not reported.

To reduce IUU fishing, CCAMLR has adopted a Catch Documentation Scheme ("CDS") to promote accurate catch reporting and monitor legal and illegal harvesting of toothfish. Under the CDS, fishing vessels must supply information describing their catches in a special CCAMLR catch document form. Vessel masters, receiving vessels, and port state officials verify the document with their signatures. Originals of all copies of the document must be returned to the Flag State of the fishing vessel that caught the fish. The Flag State then forwards the copy to the CCAMLR Secretariat. Throughout, copies of the documents remain with the catch. The toothfish catches thus are verified and tracked from the moment they are caught to the moment they are sold.

The CDS has been extremely effective at increasing catch reporting. From 1999-2000, vessels reported 11,553 tons of toothfish caught outside the Convention Area. After CCAMLR implemented the CDS in May 2000, vessels reported catching 30,152 tons of toothfish outside the Convention Area. Nonetheless, many fishermen fish outside the Convention Area and outside CCAMLR's quota and enforcement regime for toothfish. According to Australia's proposal to list toothfish in Appendix II (Proposal 39), almost 50% of toothfish landings over the past four years derived from IUU fishing.

Cooperation between CITES and CCAMLR (Doc. 16.1)

Chile's draft resolution in Doc. 16.1 should be adopted because it encourages cooperation between CITES and CCAMLR greater compliance with CCAMLR and its CDS. Chile's draft resolution urges voluntary compliance with CCAMLR's Catch Certification Document Scheme and encourages a permanent flow of information between CCAMLR and CITES. It also invites interested countries and international organizations to help prevent illegal trade in toothfish and urges CITES Parties to ensure that their flag vessels do not engage in IUU fishing of Patagonian toothfish.

These noncontroversial provisions should help both CITES and CCAMLR Parties monitor legal and illegal fishing by increasing information that tracks landings and trade flows of toothfish. In addition, implementation of the CDS by CITES Parties that are not members of CCAMLR supports CCAMLR's measures to protect toothfish populations and promote the

sustainable use of fish resources and ensures that CITES Parties do not undermine CCAMLR's conservation measures.

Coordination with CCAMLR to Conserve Toothfish (Doc. 44)

The Australian draft resolution urges cooperation between CITES and CCAMLR, and establishes rules to harmonize the Appendix II permit requirements of CITES with CCAMLR's CDS. Insofar as the Australian draft resolution meets CITES' substantive requirements, IELP supports it. However, several provisions raise legal issues that must be addressed.

Substituting CCAMLR Quotas For CITES No Detriment Findings. To harmonize CCAMLR and CITES requirements, this draft resolution makes the annual catch limits set by CCAMLR's Scientific Committee a substitute for non-detriment findings under Article IV of CITES. CITES, however, explicitly requires a State's Scientific Authority to make a non-detriment finding before issuing an export permit or certificate of introduction from the sea. As a result, the CCAMLR toothfish catch quota cannot function as those scientific authorities' non-detriment finding without contravening Article IV.

The Parties have at least two mechanisms to incorporate CCAMLR's quotas into the CITES regime for non-detriment purposes. First, a Party may designate CCAMLR as their scientific authority for purposes of issuing non-detriment findings for toothfish. Second, the Conference of the Parties could approve CCAMLR's quotas as part of a proposal submitted under Article XV that stipulates that CCAMLR's quotas are the equivalent of a non-detriment finding. For example, Resolution Conf. 10.14 allows Scientific Authorities of an importing country to issue non-detriment findings if the export is within the quota established for a CITES Party:

> Resolution Conf. 10.14 states: "in reviewing applications for permits to import whole skins or nearly whole skins of leopard *Panthera pardus* (including hunting trophies), in accordance with paragraph 3(a) of Article III of the convention, the Scientific Authority of the State of import approve permits it if is satisfied that the skins being considered are from one of the following States [for which a an export quota has been granted]."

Unlike Australia's draft resolution for toothfish, however, leopard quotas must be evaluated and approved by the COP (Resolution Conf. 10.14, paragraph (f)).

If Australia's draft resolution is amended to require that the CITES COP evaluate and approve quotas based on the advice of the CCAMLR Scientific Committee, IELP would support the "substitution" of CCAMLR quotas for CITES no-detriment findings.

Substituting CCAMLR's CDS for CITES Introduction from the Sea Certificates and Export Permits. Australia's draft resolution also proposes to substitute CCAMLR Dissostichus Catch Document (DCD) for a CITES certificate of introduction from the sea or an export permit is problematic. Australia attempts to apply Article XIV(4) to CCAMLR. Article XIV(4) relieves a CITES Party of its CITES obligations with respect to Appendix II marine species

when it complies with the requirements of a marine protection agreement that pre-dates CITES. Because CCAMLR post-dates CITES, Parties must meet their Article IV obligations when issuing an introduction from the sea certificate or an export permit.

IELP agrees in principle with the goals of Australia, because CCAMLR's CDS requirements generally exceed the requirements for a CITES export permit or introduction from the sea certificate (*see* Table 1 below). As such, substituting CCAMLR's CDS for CITES permits would be an efficient and effective way to protect and monitor trade in toothfish. Moreover, by bringing those CITES Parties whose fishermen catch toothfish in noncompliance with CCAMLR's conservation measures would help prevent IUU fishing.

Table 1: Comparison of CITES and CCAMLR/CDS Requirements

CITES Requirement	CCAMLR Requirement	Comments
Scientific Authority must make a non-detriment finding. required for export permit and certificate of introduction from the sea. Article IV(2)(a), (6)(a).	Harvest quotas based on ecosystem and precautionary approach, as well as historical catches and uncertainties in or lack of information.	Because CITES does not provide a uniform definition of "non-detriment" and concern has been raised about the issuance of non-detriment findings under Article IV, the use of CCAMLR's would provide a uniform means by which to gauge non-detriment.
Management Authority must be "satisfied" that specimen was not obtained in contravention of national laws. required for export permit only. Article IV(2)(b).	• **Contracting Party must "take steps" to determine whether Dissostichus spp. was "caught in a manner consistent with CCAMLR measures."** • **Contracting Party may issue catch documents only to vessels authorized to catch Dissostichus spp.** • **Each landing and transshipment must be accompanied by a completed catch document.** • **Vessels must be registered and use VMS to verify their catch positions.** Conservation Measure 170/XX, CDS for Dissostichus spp.	• The CCAMLR requirement is broader because it applies in the Convention Area, much of which is beyond national jurisdiction where domestic laws do not apply. • CCAMLR's CDS ensures a specimen is legally obtained. Strictly speaking, however, neither CCAMLR nor CITES require that the specimen was obtained legally. A CITES Management Authority must be "satisfied" that specimen was not obtained in contravention of law. CCAMLR requires a Party to "take steps" to ensure caught consistently with CCAMLR. • CCAMLR Conservation Measures are binding.
Management Authority must be "satisfied" that the living specime prepared and shipped to minimiz injury, damage to health or cruel treatment. required for export permit and certificate of introduction from the sea. Article IV(2)(c), (6)(b).	No equivalent finding.	Presumably, toothfish are dead when brought on board, because they are caught by longline methods. Thus, the CITES requirement is not applicable.

Nonetheless, it finds that the mechanism proposed contravenes Article IV. Because it supports the general concept, IELP will submit additional comments on Australia's draft resolution and proposed annotation, as well as review the possibility of similar proposals for coordination with the conservation measures of other organizations.

Cooperation Between CITES and CCAMLR

IELP supports the provisions of the Australian draft resolution that urge communication between CITES and CCAMLR. Under the proposed resolution, CITES Parties would consult the CCAMLR Secretariat before issuing a certificate of introduction from the sea. The CITES Animals Committee would consult with the CCAMLR Scientific Committee and report on any trade measures that would help maintain toothfish export levels that are not detrimental to the survival of the toothfish. Under Australia's draft resolution, all Parties and non-Parties to CITES would take measures to prevent IUU fishing and illegal trade in toothfish, and report to the CITES Secretariat on any data regarding illegal toothfish trade or harvests. The draft resolution facilitates a concrete procedural framework for a stream of information between the two conventions. These cooperation provisions could be combined with those proposed by Chile in Doc. 16.1.

Introduction from the Sea: Issues
(Doc. 44, Doc. 61)

Background

In the draft resolution in Doc. 44 (conservation of toothfish), third operative paragraph, Australia incompletely defines "introduction from the sea." In Doc. 61, Chile requests the establishment of a marine working group to, *inter alia,* propose a definition of introduction from the sea. To progress this discussion, IELP has assessed the issues involving introduction from the sea and prepared a definition of it that is consistent with the U.N. Convention on the Law of the Sea (UNCLOS).

Under CITES, "introduction from the sea" is the transportation into a State of a specimen of a marine species (flora and fauna) listed in Appendix I or II that was taken in the marine environment "*not under the jurisdiction of any State*." Article III(5) and Article IV(6) require the State of introduction to issue a certificate of introduction from the sea for a specimen introduced from the sea. Although neither CITES nor the CITES Parties have defined the term "not under the jurisdiction of any State," the Parties agree that the term should be harmonized with the provisions of UNCLOS.

Although UNCLOS does not refer to a State's "jurisdiction," it establishes rules for claims of "sovereignty" and "sovereign rights" in different areas of the ocean—the continental shelf, internal waters, territorial sea, exclusive economic zone, and high seas—that can be correlated with the use of the phrase "not under the jurisdiction of any State" by CITES.

Beyond the Continental Shelf

Because CITES applies to both marine plants and animals, any definition of "introduction from the sea" must incorporate the continental shelf. Article 76 of UNCLOS defines the continental shelf as comprising

- the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of a coastal State's land territory to the outer edge of the continental margin; or
- a distance 200 nautical miles from baselines from which a State's territorial sea is measured.

The first paragraph acknowledges the sovereign rights of a coastal State beyond the 200-mile mark, provided that the continental shelf extends beyond that point. The second paragraph grants sovereign rights to a coastal State up to 200 miles even if its continental shelf does not reach that distance. While UNCLOS establishes supplementary rules for measuring the extent of the continental shelf that limit the extent of the legal definition of continental shelf, the rules are well-established. A definition of introduction from the sea could simply refer to "the area beyond the continental shelf."

Beyond Exclusive Economic Zones and Fisheries Conservation Zones

UNCLOS defines the "high seas" as the area "not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." UNCLOS, art. 86. UNCLOS makes clear that these areas are "open to all States" and thus *not* under the jurisdiction of any State. UNCLOS, art. 87. Thus, the area beyond the jurisdiction of any State includes the high seas—the area beyond a State's internal waters, territorial sea, and/or exclusive economic zone.

However, UNCLOS does not necessarily limit a coastal State's claim of sovereign rights to the exclusive economic zone. UNCLOS allows coastal State's to assert sovereign rights to natural resources in an area up to 200 nautical miles from the coast and subject to the specific legal regime established by UNCLOS for Exclusive Economic Zones. UNCLOS, arts. 55, 57. However, a coastal State does not need to exercise sovereign rights over all natural resources or completely to the 200-mile mark. It may, for example, exercise sovereign rights over a limited number of natural resources. These areas are often called Exclusive Fisheries Zones (EFZs) or Fisheries Conservation Zones (FCZs). To the extent that a coastal State asserts sovereign rights over a natural resource, however, it must meet the minimum obligations of UNCLOS.[19]

This is true because the right to assert sovereign rights derives from UNCLOS directly. The right may also derive indirectly through UNCLOS to the extent that its provisions have become customary international law. A coastal State may thus assert sovereign rights over an area up to 200 nautical miles as a matter of customary international law.[20] The rights and duties of coastal States concerning fisheries under customary international law are closely related, if not the same as, those of UNCLOS.[21] Thus, a coastal State must assert its sovereign rights over living resources in a fisheries conservation zone *and* meet its conservation and management obligations.

In either case, UNCLOS provides minimum requirements for exercising sovereign rights over natural resources in an area up to 200 nautical miles from the coast. Thus, if the legal regime for an EFZ meets the minimum legal obligations of UNCLOS for the conservation of living marine resources, then it constitutes a valid exercise of "jurisdiction." Fishing within these areas for CITES-listed species would *not* require introduction from the sea certificates.

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[19] "[T]he rights and duties of states that enacted exclusive fishing zone legislation correspond to the applicable rights and duties set out in Part V [of UNCLOS] with regard to exploring and exploiting, and conserving and managing, living natural resources in the area in question." THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, vol. II, page 510, para. v.33 (eds. Satya N. Nandan & Shabtai Rosenne, 1993); *See also* William T. Burke, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 43 (1994).

[20] *Case concerning the Continental Shelf (Tunisia v. Libya)* 1982 I.C.J. 18, 38, 47-49, 79; *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1885 I.C.J. 13, 33 (June 3)("[T]he institution of the exclusive economic zone … is shown by practice of states to have become part of customary law."); *See, e.g.,* William T. Burke, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 40 (1994).

[21] Ian Brownlie, *Principles of Public International Law* 207 (5th ed. 1998); Jon M. Van Dyke, *International Governance and of the High Seas and Its Resources*, in FREEDOM FOR THE SEAS IN THE 21ST CENTURY 13 (1993).

If the legal regime for an EFZ fails to meet the minimum legal obligations of UNCLOS, it does not constitute a valid exercise of sovereign rights or jurisdiction. Fishing in these areas thus requires the issuance of an introduction from the sea certificate.

Issues of Special Concern: Transshipment between Two FCZs of One Country

Some countries, including the United States and Norway, administer territories and have declared EFZs or FCZs around those territories. An issue for CITES is how to address the catch of a CITES-listed species in the EFZ of one of these territories, the subsequent transshipment of that catch through the high seas, and the introduction of that catch into the State which administers the territory. For example, assume that a fisherman catches an Appendix II listed species in Norway's EFZ around Svalbard. To land the catch in Oslo, the fishermen must travel on the high seas and perhaps through the EFZs of Iceland, Denmark, or the United Kingdom.

Does this constitute "introduction from the sea"? The answer should be "no." "Introduction from the sea" applies only when a specimen is taken in the marine environment not under the jurisdiction of any State. In this example, the specimen was taken in the marine environment of Norway. As such, the transportation of the specimen through the high seas and the jurisdiction of other States is irrelevant.

Issues of Special Concern: Transshipment Through Another State's EEZ

"Introduction from the sea" means the "transportation into a State" of specimens taken on the high seas. A broad interpretation of "State" could require a fisherman to obtain introduction from the sea certificates from ***each*** country through which he transports his catch. The text of CITES does not provide clear guidance on how to address this issue. It is difficult to imagine that the drafters intended a fisherman who simply traversed a country's EEZ to obtain an introduction from the sea permit from that country. However, CITES requires a trader to obtain the relevant CITES permits when transiting through a country, *unless* the specimens remain in customs control. *See* CITES, Article VII(1). That suggests that CITES requires a fisherman to obtain an introduction from the sea certificate from each EEZ through which he passes.

At COP11, Australia provided a sensible solution to this issue. It proposed to define "State of introduction" as the State into which a specimen *is first landed*. This definition ensures that fishermen are not unduly burdened with CITES requirements. It also ensures that one country—the State in which the catch is first landed—has responsibility for making the appropriate non-detriment and other findings required by CITES.

Issues of Special Concern: Export and Re-export

Some fish caught on the high seas are landed at the nearest available port. The fish is then flown to another country. The provisions of CITES with respect to re-export of specimens introduced from the sea are not a model of clarity. Article III(4) and Article IV(5) allow re-export only when a Management Authority is satisfied that the specimen was "imported" into that State in accordance with the provisions of CITES. Because a specimen "introduced from the

sea" is not technically "imported," an overly strict reading of CITES would prohibit the re-export of specimens introduced from the sea.

Such an overly strict reading of CITES, however, is not justified. Certainly, specimens introduced from the sea should be capable of being re-exported, just as other specimens of flora and fauna may be. Because there is nothing unique about specimens taken on the high seas to warrant a prohibition against re-export, the failure of CITES to include "introduction from the sea" in Article III(4) and Article IV(5) must be deemed an oversight.

In the alternative, the definition of "re-export" suggests that a specimen introduced from the sea must be "exported." After being "exported," the specimen can be re-exported. Requiring an export before a re-export would require a no detriment finding to be made by the country of export. However, the country of export will be the same as the state of introduction, which made a non-detriment finding with respect to the introduction from the sea. Thus, there seems to be little added value in requiring an export prior to a re-export of a specimen introduced from the sea. (At the same time, there seems to be little additional burden in adhering strictly to the language of CITES).

Thus, a resolution on introduction from the sea should ensure that the trade transaction immediately after introduction from the sea is a "re-export." This can be accomplished by defining the phrase "imported" in Articles III(4)(a) and IV(5)(a) to mean "imported or introduced from the sea."

Proposed Definition of "Introduction from the Sea"

Consistent with UNCLOS, IELP urges the Parties to adopt the following definition of introduction from the sea:

1. Consistent with UNCLOS, the term "specimens of any species which were taken in the marine environment not under the jurisdiction of any State" means:

   (a) not taken within the territorial sea or the internal waters of a State or in the archipelagic waters of an archipelagic State; or
   (b) not taken on a State's continental shelf, in a State's exclusive economic zone, or in a marine area for which a State has lawfully asserted its sovereign rights (as in a validly declared exclusive fishery zone or fishery conservation zone).

2. For the purposes of Article III(5), Article IV(6), Article IV(7), and Article XIV(5) of the Convention, the term "State of Introduction" means the State in which a specimen is first landed.

3. For the purposes of Article III(4)(a) and Article IV(5)(a), the phrase "imported" shall mean "imported or introduced from the sea."

Introduction from the Sea Is Not a Food Security Issue

The listing of marine species in CITES and the requirements for the issuance of introduction from the sea certificates does *not* raise food security issues. More that 90% of commercial fisheries are found within 200 miles of the coast,[22] bringing the vast majority of commercial fisheries within the Exclusive Economic Zones of coastal States. ***None*** of this catch is subject to CITES requirements for introduction of the sea. Moreover, to the extent that the catch is landed in the State which has declared the Exclusive Economic Zone or a valid EFZ or FCZ, the catch will ***not*** be subject to CITES requirements for either Appendix I or Appendix II species, because CITES permits are required only for international trade in CITES-listed species.

Marine Management Organizations, Zero Quotas, and Article XIV of CITES

The questions of introduction from the sea and the regulation of marine species generally invokes Article XIV of CITES concerning the relationship of CITES to other treaties that protect marine species. Article XIV(4) states that, for Appendix II species that are also subject to a treaty relating to marine species, that Party "shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade" in such specimens.

Article XIV(4) applies only with respect to marine treaties that entered into force before CITES on July 1, 1975, such as the International Convention for the Regulation of Whaling (ICRW) and the Convention Establishing the Inter-American Tropical Tuna Commission (IATTC). It also applies only to the extent that the country harvests the relevant marine species in accordance with the provisions of the relevant marine treaty.

It is clear that if the Parties place a whale species in Appendix II, members of the International Convention for the Regulation of Whaling (ICRW) that are also Party to CITES are relieved from their CITES obligations. A question arises as to the applicability of Article XIV(4), however, when species is included in Appendix II subject to a zero quota. Article XIV(4) can be interpreted reasonably to mean that the zero quota would not apply to a country that is both a Party to CITES and the ICRW, because that country is relieved of its CITES obligations with respect to marine species covered by another treaty.

IELP doubts that the drafters of CITES intended Article XIV(4) to cover the situation of zero quotas—they probably never thought of zero quotas. A better interpretation of Article XIV(4) is:

(1) if a species is included in Appendix II of CITES and also managed by another treaty relating to marine species, a country that is Party to both of those treaties is not required to issue permits pursuant to Article IV of CITES.
(2) if a species included in Appendix II of CITES is subject to a zero quota and the species is also managed by another treaty relating to marine species, a country that is a Party to both of those treaties is not required to *issue permits* pursuant to Article IV of CITES. However, because a zero quota prohibits

[22] FREEDOM FOR THE SEAS IN THE 21ST CENTURY 231 (JON M. VAN DYKE, DURWOOD ZAELKE, AND GRANT HEWISON eds. 1993).

trade, those Parties may not issue permits. Thus, Article XIV(4) does not apply.

IELP urges the United States to support this interpretation if it arises in the context of discussions concerning the transfer of whales or other marine species to Appendix II.