

(Via email)

October 21, 2002

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

Re: Supplemental Comments from IELP Concerning CITES COP12

Management Authority:

The International Environmental Law Project (IELP) of Lewis & Clark Law School submits these supplemental comments pertaining to the relationship between CITES and CCAMLR for the Conservation of Patagonian Toothfish (Doc. 16.1, Doc. 44, Proposal 39). IELP acknowledges the new date for submission of comments, October 29, 2002, on the website of the Fish & Wildlife Service. <http://international.fws.gov/cop12/cop12.html>.

IELP's supplemental comments make two principal conclusions. First, the Chilean draft resolution in Doc. 16.1 alone is insufficient to address the conservation of Patagonian toothfish. While more cooperation is needed between CITES and CCAMLR, it is insufficient to conserve Patagonian toothfish. An Appendix II listing is necessary to protect Patagonian toothfish adequately.

Second, while IELP had legal concerns regarding the Australia's proposed annotation to the Appendix II listing of Patagonian toothfish, IELP has addressed those concerns through amended language in the annotation and in a resolution. IELP urges the United States, in light of the biological status of Patagonian toothfish and the significant illegal, unregulated, and unreported fishing in the toothfish fishery, to support Australia's Appendix II proposal and draft resolution (Doc. 44), especially if it is amended along the lines suggested in these comments.

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

**Additional Comments of the International Environmental Law Project (IELP) on the
Relationship between CITES and CCAMLR for the Conservation of Patagonian Toothfish
(Doc. 16.1, Doc. 44, Proposal 39)
October 17, 2002**

As mentioned in our earlier comments on October 4, 2002, the International Environmental Law Project (IELP) supports cooperation between CITES and the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). On further review of the proposed resolutions submitted by Chile (Doc. 16.1) and Australia (Doc. 44), as well as the information submitted with respect to Australia's proposal to list Patagonian toothfish (*Dissostichus eleginoides*) and Antarctic Toothfish (*Dissostichus mawsoni*) in CITES Appendix II, IELP makes the following additional comments. IELP has also addressed its legal concerns in a revised annotation as well as a draft resolution that combines the Australian and Chilean draft resolutions.

Cooperation Alone Is Insufficient to Protect Patagonian Toothfish

IELP believes that exchanges of information and other cooperation between CITES and CCAMLR, while beneficial and necessary, are insufficient to promote the conservation of toothfish. The fishery—already imperiled by illegal, unregulated and unreported (IUU) fishing—will continue to decline unless measures to control IUU fishing are imposed. In fact, the Secretariat, TRAFFIC, and the Species Survival Network all agree that Patagonian toothfish meets the requirements for inclusion in Appendix II. As such, they believe that Patagonian toothfish will meet the criteria for inclusion in Appendix I in the near future or that harvesting of toothfish for international trade is having or may have a detrimental impact on the species. See Resolution Conf. 9.24, Annex 2a.

For these reasons, IELP believes that the cooperation provisions of Chile's and Australia's draft resolutions must be accompanied by an Appendix II listing. As TRAFFIC reported, "no single measure will be successful in addressing IUU fishing. All possible avenues must be explored in order to address the impact of IUU fishing of Patagonian Toothfish stocks."¹ Ultimately, TRAFFIC recommends the consideration of complementing CCAMLR mechanisms with those of CITES and other conventions and that further efforts must be made to involve all trading nations in the Catch Document System (CDS).² IELP believes that an Appendix II listing under CITES provides a useful mechanism for involving all trading nations in the CDS or a regime similar to the CDS.

Substituting CCAMLR's Harvest Quotas and CDS for CITES Permit Requirements

IELP's concerns focus on the adoption of appropriate mechanisms for ensuring coordination between the CITES permit regime under Article IV and CCAMLR's CDS and method for setting quotas. Australia has proposed to substitute CCAMLR's annual catch limits

¹ Mary Lack & Glenn Sant, *Patagonian Toothfish: Are Conservation and Trade Measures Working?* TRAFFIC Bulletin, vol. 19, no. 1, at 16 (2001).

² *Id.* at 16, 17.

and CDS for CITES permit requirements under Article IV. Because Article IV of CITES explicitly requires a Party's Scientific Authority to make a non-detriment finding before issuing an export permit or certificate of introduction from the sea, as well as determine that an export, re-export, or introduction from the sea is consistent with national laws, the CITES Parties must answer two questions: (1) Do CCAMLR's quotas and CDS meet the substantive requirements of Article IV?; and (2) What is the appropriate legal mechanism for linking CCAMLR's regime to CITES permit requirements?

Do CCAMLR's quotas and CDS meet substantive requirements of Article IV of CITES?

Yes. CCAMLR's harvest quotas are set at a level equivalent to a non-detriment finding. In fact, CCAMLR's catch quotas are based on an ecosystem approach and a precautionary approach. They are also set based on historical catches and uncertainties in or lack of information. As such, they are set at a level well above the level necessary to ensure that a species is not harvested and traded to the detriment of the species.

Before a CITES export or re-export permit may be issued, a Management Authority must be satisfied that specimen was not obtained in contravention of national laws. Article IV(2)(b). Under CCAMLR's CDS (Conservation Measure 170/XX), a Contracting Party must take steps to determine whether *Dissostichus* spp. was "caught in a manner consistent with CCAMLR measures." Because CCAMLR measures must be implemented through national legislation, CCAMLR's requirement requires that a Party verify that toothfish is caught consistent with national legislation. As a result, CCAMLR's requirement is the equivalent of CITES requirement.

In addition, CCAMLR allows a Contracting Party to issue catch documents only to vessels authorized to catch *Dissostichus* spp. and each landing and transshipment must be accompanied by a completed catch document. Vessels must be registered and use Vessel Monitoring Systems to verify their catch positions. Thus, not only does CCAMLR's CDS require that a Contracting Party ensure that toothfish are caught consistently with national laws, it also establishes mechanisms to assist the Contracting Parties to make that finding.

The third permit finding under Article IV—whether the Management Authority is satisfied that the living specimen is prepared and shipped to minimize injury, damage to health or cruel treatment—does not apply. *Dissostichus* spp. entering trade are dead (the vast majority of toothfish are caught using longline methods and traded as frozen fish products).

What is the appropriate legal mechanism for linking CCAMLR's quotas to the CITES non-detriment finding?

In its proposal to list Patagonian Toothfish in Appendix II, as well as in its draft resolution relating to CCAMLR, Australia has proposed to substitute CCAMLR's catch quotas and Catch Documentation Scheme (CDS) for compliance with the permit requirements of CITES. Australia has modeled its proposal on the provisions of Article XIV(4), which allows compliance with the provisions of a marine organization to substitute for compliance with CITES. However, because Article XIV(4) does not apply to marine treaties that entered into

force after CITES entered into force, the Parties must find some other way to substitute CCAMLR's quotas and CDS for CITES permit requirements that is consistent with the Parties obligations under Article IV of CITES.

Designate CCAMLR as the CITES Scientific Authority. As the Secretariat has reported, a Party may designate CCAMLR as their CITES Scientific Authority for purposes of issuing non-detriment findings for toothfish. By doing so, a CITES Party directly links the non-detriment finding to the harvest quotas set by the CCAMLR Scientific Committee. This mechanism meets the requirements for Article IV of CITES anywhere in the CCAMLR Convention Area. Thus, such a mechanism would be valid both for export permits and for certificates of introduction of the sea provided that the catch occurred in the CCAMLR Convention Area.

IELP supports the annotation language drafted by TRAFFIC:

- (a) the Commission of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) is responsible for the development and implementation of scientific and management measures for the conservation and rational use of toothfish in its Convention Area.
- (b) non-detriment findings for international trade in specimens of toothfish caught within the CCAMLR Convention Area [in waters that are not under the jurisdiction of a State] are made on the basis of CCAMLR's conservation measures.

This language accomplishes several objectives. First, this language incorporates CCAMLR's quotas and other conservation measures into an annotation to Appendix II, thus making them approved by and binding on the Parties. As such, they are the equivalent of the COP-approved quotas for leopard skins. Resolution Conf. 10.14 provides precedent for quotas approved by the COP to be considered as the equivalent of a non-detriment finding, provided that the export is within the quota. 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 if it is satisfied that the skins being considered are from one of the following States [for which an export quota has been granted].”

Second, the annotation is written in a way that makes any changes to the quota or other conservation measures between CITES COPs binding on the Parties. Third, because the annotation designates CCAMLR as responsible for conservation measures, trade inconsistent with those measures is inconsistent with CITES, provided CITES establishes the appropriate mechanisms for implementing these obligations by Resolution.

Section A of the proposed Resolution creates those appropriate procedural mechanisms. First, it directs the Parties to designate CCAMLR as the Scientific Authority and the relevant

port authority as the Management Authority. It then directs the Parties to reject any trade based on permits issued by any other authority.

IELP has bracketed the text “in waters that are not under the jurisdiction of a State” in paragraph (b), because it is not clear why the issuance of non-detriment findings in accordance with CCAMLR’s conservation measures should be limited only to waters outside the jurisdiction of any State. The CCAMLR Convention Area includes areas where Australia and other countries have asserted sovereign rights. Presumably, countries asserting sovereign rights within the CCAMLR Convention Area would want to rely on CCAMLR’s quotas for making non-detriment findings. Perhaps political or legal issues exist with respect to these areas with which IELP is unfamiliar.

Designate the Port Authority as the CITES Management Authority. In addition, the CITES Parties could implement their obligations to issue export, re-export, and introduction from the sea certificates—whether inside or outside the CCAMLR Convention Area—by making their port authorities that are competent to issue and validate *Dissostichus* catch documents under CCAMLR the Management Authority. In this way, CITES permits are issued by a designated Management Authority but the CITES permit requirements and CDS are not duplicated, because the same entity issues the permit.

Non-detriment findings outside the CCAMLR Convention Area. CCAMLR does not set quotas outside the Convention Area. For catches of Patagonian Toothfish outside of the CCAMLR Area and beyond the jurisdiction of any country, CITES Parties must issue non-detriment findings consistent with Article IV(6)(a). For catches of Patagonian Toothfish outside of the CCAMLR Area, but within a CITES Party’s EEZ or otherwise within an area for which sovereign rights have been legally established, the Parties must issue a non-detriment finding for any export consistent with Article IV(2)(a).

Annotation

- (a) the Commission of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) is responsible for the development and implementation of scientific and management measures for the conservation and rational use of toothfish in its Convention Area.
- (b) non-detriment findings for international trade in specimens of toothfish caught within the CCAMLR Convention Area [in waters that are not under the jurisdiction of a State] are made on the basis of CCAMLR's conservation measures.

Resolution

DRAFT RESOLUTION OF THE CONFERENCE OF THE PARTIES

Conservation of and Trade in *Dissostichus* species

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

A. Permitting: In the CCAMLR Convention Area

DIRECTS the Parties to

- (a) designate the Commission for Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) as the Scientific Authority for the purposes of making non-detriment findings pursuant to Article IV(2)(a) and Article IV(6)(a) for catches of *Dissostichus* spp. in the CCAMLR Convention Area;
- (b) designate their port authorities that are competent to issue and validate *Dissostichus* catch documents under CCAMLR as the Management Authority for purposes of granting certificates of introduction from the sea, export permits, and re-export permits for catches of *Dissostichus* spp. in the CCAMLR Convention Area;

RECOGNIZES that, because the listing of *Dissostichus* spp. in Appendix II designates CCAMLR's Commission as responsible for the development and implementation of scientific and management measures for the conservation and rational use of toothfish in its Convention Area, permits issued inconsistently with paragraphs (a) and (b) above for catches of *Dissostichus* spp. in the CCAMLR Convention Area are invalid;

INSTRUCTS the Secretariat to notify the Parties of relevant conservation measures, including any changes in harvest quotas established by CCAMLR's Scientific Committee at meetings of CCAMLR's Commission;

B. Permitting: Outside the CCAMLR Convention Area

AGREES that trade in *Dissostichus* spp. taken outside the CCAMLR Convention Area and

- (a) taken in the marine environment not under the jurisdiction of any State shall require the issuance of a certificate of introduction from the sea in accordance with Article IV(6);
- (b) taken in the marine environment under the jurisdiction of any State shall require the issuance of an export permit or re-export permit in accordance with Article IV(2) or Article IV(5);

AGREES that, notwithstanding the provisions of paragraphs (a) and (b) of this section, compliance with CCAMLR's Catch Document Scheme outside the Convention Area may substitute for the findings of Article IV(2)(b), Article IV(5)(a), and Article IV(6)(b), provided that the CCAMLR catch documents are issued by the CITES Management Authority.

C. Definition of Introduction from the Sea

AGREES that, consistent with U.N. Convention on the Law of the Sea, the term "specimens of any species which were taken in the marine environment not under the jurisdiction of any State" means that a specimen was:

- (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);

AGREES that, 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.

D. Information and Cooperation

RECOMMENDS that Parties inform the Secretariat about legal exporters of *Dissostichus* spp. and that importing countries be particularly vigilant in controlling the unloading of *Dissostichus* spp. products;

RECOMMENDS that the Animals Committee, in consultation with the CCAMLR Scientific Committee and other relevant experts, examine trade in *Dissostichus* spp. and report to the next CITES Conference of the Parties on any trade measures that may be required, including the establishment of specific quotas, zero quotas or other restrictions on exports of *Dissostichus* spp. in order to maintain the level of exports of *Dissostichus* spp. harvested outside the CCAMLR Convention Area at below the level that would be detrimental to the survival of *Dissostichus* spp.;

DIRECTS the CITES Secretariat to establish procedures whereby CITES can cooperate with CCAMLR's Commission for the purpose of exchanging information relevant to the harvesting and regulation of trade in *Dissostichus* spp., enhancing synergies between CCAMLR and CITES and facilitating consultations on Introductions from the Sea;

DIRECTS the CITES Secretariat to share with CCAMLR's Commission any information it collects regarding illegal trade in *Dissostichus* spp.;

URGES all Parties to adopt CCAMLR's CDS for catches of *Dissostichus* spp. outside the CCAMLR Convention Area; and

URGES all Parties and non-Parties, as well as relevant international organizations, to take measures individually and collectively, including through CCAMLR and other international organizations, to prevent continued IUU fishing and illegal trade in *Dissostichus* spp., and to report to the CITES Secretariat on any developments regarding this issue.