

Legal and Institutional Implications of Listing Commercially Exploited Aquatic Species in the CITES Appendices

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The issue of the legal and institutional implications of listing commercially exploited aquatic species in the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora¹ in relation to other multilateral agreements concerning fisheries, such as the 1982 United Nations Convention on the Law of the Sea,² the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,³ and the so-called 1995 UN Fish Stocks Agreement,⁴ has been placed on the international agenda recently.

This has to be explained by the fact that until recently, the parties to CITES did not seem to contemplate to apply the conventional provisions to commercially-exploited aquatic species. This changed during the end of the 1990s when it became clear that, because of the continuing decline of some of these commercially-exploited aquatic species, some states may well be tempted to turn to CITES in an attempt to reverse this trend. Recently, an increasing number of proposals for listing relate to such economically important species. Being a system based on trade restrictions that relies for its implementation on the state parties through a system of import and export permits and certificates, it proved an attractive alternative to some to try to reverse the so-called tragedy of the commons. Especially the almost universal participation in CITES at present, enhances its appeal in this respect.

Since then, this relationship has drawn increased attention, not only within the CITES conventional framework, but also outside of it. The concern existed that the applicable CITES listing criteria may not be appropriate to deal with aquatic species harvested on a large-scale commercial basis. International organizations established to regulate fisheries, be they global like the Food and Agriculture Organization,⁵ or regional, like the Commission for the

¹ 993 UNITED NATIONS TREATY SERIES pp. 243-417. This convention, signed on 3 March 1973, entered into force on 1 July 1975. Hereinafter cited as CITES. At the time of writing 166 states are party to this convention.

² 1833 UNITED NATIONS TREATY SERIES pp. 3-581. This convention, signed on 10 December 1982, entered into force on 16 November 1994. Hereinafter 1982 Convention (or sometimes UNCLOS in quotations). At the time of writing 144 states and the European Community are party to this convention.

³ 10 INTERNATIONAL LEGAL MATERIALS pp. 417-425 (1995). This agreement, approved by Resolution 15/93 on 24 November 1993, has entered into force on 24 April 2003. Hereinafter 1993 FAO Compliance Agreement. At the time of writing 27 states and the European Community are party to this agreement.

⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (U.N. Doc. A/CONF.164/37), reprinted in 34 INTERNATIONAL LEGAL MATERIALS pp. 1542-1580 (1995). This agreement, signed on 8 September 1995, entered into force on 11 December 2001. Hereinafter 1995 UN Fish Stocks Agreement. At the time of writing 50 states and the European Community are party to this agreement.

⁵ Hereinafter FAO.

Conservation of Antarctic Marine Living Resources,⁶ have therefore become more and more involved.

After having explained the antecedents, the present study consists of two main parts: One relating to the application of successive treaties relating to the same subject matter, and a second one concerning the relationship of CITES with other organizations. A brief introduction to the functioning of CITES has already been provided elsewhere by the present author.⁷

I Antecedents leading up to the present study

Interaction between CITES and FOA was initiated around the turn of the century. At the request of the FAO Committee on Fisheries Sub-Committee on Fish Trade, gathered in Bremen, Germany, in June 1998, an *ad hoc* group was created to make suggestions concerning the application of CITES listing criteria to commercially-exploited aquatic species. The *ad hoc* group in turn proposed to hold a technical consultation on the issue, which took place in Rome, Italy, during the month of June 2000. This consultation stressed the potential synergy between CITES and FAO but could not conclude its work. A second Technical Consultation was convened in Windhoek, Namibia, in November 2001. This meeting concluded that important improvements could be made to the existing CITES criteria.⁸

The results of this second consultation were subsequently endorsed by the Sub-Committee on Fish Trade at its eighth session, held in Bremen, Germany, during the month of February 2002. In its Recommendations on Developing a Workplan for Exploring CITES Issues with respect to International Fish Trade and a Process for Scientific Evaluation of Relevant CITES Listing Proposals, it was recommended to the Committee on Fisheries that expert consultations should be convened on a number of issues, one of which related to the

“analysis of the legal implications of the existing CITES listing criteria in relation to the UN Convention of the Law of the Sea (UNCLOS) and related international law covering fisheries, and of any changes in those implications resulting from adoption of the proposals included in Appendix F to the Report of the Second Technical Consultation”.⁹

At its twenty-fifth session, the Committee on fisheries complied with the request by adopting the terms of reference for this consultation.¹⁰ It is in preparation of that expert consultation that the present paper has been prepared.

⁶ 1329 UNITED NATIONS TREATY SERIES pp. 47-106. This convention, signed on 20 May 1980, entered into force on 7 April 1982. Hereinafter CCAMLR. At the time of writing 30 states and the European Community are party to this Convention.

⁷ Franckx, E., *Applications of the term 'Introduction from the sea'*, paper prepared for an expert consultation to be held at FAO Headquarters, Rome, 22-25 June 2004, *sub II*.

⁸ *Recommended Comments on CITES Notification to the Parties No. 2001/037*. This document was attached as Appendix F to *Report of the Second Technical Consultation on the Suitability of the CITES Criteria for Listing Commercially-Exploited Aquatic Species, Windhoek, Namibia, 22-25 October 2001*, FAO Fisheries Report No. 667 (FAO Doc. FIRM/R667(Tri)), pp. 54-64.

⁹ *Report of the Eighth Session of the Sub-Committee on Fish Trade, Bremen, Germany, 12-16 February 2002*, FAO FISHERIES REPORT NO. 673 (FAO Doc. FIIU/R673 (Tri)), para. 21.

¹⁰ *Report of the Twenty-fifth Session of the Committee on Fisheries, Rome, 24-28 February 2003*, FAO FISHERIES REPORT NO. 702 (FAO Doc. FIPL/R702(En)), para. 48 and Appendix F.

II Application of successive treaties relating to the same subject-matter

The central theme when trying to analyse the institutional implications of listing commercially exploited aquatic species in the CITES appendices in relation to the 1982 Convention, the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement and other international instruments relative to fisheries management, is the application of successive treaties relating to the same subject-matter in general international law. This part will first look into the general provisions on the law of treaties. Secondly, the relationship between the 1982 Convention and other international agreements will be analysed in order to find out whether it had an impact *a posteriori* on the content of CITES. Thirdly, the relationship between CITES and the other international instruments relative to fisheries management, including the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement, will be addressed. Since CITES predates most of these agreements, especially the influence of a later treaty on a previous one treating the same subject-matter will retain our attention.

A The law of treaties

Contemporary international law is characterized by the conclusions of a growing number of treaties. This quite naturally increases the possibility that successive treaties may be treating either a related, a similar or sometimes even exactly the same subject-matter and this possibly, but not necessarily, between the same contracting parties.¹¹

The natural point of departure is the Vienna Convention on the Law of Treaties.¹² The basic rules contained therein concerning the application of successive treaties relating to the same subject-matter, are as follows:

- “2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the treaty do not include all the parties to the earlier one:
 - a) as between States parties to both treaties the same rule applies as in paragraph 3;
 - b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”¹³

Because very few governments reacted in a critical manner to this draft article when first proposed by the International Law Commission, the argument has been made that it therefore reflected pre-existing customary law at the time of codification.¹⁴ On the other hand, it cannot

¹¹ See for instance Shaw, M., *INTERNATIONAL LAW*, Cambridge, Cambridge University Press, p. 834 (2003), indicating that the problem raised by successive treaties is becoming a serious one under in present-day international law.

¹² 1155 UNITED NATIONS TREATY SERIES pp. 331-512. This Convention, signed on 23 May 1969, entered into force on 27 January 1980. Hereinafter 1969 Vienna Convention. At the time of writing 98 states are party to this agreement.

¹³ 1969 Vienna Convention, Art. 30.

¹⁴ Mus, J., *Conflicts Between Treaties in International Law*, 45 *NETHERLANDS INTERNATIONAL LAW REVIEW* p. 208, 213 (1998).

be denied that three consecutive special rapporteurs of the International Law Commission in charge of this issue all held different positions:¹⁵ Lauterpacht started out by claiming the later treaties should be considered void if their implementation would breach earlier treaty commitments, i.e. the rule of the *lex prior*. Fitzmaurice abandoned this lead, arguing that no priority should be assigned. Waldock, finally, reintroduced the principle of priority into the draft articles, but this time in reversed order by proposing the *lex posterior* rule instead.

P. Reuter seems to doubt whether Art. 30 of the 1969 Vienna Convention forms today part of customary law, when he states:

“Mais, en-dehors ... [d]es déclarations de compatibilité, il n'existe pas 'de principe général de priorité' mais de 'simples directives d'interprétation'.”¹⁶

Others, on the other hand, seem to be in favour of the proposition that Art. 30 of the Vienna Convention does form part of customary law.¹⁷

In the specialized literature Art. 30 of the Vienna Convention has moreover been described as “in many respects not entirely satisfactory”.¹⁸ The question how to date a treaty, in order to be able to determine the earlier and later treaty, remains for instance unsettled.¹⁹ The 1982 Convention may serve as example here for a difference of not less than 14 years is involved depending on whether one relies on the date of opening for signature or rather the date of entry into force, indicating the kind of fundamental problems which this article does not resolve.²⁰ Furthermore Art. 30 of the Vienna Convention does not give expression to the principle of *lex specialis derogat generali*,²¹ which seems nevertheless well established in case law²² as well as in the specialized literature.²³ But there are still other points of critique: The question of

¹⁵ *Id.*, pp. 227-231. See also Fox, G., *International Organizations: Conflicts of International Law*, 95 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS p. 183, 185 (2001). See also the further reference to be found in these two sources.

¹⁶ Reuter, P., *DROIT INTERNATIONAL PUBLIC*, Paris, Thémis, p. 55 (1983).

¹⁷ Aust, A., *MODERN TREATY LAW AND PRACTICE*, Cambridge, Cambridge University Press, p. 181 (2000); Mus, J., *supra* note 14, p. 213; and Sinclair, I., *THE VIENNA CONVENTION ON THE LAW OF TREATIES* p. 98 (1984). The latter author, who served as rapporteur to the *Institut de Droit International*, seems to restate this position with respect to Art. 30 in his 1995 report on the problems arising from a succession of codification conventions on a particular subject, even though some doubt may remain. As available on Internet at <www.idi-iil.org/idiE/resolutionsE/1995_lis_01_en.pdf> (last visited on 26 May 2004).

¹⁸ Aust, A., *supra* note 17, p. 174 and Sinclair, I., *supra* note 17, p. 98.

¹⁹ See in this respect the thorough analysis by Vierdag, B., *The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 59 BRITISH YEARBOOK OF INTERNATIONAL LAW pp. 75, 82-103 (1988). This author makes a further distinction between conflicts between concrete rights on the one hand, and between abstract norms on the other. *Id.*, p. 94. See also Mus, J., *supra* note 14, pp. 220-222.

²⁰ Or as concluded by Fox, G., *supra* note 15, p. 185: “[T]he failure to fix a precise date would seem to doom Article 30 to chronic indeterminacy.”

²¹ This has been defined by the *DICIONNAIRE DE DROIT INTERNATIONAL PUBLIC* (Salmon, J., ed.), Bruylant, Brussels, p. 652 (2001), as: “Principe de solution à un conflit entre une norme générale et une norme particulière, selon lequel la loi spéciale l'emporte.”

²² See *id.*, for the examples provided there.

²³ I OPPENHEIM'S INTERNATIONAL LAW (Jennings, R. & Watts, A., eds), London, Longman, p. 1280 (1996).

conflicting obligations towards different states is not covered, regional treaties are not taken into account, *erga omnes* obligations are left out of the picture, and the term treaty does not appear crystal clear.²⁴

Whatever the correct answer to the question, the fact remains that even if Art. 30 of the 1969 Vienna Convention were to be considered part of customary international law today, the rules contained in that article remain residual in nature.²⁵ It remains therefore of the greatest importance to respect the will of the parties, especially when the latter is reflected in conventional provisions which *expressis verbis* regulate the relationship with other treaties. This occurs by means of what the International Law Commission has called conflict clauses.²⁶ The following sections will focus on such conflict clauses to be found in a number of global and regional fishery management conventions.

B The 1982 Convention

Making use of this just-mentioned possibility under general international law for parties to determine the relationship between a treaty they create and other relevant international agreements,²⁷ the drafters of the 1982 Convention did conceive a specific rule which regulates this relationship in general. Of specific importance for the present study are the following paragraphs:

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

...

5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.”²⁸

Even though Paragraph 2 has been said to be derived from Art. 30 (3 & 4) of the 1969 Vienna Convention,²⁹ it is rather far-reaching and appears to go well beyond paragraphs 3 & 4 of that Art. 30 for it implies in fact the priority of the 1982 Convention in relation to all other treaties, already concluded or still to be concluded by states that are a party to the 1982 Convention.³⁰

²⁴ Sadat-Akhavi, S., *METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES*, Leiden, Martinus Nijhoff, pp. 70-84 (2003), also making reference to the difficulty of distinguishing between prior and later treaties.

²⁵ Sinclair, I., *supra* note 17, p. 97. See in this respect also Reuter, P., *supra* note 16 and accompanying text, who starts out by saying that the rules are subjected to what parties may have provided themselves. See finally also the 1969 Vienna Convention, Art. 30 (2), as reprinted *supra* note 13 and accompanying text, which precedes the paragraph giving expression to the *lex posterior* principle.

²⁶ *Reports of the International Law Commission*, 2 ILC YEARBOOK p. 214 (1966). The following definition is provided: “A clause [in a treaty] intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals.”

²⁷ See *supra* note 25 and accompanying text.

²⁸ 1982 Convention, Art. 311.

²⁹ Oxman, B., *The Third United Nations Conference on the Law of the Sea: The Ninth Session* (1980), 75 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 211, 249 (1981).

³⁰ Anon, *Article 311*, in 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Rosenne, S. & Sohn, L., eds), Dordrecht, Martinus Nijhoff, p. 299, 243 (1989), where it is stated that paragraph 2 of this article implies “a measure of priority for the 1982 Convention in the sense that it provides a yardstick against which the compatibility of those other agreements is to be measured.”

The universalism of the latter has been said to be a relevant factor in applying other related instruments.³¹ One author even compared this particular paragraph to Art. 103 of the Charter of the United Nations,³² since it pretends to prevail over all other treaties concluded in the area of the law of the sea that alter the rights and duties of states parties under the 1982 Convention.³³

This provision is a clear departure from the situation as it existed under the 1958 conventional system. Not only was there no general overall rule on the subject, but the only provision treating the issue went the other way around by giving priority to the previously concluded agreements.³⁴ The innovatory character of Art. 311 (2) can therefore hardly be denied.

Nevertheless, its practical application is very much tempered in at least two respects. First, the negotiators at the third United Nations Conference on the Law of the Sea³⁵ did not want the article to result in automatic abrogations, especially of the many technical treaties adopted under the auspices of the International Maritime Organization, eventually creating a legal vacuum.³⁶ Secondly, the fear for too strict an application is alleviated by the provision that the 1982 Convention itself can derogate from this rule.³⁷ The latter provision is often relied upon for in not less than one sixth of the total number of articles contained in the 1982 Convention, derogations of this kind are included.³⁸ Some of them even subtract whole parts of the 1982 Convention from the application of the general rule contained in Art. 311 (2).³⁹ For present purposes it is important to note that so-called straddling stocks,⁴⁰ anadromous stocks,⁴¹ and catadromous stocks⁴² all fall under the application of Art. 311 (5), and that with respect to highly migratory species⁴³ and marine mammals⁴⁴ the 1982 Convention mentions cooperation through appropriate international organizations, which in the latter case is expressly allowed to take more restrictive measures than those provided in the convention itself. Also Art. 116 falls under the application of Art. 311 (5) since it rephrases Art. 1 of the 1958 Convention on Fishing and

³¹ *Id.*, p. 241. See in this respect also Sadat-Akhavi, S., *supra* note 24, p. 131, stressing the package deal nature of the 1982 Convention, which would be negated if pre-existing treaties would trump the specific provisions constituting an integral part of that package.

³² This article reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

³³ Vukas, B., *The Law of the Sea Convention and the Law of Treaties*, in LIBER AMICORUM GÜNTHER JAENICKE -- ZUM 85. GEBURTSTAG (Götz, V., Selmer, P. & Wolfrum, R., eds), Berlin, Springer, p. 631, 649 (1998).

³⁴ It concerns the Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 UNITED NATIONS TREATY SERIES pp. 285-342. This convention, signed on 29 April 1958, entered into force on 20 March 1966. At the time of writing 37 states are party to this Convention. Art 1 (1) reads: "States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations ...".

³⁵ Hereinafter UNCLOS III.

³⁶ Sadat-Akhavi, S., *supra* note 24, p. 127 note 97.

³⁷ 1982 Convention, Art. 311 (5), as reprinted *supra* 28 and accompanying text.

³⁸ For a listing, see Anon, *supra* note 30, p. 240.

³⁹ See for instance 1982 Convention, Art. 237, excluding the 45 articles of Part XII, Protection and Preservation of the Marine Environment, from its application. For an analysis of this article, see Sadat-Akhavi, S., *supra* note 24, pp. 131-133.

⁴⁰ 1982 Convention, Art. 63.

⁴¹ 1982 Convention, Art. 66.

⁴² 1982 Convention, Art. 67.

⁴³ 1982 Convention, Art. 64.

⁴⁴ 1982 Convention, Art. 65.

Conservation of the Living Resources of the High Seas.⁴⁵ The vast majority of the commercially exploited aquatic species in which CITES might become interested in trying to reverse the tragedy of the commons,⁴⁶ in other words, do fall under the rule of Art. 311 (5) rather than Art. 311 (2) of the 1982 Convention.

At least one adjudicatory proceeding has so far been confronted with the application of Art. 311 (2) in practice. It concerns the arbitral award between Canada and France of 1986, concerning a French fishing vessel, *La Bretagne*.⁴⁷ The Canadian authorities had refused an authorization to fish in the Gulf of St. Lawrence to this vessel. According to Canada, the filleting of fish on board vessels, an activity which this country excluded its own vessels from undertaking, could be forbidden with respect to French vessels on the basis of an agreement concluded between both parties in 1972. The fundamental question, of particular concern here, was whether the term “fishery regulations” as used in that agreement was restricted to catch regulations, or whether the processing of fish, especially the filleting at sea by means of freezer-trawlers, was also covered. Canada argued that the law had changed substantially between 1972 and 1986 because of UNCLOS III and the signing of the 1982 Convention. This point of view was opposed by France. Even though both states ratified the 1982 Convention well after the rendering of this award,⁴⁸ the tribunal was of the opinion that the concepts of fishing zone, as claimed by Canada, and exclusive economic zone, as claimed by France, as well as the rights exercised therein with respect to the living resources, were equivalent and formed part of international law.⁴⁹

The tribunal explicitly referred to Art. 311, but then decided not to apply it. It justifies this approach by emphasizing that the 1982 Convention at that time had not yet entered into force. Unless the provisions in question reflected customary international law applicable to the

⁴⁵ See *supra* note 34.

⁴⁶ This means in the supposition that the conference of the parties of CITES came to accept that the expression “not under the jurisdiction of any state” excludes the exclusive economic zone from falling under the application of CITES. It should be remembered that most of the so-called high seas species cross the 200-mile limit at some stage of their life cycles and can therefore be considered, biologically, to be straddling stocks. Stressing this point, see Hayashi, M., *The Role of the United Nations in Managing the World's Fisheries*, in *THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES* (Blake, G., Hildesley, W., Pratt, M., Ridley, R. & Schofield, C., eds), London, Graham & Trotman, p. 373, 374 (1995) and by the same author, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Session*, 11 *OCEAN YEARBOOK* pp. 20, 21-22 (1994), both referring to a study by the FAO, *World Review of High Seas and Highly Migratory Fish Species and Straddling Stocks*, Rome, FAO Fisheries Circular 868 (1993), preliminary version. Beyond the field of application of the 1995 UN Fish Stocks Agreement, therefore, not much other living resources may in principle remain on the high seas. As stressed by Lucchini, L. & Vælckel, M., *DROIT DE LA MER*, Tome 2, Vol. 2, Paris, Pédone, p. 690 (1996) and Momtaz, D., *L'Accord relatif à la conservation et la gestion des stocks de poissons chevauchants et grands migrants*, 41 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* p. 676, 681 (1995). As will be seen *infra* note 77 and accompanying text, the 1995 UN Fish Stocks Agreement gives precedence to the 1982 Convention in the relationship between these two documents.

⁴⁷ *Tribunal Arbitral institué par le compromis du 23 octobre 1985 entre le Canada et la France: Différend concernant le filetage à l'intérieur du Golfe du Saint-Laurent*, 90 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL* pp. 713-786 (1986). Hereinafter 1986 Award.

⁴⁸ Both countries had signed the 1982 Convention before the rendering of the award, but Canada ratified that document only on 7 November 2003, France on 11 April 1996.

⁴⁹ 1986 Award, para. 49.

parties before it, the tribunal could not take them into account.⁵⁰ Since the tribunal was of the opinion that provisions regulating the powers of the coastal states in fishery or exclusive economic zones did not form part of customary international law,⁵¹ it reached the conclusion that the 1982 Convention did not trump the 1972 Agreement *in casu*. The tribunal even reasoned that in case the 1982 Convention would have governed the relationship between the two parties to the dispute, *quod non*, the 1972 Convention would have prevailed anyway.⁵² W. Burke, in an unusually sharp critical comment on this award, believed on the other hand that the rules in question had in the mean time crystallized into customary international law, and therefore stated:

“The Tribunal ultimately and specifically held that provisions of the LOS Convention are inconsistent with the 1972 Agreement and that the latter prevails!”⁵³

This award, in other words, even though it specifically addressed its attention to Art. 311 (2) of the 1982 Convention, was not willing to apply it in the case at hand since that convention had not yet entered into force. Nevertheless, authors have implied from the reasoning of the tribunal that, because of this article, in the eyes of the majority the 1982 Convention

“should be used as the yardstick against which the compatibility of other agreements are to be measured”.⁵⁴

⁵⁰ *Id.*, para. 51.

⁵¹ *Id.*. Stressing this distinction that the tribunal accepted the concept of the exclusive economic zone, but not its content codified in the 1982 Convention, as forming part of international law, see Arbour, J., *L’Affaire du chalutier-usine ‘La Bretagne’ ou les droits de l’Etat côtier dans sa zone économique exclusive*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW p. 61, 72 (1986). Arguing that there exists a difference in methodology between the approach of the tribunal in this case and the International Court of Justice, see Colliard, C.-A., *Le différend franco-canadien sur le ‘filetage’ dans le golfe du Saint-Laurent (sentence arbitrale du 17 juillet 1986)*, 92 REVUE GÉNÉRALE DE DROIT INTERNATIONAL p. 275, 285 (1988).

⁵² 1986 Award, para. 51. The tribunal stated: “Même si la Convention des Nations Unies sur le droit de la mer faisait actuellement droit entre les deux Parties, le Tribunal note qu’elle ne porterait cependant pas atteinte au régime conventionnel établi par l’Accord de 1972, en raison de la clause contenue dans son article 311, paragraphe 2”. Specifically mentioning this passage, see McDorman, T., *French Fishing Rights in Canadian Waters: The 1986 La Bretagne Arbitration*, 4 INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW p. 52, 57 (1989), who explains this by the fact that the tribunal considered that the term management used in the 1982 Convention did not include processing (*id.*). The dissenting opinion of D. Pharand does not touch upon the interpretation of Art. 311 (2). *Id.* pp. 757-786.

⁵³ Burke, W., *Coastal State Fishery Regulation under International Law: A Comment on The Bretagne Award of July 17, 1986 (The Arbitration between Canada and France)*, 25 SAN DIEGO LAW REVIEW p. 495, 518 (1988). According to this author “[t]he decision by the Tribunal in the *La Bretagne* case has little substance that makes it worthy of consideration or adoption. The majority opinion does not merit emulation either for the process of legal analysis, for its approach to treaty interpretation, for its use of prior decision, or for its views about substantive international law for fisheries” (*id.*, p.500); “the opinion and underlying rationale are flawed, deliver general pronouncements which raise serious questions, and reach conclusions unsupported by international law” (*id.*, p. 502); and he concludes by stating that “the Award is not reliable authority for the process of treaty interpretation, the substantive positions it holds regarding the specific issues in dispute, or the general implications of the propositions offered in support of its conclusions. The opinion is flawed not only in its general approach to coastal state fishery management authority, but also as a dependable source of guidance for smooth fishery relations between Canada and France” (*id.*, p. 533).

⁵⁴ McLaughlin, R., *Settling Trade-related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW p. 29, 58 (1997). Using almost identical wording, see also Anon, *supra* note 30, p. 243, as reproduced in that note. The exact content of the yardstick *in casu* was however far from clear. Compare the opinion of the tribunal (*supra* note 52 and accompanying

As was the case with the 1969 Vienna Convention,⁵⁵ it must be concluded that also the 1982 Convention contains a simple set of provisions, which seem to apply a very wide spectrum of different eventualities. Art. 311 (2) has however been criticized for the clumsy manner in which it established priority of the 1982 Conventions over all other conventions, existing or future.⁵⁶ The eventuality that this particular innovative paragraph may well give rise to disputes in the future has therefore already been contemplated in the literature.⁵⁷

C CITES and other relevant international instruments relative to fisheries management

a CITES

Unlike the 1982 Convention, CITES shows much more deference to previously concluded agreements by a state party. In general, the convention subordinates itself to any other treaty, already concluded or still to be concluded, by a state party to CITES:

“2. The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.”⁵⁸

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

“4. A State party to the present Convention, which is also a party to any other treaty, convention or international agreement which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement.

5. Notwithstanding the provisions of Articles III, IV and V, any export of a specimen taken in accordance with paragraph 4 of this Article shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement in question.”⁵⁹

text) with the way others have understood the essence of the case (*supra* note 53 and accompanying text).

⁵⁵ See Sinclair, I., *supra* note 17, pp. 94-95, who writes: “Indeed, it is their very simplicity which may occasion some concern, given the varying types of situations which they are designed to cover.”

⁵⁶ Vukas, B., *supra* note 33, p. 650. It for instance does not make any distinction between agreements concluded between all parties of two consecutive agreements, and the eventuality that the contracting parties to the two instruments differ. *Id.*, pp. 249-250.

⁵⁷ Anon, *supra* note 30, p. 243.

⁵⁸ CITES, Art. XIV.

⁵⁹ *Id.*

It will be clear that even in this case CITES tries, as much as possible, to accommodate the existence of such previously concluded instruments into the CITES system. But unlike paragraph 2, paragraphs 3 and 4 only relate to previously concluded agreements.

It might be important here to try to reveal the genesis of these particular paragraphs of Art. XIV of CITES, in order to clarify the intention the drafters had in mind when including these provisions in the article on international conventions. Because even though the precursor of Art. XIV (2) was already present in the working paper, which served as basis for the conference, the present paragraphs 4 and 5 on the contrary were not.⁶⁰ The inclusion of these latter two paragraphs, in fact, was closely linked to the final inclusion of the much contested concept “introduction from the sea”, as already alluded to by the present author elsewhere.⁶¹ It turned out to be the central feature of a compromise formula devised by Australia in order to find some middle ground between those in favour of inclusion of marine species under CITES, and those objecting to such inclusion, for it would ensure that

“marine species not the subject of other international agreements, e.g. dugongs and turtles, would be given protection”.⁶²

In the explanation attached to the concrete proposal submitted by this country, it was stated that its object was to ensure that other international agreements relating to marine species that ensure the survival of the species concerned would not be affected.⁶³ According to this proposal, the treaties in question would be listed in an appendix to the convention.⁶⁴ Even though Japan had proposed the deletion of all references to “introduction from the sea” in the working paper,⁶⁵ this country nevertheless believed the relationship with other treaties to be an entirely different matter and proposed an amendment of the article dealing with other conventions explicitly excluding international conservation measures which were already in force.⁶⁶ The concrete proposal of Japan also would have listed the concrete proposals in appendix.⁶⁷ The idea of a special appendix was also retained in the draft submitted by the relevant *ad hoc* committee, but did not find its way into the final version of CITES.⁶⁸ This short parenthesis on the *travaux préparatoires* can therefore be concluded by saying that the insertion of paragraphs 4 and 5 of

⁶⁰ Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, held at Washington, United States of America, 16 February-3 March 1973 (hereinafter CITES, *travaux préparatoires*), *Working Paper* (Doc. 3, 21 November 1972), p. 18. It concerns Art. XII of these draft articles.

⁶¹ Franckx, E., *supra* note 7, sub IV.

⁶² CITES, *travaux préparatoires*, *Summary Record - Tenth Plenary Session, Tuesday, February 20, 1973* (Doc. SR/10 (Final), 5 March 1973), p. 3.

⁶³ CITES, *travaux préparatoires*, *Proposals Relating to Article XII of the Working Paper* (Doc. 3) (*Submitted by the Delegation of the Australia*) (Doc. PA/XII/3, 20 February 1973), p. 1.

⁶⁴ *Id.*

⁶⁵ CITES, *travaux préparatoires*, *Proposed Amendment to the Working Paper* (Doc. 3) (*Submitted by the Delegation of Japan*) (Doc. PA/Gen/1, 17 February 1973), p. 1.

⁶⁶ *Statement by Mr. T. Yamazaki, Delegate of Japan on “Introduction from the Sea”* (Doc. PR/11, 21 February 1973), pp. 2-3, stating: “We have in mind two conventions at this moment. These are the International Convention for the Northwest Atlantic Fisheries and the International Whaling Convention.

⁶⁷ CITES, *travaux préparatoires*, *Proposed Amendment to Article XII of the Working Paper* (Doc. 3) (*Submitted by the Delegation of Japan*) (Doc. PA/XII/4, 16 February 1973), p. 1, making reference in the explanation to the same two conventions.

⁶⁸ CITES, *travaux préparatoires*, *Article XII* (*Submitted by Ad-Hoc Committee*) (Doc. Ad Hoc Cmte./1, 23 February 1973), p. 1. See para. 4.

Art. XIV is not unrelated to the fact that CITES finally was able to include marine species as a matter of principle in its scope of application. Even though Japan's preoccupation clearly related to whaling, and was thinking of only one other convention at that time,⁶⁹ the idea of listing such relevant treaties by name in an appendix, which floated for some time during the negotiations, was finally not retained.

Finally, for the sake of completeness, reference should also be made in the framework of the present study to the paragraph in this article concerning the relationship between CITES and UNCLOS III:

“6. Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.”⁷⁰

As it has already been argued in some detail by the present author elsewhere, this provision has lost most, if not all of its meaning at present.⁷¹

b 1993 FAO Compliance Agreement

Contrary to the 1982 Convention and CITES, the 1993 FAO Compliance Agreement does not contain a specific article regulating the relationship of this agreement with other possible treaty obligations of its states parties. Nevertheless, by means of its definition of the term “international conservation and management measures”, which forms a corner stone in the set-up of this agreement, a link is made with the 1982 Convention, since all such measures are to be “adopted and applied in accordance with the relevant rules of international law as reflected in” the 1982 Convention, whether they are formalized by global, regional or subregional fishery organizations or directly by treaty between the parties involved.⁷²

c 1995 UN Fish Stocks Agreement

This agreement, once again, contains a specific provision entitled “Relation to other agreements”. Its content, however, is a mere copy of the similar provisions which appeared in the 1982 Convention.⁷³ Reference to what has already been said with respect to Art. 311 (2) of the 1982 Convention may therefore suffice.⁷⁴ It will be remembered that, as a consequence, the content of Art. 44 of the 1995 UN Fish Stocks Agreement is quite far-reaching, for it provides that the provisions of this convention will trump all other agreements, existing or future, not

⁶⁹ See *supra* notes 66-67. These were also the two only examples relied upon by this country during its oral intervention in plenary. See CITES, *travaux préparatoires, Summary Record - Tenth Plenary Session, Tuesday, February 20, 1973* (Doc. SR/10 (Final), 5 March 1973), pp. 2-3.

⁷⁰ CITES, Art. XIV.

⁷¹ Franckx, E., *supra* note 7, sub IV, B, b, i.

⁷² 1993 FAO Compliance Agreement, Art. 1 (b).

⁷³ The only changes concern punctuation and the replacement of the term Convention by Agreement. 1995 UN Fish Stocks Agreement, Art. 44 (1, 2 & 3) correspond to 1982 Convention, Art. 311 (2, 3 & 4).

⁷⁴ See *supra* notes 28-57 and accompanying text.

compatible with it and affecting the rights and obligations of other states parties to it. If this seems arguable in a convention which has been called the constitution of the oceans,⁷⁵ its mere copy and paste into a convention that apparently has much more difficulty to establish itself as an international standard for the states directly concerned, seems to make this line of reasoning somewhat more difficult to sustain.⁷⁶

But having two agreements claiming precedence over all other agreements, as is thus the case with the 1982 Convention and the 1995 UN Fish Stocks Agreement as just explained, may create delicate problems in the relationship between these two instruments themselves, since both cannot simultaneously have precedence over the other. That is probably why the 1995 UN Fish Stocks Agreement received a special article outline its relationship with the 1982 Convention.⁷⁷

d Other international instruments relative to fisheries management

It can hardly be the intention of the present paper to give an exhaustive overview of all the agreements setting up regional fisheries management organizations,⁷⁸ even though this might be the only manner in which to determine the exact legal relationship existing between each one of them and the above-mentioned treaties and agreements, as well as between the RFMOs *inter se*. For a more detailed analysis of a number of them, at least as far as their relation with the 1993 FAO Compliance Agreement and 1995 UN Fish Stocks Agreement is concerned, reference can be made to a FAO Legislative Study which appeared in 2001.⁷⁹

Only CCAMLR will be addressed here in some detail, because of the issue of the catch documentation scheme which will be address later in this paper. The founding document of this RFMO is very selective in determining the relationship with other treaties. Given the specific setting in which it was created, a special relationship exists with the 1959 Antarctic Treaty.⁸⁰ Because membership does not necessarily correspond, parties to CCAMLR which are not a party

⁷⁵ As coined by the President of UNCLOS III, T. Koh. Text available on Internet at <www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf> (last visited on 26 May 2004). See also the large number of states which are at present bound by this document, as already mentioned *supra* note 2.

⁷⁶ See also the relative small group of states that are parties to this agreement, as already mentioned *supra* note 4.

⁷⁷ 1995 UN Fish Stocks Agreement, Art. 4, which reads: "Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the [1982] Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the [1982] Convention." For a more detailed analysis of this particular aspect, see Sadat-Akhavi, S., *supra* note 24, pp. 117-118.

⁷⁸ Hereinafter RFMO.

⁷⁹ Franckx, E., FISHERIES ENFORCEMENT: RELATED LEGAL AND INSTITUTIONAL ISSUES: NATIONAL, SUBREGIONAL OR REGIONAL PERSPECTIVES, FAO Legislative Study # 71, Rome, Food and Agriculture Organization, 180 pp. (2001), as available on Internet at <www.fao.org/Legal/legstud/list-e.htm> (last visited on 26 May 2004). The RFMOs covered by this study were CCAMLR, the European Community (hereinafter EC), the South Pacific Forum Fisheries Agency (hereinafter FFA), the International Commission for the Conservation of Atlantic Tunas (hereinafter ICCAT), the Indian Ocean Tuna Commission (hereinafter IOTC), the North East Atlantic Fisheries Commission (hereinafter NEAFC), the Northwest Atlantic Fisheries Organization (NAFO), the Multilateral High Level Conference (MHLC), and the South East Atlantic Fisheries Organization (SEAFO). See respectively pp. 60-63 (CCMLAR); pp. 73-74 (EC); p. 78 (FFA); pp. 83-84 (ICCAT); pp. 86-87 (IOTC); p. 95 (NEAFC); pp. 104-105 (NAFO); pp. 117-122 (MHLC); and pp. 131-135 (SEAFO).

⁸⁰ 402 UNITED NATIONS TREATY SERIES pp. 71-102. This convention, signed on 1 December 1959, entered into force on 23 June 1961. Hereinafter 1959 Antarctic Treaty.

to the 1959 Antarctic Treaty are required at least to be bound by the obligations contained in Arts I, V, IV and VI of the latter document.⁸¹ Such states must furthermore acknowledge the special obligations and responsibilities of the so-called consultative parties under the 1959 Antarctic Treaty and commit themselves to observe measures concerning the conservation of Antarctic fauna and flora recommended by these consultative parties.⁸² The resources covered specifically exclude whales and seals, since CCAMLR provides:

“Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.”⁸³

The commission set up under CCAMLR should also, according to its founding document, try to develop cooperation with intergovernmental and non-governmental organizations, of which the International Whaling Commission is *inter alia* mentioned by name.⁸⁴

D Conclusions

The brief overview of conflict clauses to be found in a number of global and regional fisheries management organizations, demonstrate that they normally heed the advice of scholars that drafters should always take the time to elaborate such clause in line with the will of the parties.⁸⁵ Such a clause can take different forms as indicated by the definition given to it by the International Law Commission.⁸⁶ In the present paper the examples encountered concern instances of prior treaties, which the treaty in question tries either to adapt⁸⁷ or subject itself to;⁸⁸ instances of future treaties to which the treaty in question subjects itself;⁸⁹ and finally instances covering past as well as future treaties which the treaty in question either subjects itself to⁹⁰ or, on the other hand, tries to have priority over.⁹¹ It will be easily understood that a combination of all these possible inter-linkages, and some not covered in the overview presented here,⁹² will easily lead to situations which might become rather confusing, especially if one includes still further complicating factors like different states parties to the two instruments or difficulties

⁸¹ CCAMLR, Arts III & IV.

⁸² CCAMLR, Art. V.

⁸³ CCAMLR, Art. VI. Sadat-Akhavi, S., *supra* note 24, p. 124, explaining this rule of conflict by the fact that the prior conventions contain much more detailed provisions for the one particular resource they are concerned with.

⁸⁴ CCAMLR, Art. XXIII (3).

⁸⁵ Mus, J., *supra* note 14, p. 232, who concludes: “This contribution shows that including conflict clauses in treaties may be of great value in determining priority between conflicting treaties.”

⁸⁶ The definition reprinted *supra* note 26 continues: “Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometime to any treaty past or future.”

⁸⁷ CITES, Art. XIV (4 & 5), *supra* note 59 and accompanying text.

⁸⁸ CCAMLR, Arts III, IV, V, and VI, *supra* notes 81-83 and accompanying text.

⁸⁹ 1993 Compliance Agreement, Art. 1 (b), *supra* note 72 and accompanying text. At the time of the adoption of this agreement, the 1982 Convention had not yet entered into force.

⁹⁰ CITES, Art. XIV (2), *supra* note 58 and accompanying text.

⁹¹ 1982 Convention, Art. 311 (2) and 1995 UN Fish Stocks Agreement, Art. 44 (1), *supra* notes 28 and 73 respectively.

⁹² For a much more overview, see Sadat-Akhavi, S., *supra* note 24, pp. 87-96, distinguishing between two broad categories (those clauses giving priority to the treaty in which they are incorporated, and those giving priority to other treaties) with three subcategories each (priority over/of existing treaties, future treaties or both).

related to distinguishing prior from later treaties. Some of these situations so encountered might even simply be unresolvable.⁹³ But if they are, J. Mus provides the following road map:

“One should look for conflict clauses in both conflicting treaties for resolving the conflict and, in the absence of any clause whatsoever, one should try to interpret both treaties, especially the later one, on the basis of Articles 31 and 32 of the 1969 Vienna Convention, in order to see which treaty should take priority. When a treaty interpretation appears to be inconclusive, the *lex posterior* rule should be applied in the last resort.”⁹⁴

In order to illustrate how much the intention of the parties still permeates these legal rules conceived for settling disputes relating to the application of successive treaties relating to the same subject-matter, it might be instructive to consider the application made of them before and after the creation of the World Trade Organization⁹⁵ in 1994 in its relation to CITES and other multinational environmental agreements.⁹⁶ Before 1994 authors had, in principle, no difficulty with the application of the *lex posterior* principle. Since the norms of CITES and those of the GATT proved inconsistent, as subsections (b) and (c) of Art. XX of the latter agreement have been found to have no application to natural resources situated outside the jurisdiction of the trade-restricting state,⁹⁷ states parties to both agreements would nevertheless have to apply CITES on the basis of Art. 30 (3) of the 1969 Vienna Convention.⁹⁸ But even then, Art. 30 (4)(b) created

⁹³ If the conflict clauses in two treaties are complementary to one another, that is of course the ideal world. See for instance the relationship between the 1982 Convention and the Convention on Biological Diversity (1760 UNITED NATIONS TREATY SERIES pp. 142-382. This convention, signed on 5 June 1992, entered into force on 29 December 1993. Hereinafter CBD. At the time of writing 187 states and the European Community are party to this convention). CBD, Art. 22 (2), which requires that convention to be implemented consistent with the rights and obligations of states under the law of the sea, and Art. 311 of the 1982 Convention both indicate that in case of conflict the 1982 Convention takes precedence over CBD. Allen, C., *Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-sea Vent Resource Conservation and Management*, 13 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW p. 563, 607-608 (2001). *A contrario*, one could think of two treaties, each of them subjecting themselves to the other, or *vice versa* both claiming priority over the other. An example of the former can be found *infra* note 141 and accompanying text.

⁹⁴ Mus, J., *supra* note 14, p. 231. See also Sadat-Akhavi, S., *supra* note 24, p. 249, ending up with a similar list of steps to follow.

⁹⁵ Hereinafter WTO.

⁹⁶ Agreement Establishing the World Trade Organization, 1867 UNITED NATIONS TREATY SERIES pp. 3-507. This agreement, signed on 15 March 1994, entered into force on 1 January 1995. Hereinafter WTO Agreement. At the time of writing 146 states and the European Community are party to this agreement. This organization was created during the Uruguay round of trade negotiations held in the framework of the General Agreement on Tariffs and Trade (hereinafter GATT), established in 1947. The WTO Agreement is an umbrella agreement which, besides creating the WTO, also brought GATT within its structure. For a succinct description, see Sands, P. & Klein, P., *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS*, London, Sweet & Maxwell, pp. 116-118 (2001)

⁹⁷ And since CITES does allow states parties to protect non-domestic species through trade restrictions, the latter would seem to violate GATT since such actions would be considered quantitative restrictions. See Houseman, R. & Zaelke, D., *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW p. 535, 582 (1992).

⁹⁸ See for instance in chronological order: Cameron, J. & Robinson, J., *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT*, 2 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW p. 3, 16 (1992); Schoenbaum, T., *Free International Trade and Protection of the Environment*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 700, 720 (1992); Mayer, D. & Hoch, D., *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AMERICAN BUSINESS LAW JOURNAL pp. 187, 219-221 (1993). Rare were those authors which made reference in this framework to CITES,

a problem if a particular state was not party to CITES, for in that case GATT provisions would remain operational.⁹⁹ This was not a negligible problem, for the majority of trade restricting provisions of for instance CITES would most probably be challenged by non-parties. Because states parties to CITES have freely committed themselves one could expect that they would not normally challenge such provisions before GATT. Non-parties, on the other hand, have not consented and, moreover, very often are the prime target of such restrictive measures.¹⁰⁰

This tone however drastically changed after 1994, because by resetting the date from 1947 to 1994,¹⁰¹ the new WTO Agreement would leapfrog over most environmental treaties using trade measures, including CITES.¹⁰² Suddenly, the approach based on Art. 30 (3) of the 1969 Vienna Convention was labelled “out of place”,¹⁰³ “difficult to reconcile with the expectations of nations”,¹⁰⁴ “does not offer a desirable solution”,¹⁰⁵ “may provide a convenient solution in a specific case, but not in general where the conflict between multilateral environmental agreements and GATT rules emerges”,¹⁰⁶ and “arbitrarily applies the principle of *lex posterior*”.¹⁰⁷ Solutions were found, *inter alia*, in the *lex specialis* principle,¹⁰⁸ which was believed to offer relief since multilateral environmental agreements in general, and CITES in particular, are much more specific than the general provisions of the WTO Agreement.¹⁰⁹ Some have even looked at Art. 311 of the 1982 Convention as antidote in this respect, in order to conclude that

Art. XIV (2) (see *supra* note 58 and accompanying text), indicating this could possibly undermine this reasoning. Caldwell, D., *International Environmental Agreements and the GATT: An Analysis of the Potential Conflict and the Role of a GATT ‘Waiver’ Resolution*, 18 MARYLAND JOURNAL OF INTERNATIONAL LAW AND TRADE p. 173, 188 note 99 (1994).

⁹⁹ Schoenbaum, T., *supra* note 98, p. 720, suggesting an implied modification of GATT, or better still its amendment.

¹⁰⁰ Caldwell, D., *supra* note 98, p. 188.

¹⁰¹ See *supra* note 96.

¹⁰² Schultz, J., *The GATT/WTO Committee on Trade and the Environment – Toward Environmental Reform*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 423, 434 (1995). See also Ahn, D., *Environmental Disputes in the GATT/WTO: Before and After US–Shrimp Case*, 20 MICHIGAN JOURNAL OF INTERNATIONAL LAW pp. 819, 855-856 (1999), arguing that the application of Art. 30 of the 1969 Vienna Convention after 1994 results in the fact that “most international environment agreements that included trade provisions will be judged by the WTO on their merit.”

¹⁰³ Fox, G., *supra* note 15, p. 186.

¹⁰⁴ Winter, R., *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?*, 11 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY p. 223, 237 (2000). Using almost identical language, see also Voon, T., *Sizing Up the WTO: Trade-environment Conflict and the Kyoto Protocol*, 10 JOURNAL OF TRANSNATIONAL LAW AND POLICY p. 71, 77 (2000).

¹⁰⁵ Winter, R., *supra* note 104, p. 237.

¹⁰⁶ Brunner, A., *Conflicts Between International Trade and Multilateral Environmental Agreements*, 4 ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW p. 74, 88 (1997).

¹⁰⁷ Hicks, B., *Treaty Congestion in International Environmental Law: The Need for Greater International Coordination*, 32 UNIVERSITY OF RICHMOND LAW REVIEW p. 1643, 1661 (1999).

¹⁰⁸ See *supra* note 21 and accompanying text.

¹⁰⁹ See for instance Brand, R., *Sustaining the Development of International Trade and Environmental Law*, 21 VERMONT LAW REVIEW p. 823, 868 (1997); Brunner, A., *supra* note 106, pp. 88-89; Voon, T., *supra* note 104, p. 77, arguing that Art. 30 of the 1969 Vienna Convention potentially conflicts with this rule; and Winter, R., *supra* note 104, pp. 237-238.

“it is reasonable to believe that a future international tribunal could choose to disregard WTO/GATT if the implementation of its provisions are found to be incompatible with the object and purpose of UNCLOS.”¹¹⁰

But if Art. 311 of the 1982 Convention can come in handy when trying to downgrade the impact of the leapfrogging effect of the creation of WTO, the reverse side of the medal is that this same article can play a similar role with respect to the treaties it tries to protect from the WTO logic. Indeed, in the same way as the prior versus later treaty is essential in the determination of the relationship between WTO/GATT and multilateral environmental agreements, Art. 311 (2) governs the relationship between the 1982 Convention and other international agreements relating to law of the sea issues by providing in principle precedence of the former over the latter.¹¹¹ This precedence also covers international environmental agreements,¹¹² including CITES. Here the main defence has been to insist that the 1982 Convention itself relies on treaties such as CITES for more specific rules and enforcement, since such specialized fora are best suited for this task.¹¹³

It seems therefore safe to conclude from the analysis above that no hard-and-fast rule exists in contemporary international law regulating the relationship between the different treaties concerned with the conservation and management of commercially exploited aquatic species. Much will depend from the conflict clauses to be found in these different instruments, but even then, disregarding for a minute the many difficulties encountered when trying to apply these provisions in practice, a teleological approach appears to be present in state practice in order to arrive at the most desired end result.¹¹⁴ Each case, as a result, will have to be analysed and evaluated on its own merits taking into account all the relevant circumstances in order to arrive at the highest possible common denominator acceptable to the states parties to the agreements in question.

¹¹⁰ McLaughlin, R., *supra* note 54, pp. 58-59.

¹¹¹ See for instance Young, A., *Antarctic Resource Jurisdiction and the Law of the Sea: Question of Compromise*, 11 BROOKLYN JOURNAL OF INTERNATIONAL LAW pp. 45, 63-65 (1985), trying to restrict the powers of the parties under the Antarctic Treaty system with respect to carrying out commercial enterprises there; and Walker, G., *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter with Admiralty Law*, 20 TULANE MARITIME LAW JOURNAL pp. 217, 224-225 (1996), arguing that older conventions relating to shipping should also be checked against the 1982 Convention.

¹¹² Burke, W., *Implications for Fisheries Management of U.S. Acceptance of the 1982 Convention on the Law of the Sea*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 792, 800 (1995), arguing that in theory the 1992 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, prohibiting high seas Salmon fishing there, might be contrary to the 1982 Convention, Art. 66 (3)(a) permitting such fishing if causing economic dislocation.

¹¹³ Vice, D., *Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution*, 29 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS p. 577, 619 (1997).

¹¹⁴ Another striking example may be the relationship between the CBD and the 1982 Convention. As mention *supra* note 93, both agreements point at the priority of the latter over the former, something which is recognized in the literature. But if the application of the supremacy would lead to the general principles of the law of the sea endangering the biological diversity, authors are less certain and offer a “better reading”. See for instance Rieser, A., *International Fisheries Law, Overfishing and Marine Biodiversity*, 9 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW pp. 251, 257-258 (1997).

And here one touches upon “the most urgent and overarching need” in this area, and that is increased co-operation.¹¹⁵ Even though P. Birnie and A. Boyle consider CITES in a chapter on land-based species, a similar remark is certainly not out of place with respect to marine living resources.¹¹⁶ Since all systems have their strong and weak points,¹¹⁷ a closer co-operation could significantly enhance the global level of protection.

III International co-operation: CITES and its relation to other treaties

A Listing

The main technique relied upon by CITES in order to protect the wild fauna and flora from over-exploitation through international trade, namely the listing of species, is certainly not unique. In fact, it has been described as “a basic technique of fisheries and marine mammal conventions.”¹¹⁸ As such it seems compatible with the modern law of international fisheries which includes a species approach, as introduced by the 1982 Convention.¹¹⁹

B Co-operation with FAO and RFMOs

This section will concentrate on those other institutions with which CITES has a formalized co-operation, or is at least in the process of establishing one. They are five in number and will be treated in chronologic order.

a FAO

The conflict clauses to be found in CITES, as argued before,¹²⁰ show much deference to previously concluded agreements. Art. VIII of the FAO Constitution, on the other hand, entitled co-operation with organizations and persons, seems broad enough to allow for co-operation with conventional systems as CITES.¹²¹ Since none of these documents tries to impose itself upon the other, a flexible form of co-operation seems perfectly possible, as evidenced by the recent steps undertaken in this direction.¹²² The fact that CITES in its article on Appendix II, of particular importance for commercially exploited aquatic species it should be remembered, allows for the

¹¹⁵ Birnie, P. & Boyle, A., *INTERNATIONAL LAW AND THE ENVIRONMENT*, Oxford, Oxford University Press, pp. 634-635 (2002).

¹¹⁶ Churchill, R. & Ulfstein, G., *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law*, 94 *AMERICAN JOURNAL OF INTERNATIONAL LAW* pp. 623, 658-659 (2000).

¹¹⁷ Koester, V., *The Five Global Biodiversity-Related Conventions: A Stocktaking*, 11 *REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW* pp. 96-103 (2002), including CITES in his overview.

¹¹⁸ Birnie, P. & Boyle, A., *supra* note 115, p. 609.

¹¹⁹ Orrego Vicuna, F., *THE CANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES*, Cambridge, Cambridge University Press, pp. 31-32 (1999).

¹²⁰ See *supra* notes 58-59 and accompanying text.

¹²¹ As available on Internet at <www.fao.org/DOCREP/003/X8700E/x8700e01.htm#13> (last visited on 26 May 2004).

¹²² See *supra* sub I.

possibility to involve “international scientific authorities”, certainly helps to frame these initiatives.¹²³

No co-operation agreement has so far been finalized.¹²⁴

b International Whaling Commission¹²⁵

CITES has a very specific conflict clause relating to marine species,¹²⁶ which grants relief of conventional requirement relating to Appendix II on the condition that the provisions of the other treaty granting protection have been complied with. As it has been pointed out, the references to Arts III and V in Art. 14 (5) constitute a drafting mistake, since only Appendix II species can be included.¹²⁷ The 1946 Whaling Convention does not have an express provision regulating its relationship with other treaties.¹²⁸

Co-operation started in 1997 and has been a story with ups and downs, establishing a delicate relationship between both sides.¹²⁹ Whether CITES has the obligation to play second fiddle, as argued in the literature,¹³⁰ is far from being settled.¹³¹

¹²³ CITES, Art. IV (7).

¹²⁴ The Committee on Fisheries of FAO was unable to reach consensus on a proposed draft Memorandum of Understanding during the month of February 2003. See *Report of the Twenty-fifth Session of the Committee on Fisheries, Rome, 24-28 February 2003*, *supra* note 10, para. 48, where it is stated that no consensus could be reached, and Appendix G, where the text of the proposed Memorandum of Understanding can be found. This point was further discussed at the ninth meeting of the Sub-committee on Fish Trade of the Committee on Fisheries of FAO early 2004. See *CITES Issues with Respect to International Fish Trade and the CITES/FAO MoU, Bremen, Germany, 10-14 February 2004, Agenda Item 5*, FAO Doc. COFI:FT/IX/2004/3, as available on Internet at <ftp.fao.org/fi/document/COFI/cofift_9/3e.pdf> (last visited on 26 May 2004). For the steps already undertaken in the framework of CITES, see for instance CoP 13 Doc. 12.4, *Cooperation with the Food and Agriculture Organization of the United Nations (FAO)*, submitted by Japan to the thirteenth conference of the parties to be held at Bangkok, Thailand, in 2004, as available on Internet at <www.cites.org/common/cop/13/raw-docs/JP02.pdf> (last visited on 26 May 2004), p. 2, paras 3-8, where an overview is given.

¹²⁵ Hereinafter IWC. Convention for the Regulation of Whaling, 161 UNITED NATIONS TREATY SERIES pp. 72-110. This convention, signed on 2 December 1946, entered into force on 10 November 1948. At the time of writing 52 states are party to this convention. Hereinafter 1946 Whaling Convention.

¹²⁶ See *supra* note 59 and accompanying text. As stated there, this conflict clause only applies to already existing agreements.

¹²⁷ Wijnstekers, W., *THE EVOLUTION OF CITES*, Geneva, CITES Secretariat, p. 355 (2003).

¹²⁸ 1946 Whaling Convention, Recital 6 refers back to a number of previous whaling agreements, but without giving any indication as to their relationship with the 1946 document.

¹²⁹ Gillespie, A., *Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans*, 33 OCEAN DEVELOPMENT AND INTERNATIONAL LAW pp. 17, 31-42 (2002).

¹³⁰ *Id.*, pp. 38-41.

¹³¹ 1946 Whaling Convention, Art. XV (2)(b), relied upon by Gillespie in order to drive home his argument that CITES must follow the lead of IWC as far as cetaceans are concerned (*id.*, pp. 31, 39, and 40), does not appear really relevant. First of all, if it was supposed to create a hierarchy, it should have been included in Art. XIV which specifically treats this problem. Secondly, the Secretariat is not the decision making body under CITES. This article can therefore hardly be interpreted as imposing a legal obligation to the states parties through the medium of the Secretariat. And finally, resolution Conf. 12.4 (“Cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources regarding trade in toothfish”, adopted at the twelfth conference of the parties held at Santiago, Chile, in 2002), formalizing the co-operation between CITES and CCAMLR with respect to toothfish, explicitly refers in Recital 3 to this provision, whereas the subordination of CITES to CCAMLR does not seem to be implied by this resolution.

At present, the relationship with IWC is regulated by means of resolution Conf. 11.4,¹³² which again does appear to depict the relationship in terms of complementarity rather than subordination.

c Convention on the Conservation of Migratory Species of Wild Animals¹³³

This convention was signed a few years after CITES. Therefore, it is the first in the list to which only Art. XIV (2) of CITES will be applicable. CMS itself has an article containing three paragraphs on the effect of international conventions and other legislation.¹³⁴ The first paragraph is almost identical¹³⁵ to Art. XIV (6) of CITES.¹³⁶ Not much attention should be given to it, since it has been argued that its present-day importance is negligible at best.¹³⁷ Also paragraph 3 very much resembles a corresponding provision of CITES, but since it has to do with the relationship of CMS-national legislation, it needs no further comment.¹³⁸ Only paragraph 2 therefore remains to be addressed:

“The provisions of this Convention shall in no way affect the rights or obligations of any Party deriving from any existing treaty, convention or agreement.”¹³⁹

Since chances are rather high that parties to CMS are also parties to CITES, given the fact that the latter group is almost twice as large as the former,¹⁴⁰ this clause would seem to imply that CITES will generally have precedence over CMS. But because CITES subordinates itself not only to already existing, but also to possible future treaties, one is confronted in this case with two conventions giving priority to the other, or put the other way around, both subjecting themselves to the other.¹⁴¹

Co-operation between CMS and CITES, the need of which would seem to be obvious, received a concrete content only rather recently. It took more than 20 years for both conventional systems to realize that they could mutually benefit from joint action.

¹³² “Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission”, adopted at the eleventh conference of the parties held at Gigiri, Kenya, in 2000. This resolution was revised at the twelfth conference of the parties, held at Santiago, Chile, in 2002. The revision, besides a few cosmetic changes, concerned mainly the introduction of a new section relating to the cooperation in monitoring illegal trade in whale parts and derivatives.

¹³³ 1651 UNITED NATIONS TREATY SERIES pp. 355-490. This convention, signed on 23 June 1979, entered into force on 1 November 1983. At the time of writing 85 states and the European Community are party to this convention. Hereinafter CMS.

¹³⁴ CMS, Art. XII.

¹³⁵ Franckx, E., *supra* note 7, *sub* IV, B, b, I. See notes 140-141 and accompanying text there.

¹³⁶ See *supra* note 70 and accompanying text.

¹³⁷ See *supra* note 71 and accompanying text.

¹³⁸ Compare CMS, Art. XII (3) with CITES, Art. XIV (1).

¹³⁹ CMS, Art. XII (2).

¹⁴⁰ Compare *supra* notes 1 (CITES) and 133 (CMS), where present-day membership is given.

¹⁴¹ CITES, Art. XIV (2).

This co-operation is at present governed by Decisions 12.5 and 12.6.¹⁴² Most of the concrete species which received special attention in this co-operation programme are of particular interest here, since they concern marine species like marine turtles, the whale shark and great white shark, as well as sturgeons. A Memorandum of Understanding was concluded between both secretariats during the month of September 2002.¹⁴³

d CCAMLR

Since CCAMLR is posterior to CITES, only Art. XIV (2) is applicable.¹⁴⁴ On the other hand, CCAMLR only subjects itself to the 1946 Whaling Convention and the Convention for the Conservation of Seals.¹⁴⁵ Once again, therefore, no restrictive clauses hamper possible co-operation between both conventional systems.

Co-operation is of recent nature and is directly tied to the commercial exploitation of Patagonian and Antarctic toothfish, which increased dramatically since the late 1980s. After having tried several means at its disposal (catch limits, inspection, prohibition of landings, and vessel monitoring systems) a catch documentation scheme¹⁴⁶ was introduced in 1992. The system became operational on 7 May 2000.¹⁴⁷

Specific about the scheme is that the drafters tried to make it compatible with WTO/GATT standards. This explains why non-parties to CCAMLR can become parties to it, why parties as well as subscribing non-parties have to comply with exactly the same requirements, and why non-conforming shipments of toothfish are targeted, not particular countries.¹⁴⁸ Whether this careful approach will be able to stand WTO/GATT scrutiny, remains to be tested. Some are confident,¹⁴⁹ but possible difficulties still remain.¹⁵⁰ Others have however argued that what remained after negotiations was an emasculated version which would have no difficulty in standing the test.¹⁵¹ But since such a system will probably be ineffective, the argument is made that CCAMLR should have flexed its muscles by introducing a scheme

¹⁴² “Memorandum of Understanding between CITES and the Convention on the Conservation of Migratory Species of Wild Animals (CMS)”, as available on Internet at <www.cites.org/eng/decis/valid12/12-05_6.shtml> (last visited on 26 May 2004).

¹⁴³ For a general description, see Wijnstekers, W., *supra* note 127, pp. 350-351.

¹⁴⁴ See *supra* note 58 and accompanying text.

¹⁴⁵ See *supra* note 83 and accompanying text.

¹⁴⁶ Hereinafter CDS. The relevant resolutions and an explanatory memorandum are available on Internet at <www.ccamlr.org/pu/e/cds> (last visited on 26 May 2004).

¹⁴⁷ For a clear overview, see Agnew, D., *The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean, and the CCAMLR Catch Documentation Scheme*. 24 *MARINE POLICY* pp. 361, 365-368 (2000).

¹⁴⁸ *Id.*, p. 370.

¹⁴⁹ *Id.*

¹⁵⁰ Bialek, D., *Sink or Swim: Measures Under International Law for the Conservation of Patagonian Toothfish in the Southern Ocean*, 34 *OCEAN DEVELOPMENT AND INTERNATIONAL LAW* pp. 105, 122-126 (2003). Kaye, S., *INTERNATIONAL FISHERIES MANAGEMENT*, The Hague, Kluwer Law International, pp. 439-442 (2001).

¹⁵¹ Popick, I., *Are There Really Plenty of Fish in the Sea? The World Trade Organization's Presence is Effectively Frustrating the International Community's Attempts to Conserve the Chilean Sea Bass*, 50 *EMORY LAW JOURNAL* pp. 939, 975-981 (2001).

applicable to all.¹⁵² Even such a stronger version, it has been argued, would still have been able to stand the WTO/GATT test.¹⁵³

At present the relationship between CCAMLR and CITES is governed by resolution Conf. 12.4.¹⁵⁴ But unlike the co-operation with CBD, this one was somewhat forced on CITES. It served as a *quid pro quo* for the Australian withdrawal of its proposal to nominate the Patagonian toothfish for consideration as possible Appendix II species, which it had introduced in June 2002.¹⁵⁵

e CBD

Since CBD postdates CITES, again only Art. XIV (2) is applicable.¹⁵⁶ The conflict clauses contained in CBD are not claiming any priority. It was already mentioned above that it subjects itself to the law of the sea.¹⁵⁷ It furthermore gives precedence to all previously concluded agreements, except in very exceptional circumstances.¹⁵⁸ But given the nature of the exception, it is hardly imaginable that this will ever be applied in the relationship with CITES.

Between these two entities a very fruitful co-operation has been built up over the years.¹⁵⁹

At present this relationship is regulated by resolution Conf. 10.4.¹⁶⁰ As indicated by this resolution, a Memorandum of Understanding is operational linking the two secretariats.¹⁶¹

C Conclusions

It will be clear from the above-mentioned overview that no fundamental difficulties are raised by the different conflict clauses encountered in the respective founding documents governing the mutual relationship between CITES on the one hand, and the other entities with which it has set up, or is in the process of setting up a formalized form of co-operation on the other hand.

¹⁵² *Id.*, p. 985.

¹⁵³ *Id.*, pp. 981-984.

¹⁵⁴ See *supra* note 131.

¹⁵⁵ Bialek, D., *supra* note 150, p. 127.

¹⁵⁶ See *supra* note 58 and accompanying text.

¹⁵⁷ See *supra* note 93.

¹⁵⁸ CBD, Art. 22 (1): "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."

¹⁵⁹ For a detailed description, see Wijnstekers, W., *supra* note 127, pp. 349-350.

¹⁶⁰ "Co-operation and Synergy with the Convention of Biological Diversity", adopted at the tenth conference of the parties, held at Harare, Zimbabwe, in 1997.

¹⁶¹ *Id.*, Recital 1.

How this relationship should look like in practice is of course for the partners to agree upon. But instead of trying to create an hierarchical structure between them,¹⁶² probably the better approach would be to try to look for synergies between different, but equal partners. As indicated by the study of V. Koester, when a global comparison is made, all systems have their strengths and weaknesses, combining elements like number of participants and whether concrete or general obligations are prescribed in different ways, given each and every one of them their own effectiveness.¹⁶³ These differences could be easily used to strengthen instead of weaken the level of over-all protection. Like suggested by D. Bialek, concrete forms of co-operation could be worked out where one system supplements the other if need may be.¹⁶⁴ Focussing on CITES, it has been stated that this system

“provides an outstanding example of an insufficiently used potential for complementarity.”¹⁶⁵

The condition must of course be that both sides are in agreement on the exact path to follow. As indicated by the present study, no principle legal hurdles appear to exist to make such co-operation impossible.

¹⁶² As proposed by Gillespie, A., *supra* note 129, pp. 18 and 40, using words as CITES acting *ultra vires* and in a way highly questionable under international law, or even adjudicating the ineffectiveness of IWC. See also Nichols, P., *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS pp. 711, 751-756 (1996), arguing for superiority of WTO over CITES.

¹⁶³ Koester, V., *supra* note 117, pp. 96-103.

¹⁶⁴ Bialek, D., *supra* note 150, pp. 127-129, looking into the possibility of listing toothfish under CITES and remarking that the CDS would probably have to be adapted to fit under CITES.

¹⁶⁵ De Klemm, C., *Fisheries Conservation and Management and the Conservation of Marine Biological Diversity*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW (Hey, E., ed.), The Hague, Kluwer Law International, p. 423, 497 (1999), stressing the fact that fishery conventions normally regulate catch, not trade.

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