

Understanding Introduction from the Sea



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The International Environmental Law Project (IELP) is a legal clinic at Lewis & Clark Law School that works to develop, implement, and enforce international environmental law. It works on a range of issues, including wildlife conservation, climate change, and issues relating to trade and the environment.

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Executive Summary

Introduction from the sea (IFS), with import, export, and re-export, is one of the four types of trade regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). IFS applies to specimens of species included in Appendix I or II when caught beyond the jurisdiction of any State. When IFS applies, as it does for whales and some species of sharks, the State of introduction must issue an IFS certificate. A State of introduction may issue an IFS certificate only if the introduction will not be detrimental to the survival of the species (the non-detriment finding). In addition, it must determine for any Appendix I specimen that the introduction is not for primarily commercial purposes.

Aspects of IFS remain unclear or undefined. For example, the CITES Parties have yet to determine when IFS certificates should be issued or which State—the flag State or the port State—should issue the IFS certificate. From a legal perspective, this report concludes that the port State is the State of introduction. This conclusion hinges on the definition of “introduction from the sea.” That definition uses the phrase “transportation into a State,” which connotes travel from one place into a nation-State. The alternative—that the flag State is the State of introduction—would require the vessel to somehow be part of the territory of the flag State so that landing the fish on the deck of the boat constituted travel. Not only is that interpretation inconsistent with the ordinary meaning of “transportation,” but it is also inconsistent with international law, which bestows a vessel with the nationality of the flag State. Thus, the capture of a CITES-listed specimen on the high seas by a vessel does not constitute “transportation into a State” because the vessel is not a State.

Moreover, the argument of some CITES Parties that “State of Introduction” may be interpreted to mean the flag State must be rejected. The Convention provides that the introduction from the sea requires the issuance of an IFS certificate by the State of introduction. As such, the State of introduction is closely linked to the definition of “introduction from the sea.” Thus, it is the port State that issues the IFS certificate. Surely if the drafters of CITES wanted the flag State to issue the IFS certificate, they would have required the introduction from the sea to require the prior grant of an IFS certificate by the “flag State” rather than the “State of introduction.”

The conclusion in no way upsets flag State control over its vessels. Flag States are free to impose whatever restrictions they wish on vessels flying their flag. Flag States may wish to pursue whatever enforcement actions concerning violations of fisheries law they want. Issuance of IFS certificates, as with sanitary and phytosanitary requirements that confirm a product is pest or disease free, is only about trade and the entry of goods into the port State. These legal issues are analyzed in Section III.

From a practical perspective, issuance by the port State makes the most sense. For example, if “transportation into a State” means transportation into a port State, then transshipment at sea does not require any CITES permits. If transportation into a State means landing a specimen on a vessel, then transshipment to a vessel flagged by another country would

require an export permit. If the transshipment involves an Appendix I specimen, then an import permit would be needed also.

In addition, by defining State of introduction as the port State, the CITES Parties would diminish introduction from the sea from countries issuing flags of convenience or otherwise allowing the harvest of CITES-listed specimens by fishing vessels engaged in illegal, unreported, and unregulated (IUU) fishing. While ports of convenience are recognized as a growing problem, far more is known about States issuing flags of convenience and vessels engaged in IUU fishing. Thus, the Parties will be able to avoid problems associated with these countries and vessels by refusing to issue an IFS certificate to any vessel flying a flag of convenience or engaged in IUU fishing. These and other implementation issues are discussed in Section 4.

Section 5 provides some guidance on the issuance of non-detriment findings. Of significance, research by the UN Food and Agriculture Organization (FAO) concludes that flag States are likely to have better information about fish catches and trade involving their vessels than regional fisheries bodies (RFBs) or FAO. This is because the data submitted to RFBs and FAO are disaggregated. As a result, while the flag State may have information about whether certain fish were caught inside an Exclusive Economic Zone (EEZ) or on the high seas, the information it submits to RFBs and FAO is most likely to report total catch irrespective of location. Similarly, trade data is unlikely to describe whether the specimens traded were caught in an EEZ or on the high seas. This fact suggests that, at a minimum, a flag State should be consulted prior to making a non-detriment finding.

Recognizing that flag States may possess better data than port States and the vehemence with which some CITES Parties insist on making the flag State the State of introduction, this report suggests an approach that balances these concerns with the legal conclusion that the port State is the State of introduction. This report proposes a solution that is not complex, is in the best interests of the species, and avoids problems associated with flags of convenience and IUU fishing. This approach comprises three principles:

- First, the port State would be identified as the State of introduction. As such, there would be a presumption that the port State issues the IFS certificate and that recognizes the underlying legal conclusion that port States are the State of introduction.
- Second, this presumption would be waived when some formal arrangement exists between the port State and the flag State.
- Third, criteria would determine when a port State may enter into such an agreement with a flag State to issue IFS certificates. These criteria would include ratification by the flag State of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (“The FAO Compliance Agreement”) and the UN Highly Migratory and Straddling Fish Stocks Agreement. These two agreements were chosen because they emphasize the need for flag States to take active control of vessels flying their vessels and, in the absence of such control, greater involvement by port States. To encourage

cooperation and synergy with RFBs. The flag State would also need to be a member of the relevant RFB, if the CITES-listed specimen is managed by an RFB.

Section 6 elaborates on these issues. Moreover, Annex C includes a draft resolution to the CITES Parties that incorporates all the issues discussed in this report.

1. What Is Introduction from the Sea?

“Introduction from the sea” is one of the four types of trade regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹ Under CITES, “trade” includes import, export, re-export, and introduction from the sea.² Generally speaking, introduction from the sea applies to specimens harvested on the high seas and then taken someplace for entry into the market. When a CITES-listed specimen is taken on the high seas, the “State of introduction” must issue an IFS certificate.

However, this general explanation of introduction from the sea, or IFS, masks a number of challenging questions, including the following:

- ***Which State is the State of introduction—the flag State or the port State?*** The State of introduction must issue a certificate of introduction from the sea (IFS certificate). The Parties, however, have not determined whether the flag State of the vessel that caught the CITES-listed specimen or the port State in which the catch is landed is the State of introduction.
- ***When should IFS certificates be issued?*** Some people believe that IFS certificates are best issued prior to catching the CITES-listed specimen. Others believe that the IFS certificate may be issued at any time before the specimen clears customs in the State of introduction.
- ***How should non-detriment findings be made?*** Issuance of an IFS certificate requires the State of introduction to determine that the introduction will not be detrimental to the survival of the species, a finding more commonly known as the non-detriment finding. How should non-detriment findings be made for species caught on the high seas?
- ***What is the Role of Regional Fisheries Bodies (RFBs)?*** Because RFBs may manage a species subject to IFS, they may have information relevant to making a non-detriment finding. When making non-detriment findings, should the State of introduction be required to consult with an RFB that has management authority over the species?

As marine species are increasingly included in the CITES Appendices, the Parties have sought to clarify these and other issues. As a result, the Parties established an IFS Working Group. This Report explains some of the critical issues that the IFS Working Group have identified and suggests an appropriate way forward. In doing so, it takes into account international law as well as the practical realities of fishing on the high seas.

¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, *signed* Mar. 3, 1973, *entered into force* July 1, 1975, 993 U.N.T.S. 243.

² CITES, art. I(c).

1.1. When Do the IFS Provisions Apply?

Article I(e) of CITES defines IFS as:

transportation into a State of specimens of any species [included in Appendix I or II] which were taken in the marine environment not under the jurisdiction of any State.

This definition has two distinct parts which help explain when IFS applies:

- **Where?** The definition identifies where the specimens are caught as “in the marine environment not under the jurisdiction of any State.” As described in Section 2 below, the Parties have answered this question in Resolution Conf. 14.6 by defining that phrase basically as the “high seas.”
- **When and Who?** The definition makes clear that IFS is triggered when there is “transportation into a State.” Substantial disagreement exists among the Parties concerning this definition. However, its resolution is key for determining which country issues the IFS certificate. As Section 3 explains, this report concludes that transportation into a State occurs when a specimen clears customs in a port State. For practical reasons, however, it may make sense to have certain flag States issue IFS certificates.

1.2. What do the IFS Provisions Require?

Many CITES observers have often worried about the application of IFS to a particular group of species, such as whales and dolphins. The requirements for IFS, however, are similar to those for imports and exports, including the requirement to make a non-detriment finding. For example, when a species is caught on the high seas, the State of introduction must issue an IFS certificate. If the specimen is an Appendix I specimen, such as a fin whale, the State of introduction must:

- make a non-detriment finding;
- be satisfied that the specimen will not to be used for primarily commercial purposes; and
- be satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it.

For an Appendix II specimen, the State of introduction must make the non-detriment finding and be satisfied that the proposed recipient is suitably equipped to house and care for a living specimen. As shown in Tables 1 and 2 below, the permit requirements for IFS of an Appendix I specimen are identical to the requirements for import of an Appendix I specimen. For an Appendix II specimen, the permit requirements for IFS lack one finding that applies to an export of an Appendix II specimen.

Table 1: Permit Requirements: Appendix I Specimens

IFS, Art. III(5)	Import, Art. III(3)
Non-detriment finding	Non-detriment finding
Not for primarily commercial purposes	Not for primarily commercial purposes
Recipient can suitably house and care for living specimen	Recipient can suitably house and care for living specimen

Table 2: Permit Requirements: Appendix II Specimens

IFS, Art. IV(6)	Export, Art. IV(2)
Non-detriment finding	Non-detriment finding
Recipient can suitably house and care for living specimen	Recipient can suitably house and care for living specimen
	Specimen was legally obtained.

While the permit requirements for IFS are essentially the same as for imports and exports, there are two important distinctions. First, with respect to Appendix I specimens, CITES requires the issuance of both an import and export permit. By requiring separate findings from the country of export and the country of import, CITES establishes dual controls—a “double check”—that allows two countries to review trade in the specimen. In contrast, the provisions for IFS do not envisage a double check. Only the State of introduction issues an IFS certificate.

Second, for both Appendix I and II specimens, IFS does not require a finding that the specimen was legally obtained, as is required for export of such specimens. It is not exactly clear why this finding is omitted. IFS probably does not require such a finding, because at the time of the entry into force of CITES few institutions managed fisheries on the high seas. As such, few conservation and management measures existed. Many members of the IFS Working Group consider this to be a gap in IFS permitting and have proposed that the Management Authority of the State of introduction consult with a relevant RFB to help identify whether the specimen was legally obtained.

1.3. Do the IFS Provisions Currently Apply to Any CITES-listed Species?

Yes. Appendix II currently includes three species of sharks, basking shark (*Cetorhinus maximus*), whale shark (*Rhincodon typus*), and great white shark (*Carcharodon carcharias*), with distribution on the high seas.³ In addition, all whales, dolphins, and porpoises are included in Appendix II except those included in Appendix I; many of these are known to exist on the high seas.

³ JEAN-JACQUES MAGUIRE ET AL., THE STATE OF WORLD HIGHLY MIGRATORY, STRADDLING AND OTHER HIGH SEAS FISHERY RESOURCES AND ASSOCIATED SPECIES (FAO Fisheries Technical Paper 495: 2006), at: <http://www.fao.org/docrep/009/a0653e/a0653e05.htm>.

2. Where Is the “Marine Environment Not Under the Jurisdiction of any State”?

After several years and meetings of the Conference of the Parties, the Parties agreed on a common definition of the phrase “in the marine environment not under the jurisdiction of any State.” At the Fourteenth Meeting of the Conference of the Parties (CoP14), the Parties defined this phrase as:

those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea.⁴

The language of this definition derives from the U.N. Convention on the Law of the Sea (UNCLOS). Under UNCLOS, coastal States have sovereignty over their territorial seas—the marine area extending up to 12 nautical miles from their coastline. They also have “sovereign rights” to manage living and non-living resources in their exclusive economic zone (EEZ)—an area up to 200 nautical miles from their coastline but excluding the territorial sea. They also have “sovereign rights” to living and non-living resources on the continental shelf—the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea.

The CITES Parties were guided by these concepts when defining the area to which IFS applies. In particular, the Parties equated sovereignty and sovereign rights over an area as equivalent to “jurisdiction.” As a consequence, the only areas “not under the jurisdiction of any State” are those areas where sovereignty and sovereign rights are not accorded to coastal States. These areas are confined waters of the high seas and lands extending beyond any State’s continental shelf (collectively referred to in this report as the “high seas” for simplicity).

Because IFS only applies to the high seas, the IFS provisions of CITES do **not** apply to fish or other marine species caught within a Party’s territorial sea or EEZ. Some examples may help explain when IFS certificates are required:

- (1) A fisherman catches a whale shark, a specimen of an Appendix II species, in the territorial waters of CITES Party X and transports that whale shark to a port in CITES Party X. This does **not** constitute IFS. Moreover, it does not constitute import or export. No CITES permits or certificates are required.
- (2) A fisherman catches a whale shark in the EEZ of CITES Party X and wishes to take the whale shark to the CITES Party Y. This does not constitute IFS, because this EEZ is under the jurisdiction of CITES Party X. However, CITES Party X must issue a CITES export permit.
- (3) A fisherman on a vessel flagged by CITES Party Y catches a whale shark in the high seas beyond the EEZ of CITES Party X and wishes to transport it to a port in CITES Party X. An IFS certificate is required. Section 3 of this report discusses whether CITES Party X

⁴ CITES, Resolution Conf. 14.6, *Introduction from the Sea* (2007).

as the port State or CITES Party Y as the flag State has the authority to issue the IFS certificate.

3. Which State Issues the IFS Certificate?—“Transportation into a State”

Introduction from the sea is triggered when there has been “transportation into a State.” The essential question concerns when a specimen is “transport[ed] into a State.” While one would think that the meaning of this phrase is straightforward, it is not. The principal issue driving interpretations of this phrase is control over the permitting process. Where IFS occurs, the “State of introduction” must issue an IFS certificate.

The debate centers on the meaning of key provisions of CITES as well as the desire to avoid permitting by “flags of convenience.” Articles III(5) and IV(6) require the Management Authority of the State of introduction to issue the IFS certificate. CITES does not define the term “State of introduction.” However, it does define “introduction from the sea” as “transportation into a State.”

As a consequence, three distinct possibilities exist for determining which State should issue an IFS certificate:

- First, many believe that the flag State is the appropriate State to issue the IFS certificate, because landing the specimen on a fishing vessel constitutes “transportation into a State.” Others argue that “State of introduction,” an undefined term in the Convention, can be interpreted to mean “flag State.” They believe this is appropriate because the flag State may have more information about a specimen on the high seas than the port State.
- Second, others believe that the State in which the specimen is first landed and clears customs, i.e., the port State is the “State of introduction” and should issue the IFS certificate.
- Third, a very small minority of Parties believe that IFS could occur when a vessel carrying a CITES specimen taken on the high seas enters a State’s EEZ. This argument appears to rely on a State’s “jurisdiction” over waters of the EEZ for certain purposes under UNCLOS.

As described below, this legal opinion concludes that the trigger for IFS—the transportation into a State—logically refers to the State of introduction. Moreover, because a fishing vessel is not a State, the State of introduction must be the State into which the specimen caught on the high seas is landed—the port State.

3.1. The Port State Is the “State of Introduction”

Under principles of international law, “transportation into a State” requires movement of a CITES-listed specimen from a vessel into a port State. First, the Vienna Convention on the Law of Treaties requires treaties to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁵ Using this first rule of treaty interpretation, “transportation into a State” means the State into which a specimen is first landed and clears customs. Second, customary international law has never treated a vessel flagged by a State as an extension of the flag State’s territory. To the contrary, international law provides that a vessel has the *nationality* of the flag State. Third, flag States have never had complete or exclusive jurisdiction over vessels it flags. Rather, flag States have primary jurisdiction. As such, defining the port State as the State of introduction does not offend notions of flag State jurisdiction.

3.1.1. “Transportation into a State” Means Travel into the Port State

Using the cardinal rule of treaty interpretation that treaties be interpreted in accordance with the ordinary meaning of the terms used in the treaty, it is clear that “transportation into a State” means the State into which a specimen is first landed and clears customs. The phrase “introduction from the sea” is defined to mean “transportation into a State.” That phrase specifies that there must be travel, i.e. *transportation*, into a State. Indeed, “transportation” is defined as a “conveyance or travel from one place to another.”⁶ If the drafters of the Convention intended landing a specimen on a boat to constitute transportation into a State, surely they would have substituted the word “transportation” with harvest or landing or some other word to indicate that they meant taking a marine resource from the high seas and putting it on a vessel. By using “transportation,” they clearly meant the movement of a specimen on a vessel from one place to another place.

This interpretation is supported by the overall construction of the definition of “introduction from the Sea,” which includes two distinct elements. The first element requires that a specimen be “taken from the marine environment not under the jurisdiction of any State.” This is the part of the definition that refers to harvesting a specimen on the high seas—that is, the landing of the specimen on a fishing vessel. The second element requires the specimen to be “transport[ed] into a State.” If the drafters intended “State of introduction” to mean the flag State, there would have been no need to add the phrase “transport[ed] into a State”: introduction from the sea would occur as soon as the specimen is “taken from the marine environment not under the jurisdiction of any State.”⁷ An interpretation of “transportation into a State” as meaning transport from the marine environment onto a fishing vessel makes the first element of the definition of “introduction from the sea” redundant. The International Court of Justice and other

⁵ The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331, art. 31 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

⁶ Merriam-Webster Online Dictionary.

⁷ *Accord* Wm. Carroll Muffett, “Trade in Humpback Whales As an Introduction from the Sea under CITES” (undated).

international tribunals have made clear that a interpretations making a provision redundant are not acceptable.⁸

When exactly does transportation into a port State occur? A port State, or more accurately a coastal State, has territorial sovereignty over its in land, internal waters, and its territorial sea—the area extending up to 12 nautical miles from a State’s coast. It also has sovereign rights to natural resources in the EEZ, an area up to 200 nautical miles from a State’s coast. As a consequence, “transportation into a State” could mean that the specimen has:

- (1) entered the inland waters or territorial sea of a State,
- (2) entered the EEZ of a State; or
- (3) cleared customs.

Only the third approach is consistent with the overall permitting structure of the Convention. Article VII(1) of the Convention exempts from CITES permits the “transshipment of specimens through or in the territory of a Party while the specimen remains in customs control.” If specimens that remain in customs control do not require permits, then it logically follows that specimens that have not yet reached customs do not require a permit, because a permit is only necessary once the specimen has *cleared* customs. Thus, “transportation into a State” occurs when a specimen first clears customs. This will be the port State, unless a specimen taken on the high seas is moved onto a helicopter or plane and flown to a landlocked country.

3.1.2. A Ship Is Not a Floating Territory of the Flag State

In discussions of “introduction from the sea,” some have argued that “transportation into a State” occurs when a specimen is brought onto a ship because the ship is a “floating part” of the territory of the flag State. International law, however, has never accepted the idea of a ship as part of the territory of the flag State. To the contrary, scholars have referred to this idea as “fiction.” As one scholar commented, the fiction of a ship as a floating territory “exploded” long ago.⁹ Another international law scholar said that international law “[c]ertainly ... does not base its rules on the territoriality doctrine”¹⁰—the idea that a ship is the territory of the flag State.

Instead, the flag State confers *nationality* on a ship, not territoriality. Both the Convention on the High Seas of 1958 and UNCLOS affirm this view. Both treaties provide that, for purposes of flagging a ship:

⁸ See, e.g., Corfu Channel Case, 1949 I.C.J. 24 (April 9); Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. Reports 6, 23 (Feb. 3); 1966 Y.B. Int’l L. Comm’n, Vol. II, at 209; United States–Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body of the World Trade Organization, WT/DS2/AB/R, AB-1996-1, at 23, (decided April 29, 1996; adopted May 20, 1996).

⁹ Sompong Sucharitkul, *Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities*, 54 AM. J. COMP. L. 409, 416, also 413 (Fall 2006).

¹⁰ D.P. O’CONNELL, INTERNATIONAL LAW, VOL. II 661 (1965).

Every State shall fix the conditions for the grant of its *nationality* to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the *nationality* of the State whose flag they are entitled to fly.¹¹ (emphasis added).

In contrast, UNCLOS clearly distinguishes the grant of nationality to ships from the grant of sovereignty or sovereign rights—concepts that indicate a more territorial relationship to a State. For example, UNCLOS identifies those areas where States have sovereignty, such as internal waters,¹² the territorial sea¹³ and archipelagic waters,¹⁴ and sovereign rights, as with respect to the continental shelf¹⁵ and EEZ.¹⁶ Because UNCLOS distinguishes nationality of ships from sovereignty and sovereign rights over particular areas or resources, UNCLOS provides no support for the idea of ships as part of the floating territory of the flag State.

While prominent international scholars have called ships “floating parts” of the flag State,¹⁷ they have always used phrase as a convenient fiction only. Using this fiction, scholars could conveniently describe why children born on board a ship may be granted citizenship of the flag State as if they are born within the flag State’s territory.¹⁸ The fiction also helped explain why contracts formed on a ship are enforced under the laws of the flag State and crimes committed on board a ship are regarded as if they occurred in the flag State’s territory.¹⁹ However, flag States conferred nationality on children born on vessels and contract disputes were settled in accordance with the laws of the flag State not because the ships were the territory of the flag State, but because the flag State had jurisdiction over the vessel.

Despite these examples, the great international legal scholar Lassa Oppenheim declared in 1905 that “private vessels are in fact not floating portions of the flag State.”²⁰ In fact, the history of the negotiations creating the Convention on the High Seas and, ultimately, UNCLOS make clear that the negotiators expressly rejected the fiction of ships as territory of the flag State. In 1950, the Secretariat of the International Law Commission wrote that “the *nationality* of ships ... is the essential (paramount/primordial) condition” for the peaceful use of the high sea (original in French only: *La nationalité du navire ... est la condition primordiale de l'utilisation paisible de la haute mer*).²¹ He elaborated that nationality makes possible the permanent subjection of the ship to the jurisdiction of the flag state, “without which, it would otherwise be necessary to make use of the *fiction of territoriality* to explain this subjection.” (original in

¹¹ UN Convention on the Law of the Sea, art. 91, *signed* Dec. 10, 1982, *entered into force* November 16, 1994, 1833 U.N.T.S. 397 (hereinafter UNCLOS); Convention on the High Seas, art. 5(1), *signed* Apr. 29, 1962, *entered into force* Sept. 30 1962, 450 U.N.T.S. 82.

¹² UNCLOS, art. 2(1) (“The sovereignty of a Coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”).

¹³ *Id.*

¹⁴ *Id.* at arts. 2, 49.

¹⁵ *Id.* at art. 77(1).

¹⁶ *Id.* at art. 56(1).

¹⁷ L. OPPENHEIM, INTERNATIONAL LAW, vol. I, 318 (1905); *see also* L. OPPENHEIM, INTERNATIONAL LAW 597 (8TH ED., EDITED BY HERSCH LAUTERPACHT, 1955).

¹⁸ L. OPPENHEIM, INTERNATIONAL LAW, vol. I, 318 (1905).

¹⁹ *Id.*

²⁰ *Id.*

²¹ UN Doc. A/CN.4/32, para. 47, in Yb.I.L.C. 1950, vol. II (French only) (emphasis added).

French only: “sans qu’il soit besoin aucunement de faire appel à la fiction de territorialité du navire pour expliquer cette soumission.”)²²

Also in 1950, the International Law Commission’s Special Rapporteur on the law of the sea, J.P.A. François, expressly noted that the majority of authorities reject the concept of a ship as territory. (“Toutefois la plupart des auteurs rejettent cette théorie, et l’on a critiqué la Cour pour avoir repris l’idée de l’assimilation du navire au territoire.”). Importantly, he noted that flag States have jurisdiction “as if” the ship were territory of the flag State, not “because” the ship is the territory of the flag State.²³ Because scholars and maritime States accepted that the flag State confers nationality on ships flying its flag, the Special Rapporteur concluded that resort to the fiction of territoriality was unnecessary. (“Selon cette opinion il n’est aucunement besoin pour expliquer la condition juridique du navire, d’invoquer l’idée de territorialité.”)²⁴ The International Law Commission adopted this view. Recognizing that international law never treated ships as floating parts of the flag State, scholars emphasize that “States have abandoned the fiction of the territoriality of the ship.”²⁵

3.1.3. Flag States Have “Primary Jurisdiction” over Their Vessels

Once a flag State confers nationality on a ship, it must exercise control and jurisdiction over the ship.²⁶ UNCLOS further states that ships “shall be subject to [the flag state’s] exclusive jurisdiction on the high seas.”²⁷

The use of the phrase “exclusive jurisdiction” in UNCLOS has contributed to the erroneous view that a ship is a floating part of the flag State’s territory²⁸ and that port States and coastal States have no control over ships flagged by other States. Again, the fiction helped explain which State would have jurisdiction over a ship on the high seas—an area where no State may claim territorial sovereignty.²⁹ Granting a flag State jurisdiction over ships flying its flag on the high seas provided an enforcement capacity where no other authority existed to police activities on and among ships.³⁰ The jurisdiction of the flag State over the ship “would seem to be the most appropriate, and eminently reasonable.”³¹ The fiction of territoriality serves to illustrate the authority of the flag State in regard to the ship in order to protect the State’s interests.

Although UNCLOS speaks of “exclusive” jurisdiction, international law never recognized the flag State’s jurisdiction as exclusive. For example, a non-flag State may exercise authority over foreign ships to institute blockades and seizing contraband during times of war, verify the flag of a suspicious ship, exercise the right of pursuit for violation of law within its

²² *Id.*

²³ UN Doc. A/CN.4/17, para. 12, in Yb. I.L.C 1950, vol. II (French only).

²⁴ *Id.*, para. 12.

²⁵ RENE-JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA 407 (1991).

²⁶ UNCLOS, *supra* note 3, at art. 94.

²⁷ *Id.*, art. 92.

²⁸ DUPUY & VIGNES, *supra* note 25, at 407.

²⁹ S.S. Lotus, (France v. Turkey) 1927, PCIJ Report Series A. No. 10, at 25.

³⁰ DUPUY & VIGNES, *supra* note 25, at 407.

³¹ *Id.*

territorial waters, or prevent the abuse of its flag without authority.³² Even on the high seas, jurisdiction is not exclusive.

France specifically claimed that it had exclusive jurisdiction over all activities associated with French-flagged ships. The Permanent Court of International Justice, while posing the collision of the two ships as two “territories” colliding,³³ rejected France’s claim of exclusive jurisdiction and ruled that Turkey could bring criminal charges against a French seaman for an accident on the high seas between French and Turkish ships.³⁴

Moreover, the concept of “exclusive jurisdiction” of flag States is eroded by well-accepted principles of international law that recognize the rights of coastal and port States to maintain jurisdiction over foreign-flagged vessels. Coastal States have broad jurisdiction over vessels to enforce laws concerning fisheries, pollution, and other matters in their territorial seas, contiguous zone, and EEZ.

As a general rule of international law, for example, port States have jurisdiction over foreign vessels in their ports.³⁵ UNCLOS reflects this principle of customary international law in Article 218, which authorizes port State jurisdiction over foreign vessels voluntarily in its ports for pollution discharges occurring *outside* that port State’s territorial sea or EEZ.³⁶

In addition, customary international law recognizes that a coastal State has jurisdiction in its territorial sea.³⁷ For example, Article 27 of UNCLOS expressly grants a coastal State criminal jurisdiction over foreign ships in its territorial sea when the consequences of the crime extend to the coastal State, the crime disturbs the peace of the coastal State or the good order of the territorial sea, or the measures are necessary to suppress drug trafficking.³⁸ A coastal State may take *any steps* authorized by its own laws to arrest or investigate for criminal or civil prosecution a foreign ship passing through its territorial sea after leaving internal waters.³⁹ On the other hand, a coastal State “should not” exercise civil jurisdiction in relation to a person aboard a foreign ship and “must not” arrest a ship to instigate civil proceedings where the foreign ship is merely

³² OPPENHEIM, vol. 1, *supra* note 17 at 320-322.

³³ S.S. Lotus, (France v. Turkey) 1927, PCIJ Report Series A. No. 10, at 25.

³⁴ The court concluded:

Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

Id.

³⁵ See, e.g., A. V. Lowe, *The Right of Entry into Maritime Ports in International Law*, 14 SAN DIEGO L. REV. 597, 597 (1977).

³⁶ UNCLOS, *supra* note 12, at art. 218(1). The right is limited. For example, a port State may not institute proceedings against a vessel for discharges into the maritime waters of another State unless requested to do so by that State, the flag State, or a state damaged by the discharge.

³⁷ DUPUY & VIGNES, *supra* note 25, at 407.

³⁸ UNCLOS, *supra* note 12, art. 27(1)(a)-(b).

³⁹ *Id.* at art. 27(2).

passing through the territorial sea.⁴⁰ In addition, a coastal State has enforcement jurisdiction over any vessel discharging pollutants or dumping⁴¹ in its territorial sea.⁴²

UNCLOS further empowers coastal States to exercise control in their contiguous zones when necessary to “prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”⁴³ Coastal States may also punish the infringement of such laws and regulations committed within its territory or the territorial sea.⁴⁴

UNCLOS also grants a coastal State the right to take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with its laws and regulations relating to the management and exploitation of natural resources in its exclusive economic zone (EEZ). While the coastal State must promptly release arrested vessels and crews upon payment of a reasonable bond⁴⁵ and notify the flag State of any penalty imposed,⁴⁶ the jurisdiction of coastal States is clear. In addition, a coastal State has enforcement jurisdiction over vessels discharging pollutants⁴⁷ or dumping⁴⁸ in its EEZ.

A coastal State may even have jurisdiction over a foreign ship on the high seas when it exercises its right of hot pursuit.⁴⁹ A coastal State may exercise its right of hot pursuit where it has “good reason to believe” that the foreign ship has violated a law and regulation within that coastal State’s internal waters, territorial sea, or EEZ. Prior to pursuit, the coastal State must warn the foreign vessel to stop. Once the pursuit commences, it may not be interrupted. With these qualifications, the coastal State has the right to exercise its police powers on the high seas against foreign-flagged vessels.⁵⁰

The U.N. Fish Stocks Agreement continues the erosion of flag State jurisdiction. Due to problems with illegal, unreported, and unregulated (IUU) fishing, the Fish Stocks Agreement established rules that, among other things, grant Parties to the agreement—regardless of whether they are a coastal State, port State or otherwise—the right to enforce fisheries measures on the high seas. The right is not unfettered. Where the Party to the Fish Stocks Agreement is also a member of a regional fisheries management organization (RFMO), that Party may board and inspect fishing vessels flying the flag of another Party to the Fish Stocks Agreement, even if that Party is not a member of the RFMO, to enforce the conservation and management measures of the RFMO relating to a “straddling stock” or a “highly migratory fish stock.”⁵¹ A similar

⁴⁰ *Id.* at arts. 27(1)-(2).

⁴¹ *Id.* at art. 216(1).

⁴² *Id.* at arts. 220(2)-(6).

⁴³ *Id.* at art. 33(1)(a).

⁴⁴ *Id.* at art. 33(1)(b).

⁴⁵ *Id.* at art. 73(1). In addition, penalties may not include imprisonment. *Id.* at art. 73(2).

⁴⁶ *Id.* at art. 73(3).

⁴⁷ *Id.* at arts. 220(3)-(6).

⁴⁸ *Id.* at art. 216(1).

⁴⁹ *Id.* at art. 111(1).

⁵⁰ DUPUY & VIGNES, vol. 1, *supra* note 25, at 410.

⁵¹ 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 Species, art. 21(1), *signed* Sept. 8, 1985, *entered into force* Dec. 11, 2001, 2167 U.N.T.S. 3 (hereinafter Fish Stocks Agreement).

enforcement right exists for violations of the RFMO's conservation and management measures on the high seas when the vessel enters the national jurisdiction of the inspecting State.⁵² While other limitations apply,⁵³ including communication with the flag State, the Fish Stocks Agreement is an important innovation in high seas fisheries enforcement that evinces the further erosion of the exclusive jurisdiction of the flag State.

3.2. “State of Introduction” Also Means the Port State

Some Parties, while agreeing that “transportation into a State” means the port State, nonetheless believe that the Convention provides flexibility to define the “State of introduction” as the flag State.⁵⁴ These Parties claim that because the Convention does not define “State of introduction,” it provides enough flexibility to define “State of introduction” as either the flag State or the port State.

As a matter of treaty interpretation, this view is not correct. For both Appendix I and II specimens, “[t]he introduction from the sea of any specimen ... require[s] the prior grant of a certificate from a Management Authority of the State of introduction.” Based on any logical interpretation of this obligation, “State of introduction” must relate to “introduction from the sea.” Had the drafters intended “State of Introduction” to mean the flag State, the drafters would have provided that “[t]he introduction from the sea of any specimen ... requires the prior grant of a certificate from a Management Authority of the flag State.” They did not do so.

As the International Court of Justice has said, “When the Court can give effect to a provision of a treaty by giving the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.”⁵⁵ Others have phrased the rule as a prohibition against seeking alternative meanings where the ordinary meaning does not lead to absurd conclusions:

When a deed is worded in clear and precise terms,—when the meaning is evident, and leads to no absurd conclusion,—there can be no reason for refusing to admit the meaning which such deed naturally presents.”⁵⁶

Concerning introduction from the sea, it is clear that the drafters linked “State of introduction” to “introduction from the sea” in the same way that they linked import permits to the State of import, export permits to the State of export, and re-export permits to the State of re-export. Because they could have easily characterized the “State” for IFS purposes as the flag State or some other State, it would be absurd to suggest that the drafters did not link “State of Introduction” to the definition of “introduction from the sea.” Because that definition includes

⁵² *Id.* at art. 21(14).

⁵³ The limitations are set out in articles 21 and 22 of the Fish Stocks Agreement.

⁵⁴ See CITES, CoP14 Doc. 33, “Introduction from the Sea” (2007).

⁵⁵ Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3).

⁵⁶ Vattel, *THE LAW OF NATIONS*, VOL. II, § 263 (1758 edition, translated by C.G. Fenwick) (Washington: Carnegie Institution: 1916). See also Shabtai Rosenne, *The Election of Five Members of the International Court of Justice in 1981*, 76 AM. J. INT’L L. 364, 365 (1982) (“It is a cardinal principle of interpretation that a treaty should be interpreted in good faith and not lead to a result that would be manifestly absurd or unreasonable.”).

the phrase “transportation into a State,” the State of introduction is the State into which the specimen is transported—i.e., the port State.

3.3. Concurring Views that the Port State is the State of Introduction

The view that the port State is the “State of introduction” is widely shared. For example, an FAO Expert Consultation concluded that “transportation into a State” occurs when a specimen clears customs and that it does not refer to when the specimen is landed on a vessel:

[T]he Consultation considered whether introduction occurs when a fishing vessel takes a specimen of a species of fish on board (thus making the flag State the State of introduction), or whether that only happens when the fish is landed in a port and cleared by customs (thus making the port State the State of introduction). The Consultation considered that a normal reading of the founding document of CITES, which uses the term “transportation into”, points to the latter situation. This interpretation is consistent with recent developments in international fisheries law which increases the emphasis on port States in this respect.⁵⁷

Prof. Dr. Erik Franckx, a participant in the 2005 IFS workshop, reached similar conclusions:

The first [practical difficulty] relates to the question, put in simple terms, whether introduction occurs when a fishing vessels (*sic*) takes a specimen of a species of fish, included in Appendices I or II of CITES, on board, or whether that only occurs when the fish is landed in a port of one of the member states. . . . As to the first question, a literal reading of the convention conveys the impression, by means of the word “transportation into”, that the founding fathers of CITES had the second alternative in mind when drafting the convention.”⁵⁸

In addition, the Secretary General of CITES has maintained through at least two editions of his book, *The Evolution of CITES*, that the port State is the State of Introduction:

There has been some discussion about whether landing specimens in a port or to bring them on board of a vessel is an introduction from the sea. I have always been convinced of the first scenario. “Transportation into a state” is clearly something different from “entering the territory of a state” and I therefore believe that a specimen is introduced from the sea upon landing. That is obviously also the only feasible way to apply controls. It is difficult to imagine how CITES-controls can be implemented otherwise. If bringing a specimen on board of vessel is introduction from the sea, then what should happen when that specimen is being transferred from one vessel to another with a different flag and on the high

⁵⁷ FAO, EXPERT CONSULTATION ON LEGAL ISSUES RELATED TO CITES AND COMMERCIALY-EXPLOITED AQUATIC SPECIES, FIRM/R746 (En), para. 18 (2004).

⁵⁸ Eric Franckx, *Applications of the Term “Introduction from the Sea”* 12 (2004) (background paper to FAO Expert Consultation on Legal Issues Related to CITES (2004)).

seas before being landed? This, as we have seen, would require a CITES export permit.⁵⁹

3.4. Does Port State Authority to Issue IFS Certificates Erode Flag State Responsibility?

No, issuance of IFS certificates by port States in no way erodes or interferes with a flag State's control over vessels flying its flag. The issuance of IFS certificates is about trade and meeting certain conditions for entry of goods into the port State. It is not about control over the vessel. Indeed, "introduction from the sea" is one of the four types of "trade" defined and regulated by CITES. Nothing about issuing IFS certificates touches upon the fundamental duty of the flag State to control its vessels. Thus, the flag State will still be able to determine whether one of its vessels has the right to catch a CITES-listed specimen on the high seas. The flag State will have authority to bring enforcement actions for violations of rules applying on the high seas. The port State is merely authorizing that vessel to land the CITES-listed specimen in that State, in the same way that it would authorize the importation of agricultural and other products. Flag States would still authorize and issue permits to their vessels to fish on the high seas.⁶⁰ Port States would control the CITES-listed specimens that enter their countries.

3.5. Could the Management Authority Be an RFB or NGO?

Yes, the Management Authority responsible for issuing IFS certificates could be an RFB or nongovernmental organization (NGO). Article IX(1) requires each Party to designate "one or more Management Authorities competent to grant permits or certificates on behalf of the Party." Article IX(1) puts no limitations on the geographic location or on the governmental or nongovernmental nature of the Management Authorities. Thus, Parties have used similar language on the designation of "one or more Scientific Authorities" to designate NGOs as Scientific Authorities. A review of the National Contacts Database on the CITES website identifies museums, institutes, and other organizations as Scientific Authorities.⁶¹

⁵⁹ WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES* (under "Definitions in Article I") (2005).

⁶⁰ A number of countries require vessels flying their flag to obtain a license as a condition of fishing on the high seas. *See, e.g.*, Canada Fisheries Act (R.S., 1985, c. F-14), §§ 23, 87; European Communities, Council Regulation (EC) No 2371/2002, of 20 December 2002, on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, arts. 1, 22; Namibia, Marine Resources Act, Aug. 1, 2001, §§ 32(4), 40, 52, *at*: <http://faolex.fao.org/docs/pdf/nam44344.pdf>; South Africa, The Marine Living Resources Act, May 27, 1998 (Act 18 of 1998), arts. 40–4, *at*: <http://www.info.gov.za/view/DownloadFileAction?id=70675>; Tonga, Fisheries Management Act of 2002, arts. 44–64; <http://faolex.fao.org/docs/pdf/ton71107.pdf>; United States, High Seas Fishing Compliance Act, 16 U.S.C. §§ 5501–5509.

⁶¹ CITES National Contacts Database, <http://www.cites.org/cms/index.php/lang-en/component/ncd/>. *See, e.g.*, Albania and Madagascar.

4. How Do Implementation Issues Affect IFS?

The IFS Working Group has identified a number of implementation issues affecting IFS. For most purposes, the practical implementation of IFS will be facilitated by port State issuance of IFS certificates. For example, transshipment from one vessel to a vessel flagged by another State would not require a CITES export permit. In addition, it would eliminate concerns that flags of convenience are issuing IFS certificates inappropriately. These and other issues are described below.

4.1. Flags of Convenience and Ports of Convenience

The IFS Working Group and others have asked whether the failure of some flag States to control their vessels and enforce conservation and management measures of fisheries organizations provides a practical reason to support port State issuance of IFS certificates. Others have noted that ports of convenience are also a problem. Does one problem tip the balance in favor of flag State or port State issuance of IFS certificates?

Flags of convenience constitute one aspect of illegal, unreported, and unregulated (IUU) fishing. IUU fishing includes fishing without permission, catching protected species, using prohibited gear types, disregarding catch quotas, and misreporting catch, among other things. Flags of convenience facilitate IUU fishing, because the flag State that issues such flags does not ensure its vessels fish in compliance with applicable fishing regulations. A flag of convenience (FOC) country is one that makes its flag available to a vessel and the “only link between the flag state and the ship is registration—as opposed to management, crew nationality, ownership, or any other ‘genuine’ connection with the state.”⁶²

Research indicates that the use of flags of convenience is an issue that the CITES Parties should consider when designing IFS procedures. Data from the Sea Around Us Project, an academic program at the University of British Columbia, indicates that the yearly fish catch on the high seas is 12,000,000 tonnes⁶³, or 16% of total global fish catch.⁶⁴ In 2004, ten countries caught 61.87% of the total high seas catch.⁶⁵ Table 3 ranks the countries in terms of total catch on the high seas.

⁶² Jessica K. Ferrell, *Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks*, 35 ENVTL. L. 323, 363 (2005).

⁶³ Sea Around Us Project, <http://www.seaaroundus.org/TrophicLevel/EEZTaxon.aspx?eez=0&fao=0&country=Hsigh%20seas&Hasnote=1&typeOut=4>.

⁶⁴ Sea Around Us Project, <http://www.seaaroundus.org/TrophicLevel/PercentEEZHS.aspx?EEZ=999&FAO=0&TypeOut=0>.

⁶⁵ Sea Around Us, *supra* note 64.

Table 3: High Seas Fish Catch—2004

Country	Total Tonnes	Percentage of Total High Seas Catch
1. Chile	1,302,765.24	10.08%
2. Japan (main islands)	1,250,246.19	9.67%
3. China	986,497.51	7.63%
4. India	868,721.35	6.72%
5. Russian Federation	738,261.21	5.71%
6. Indonesia	670,152.18	5.18%
7. Mexico	566,459.14	4.38%
8. Taiwan	564,745.08	4.37%
9. Malaysia	503,192.25	3.89%
10. Korea (South)	454,729.42	3.52%
15. United States	331,060.32	2.56%
16. Spain	287,155.28	2.22%
19. Faroe Islands	161,020.12	1.25%
22. France	134,931.34	1.04%

None of these countries is considered an FOC country. In an extensive study of flags of convenience, Gianni and Simpson identified fourteen FOC countries.⁶⁶ Four of these countries—Honduras, Panama, Belize and St Vincent and the Grenadines—“have consistently topped the list of FOC countries with the largest number of large-scale fishing vessels registered to fly their flag.”⁶⁷ In 2005, these four countries had 953 vessels greater than 24 meters in length registered under their flag, accounting for more than 75% of all FOC vessels of this size.⁶⁸ More generally, an estimated 15% of the world’s large-scale fishing fleet (fishing vessels, trawlers and fish factory ships more than 24 meters in length⁶⁹) are listed as flag unknown or are registered to an FOC country.⁷⁰

Gianni and Simpson’s 2005 data on vessel capacity (gross tonnage) for the top four countries with accompanying high seas catch data are summarized in Table 4 (note: because catch data was unavailable for 2005, catch data from 2004 was used in the 2005 table). Data for the remaining ten FOC countries identified by Gianni and Simpson are not included here because

⁶⁶ Belize, Bolivia, Cambodia, Cyprus, Georgia, Equatorial Guinea, Honduras, Marshal Islands, Mauritius, Netherland Antilles, Panama, St Vincent and the Grenadines, Sierra Leone, Vanuatu. *Id.*

⁶⁷ MATHEW GIANNI & WALT SIMPSON, THE CHANGING NATURE OF HIGH SEAS FISHING 12 (Oct. 2005). (These four countries “consistently top lists of FOC countries in terms of numbers of large-scale (≥ 24 m) fishing vessels on their registries and because they were most often identified by regional fisheries management organizations as being the flag States of particular concern in a survey of FOCs and IUU fishing worldwide conducted in 2002.” *Id.*)

⁶⁸ *Id.* at 13-14.

⁶⁹ *Id.* at 12.

⁷⁰ *Id.* at 3.

the number of ships and gross tonnage for each of these countries is dramatically less than that for the top four countries.⁷¹

Table 4: Flags of Convenience: Vessel Capacity and High Seas Catch—2005

Country	Gross Tonnage (Capacity) ⁷²	Percentage Gross Tonnage of FOC Countries ⁷³	Percentage of High Seas Catch; (Tonnes) ⁷⁴
Belize	259,119	26.9%	>0.01%; (88.69)
Honduras	158,842	16.5%	0.08%; (10,184.13)
Panama	134,286	13.9%	0.65%; (83,803.83)
St. Vincent and the Grenadines	97,893	10.2%	Data not available

While these four countries have vessels engaged in high seas fisheries, it is not known to what extent that catch from these vessels enters international trade. To date, neither FAO nor any other organization has disaggregated trade data based on whether the fish are caught on the high seas or within an EEZ or territorial waters of a coastal State. In any event, CITES can ensure that FOC countries do not issue IFS certificates by recognizing port States as the State of introduction with the responsibility to issue IFS certificates.

Just as vessels flying flags of convenience could pose a problem if flag states have authority to issue IFS certificates, so too could “ports of convenience” pose a problem if port States have authority to issue IFS certificates. According to the FAO, “ports of convenience” are those ports that:

fail to monitor fishing vessels using their ports[,] fail to exercise control over the handling of catches, including catches taken by IUU fishing vessels[, and] often host companies that own or manage IUU fishing vessels or support their operations.⁷⁵

Ports of convenience tend to be in “developing countries where financial considerations (e.g. the sale of essential goods and services) override vessel control and regulatory functions.”⁷⁶ While FAO reports a growth in ports of convenience, little information exists on the extent of the problem. Las Palmas de Gran Canaria, which is used by IUU vessels fishing off the coast of West Africa, has drawn international attention because it offers entry to the massive EU market. In 2004, the OECD reported that:

⁷¹ See *id.* at 13-14. Four of these countries—Bolivia, Cambodia, Georgia and Vanuatu—were identified as potential “up and coming” FOCs. From 1999-2003 the total number of ships registered to these four countries rose from 70 to 184. *Id.* at 18.

⁷² *Id.* at 13-14

⁷³ *Id.*

⁷⁴ Sea Around Us, *supra* note 64 (Data is from 2004. Data from 2005 is unavailable).

⁷⁵ David J. Doulman, *International Framework for Port State Measures to Combat IUU Fishing: Towards More Stringent and Binding Measures* (FAO: Mar. 31, 2008). See also FAO, *Stronger Port Security Key to Fight Against Illegal Fishing*, <http://www.fao.org/newsroom/en/news/2006/1000380/index.html> (last visited Oct 3, 2008)(describing problems of ports of convenience).

⁷⁶ Doulman, *supra* note 75, at 8.

Las Palmas de Gran Canaria is one of the major ports of convenience. It serves as the main distribution centre for fish caught off Africa, provides services to IUU fleets, and hosts a number of companies which operate pirate vessels. Other such ports include Port Louis, in Mauritius and (historically) Cape Town.⁷⁷

Given the lack of data on ports of convenience, it is difficult to say whether they pose a greater risk to fisheries management than flags of convenience. At this time, more is known about specific FOC countries and specific problem vessels. In that sense, it may be easier to design systems for IFS that take into account the existing, known information about flags of convenience rather than unknown information about ports of convenience. Certainly, CITES, FAO, RFBs, and other institutions should continue to gather data about ports of convenience.

4.2. Permitting Issues

4.2.1. When Should an IFS Certificate Be Issued?

The introduction from the sea of any Appendix I or II specimen requires the “prior grant and presentation” of an IFS certificate. Because introduction from the sea occurs after a specimen clears customs, the IFS certificate may be issued at any time prior to that specimen clearing customs. In other words, the IFS certificate could be issued either before or after the specimen is caught. (If “introduction from the sea” is defined as occurring when the fish is landed on a vessel, then the IFS certificate must be issued *before* the specimen is landed on the vessel. This is true because Articles III and IV clearly state that introduction from the sea requires the *prior grant* of an IFS certificate.).

From an implementation perspective, the issuance of an IFS certificate before a specimen is landed on a vessel provides authorities with greater oversight of fisheries operations. By granting an IFS certificate prior to landing the specimen on the vessel, CITES or fisheries authorities may be able to designate where the vessel is authorized to catch CITES-listed specimens and impose other conditions, such as a quota, on the number of specimens that may be caught. If such measures are taken, the issuance of an IFS certificate prior to taking a specimen acts as a means to ensure trade in CITES-listed specimens is sustainable. In addition, doing so could help reinforce the catch limits established by Regional Fisheries Bodies (RFBs), because the IFS certificate could expressly limit the non-detriment finding to catches consistent with RFB quotas and other rules.

Prior issuance of IFS certificates could also address bycatch in a number of ways. First, it could expressly allow bycatch of certain species up to a specified amount. Second, it would be possible to expressly disallow any IFS resulting from bycatch. By requiring the prior issuance of IFS certificates, the Parties avoid pressure from fishermen who appear in port with bycatch, claiming that the specimen will be wasted if an IFS certificate is refused. This is the same philosophy underpinning the issuance of an import permit for an Appendix I specimen prior to issuance of an export permit. The Parties did not want wildlife traders exporting specimens from

⁷⁷ OECD, FISH PIRACY: COMBATING ILLEGAL, UNREPORTED AND UNREGULATED FISHING 376 (2004).

species threatened with extinction, especially living specimens, unless an importing country had already agreed that the relevant permit conditions were met.

Whether for bycatch or targeted catch, the Convention appears to contemplate the issuance of IFS certificates prior to harvesting a specimen on the high seas. Article IV(7) of the Convention allows IFS certificates to remain valid for up to one year.⁷⁸ Because it does not seem likely that a fishing vessel would retain a marine specimen for longer than one year, CITES appears to contemplate the issuance of an IFS certificate prior to the taking of the specimen. In addition, the validity of an IFS certificate for up to one year allows CITES authorities to link their non-detriment findings to quotas and other conservation measures adopted by RFBs. If an RFB issues a quota for a specific country or species, then the Scientific Authority of the State of introduction could issue IFS certificates based on those quota limits and for the period, up to one year, that the quota remains in effect.

4.2.2. How Would a Port State Issue an IFS Certificate to the Vessel Flagged by Another Country?

An argument has been made that issuance of an IFS certificate by one country to a vessel flagged by another country would somehow be unduly complex.⁷⁹ From a technical or practical perspective, this is simply not true, regardless of whether the IFS certificate is issued prior to a specimen being taken or prior to the specimen clearing customs. Fishing vessels, particularly those capable of fishing on the high seas, will have substantial radio, fax, and other equipment to communicate with authorities in other countries. As just one example, the United States allows vessel owners whose vessels fish for highly migratory species or land their catch off the west coast of the United States to obtain a replacement permit by mail or fax.⁸⁰ Applications may be obtained through the internet.⁸¹

Moreover, some vessels may rarely visit the ports of the flag State and have much greater contact with the port State. For example, certain U.S. vessels fishing in the western Pacific may have much more frequent contact with Port Moresby, Papua New Guinea than the United States. This situation is likely true for countries without territorial possessions throughout the world. For example, the Polish vessels fishing for hake in U.S. waters during the 1980s never saw Poland. Instead, those vessels used Vancouver, British Columbia or other ports as their port for making repairs, cleaning, dry dock, and changing crews, among other things. Thus, there should be no practical difficulty getting permits or other documents from the port State.

Lastly, it is normal for the port State to require documentation from a vessel flagged by another State. For example, the United States requires any vessel landing certain highly

⁷⁸ CITES, Resolution Conf. 12.3 (Rev. CoP14), *Permits and Certificates*, makes import, export, and re-export permits valid for one year also.

⁷⁹ F. Meere et al., *CITES Introduction from the Sea—A Practical Way Forward*, TRAFFIC Bulletin, vol. 21, No. 3, at 3 (2008).

⁸⁰ National Marine Fisheries Service, Final Rule, Fisheries Off West Coast States; Highly Migratory Species Fisheries, 72 FR 10935 (March 12, 2007).

⁸¹ 50 C.F.R. § 660.707(b)(3)(i) (noting that applications are available at: <http://swr.nmfs.noaa.gov/permits.htm>).

migratory species⁸² in the United States that were caught on the high seas to obtain an International Trade Permit prior to such landing.⁸³ Similarly, New Zealand requires an import permit for Antarctic fish,⁸⁴ and Australia requires an import permit for salmon and other species.⁸⁵

It is absolutely true that the port State may require vessels to comply with permitting requirements for the entry of fish into their countries. This is no different from States requiring documentation, such as bills of lading or sanitary or phytosanitary certificates, for any other product. As with sanitary or phytosanitary certificates that require products to be free of pests and diseases prior to entry into an importing country's market, an IFS certificate helps the importing country control its borders for the entry of goods. An IFS certificate does not grant the vessel a right to fish on the high seas or take law enforcement action against a foreign flagged vessel. That is generally a matter for the flag State. The IFS certificate merely provides the vessel with permission to land and market a CITES-listed specimen in the port State.

4.2.3. Will Transshipment At Sea Require CITES Permits?

No, transshipment will not require CITES permits *if the port State is recognized as the State of introduction*. In fact, the potential for transshipment at sea provides one compelling practical reason for making the port State the State of introduction and, thus, the issuer of IFS certificates. By recognizing the port State as the State of introduction, all transactions on the high seas are irrelevant from a permitting perspective. The only transaction that requires permitting under CITES is the landing of a specimen in the port State.

From a practical perspective, defining “transportation into a State” to mean when a specimen is landed on a vessel would create unnecessary complexity. *If landing a specimen on a vessel constitutes transportation into a State*, then the subsequent entry into a port State other than the flag State would constitute export and require an export permit. Similarly, any subsequent transfer to a vessel flagged by another State would be an export and require an export permit.⁸⁶ If the specimen enters a third State, then this would be a re-export. Moreover, if any of

⁸² These species are: Atlantic bluefin tuna (*Thunnus thynnus*), Pacific bluefin tuna (*Thunnus orientalis*), Southern bluefin tuna (*Thunnus maccoyii*), Swordfish (*Xiphias gladius*), and Bigeye tuna (frozen) (*Thunnus obesus*).

⁸³ 50 C.F.R. §§ 300.180–300.189.

⁸⁴ Import Health Standard for Antarctic Fish, §5.1, Issued pursuant to Section 22 of the Biosecurity Act 1993 (Sept. 12 2007), at: <http://www.biosecurity.govt.nz/imports/animals/standards/antaquic.all.htm>.

⁸⁵ Australian Quarantine and Inspection Service, Import Case Details–Public Listing, http://www.aqis.gov.au/icon32/asp/ex_casecontent.asp?intNodeId=8754503&intCommodityId=16633&Types=none&WhichQuery=Go+to+full+text&intSearch=1&LogSessionID=0.

⁸⁶ The exception for transshipment does not affect IFS. Article VII(1) of the Convention exempts from the CITES permitting scheme “the transit or transshipment of specimens through or in the territory of a Party while the specimens *remain in Customs control*” (emphasis added). Transshipment is a common feature of fisheries, where one vessel may catch the fish but another vessel takes the fish to a port for sale. In this way, the fishing boats are able to continue fishing while transport vessels move the fish to market. However, when fish or other marine specimens are transferred from one vessel to another, the specimens do not “remain in Customs control.” As a result, the CITES exception does not apply. CITES Resolution Conf. 9.7 addresses other aspects of the “transit and transshipment” exception. It provides, in relevant part:

a) for the purpose of Article VII, paragraph 1, of the Convention, the phrase ‘transit or transshipment of specimens’ be interpreted to refer only to:

these transactions involves an Appendix I specimen, then an import permit will also be required. This cannot be what the drafters of CITES intended. As others have suggested, including the Secretary General, this would also be unduly cumbersome.⁸⁷

The European Union and others have proposed to define “State of introduction” as the flag State, but not because landing a specimen on a vessel constitutes transportation into a State. They claim that IFS is not a single event, but rather a process that begins with catching the CITES-specimens on the high seas and ends clearing CITES-specimens through customs. In this scenario, only the catch at sea would require an IFS certificate. Nonetheless, the Parties would need to establish some documentation that would follow the catch of CITES-specimens if they were transferred to a vessel flagged by another Party. Theoretically, the captain of the vessel that caught the CITES specimens would present the IFS certificate to the captain of the transshipment vessel.

Tables 5, 6 and 7 highlight the different permit scenarios for depending on how “State of introduction” is defined. The simplest option is to define the port State as the State of introduction, because only one certificate or permit is needed.

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- i) specimens that remain in Customs control and are in the process of shipment to a named consignee when any interruption in the movement arises only from the arrangements necessitated by this form of traffic; and
 - ii) cross-border movements of sample collections of specimens that comply with the provisions of section XV of Resolution Conf. 12.3 (Rev. CoP14) and are accompanied by an ATA carnet

CITES, Resolution Conf. 9.7 (Rev. CoP13), *Transit and Transshipment* (1994).

⁸⁷ In explaining his conclusion that the port State is the State of introduction, the CITES Secretary General made this very point:

“Transportation into a state” is clearly something different from “entering the territory of a state” and I therefore believe that a specimen is introduced from the sea upon landing. That is obviously also the only feasible way to apply controls. It is difficult to imagine how CITES-controls can be implemented otherwise. If bringing a specimen on board of vessel is introduction from the sea, then what should happen when that specimen is being transferred from one vessel to another with a different flag and on the high seas before being landed? This ... would require a CITES export permit.

WILLEM WUNSTEKERS, THE EVOLUTION OF CITES (under “Definitions in Article I”) (2005). It would also be impractical to consider entry into a coastal State’s territorial sea or EEZ as “transportation into a State.” If this definition is adopted, then each time a vessel crosses into the territorial sea or EEZ of another State an export or re-export permit will be required. In some areas, such as vessels transiting from West Africa to Europe, a vessel might need re-export permits from 10 or more Parties.

Table 5: Port State Is the State of Introduction

Action	Certificate or Permit Needed?
Fishing Vessel Flagged by Country W Catches CITES Specimens	No
Fishing Vessel Flagged by Country W Transfers CITES Specimens to “Transport” Vessel Flagged by Country X	No
Transport Vessel Flagged by Country X Enters EEZ of Country Y	No
CITES Specimens Clears Customs in the Territory of Country Z	IFS Certificate required from Country Z

**Table 6: Flag State Is the State of Introduction:
Landing a Specimen on a Vessel Constitutes “Transportation into a State”**

Action	Certificate or Permit Needed?
Fishing Vessel Flagged by Country W Catches CITES Specimens	IFS Certificate Required from Country W Prior to Landing CITES Specimen on Vessel
Fishing Vessel Flagged by Country W Transfers CITES Specimens to “Transport” Vessel Flagged by Country X	Export Permit Required from Country W
Transport Vessel Flagged by Country X Enters EEZ of Country Y	No
CITES Specimens Clears Customs in the Territory of Country Z	Re-export Permit Required from Country X

Table 7: “State of Introduction” Defined as Flag State

Action	Certificate or Permit Needed?
Fishing Vessel Flagged by Country W Catches CITES Specimens	IFS Certificate needed from Country W
Fishing Vessel Flagged by Country W Transfers CITES Specimens to “Transport” Vessel Flagged by Country X	Not export but not clear what documents should follow specimens
Transport Vessel Flagged by Country X Enters EEZ of Country Y	No
CITES Specimens Clears Customs in the Territory of Country Z	No

4.2.4. Does Article XIV Exempt High Seas Catch from IFS Certificates?

In some circumstances, yes, Article XIV will exempt specimens caught on the high seas from IFS requirements. Article XIV of CITES provides that, for Appendix II species that are also subject to an international treaty affording protection to the Appendix II marine species, the Party “shall be relieved of the obligations imposed on it under [CITES] with respect to trade.”⁸⁸ Article XIV(4), however, imposes a number of limitations:

- (1) The international treaty must afford protection to marine species.

⁸⁸ The full text of Article XIV(4) of the Convention reads as follows::

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.

- (2) The exception applies only with respect to marine treaties that entered into force before CITES on July 1, 1975;
- (3) The exception only applies to trade in Appendix II specimens.
- (4) The exception only applies to trade in Appendix II specimens if they are taken by ships that are acting in accordance with the other treaty providing protection to marine species.
- (5) The scope of the exception depends on whether the port State or the flag State is considered the State of introduction.
 - (a) If the port State is the State of introduction, then the exception only applies to the extent that the flag State is the same as the port State. This is so, because the exception only applies with respect to specimens “taken by ships registered in that State” where “that State” refers to a State that is party to CITES and a relevant marine treaty. Thus, where a vessel of a flag State wants to introduce the Appendix II specimen to another State, the State of introduction must issue an IFS certificate, because it is not exempted from permit requirements.
 - (b) If the flag State is the State of introduction, then no IFS permit is needed.
- (6) Article XIV(5) requires the State of introduction to issue a certificate indicating that a specimen was taken in accordance with the provisions of the other marine species. This provision is problematic. If the flag State is the State of introduction, then the flag State will be responsible for determining whether a specimen may be exported from another Party—the State of introduction. If the port State is the State of introduction, then it will be asked to determine that the specimen was taken in accordance with a treaty to which it may not be Party and in any even with respect to a vessel it has not flagged.

Perhaps the most significant limitation on the exception is that it applies only to those treaties in force before July 1, 1975, the date that CITES entered into force. As a consequence, vessels acting in accordance with the treaties included in Table 8 would not be subject to IFS provisions of CITES for Appendix II specimens. These RFBs provide only an illustrative list of RFBs that pre-date the entry into force of CITES, but they are perhaps the RFBs most likely to implicate Article XIV(4). For example, the IWC already manages the harvest whale species included in Appendix II. ICCAT, IATTC, and NAFO manage bycatch in some shark species. It is worth noting that Article XIV(4) applies to *any* “treaty, convention or international agreement.” As such, it appears to apply to bilateral agreements as well as multilateral agreements. Table 8, therefore, provides only a representative sample of agreements that pre-date CITES.

To facilitate implementation of Article XIV(4), a proponent of a proposal to list a species in Appendix II should include a list of agreements to which Article XIV(4) applies for the species being proposed. This will provide Parties with relevant information upon which to base their decision as to whether a species warrants protection in Appendix II. It also gives the Parties an opportunity to review the list and to revise it, if necessary. From these lists, it will then be

possible for the Parties to ascertain how much trade and from which Parties will be exempt from CITES IFS certificates.

Table 8: Major Treaties and Species Subject to Article XIV(4) Exception

Treaty	Date Signed	Entry into Force	Species of CITES Interest
International Convention for the Regulation of Whaling (ICRW)	Dec. 2, 1946		West Greenland minke whale is managed by the IWC and included in Appendix II * Because “small cetaceans” are currently not within the scope of the ICRW, the exception does not apply; all small cetaceans require issuance of IFS certificates and other CITES documents.
Convention for the Establishment of an Inter-American Tropical tuna Commission (IATTC)	May 31, 1949	Mar. 3, 1950	
International Convention for the Conservation of Atlantic Tunas (ICCAT)	May 14, 1966	Mar. 21, 1969	
Resolution 1/48 of the FAO Council Revised Statutes of the Fishery Committee for the Eastern Central Atlantic (CECAF)	Established by the FAO Council at its 48th Session, June 1967	Sept. 19, 1967	
Agreement on the Organization of the Permanent Commission on the Exploitation and Conservation of the Marine Resources of the South Pacific	August 18, 1952	August 18, 1952	

Table 9: Major Treaties and Species Not Subject to Article XIV(4) Exception

Treaty	Date Signed	Entry into Force	Species of CITES Interest
Agreement for the Establishment of an Indian Ocean Tuna commission	Nov. 25, 1993	March 27, 1996	
Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)	May 20, 1980	Apr. 7, 1982	Patagonian toothfish (not currently listed)
Convention for the Conservation of Southern Bluefin Tuna (CCSBT)	May 10, 1993	May 20, 1994	
Convention on Future Multilateral cooperation in the Northwest Atlantic Fisheries (NAFO)	Oct. 24, 1978	Jan. 1, 1979	

Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean	Sept. 5, 2000	June 19, 2004	
Convention on the Conservation of Migratory Species	June 23, 1979	1983	Various whale, sea turtle, and other species protected by CMS are included in the CITES Appendices

5. IFS and Non-Detriment Findings

Of critical importance for the issuance of any permit or certificate for trade in CITES-listed specimens is the “non-detriment finding.” As with any export of an Appendix I or II specimen, CITES requires any IFS to be accompanied by a finding that the trade “will not be detrimental to the survival of the species involved.” Introduction from the sea raises a number of questions for the issuance of non-detriment findings.

5.1. Who Makes the Non-Detriment Finding?

The State of introduction issues the non-detriment finding. Articles III and IV of the Convention clearly provide that introduction from the sea requires the making of a non-detriment finding by the Scientific Authority of the State of introduction. Again, because this report defines the port State as the State of introduction, the port State will issue the non-detriment finding.

One question that has arisen during the IFS discussions is whether one CITES Party may issue the IFS certificate while another Party makes the non-detriment finding. This question arose because some members of the IFS Working Group thought there might be advantages to granting authority to make non-detriment findings to some countries, such as those that are members of a relevant regional fisheries management organization, even if they did not have the authority to issue the IFS certificate.

As a general matter, Article IX(1) of the Convention allows CITES Parties to designate “one or more Scientific Authorities.” Article IX(1) imposes no limitation on the location of the Scientific Authority. It is thus legally possible for a Party to designate different Scientific Authorities for different taxa, as some Parties have done. El Salvador, for example, has designated different Scientific Authorities for flora and fauna, marine and freshwater species, and forest species.⁸⁹ In the context of IFS, a port State could designate the Scientific Authority of a flag State to advise on whether the introduction of specimens caught by vessels flagged by that country are not detrimental to the survival of the species involved. Regardless of the identity of the Scientific Authority, the Management Authority of the State of Introduction still maintains overall authority to issue the IFS certificate.

⁸⁹ See, e.g., CITES, National Contacts Database: El Salvador, <http://www.cites.org/cms/index.php/lang-en/component/ncd/?country=SV>.

This report acknowledges that Articles III and IV both refer to Management Authorities and Scientific Authorities “of the State of introduction.” This could be interpreted as requiring the Management and Scientific Authorities to be located within the State of introduction.⁹⁰ However, the use of the word “of” in the phrase “*of* the State of introduction” likely indicates that the Management or Scientific Authority is the one designated by the State of introduction, because the preposition “of” indicates possession. If the Management or Scientific Authority needed to be located in the State of introduction, then the drafters of CITES would have referred to a Scientific Authority “*in* the State of introduction.”

The argument may be clearest for Appendix II specimens. Article IV(7) refers to issuance of an IFS certificate upon the advice of a Scientific Authority. It does not say upon the advice of a Scientific Authority of the State of Introduction. It is noteworthy that all other references in Articles III and IV to a Management Authority or a Scientific Authority are qualified by the phrase “of the State of Introduction.” It is not known whether this distinction was intentional or the result of a drafting error. In any event, the State of introduction would have the authority to determine whether it wanted to designate the Scientific Authority of another country or perhaps a scientific body of a relevant RFB to make non-detriment findings for specific species.

The related question is whether this dual approach—issuance of the IFS certificate by the port State and making the non-detriment finding by another Party or entity—is a good idea. In principle, there is nothing inherently wrong with this approach. In fact, in some cases there may be benefits to this approach. Assume, for example, that Patagonian toothfish is included in Appendix II. Toothfish is managed by the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). At present, the members of CCAMLR prohibit fishing for toothfish in certain areas and set quotas for harvesting toothfish in other areas.⁹¹ If a CITES Party designated the Commission to CCAMLR as the Scientific Authority for toothfish, it could use these decisions of the CCAMLR Commission as an equivalent of a non-detriment finding. Thus, when the Commission has prohibited directed fishing, as in Statistical Subarea 48.5,⁹² a non-detriment finding could not be issued; trade in any toothfish specimen caught in this area would be considered detrimental to the survival of the species. Where the catch derives from an area subject to a quota, the State of introduction would communicate with the Secretariat of CCAMLR to ensure that the quota has not been exceeded. Where it has not, then a non-detriment finding would issue. Where it has been exceeded, then a non-detriment finding would not be made and an IFS certificate would not be issued.

5.2. What Factors Should Be Considered Before Making a Non-Detriment Finding?

The making of non-detriment findings is critical to the success of CITES and for the conservation of species in trade. The Secretary General has called the issuance of adequate NDFs

⁹⁰ Indeed, previous commentators have made this point. See “Comments of SSN/IELP of October 30, 2008 on the Chairmen’s Rolling Text on Introduction from the Sea (Version–16 September 2008).”

⁹¹ See, e.g., Conservation Measure 41-03 (2008), *Limits on the Fishery for Dissostichus spp. in Statistical Subarea 48.4 in the 2008/2009 Season* (setting a quota of 75 tonnes).

⁹² CCAMLR, Conservation Measure 32-09 (2008), *Prohibition of Directed Fishing for Dissostichus spp. Except in Accordance with Specific Conservation Measures in the 2008/2009 Season*.

“obviously essential for achieving the aims of the Convention” and has said, “It is also obvious that this advice requires sufficient knowledge of the conservation status of the species and that a positive advice should not be given in the absence thereof.”⁹³ Nonetheless, many Parties lack the technical expertise, financial resources, or political will to make appropriate NDFs—problems that have been widely acknowledged.⁹⁴ The International Union for the Conservation of Nature (IUCN), for example, has reported that “many species continue to be traded in the absence of information about the impact of such exploitation on the wild population.”⁹⁵

How, then, should a Party make a non-detriment finding for a marine species taken on the high seas? The Convention is silent on the requirements for determining whether an export or introduction from the sea is detrimental to the survival of a species, but the Parties have provided some guidance through a resolution and other documents.⁹⁶ For example, Resolution Conf. 10.3 recommends that export permit NDFs be “based on the scientific review of available information” regarding the following:

- population status;
- distribution;
- population trend;
- harvest;
- other biological and ecological factors, as appropriate; and
- trade information relating to the species concerned.⁹⁷

While Resolution Conf. 10.3 provides guidance on the type of information that should be assessed specifically for exports, there is no reason why these same factors should not be considered for introductions from the sea as well. However, these factors do not provide additional guidance concerning the adequacy of the data supporting NDFs. For many species, quality data are simply lacking. This is especially true for marine species where assessing population levels poses even greater challenges than assessing population levels of terrestrial species. To fill in these data gaps and to ensure that Parties have adequate data to make a well-informed non-detriment finding, Parties should look to sources outside of their designated Scientific Authority.

5.2.1. Relevant Regional Fisheries Bodies

Regional fisheries bodies (RFBs) and other international institutions may be an important

⁹³ WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES: A REFERENCE TO THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA* 67 (7th ed. 2003).

⁹⁴ “Clearly, action is needed to improve the situation and to assist Scientific Authorities in making non-detriment findings.” CITES Inf. Doc. 11.3, *CITES Scientific Authorities Checklist to Assist in Making Non-Detriment Findings for Appendix II Exports*, 1.

⁹⁵ A.R. ROSSER & M.J. HAYWOOD, OCCASIONAL PAPER OF THE IUCN SPECIES SURVIVAL COMMISSION NO. 27, *GUIDANCE FOR CITES SCIENTIFIC AUTHORITIES: CHECKLIST TO ASSIST IN MAKING NON-DETRIMENT FINDINGS FOR APPENDIX II EXPORTS* 3 (2002).

⁹⁶ See Resolution Conf. 10.3, *Designation and Role of the Scientific Authorities* (1997); Inf. Doc. 11.3, *supra* note 94; Doc. 11.12.2, *Strategic and Administrative Matters—Evolution of the Convention—Strategic Plan for the Convention*, 15 (Apr. 2000), and ROSSER & HAYWOOD, *supra* note 95.

⁹⁷ Resolution Conf. 10.3, *supra* note 96, at para. h of “RECOMMENDS.”

source of valuable information concerning a species included in the CITES appendices and subject to IFS certificates. While some gaps in geographic and species coverage exist, the jurisdiction of existing RFBs nearly blankets the high seas and covers many of the species most likely to be subject to CITES trade controls. In addition to these RFBs, other organizations, such as the Food and Agriculture Organization and the International Whaling Commission, have global jurisdiction over certain fisheries related issues or species subject to trade regulation by CITES.

To assist with making non-detriment findings, the CITES Parties or a State of introduction could seek relevant information from the relevant RFB prior to making a non-detriment finding. Because many of these bodies meet more than once each year, it may be most productive for the Secretariat to obtain information from an RFB having jurisdiction over a CITES-listed specimen and post the relevant information on the CITES website. In this way, all CITES Parties would have access to the most up-to-date information from an RFB.

While information from an RFB will no doubt be valuable, a State of introduction should not presume that harvesting of marine specimens in accordance with the rules of an RFB is not detrimental to the survival of the species at issue. It will very much depend on the species and RFB in question. There are many commercial marine species that are legally harvested at rates that are not sustainable but nonetheless done in accordance with RFB arrangements. In fact, a species may be included in a CITES appendix because an RFB has failed to adequately manage that species.

For this reason, consultation with an RFB should be informal. That is, while the State of introduction should taking into account any advice from the relevant RFB, it should maintain responsibility to make an *independent* assessment of non-detriment.

Of course, this does not prevent a CITES Party from designating the RFB as the relevant Scientific Authority for making non-detriment findings. Similarly, it does not prevent the Parties as a whole from using the quotas established by a relevant RFB to set a quota for trade in a marine species. However, these steps would presumably only be taken if the relevant RFB was managing the fishery for biological sustainability.

5.2.2. Flag States

The flag State may sometimes have information that is not readily available to the State of introduction or even the relevant RFB. For example, the flag State may have vessels that fish in areas different from those of the State of introduction. At other times, the flag State may participate in a number of RFBs that the State of introduction does not. In these circumstances, the State of introduction should consult with the flag State to obtain any relevant information.

Most critically, however, the flag State may have data that is better than that possessed by FAO or others because it is more specific to the fishery. In 2006 the FAO reported that:

it is common for potentially useful data to exist, but not available to scientists and managers that need it. Particularly for international fisheries that occur on the high seas, data is usually aggregated (in time, space, by gear type, etc.) before

being reported to regional fisheries organizations and FAO. These databases are highly aggregated summaries of the actual data that is collected by national and local authorities. Thus, the statistics provided to FAO by its members, allow a distinction between long-distance and “domestic” fishing (i.e. within and close to the member EEZ) but does not allow to distinguish between catches in the EEZ and in the areas adjacent or close to it, i.e. on straddling stocks.⁹⁸

The problems identified by FAO obviously argue for consultation between the port State and the flag State.

6. May Port and Flag States Share Responsibility for Issuing IFS Certificates?

For the reasons explained above, this report concludes that designation of the port State as the Party which issues the IFS certificate is the only legally defensible interpretation of the Convention. Some issues, such as the problem of flags of convenience, suggest that port State issuance of IFS certificates is most practical approach. On the other hand, the flag State may be better situated to issue IFS certificates, particularly in regards to making non-detriment findings, because they have better access to data. Moreover, the report recognizes that some Parties have adamantly opposed this view.

In the spirit of cooperation, this report includes an approach that may balance the legal conclusion that CITES designates the port State as the State of introduction with the need to reconcile the interests of flag States. This report proposes a solution that is not complex, is in the best interests of the species, and avoids problems associated with flags of convenience and IUU fishing.

This approach comprises three principles:

- First, the port State would be identified as the State of introduction. As such, there would be a presumption that the port State issues the IFS certificate.
- Second, this presumption would be waived when some other arrangement exists between the port State and the flag State.
- Third, criteria would determine when a port State may enter into such an agreement with a flag State to issue IFS certificates.

By establishing the presumption that port States issue the IFS certificate, the Parties recognize the underlying legal conclusion that port States are the State of introduction. The possibility to waive the presumption, however, is also consistent with Article IX(1) of the Convention, which allows a Management Authority to designate “one or more Management Authorities competent to issue permits and certificates.” In the case of IFS, the Management

⁹⁸ JEAN-JACQUES MAGUIRE, THE STATE OF WORLD HIGHLY MIGRATORY, STRADDLING AND OTHER HIGH SEAS FISHERIES RESOURCES AND ASSOCIATED SPECIES 72 (FAO Fisheries Technical Paper 495: 2006).

Authority of the port State would designate the Management Authority of the flag State as having competence to issue IFS certificates.

In addition, the Parties would know which Party has responsibility for issuing IFS certificates. In this regard, we note that certain ambiguous provisions of the Convention have resulted in implementation problems. For example, Article VII(3) of the Convention exempts Appendix II personal and household effects from permit requirements when, among other things, the State where removal occurred requires the prior grant of an export permit. Because most Parties did not notify the Secretariat as to whether they required such an export permit, importing States did not know whether the personal and household effect was legally exported. To eliminate this ambiguity, Resolution 13.7 (Rev. CoP14) established the presumption that export permits or re-export certificates would not be required for personal or household effects that met the other criteria unless a Party notified the Secretariat that such permits or certificates were required. Similarly, it seems essential that the provisions for introduction from the sea clearly establish a presumption as to which Party issues the IFS certificate.

This approach also avoids many of the problems associated with flags of convenience and specific IUU vessels by developing criteria for determining when port States may enter into agreements with flag States for issuance of IFS certificates. To enhance synergies with other conventions addressing fisheries, and to avoid problems associated with flags of convenience, we propose the following language concerning issuance of IFS certificates:

The Management Authority of the port State shall issue the certificate of Introduction from the sea, unless:

1. The Management Authority of the flag State of the vessel that caught the specimens provides written notification to the Parties that it has ratified, accepted, or acceded to, or is a cooperating non-Party to:
 - a. The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (“The FAO Compliance Agreement”);
 - b. The Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (“The Fish Stocks Agreement”); and
 - c. Any regional fisheries body with conservation and management responsibilities for the listed species in question.
2. The flag State is not considered a country that issues flags of convenience.
3. Regardless of whether the flag State meets the conditions includes in paragraphs 1 and 2, neither the flag State nor the port State may issue an IFS certificate to a vessel included in one of the following blacklists:

Blacklist Name	Website	Online Blacklist
CCAMLR	http://www.ccamlr.org	http://www.ccamlr.org/pu/e/sc/fish-monit/iuu-list-08.pdf
CCSBT	http://www.ccsbt.org/docs/sear ch.cfm	Not yet established
IATTC	http://www.iattc.org	http://www.iattc.org/VesselRegister/IUUENG.html
ICCAT	www.iccat.int	http://www.iccat.int/IUU.htm
IOTC	http://www.iotc.org/English/index.php	http://www.iotc.org/English/iuu/search.php
NAFO	http://www.nafo.int	http://www.nafo.int/fisheries/ frames/fishery.html
NEAFC	www.neafc.org	http://www.neafc.org/measures/ iuu-a-list.htm
Norway	http://www.fiskeridir.no/fiskeridir/english	http://www.fiskeridir.no/fiskeridir/fiskeri/iuu_liste
WCPFC	WCPFC http://www.wcpfc.int	http://www.wcpfc.int/mcs/pdf/WCPFC%20IUU%20Vessel%20List_7%20Dec%202007.pdf

This approach not only encourages synergy among international agreements, but it also helps enforce the provisions of the fisheries agreements. For example, both the FAO Compliance Agreement and the Fish Stocks Agreement provide that “[n]o Party shall allow any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities of that Party.”⁹⁹ These agreements further provide that “[n]o Party shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the Party is satisfied that it is able ... to exercise effectively its responsibilities ... in respect of that fishing vessel.”¹⁰⁰ CITES would defeat the purposes of these agreements if it allowed flag States that are not in compliance with these obligations to issue IFS certificates.

In the alternative, Parties meeting the requirements listed above could be given authority to issue IFS certificates that port States must recognize. There are advantages to this approach. As described in Section 5 below, flag States often do have better data than both the port State and the relevant RFB. This is true because data from fishing nations is aggregated before submission to FAO or RFBs. As of May 15, 2009, 43 CITES Parties are also Party to the FAO Compliance Agreement and the UN Fish Stocks Agreement. Of these Parties, only Belize is a FOC country and would thus be disqualified from issuing IFS certificates as a flag State.

⁹⁹ FAO Compliance Agreement, art. III(2). The language of the FSA is slightly different than the quoted language, but nonetheless carries the same obligation. FSA, art. 18(3)(b)(ii).

¹⁰⁰ FAO Compliance Agreement, art. III(3). The language of the FSA is slightly different than the quoted language, but nonetheless carries the same obligation. FSA, art. 18(2).

Annex A — Relevant IFS Provisions in CITES

Article III – Regulation of Trade in Specimens of Species Included in Appendix I

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

- (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;
- (b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
- (c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes.

Article IV – Regulation of Trade in Specimens of Species Included in Appendix II

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

- (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and
- (b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment.

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

Annex B — Regional Fisheries Bodies

Note: This is not intended to be a complete list of all RFBs. A more complete list can be found at: <http://www.intfish-preview.net/igifl/treaties/multilateral.htm>

RFB	JURISDICTION	SPECIES
<u>CCAMLR</u> Commission for the Conservation of Antarctic Marine Living Resources	FAO Statistical Areas: 48, 58, 88 A line connecting 50°S, 0°; 50°S, 30°E; 45°S, 80°E; 55°S, 80°E; 55°S, 150°E; 60°S, 150°E; 60°S, 50°W; 50°S, 50°W; 50°S, 0°. Article I, para. 4	“Antarctic marine living resources,” including populations of fin fish, mollusks, crustaceans and all other species of living organisms, including birds. Article I, para. 1 & 2
<u>FFA</u> South Pacific Forum Fisheries Agency	In preamble: “the South Pacific region” FAO Statistical Areas: mainly 71 and 81.	In preamble: Express interest in “living marine resources of the South Pacific region and in particular of the highly migratory species.”
<u>IATTC</u> Inter-American Tropical Tuna Commission	Article II: “eastern Pacific Ocean”	Article II: yellowfin and skipjack tuna and “the kinds of fishes commonly used as bait in the tuna fisheries, especially the anchovetta, and of other kinds of fish taken by tuna fishing vessels; and the . . . populations of fishes supporting all these fisheries”
<u>ICCAT</u> International Commission for the Conservation of Atlantic Tunas	Article I: “all waters of the Atlantic Ocean, including the adjacent Seas.”	Article IV: populations of tuna and tuna-like fishes and “other species of fishes exploited in tuna fishing in the Convention area as are not under investigation by another international fishery organization”
<u>IOTC¹⁰¹</u> Indian Ocean Tuna Commission		

¹⁰¹ IOTC is a Commission adopted under Article XIV of the FAO Constitution. This article provides authority to the Conference and the Council to “approve and submit” to Member Nations “agreements concerning questions relating to food and agriculture.” Article XIV, para. 1 & 2.

<u>NAFO</u> Northwest Atlantic Fisheries Organization	Article I: “the waters of the Northwest Atlantic Ocean north of 35°00' north latitude and west of a line extending due north from 35°00' north latitude and 42°00' west longitude to 59°00', thence due west to 44°00' west longitude, and thence due north to the coast of Greenland, and the waters of the Gulf of St. Lawrence, Davis Strait and Baffin Bay south of 78°10' north latitude.”	Article I, para. 4: “This Convention applies to all fishery resources of the Convention Area, with the following exceptions: salmon, tunas and marlins, cetacean stocks managed by the International Whaling Commission or any successor organization, and sedentary species of the Continental Shelf . . .”
<u>WECAFC</u>¹⁰² Western Central Atlantic Fishery Commission	Para. 1: “all marine waters of the Western Central Atlantic bordered by a line drawn as follows: From a point of the coast of South America at 10°00' S latitude in a northerly direction along this coast past the Atlantic entry to the Panama Canal; thence continue along the coasts of Central and North America to a point on this coast at 35°00' N latitude; thence due east along this parallel to 42°00' W longitude; thence due north along this meridian to 36°00' N latitude; thence due east parallel to 40°00' W longitude; [thence due south along this meridian to 5°00' N latitude on the coast of South America]; thence due east along this parallel to 30°00' W longitude; thence due south along this meridian to the equator; thence due east along the equator to 20°00' W longitude; thence due south along this meridian to 10°00' S latitude; thence due west along this parallel to the original point at 10°00' S latitude on the coast of South America.”	Preamble: “Noting further that the need for international cooperation for the conservation, development and utilization of the living resources, especially shrimps, of that area had been recognized.”
<u>NEAFC</u> Northeast Atlantic Fisheries Commission	Article I, para. 1: “The area to which this Convention applies . . . shall be the waters: within those parts of the Atlantic and Arctic oceans and their dependent seas which lie north of 36° north latitude and between 42° west longitude and 51° east longitude, but excluding: the Baltic Sea and the Belts lying to the south and east of lines drawn from Hasenore head to Griben Point, from Korshage to Spodsbjerg and from Gilbjerg Head to the Kullen, and the Mediterranean Sea and its dependent seas as far as the point of intersection of the parallel of 36° latitude and the meridian of 5°36' west longitude	Article I, para. 2: “This convention applies to all fishery resources of the Convention Area with the exception of sea mammals, sedentary species, . . . and, in so far as they are dealt with by other international agreements, highly migratory species and anadromous stocks.

¹⁰² Resolution 4/61 of the FAO Council established WECAFC pursuant to Article VI, para.1 of the FAO Constitution. This provision states that “the Conference or Council may establish commissions . . . or regional commissions . . . to advise on the formulation and implementation of policy and to coordinate the implementation of policy.” It also states that “[t]he Conference or Council may also establish, in conjunction with other intergovernmental organizations, joint commissions . . . or joint regional commissions.”

	[and] within that part of the Atlantic Ocean north of 59° north latitude and between 44° west longitude and 42° west longitude.”	
<u>WIOTO</u> Western Indian Ocean Tuna Organization	Annex II: “Starting along latitude 11° 00’ N from the Eastern Coast of India and through the following coordinates: Lat. 11°00’N and long. 85°00’E; Lat. 3°00’ and long. 85°00’E; Lat. 3°00’N and long. 80°00’E; Lat. 45°00’S and long. 80°00’E; Lat. 45°00’S and long. 30°0’E; and proceed along meridian 30°00’E to the Coast of Africa.”	Annex III: Tuna and tuna-like species: Yellowfin tuna, skipjack tuna, bigeye tuna, albacore tuna, Southern bluefin tuna, longtail tuna, frigate tuna, bullet tuna, kawakawa, narrow-barred Spanish mackerel commerson, Indo-Pacific King mackerel guttatus, Indo-Pacific blue marlin, black marlin, striped marlin, Indo-Pacific sailfish, swordfish.
<u>SEAFO</u> ¹⁰³ South East Atlantic Fisheries Organization	Article 4: “all waters beyond areas of national jurisdiction in the area bounded by a line joining the following points along parallels of latitude and meridians of longitude—beginning at the outer limit of waters under national jurisdiction at a point 6° South, thence due west along the 6° South parallel to the meridian 10° West, thence due north along the 10° West meridian to the equator, thence due west along the equator to the meridian 20° West, thence due south along the 20° West meridian to a parallel 50° South, thence due west along the 50° South parallel to the meridian 30° East, thence due north along the 30° East meridian to the coast of the African continent”	Article I, (l): “‘Fishery resources’ means resources of fish, mollusks, crustaceans and other sedentary species within the Convention Area, excluding: • sedentary species subject to the fishery jurisdiction of coastal States pursuant to Article 77 paragraph 4 of [UNCLOS] . . . • highly migratory species listed in Annex I of . . . UNCLOS].”
<u>CCSBT</u> Commission for the Conservation of Southern Bluefin Tuna	The text does not specify a particular jurisdiction; presumably, it is wherever the southern bluefin tuna is found and fished.	Article I: “This Convention shall apply to southern bluefin tuna.” Article 2(a): “‘Ecologically related species’ means living marine species which are associated with southern bluefin tuna, including but not restricted to both predators and prey of southern bluefin tuna.”

¹⁰³ Article 18: “The Organisation shall cooperate, as appropriate, with the Food and Agricultural Organization of the United Nations and with other specialized agencies and organizations on matters of mutual interest.” Article 34: “The Director-General of the Food and Agricultural Organisation of the United Nations shall be the Depositary of this Convention, and any amendments or revisions thereto.” As Depositary, the Director-General has a variety of administrative duties, including: sending out copies of the Convention to signatories; arranging for the registration of the Convention with the UN; and informing all signatories of all instruments of ratification, accession, acceptance, and approval deposited, the date of entry into force of the Convention, the entry into force of amendments, and withdrawals.

<u>IBSFC</u> International Baltic Sea Fishery Commission	Article II, para. 1: “The area to which this Convention applies . . . shall be all waters of the Baltic Sea and the Belts excluding internal waters, bounded in the west by a line as from Hasenore Head to Griben Point, from Korshage to Spodsbjerg and from Gilbjerg Head to the Kullen.	Article II, para. II: “This Convention shall apply to all fish species and other living marine resources in the Convention Area.”
<u>WCPOFSC</u>¹⁰⁴ Western and Central Pacific Ocean Fish Stocks Convention	Article 3, para. 1: “the area of competence of the Commission comprises all waters of the Pacific Ocean bounded to the south and to the east by the following line: From the south coast of Australia due south along the 141° meridian east longitude to its intersection with the 55° parallel of south latitude; thence due east along the 55° parallel of south latitude to its intersection with the 150° meridian of east longitude; thence due south along the 150° meridian of east longitude to its intersection with the 60° parallel of south latitude; thence due east along the 60° parallel of south latitude to its intersection with the 130° meridian of west longitude; thence due north along the 130° meridian of west longitude to its intersection with the 4° parallel of south latitude; thence due west along the 4° parallel of south latitude to its intersection with the 150° meridian of west longitude; thence due north along the 150° meridian of west longitude.	Article 3, para. 3: “The Convention applies to all stocks of highly migratory fish within the Convention Area except sauries. Conservation and management measures under the Convention shall be applied throughout the range of the stocks, or to the specific areas within the Convention Area, as determined by the Commission”
<u>RECOFI</u>¹⁰⁵ Regional Commission for Fisheries	Article IV: “the Commission shall carry out [its responsibilities] . . . in the region bounded in the south by the following rhumb lines: from Ras Dhabat Ali in (16° 39’N, 53° 3’30’’E) then to a position in (16° 00’N, 53° 25’E) then to a position in (17° 00’N, 56° 30’E) then to a position in (20° 30’N, 60° 00’E) then to Ras Al-Fasteh in (25° 04’N, 61° 25’E).	Article III: “The purpose of RECOFI shall be to promote the development, conservation, rational management and best utilization of living marine resources, as well as the sustainable development of aquaculture in the Area”
<u>IWC</u> International Whaling Commission	Article I, para. 2: “This Convention applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments, and to all waters I which whaling is prosecuted by such factory ships, land stations, and whale catchers.”	Preamble: “a convention to provide for the proper conservation of whale stocks” Article V: refers to authority to adopt regulations relating to “whale resources”

¹⁰⁴ Article 22: “The Commission shall cooperate, as appropriate, with the Food and Agriculture Organization of the United Nations and with other specialized agencies and bodies of the United nations on matters of mutual interest.”

¹⁰⁵ RECOFI is an Article XIV body under the FAO Constitution.

<u>CECAF</u>¹⁰⁶ Committee for the Eastern Central Atlantic Fisheries	Eastern Central Atlantic between Cape Spartel and the Congo River	All living marine resources within its Area of Competence
<u>GFCM</u>¹⁰⁷ General Fisheries Commission for the Mediterranean	FAO Statistical Area 37. Preamble: “the Mediterranean and the Black Sea and connecting waters”	Article III: “The purpose of the Commission shall be to promote the development, conservation, rational management and best utilization of living marine resources, as well as the sustainable development of aquaculture in the Region”
<u>APFIC</u>¹⁰⁸ Asia-Pacific Fishery Commission	Preamble: “the Asia-Pacific Area”	Article IV: “The purpose of the Commission shall be to promote the full and proper utilization of <i>living aquatic resources</i>”
<u>ASCOBANS</u> Agreement on the Conservation of Small Cetaceans of the Baltic and North Sea	Para. 1.2: “‘Area of Agreement’ means the marine environment of the Baltic and North Seas, as delimited to the north-east by the shores of the Gulfs of Bothnia and Finland; to the south-west by latitude 48°30’N and longitude 5°W; to the north-west by longitude 5°W and a line drawn through the following points: latitude 60°N/longitude 5°W, latitude 61°N/longitude 4°W, and latitude 62°N/longitude 3°W; to the north by latitude 62°N; and including the Kattegat and the Sound and Belt passages but excluding the waters between Cape Wrath and St. Anthony Head.”	Para. 1.1: The agreement applies to “all small cetaceans found within the management area” “Small cetaceans” means any species, subspecies or population of toothed whales <i>Odontoceti</i>, except the sperm whale <i>Physeter macrocephalus</i>.
<u>ACCOBAMS</u> Agreement for the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area	Article I, para. 1: “The geographic scope of this Agreement . . . is constituted by all the maritime waters of the Black Sea and the Mediterranean and their gulfs and seas, and the internal waters connected to or interconnecting these maritime waters, and of the Atlantic area and the internal waters connected to or interconnecting these maritime waters, and of the Atlantic area contiguous to the Mediterranean Sea west of	Article I, para 2: “This Agreement applies to all cetaceans that have a range which lies entirely or partly within the Agreement area or that accidentally or occasionally frequent the Agreement area” (Listed in Annex I) “Cetaceans” means animals, including individuals, of those species, subspecies or populations of <i>Odontoceti</i> or <i>Mysticeti</i>.

¹⁰⁶ Established by Resolution 1/48 of the FAO Council at its 48th Session under Article VI(2) of the FAO Constitution. This information is mostly taken from Oceanlaw, www.oceanlaw.net/orgs/ and FAO, www.fao.org/fi/body/rfb/cecaf/cecaf_mandate.htm.

¹⁰⁷ International agreement under Article XIV of FAO Constitution.

¹⁰⁸ FAO has approved the establishment of this body under Article XIV of the FAO Constitution.

	the Straits of Gibraltar. For purposes of this Agreement: the Black Sea is bounded to the southwest by the line joining Capes Kelaga and Dalyan (Turkey); the Mediterranean Sea is bounded to the east by the southern limits of the Straits of the Dardanelles between the lighthouses of Mehmetcik and Kumkale (Turkey) and to the west by the meridian passing through Cape Spartel lighthouse, at the entrance to the Strait of Gibraltar; and the contiguous Atlantic area west of the Strait of Gibraltar is bounded to the east by the meridian passing through Cape Spartel lighthouse and to the west by the line joining the lighthouses of Cape St. Vicente (Portugal) and Casablanca (Morocco).”	
<u>NAMMCO</u> North Atlantic Marine Mammal Commission	Article 2: “the North Atlantic”	Article 2: “marine mammals”
<u>COREP</u> ¹⁰⁹ Regional Fisheries Committee for the Gulf of Guinea * not yet in force	The Convention applies to the Central and Southern Gulf of Guinea	All living resources within the Convention Area
<u>CPPS</u> Permanent Commission for the South Pacific	The South Pacific	All living marine resources
<u>SRCF</u> Sub-regional Commission on Fisheries	The EEZs of the Contracting Parties and the “Sub-region”	All fishery resources within its area of competence.
<u>PICES</u> North Pacific Marine Science Organization	Article II: “The area which the activities of the Organisation concern shall be the temperate and sub-Arctic region of the North Pacific Ocean and its adjacent seas, especially northward from 30 degrees North Latitude, hereinafter referred to as the ‘area concerned.’ Activities of the Organisation, for scientific reasons, may extend farther	Article III: Purpose of the Organization: • “to promote and coordinate marine scientific research in order to advance scientific knowledge of the area concerned and of its living resources, including but not necessarily limited to research with respect to the ocean

¹⁰⁹ Information for COREP, SRCF, and CPPS taken directly from “Internet Guide to International Fisheries Law.” I could not find websites or texts for these.

	southward in the North Pacific Ocean.”	environment and its interactions with land and atmosphere, its role in and response to global weather and climate change, its flora, fauna and ecosystems, its uses and resources, and impacts upon it from human activities; and • to promote the collection and exchange of information and data related to marine scientific research I the area concerned.”
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Annex C — Draft Resolution on Introduction from the Sea

Conf. 15.X

Introduction from the Sea

TAKING INTO ACCOUNT the CITES Workshop on Introduction from the Sea Issues (Geneva, 30 November – 2 December 2005) held pursuant to Decision 13.18 of the Conference of the Parties and subsequent work of the Introduction from the Sea Working Group;

RECALLING that ‘introduction from the sea’ is defined in Article I, paragraph e), of the Convention as "transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State";

RECALLING ALSO that Article XIV, paragraph 6, of the Convention provides that "Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea";

RECALLING FURTHER that Article III, paragraph 5, and Article IV, paragraphs 6 and 7, of the Convention, provide a framework to regulate the introduction from the sea of specimens of species included in Appendices I and II, respectively;

RECOGNIZING the need for a common understanding of the provisions of the Convention relating to introduction from the sea in order to facilitate the standard implementation of trade controls for specimens introduced from the sea and improve the accuracy of CITES trade data;

Note: These five paragraphs are taken verbatim from RC 14.6 except last clause of first paragraph.

RECALLING that provisions of Articles III, IV and V shall not apply to the transit or transshipment of specimens through or in the territory of a Party while the specimens remain in Customs control;

THE CONFERENCE OF THE PARTIES

I. Definitions

AGREES that ‘the marine environment not under the jurisdiction of any State’ means those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea.

AGREES that ‘transportation into a State’ means the clearance of specimens by Customs and not transport through the waters of a coastal State or into a port of a port State.

AGREES that the ‘State of introduction’ is the State in which specimens caught in the marine environment not under the jurisdiction of any State first clear customs.

II. State of Introduction

AGREES that the Management Authority of the State of introduction shall issue the certificate of introduction from the sea, unless the Management Authority of the State introduction has entered into an agreement with the flag State and the following conditions are met:

- a) The Management Authority of the flag State of the vessel that caught the specimens provides written notification to the Parties that it has ratified, accepted, or acceded to, or is a cooperating non-Party to:
 - i) The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (“The FAO Compliance Agreement”);
 - ii) The Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (“The Fish Stocks Agreement”); and
 - iii) Any regional fisheries body with conservation and management responsibilities for the species in question.

In the alternative, a list of countries that meet these conditions for certain CITEs-listed species could be established. They would be allowed to issue IFS certificates without an agreement with the port State.

- b) The flag State is not listed as a country that issues flags of convenience in one of the following lists:

Sponsor	Website	Online List
International Transport Workers’ Federation	http://www.itfglobal.org	http://www.itfglobal.org/flags-convenience/flags-convenience-183.cfm

- c) Regardless of whether the flag State meets the conditions includes in paragraphs 1 and 2, neither the flag State nor the port State may issue an IFS certificate to a vessel included in one of the following blacklists:

Blacklist Name	Website	Online Blacklist
CCAMLR	http://www.ccamlr.org	http://www.ccamlr.org/pu/e/sc/fish-monit/iuu-list-08.pdf
CCSBT	http://www.ccsbt.org/docs/sear ch.cfm	Not yet established
IATTC	http://www.iattc.org	http://www.iattc.org/VesselRegister/IUUENG.html
ICCAT	www.iccat.int	http://www.iccat.int/IUU.htm

IOTC	http://www.iotc.org/English/index.php	http://www.iotc.org/English/iuu/search.php
NAFO	http://www.nafo.int	http://www.nafo.int/fisheries/frames/fishery.html
NEAFC	www.neafc.org	http://www.neafc.org/measures/iuu-a-list.htm
Norway	http://www.fiskeridir.no/fiskeridir/english	http://www.fiskeridir.no/fiskeridir/fiskeri/iuu_liste
WCPFC	WCPFC http://www.wcpfc.int	http://www.wcpfc.int/mcs/pdf/WCPFC%20IUU%20Vessel%20List_7%20Dec%202007.pdf

III. Process for Issuing Certificates of Introduction from the Sea

AGREES that:

- a) to the maximum extent practicable, introduction from the sea certificates be issued prior to landing on a vessel any specimen of a species included in Appendix I or II taken in the marine environment not under the jurisdiction of any State’.
- b) prior to issuing any certificate of introduction from the sea, the Management Authority of the State of introduction should satisfy itself that:
 - i) The flag State of the vessel seeking a certificate of introduction from the sea is not considered a country that issues flags of convenience.
 - ii) That the vessel seeking a certificate of introduction from the sea is not included in one of the blacklists included in Section II of this Resolution.
- c) a Management Authority granting a certificate in accordance with Article III, paragraph 5, or Article IV, paragraph 6, as applicable, include the number and/or weight of the specimens that may be harvested.
- d) upon landing, authorities of the State of introduction verify that the number and/or weight of specimens actually introduced is no more than allowed pursuant to the certificate issued in accordance with paragraph c) of Section III of this Resolution.

IV. Non-Detriment Findings

RECOMMENDS that the Scientific Authority of the State of introduction, or of the flag State where the flag State has authority to make this finding, prior to advising that the introduction will not be detrimental to the survival of the species involved, take into account the following:

- a) any conservation and management measures, including quotas, of a Regional Fisheries Body having conservation and management authority over the species in question;
- b) any relevant information from the CITES authorities of the flag State;

V. Flags of Convenience and Ports of Convenience

DIRECTS the Secretariat to:

- a) consolidate the lists of vessels included in the blacklists identified in Section II, above, and to publish the consolidated list on the CITES website. The consolidated list should be reviewed and updated every six months;
- b) consolidate any lists of countries considered to issue flags of convenience. The consolidated list should be reviewed and updated every six months;
- c) communicate with the UN Food and Agricultural Organization to develop a list of ports of convenience and report to the Parties at each meeting of the Conference of the Parties as to whether to prepare a blacklist of ports of convenience; and
- d) maintain and publish on the CITES website a list of Regional Fisheries Bodies with management authority over species included in Appendix I or II of the Convention.

VI. Miscellaneous

REPEALS Resolution Conf. 14.6 (The Hague, 2007) – Introduction from the Sea