

The Application of CITES to Atlantic Bluefin Tuna and Other Marine Species



Prof. Chris Wold & Prof. Erica Thorson
International Environmental Law Project
February 19, 2010

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.

This Report was prepared for Greenpeace-International. All views expressed in the Report are those of the authors only.

The following people contributed to this report: David Allen, Ariel Blackthorne, Elizabeth Dawson, Chris Gunn, Rebecca Hoyt, Michael Liu, Ivy Newman, Lay-Ping Tan.

For more information, contact:

Chris Wold
Associate Professor of Law & Director
International Environmental Law Project
Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland, OR 97219 USA
TEL +1-503-768-6734
FX +1-503-768-6671
E-mail: wold@lclark.edu
law.lclark.edu/org/ielp

Cite as:

INTERNATIONAL ENVIRONMENTAL LAW PROJECT, THE APPLICATION OF CITES TO ATLANTIC BLUEFIN TUNA AND OTHER MARINE SPECIES (2010)

Copyright © 2010 International Environmental Law Project

**The Application of CITES to Atlantic Bluefin Tuna
and Other Marine Species
Prof. Chris Wold* & Prof. Erica Thorson⁺**

I. Introduction

Any proposal to list bluefin tuna, sharks, and other marine species in the CITES Appendices is likely to raise a number of issues about the application of the Convention on International Trade in Endangered Species of Fauna and Flora (CITES) to marine species. These issues include the following:

- the scope of CITES as it relates to marine species, and specifically commercially valuable marine species;
- whether any special criteria apply to listing marine species in the CITES Appendices;
- whether special rules or exceptions apply to trade in marine species; and
- the role of the Food and Agriculture Organization (FAO) in the CITES listing process.

The following assessment analyzes these issues and makes the following conclusions:

1. CITES clearly applies to marine species as well as any commercially valuable marine species.
2. When a showing of “decline” is required to include a species in the CITES Appendices, the CITES listing criteria establish special rules for “commercially-exploited aquatic species”¹—a term which covers most relevant marine species—because “decline” is defined differently for these species. This assessment identifies a dispute between some CITES Parties

* Associate Professor of Law & Director, International Environmental Law Project (IELP), Lewis & Clark Law School, wold@lclark.edu; (503) 768-6734.

⁺ Clinical Professor of Law & Staff Attorney, International Environmental Law Project (IELP), Lewis & Clark Law School, ejt@lclark.edu; (503) 768-6715.

¹ The CITES Parties have not defined “commercially exploited aquatic species.” In 2004, however, FAO reported:

The term “commercially-exploited aquatic species” in relation to CITES has been agreed within FAO to encompass “resources exploited by fisheries in marine and large freshwater bodies.” In relation to the taxa “there was full support for considering invertebrate and fish species, although some countries requested that all exploited aquatic species including marine mammals should also be considered where appropriate”. On the basis of those discussions, this Expert Consultation focused on fish and invertebrate species.

FAO, REPORT OF THE EXPORT CONSULTATION ON IMPLEMENTING ISSUES ASSOCIATED WITH LISTING COMMERCIALY-EXPLOITED SPECIES ON CITES APPENDICES, FIRM/R741 (En) ¶ 11 (2004).

and FAO regarding the applicability of the “decline” criterion to Appendix II species, concluding that FAO’s interpretation is not correct.

3. FAO has a role to play in reviewing proposals to include “commercially-exploited aquatic species” in the Appendices, but the CITES Parties are not required to rely on FAO’s assessment.
4. CITES includes special rules—known as “introduction from the sea”—that apply to trade in specimens of marine species taken on the high seas and transported into a State. In other respects, the rules for trade apply equally to marine and other species. Fisheries conservation zones (FCZs) are of particular significance for bluefin tuna. FCZs are a partial implementation of the exclusive economic zone regime and thus fall within the “jurisdiction” of a State for CITES permitting purposes. Catches in a State’s FCZ that are landed in the territory of that State do not require CITES permits unless subsequently exported.
5. CITES exempts a Party from issuing permits for specimens of an Appendix II marine species if (1) the specimen is taken in accordance with the provisions of a treaty that affords protection to marine species, (2) the treaty pre-dates CITES, (3) the CITES Party is also a Party to the other treaty, and (4) the specimen is taken by a vessel flagged by the State invoking the exception. Thus, an Appendix II listing for Atlantic bluefin tuna would be of little value, because most Atlantic bluefin tuna are caught by Parties to the International Convention for the Conservation of Atlantic Tuna, a treaty that pre-dates CITES.
6. The issuance of CITES permits will not necessarily duplicate the bluefin catch document (BCD) scheme of the International Commission for the Conservation of Atlantic Tuna (ICCAT) since few countries have, to date, complied with the reporting requirements under the ICCAT’s BCD.

II. The Application of CITES to Marine Species, Including Commercially Valuable Species

Despite the arguments of some CITES Parties that CITES should not regulate trade in marine species, marine species unequivocally fall within the scope of CITES. CITES regulates “trade” in “species.” The definitions of both of these terms indicate that marine species, even commercially valuable marine species, fall within the scope of CITES. The practice of the Parties further supports this conclusion.

“Species.” Article I of CITES defines “species” as “any species, subspecies, or geographically separate population thereof.” The definition of “species” is notably inclusive; the use of “any” clearly provides that all types of plants and animals are eligible for listing in the CITES Appendices. The definition does not distinguish marine from terrestrial species or commercially valuable from non-commercially valuable

species. No other definition or provision of the Convention narrows the definition of “species.”

“Trade.” The definition of “trade” reinforces the view that marine species unequivocally fall within the scope of the Convention. Article I(c) of CITES defines “trade” as import, export, re-export, and introduction from the sea. “Introduction from the sea” means the “transportation into a State of specimens of *any* species which were taken in the marine environment not under the jurisdiction of any State” (emphasis added). In other words, CITES expressly contemplates species taken from the high seas as being subject to the trade controls of CITES. For these species, CITES includes a special permitting system (which is described in Section IV(B), below). To suggest that CITES does not cover marine species would be to read these provisions out of the Convention—a consequence that clearly contradicts the drafters’ intent. In fact, the negotiators included “introduction from the sea” specifically because “3/4 of the earth’s surface should not be excluded from the realm of the Convention.”²

Practice within CITES: Marine Species. The practice of the CITES Parties further supports the view that CITES covers marine species. CITES has a long history of including marine species in the Appendices, placing most whale species in the Appendices at the time CITES was adopted in 1975. Appendix I now includes all beaked whales, almost all great whales, all marine turtles, coelacanths, six fur seal species, three marine dolphin species, two porpoises, and dugongs. Appendix II includes all black corals, all dolphins not in Appendix I, all giant clam species, all stony coral species, basking shark, whale shark, great white shark, humphead wrasse, most sturgeon species, queen conch, and all seahorses.

Practice within CITES: Commercially Valuable Species. The Parties have also included many commercially valuable species in the Appendices. In fact, the preamble to the Convention specifically recognizes the commercial value of wildlife. Paragraph 2 of the preamble indicates that the drafters were “conscious of the ever-growing value of wild fauna and flora from ... economic points of view.” In addition, paragraph 4 of the preamble provides that “international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.” These paragraphs of the preamble expressly recognize that a species’ economic value may lead to its “over-exploitation.” Recognizing this, the CITES Parties have had no trouble listing commercially valuable species in the Appendices. Mahogany and ramin, for example, are included in Appendix II. Many of the marine species included in the Appendices, including sturgeons, great whales, and sharks, have substantial commercial value.

Practice within CITES: Resolutions. The CITES Parties have also shown their willingness to address marine species, even for species not included in the Appendices, through resolutions. For example, resolutions address trade in corals (Resolution Conf.

² Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Position Regarding the Inclusion of “Introduction from the Sea” into Convention, PA/Gen/2 (Feb. 20, 1973) (submission of Germany).

11.10 Rev. CoP14), sharks (Resolution Conf. 12.6), and toothfish (Resolution Conf. 12.4).

III. The CITES Listing Criteria

CITES requires Parties to submit proposals to list a species in Appendix I or II. The proposal must include biological information and trade data so that the Parties may evaluate the status of the species. If two-thirds of the Parties present and voting agree that the species meets the relevant biological and trade criteria, the species will be included in Appendix I or II.

As described below, the Parties have developed criteria for including species in Appendix I or II. To the extent that a Party proposes to list a species because the species is in “decline,” then special criteria apply to commercially-exploited aquatic species (CEAS). As described below, no dispute exists concerning the applicability of the “decline” guidance to proposals to list marine species in Appendix I. On the other hand, FAO and some Parties believe that the “decline” criteria apply to all proposals to list species in Appendix II, while others disagree.

A. The CITES Listing Criteria and Marine Species

The Convention text provides few parameters for the Parties’ listing decisions. Article II simply states that:

- Appendix I “shall include all species threatened with extinction which are or may be affected by trade,” and
- Appendix II shall include “all species which although not necessarily threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation.”

To help define more specific criteria to determine when a species is eligible for inclusion in Appendix I or II, the Parties adopted “listing criteria” in Resolution Conf. 9.24 (Rev. CoP14). The listing criteria include specific criteria for inclusion in Appendix I and Appendix II (found in Annex I and Annex 2a of Resolution Conf. 9.24 (Rev. CoP14)).

These criteria relate to a species’ abundance, the size and quality of the species’ habitat, and other factors. The criteria themselves do not distinguish between marine and terrestrial species, and the Resolution does not require a species to meet each of the many criteria. However, for those criteria relating to a species’ “decline,” such as “a marked decline in the population size in the wild” (Paragraph C of Annex 1), the interpretive “guidelines” do distinguish between terrestrial species and CEAS. The following two sections discuss the “decline” guidelines for Appendix I and II listings.

B. The Application of the “Decline” Guidelines for Listing Species in Appendix I

Annex 5 of Resolution Conf. 9.24 explains that “decline” can be expressed either as the overall long-term extent of decline or the recent rate of decline. It also provides general measures to identify when a species is in decline (e.g., a general guideline for “a marked recent rate of decline is a percentage decline of 50% or more in the last 10 years or three generations, whichever is the longer.”). A footnote, however, establishes different numerical parameters for judging the “decline” of CEAS. Whereas a “general guideline for a marked historical extent of decline is a percentage decline to 5%-30% of the baseline,” the footnote provides:

“In marine and large freshwater bodies, a narrower range of 5-20% is deemed to be more appropriate in most cases, with a range of 5-10% being applicable for species with high productivity, 10-15% for species with medium productivity and 15-20% for species with low productivity. Nevertheless some species may fall outside this range. Low productivity is correlated with low mortality rate and high productivity with high mortality. One possible guideline for indexing productivity is the natural mortality rate, with the range 0.2-0.5 per year indicating medium productivity....

A general guideline for a marked recent rate of decline is the rate of decline that would drive a population down within approximately a 10-year period from the current population level to the historical extent of decline guideline (i.e. 5-20% of baseline for exploited fish species). There should rarely be a need for concern for populations that have exhibited an historical extent of decline of less than 50%, unless the recent rate of decline has been extremely high.”

The Parties, however, are not necessarily required to use these guidelines. First, these “decline” guidelines only apply to those criteria relating to decline. However, only one of the three criteria for including a species in Appendix I requires a showing of “decline”; Paragraph C of Annex 1 calls for “a marked decline in the population size in the wild.” (A species may also be included in Appendix I pursuant to Paragraph A, which relates to small populations, if an observed, inferred or projected “decline” in the number of individuals or the area and quality of habitat can be shown. However, this “decline” criterion is only one of several criteria that can be used to include the species in Appendix I under Paragraph A.).

Second, even if the species is proposed for listing based on its “decline,” it is not clear to what extent the Parties must use these guidelines. A note preceding the listing criteria for Appendix I species provides that:

“The following criteria must be read in conjunction with the definitions, explanations and guidelines listed in Annex 5, including the footnote with respect to application of the definition of ‘decline’ for commercially exploited aquatic species. “

Importantly, the parameters identified in the footnote to Annex 5 are guidelines, not binding requirements; the numerical indicators are just examples of the types of parameters that a Party could use to identify a population decline. A separate note to the definitions in Annex 5 makes this manifestly clear:

“Where numerical guidelines are cited in this Annex, they are presented only as examples, since it is impossible to give numerical values that are applicable to all taxa because of differences in their biology.”

Even if the guidelines are not binding on the Parties in any legal sense, they are important guidelines negotiated over many years, and many Parties will insist on applying them. Thus, the “decline” guidelines create important parameters for listing CEAS in Appendix I, provided that the proposal to list a species in Appendix I relies on one of the “decline” criteria included in the listing criteria.

C. The Application of the “Decline” Guidelines for Listing Species in Appendix II

Some Parties and FAO have recently disputed the application of the “decline” guidelines to proposals to list a CEAS in Appendix II. The dispute arises because the note preceding the Appendix II listing criteria, like the Appendix I criteria, direct the Parties to read the criteria in conjunction with the definitions on Annex 5, including the “decline” definition applicable to CEAS.

Although the word “decline” appears in the note preceding the criteria for including a species in Appendix II, the word “decline” is not actually used in the substantive criteria. Instead, the listing criteria, found in Annex 2a, provide that a species should be included in Appendix II when—on the basis of available trade data and information on the status and trends of the wild population(s)—at least one of the following criteria is met:

“A. It is known, or can be inferred or projected, that the regulation of trade in the species is necessary to avoid it becoming eligible for inclusion in Appendix I in the near future; or

B. It is known, or can be inferred or projected, that regulation of trade in the species is required to ensure that the harvest of specimens from the wild is not reducing the wild population to a level at which its survival might be threatened by continued harvesting or other influences.”
(emphasis added)

Although the word “decline” is not found in either Paragraph A or B of these criteria, FAO makes three principal arguments to read “decline” into both Paragraph A and B. All three of these arguments are without merit.

First, FAO points to the note preceding Annex 2a, which states that the Parties “must” read the criteria in light of the definitions in Annex 5, including the “decline” definition for CEAS.

Despite FAO’s assertion, the note preceding the Appendix II criteria can be given full effect without reading “decline” into Paragraph B. With respect to Paragraph B, the criteria use “reducing” to describe the relevant population change, not “decline.” As Germany (on behalf of the European Union), the Secretariat and others argue,³ the definition of “decline” and the footnote relating to CEAS are irrelevant to the listing criteria under Paragraph B. The word “decline” is used neither directly nor indirectly in Annex 2a. As such, reference to the definition of “decline” is not warranted.

While the guidance on “decline” for CEAS does not apply to listing species under Paragraph B, it may apply to listing species under Paragraph A. As quoted above, Paragraph A refers to species that may be eligible for inclusion in Appendix I in the near future. To be included in Appendix I, a species must meet one of the criteria included in Annex 1, one of which requires a showing of “decline.” Thus, a species may be included in Appendix II if, for example, its population “decline” may lead to an Appendix I listing in the near future.

Second, FAO points to a paragraph in the footnote to the definition of “decline” that states:

“For listing in Appendix II, the historical extent of decline and the recent rate of decline should be considered in conjunction with one another. The higher the historical extent of decline, and the lower the productivity of the species, the more important a given rate of decline is.”

This argument is unpersuasive. The reference to Appendix II listings in the “decline” footnote does not change the operative text of Annex 2a. As with FAO’s first argument, the footnote on “decline” is relevant to proposals under Paragraph A when those proposals rely on the decline factors included in Annex 1. In other words, the footnote’s reference to Appendix II listings only logically applies to those proposals falling under Paragraph A, because only that paragraph implicitly cross-references the Appendix I listing criteria that require a “decline.”

Third, FAO insists that the words “reducing” and “decline” are synonyms and should be read to mean the same thing. To support this argument, it points to Annex 5 of Resolution Conf. 9.24 (Rev. CoP14), which defines “decline” as “a *reduction* in the

³ See CITES, SC58 Doc. 43, *Criteria for Amendment of Appendices I and II*, para. 9 (July 2009); CITES, CoP14 Inf. 48, *Comments on the FAO Assessment of CITES Amendment* (submitted by Germany on behalf of the European Community and its Member States) (2007).

abundance, or area of distribution, or area of habitat of a species.” (emphasis added). Because the definition of “decline” uses the word “reduction,” FAO argues that “reducing” in Annex 2a actually means “decline.”

This argument also fails. Despite its attempt, FAO cannot read “reducing” as “decline” where the Parties have made a conscious choice to use different words. In the lengthy process to revise the listing criteria, Parties and others made a large number of proposals to amend Paragraph B of Annex 2a; none of the proposed revisions included the use of the word “decline.” This is further evidence that the drafters of Resolution 9.24 specifically chose not to use “decline” in the Appendix II criteria, despite clearly choosing to use it in the Appendix I criteria. As a matter of treaty interpretation, words are to be given their ordinary meaning.⁴ A corollary of that rule is that where different words are used, they must be given different meanings. While these rules of treaty interpretation do not apply directly to interpretation of a resolution, they are rules of common sense. Here, the history of the negotiations supports interpreting “reducing” differently from “decline.”

In fact, when the Parties adopted the listing criteria at CoP9, some Parties voiced their concern that “decline” might be read into the Appendix II listing criteria. The United States, for example, noted in Doc. 9.41, that:

“the decline requirements of this annex (Annex 2) are biologically inappropriate, and contradictory to the purpose and spirit of the Convention.”

Thus, clear sentiment existed at the time of revising the listing criteria that the biological concept of “decline” was an inappropriate indicator for listing species in Appendix II under Paragraph B.

D. The Role of FAO in Evaluating Proposals to List Species in the CITES Appendices

Article XV(2)(b) of CITES specifies that upon receiving proposals for listing marine species, the Secretariat shall consult with relevant inter-governmental bodies with a view to obtaining scientific data these bodies may be able to provide. The Secretariat is charged with communicating the views expressed and data provided by these bodies to the Parties.

To implement this provision, CITES and FAO have agreed to a Memorandum of Understanding (MoU). Concerning proposals to list species in the Appendices, the MoU provides that:

“[t]he FAO will work together with CITES to ensure adequate consultations in the scientific and technical evaluation of proposals for

⁴ Vienna Convention on the Law of Treaties, art. 31.1, May 23, 1969, U.N. Doc. A/CONF. 39/27. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

including, transferring or deleting commercially-exploited aquatic species in the CITES Appendices based on the criteria agreed by the Parties to CITES, and both signatories will address technical and legal issues relating to the listing and implementation of such listings.”⁵

FAO has embraced its role and provides thorough reviews of species proposals. Nonetheless, FAO’s scientific and technical evaluation is just one source of information for the Parties to evaluate when deciding whether to list a species in the CITES Appendices. The proposal itself, the Secretariat’s assessment, and the views and assessments of others also provide valuable information to help determine whether a species meets the criteria for inclusion in the Appendices, but no single assessment is determinative. The CITES Parties must evaluate for themselves whether they believe a species meets the criteria for inclusion in the Appendices.

IV. Permit Provisions for Marine Species

The key to the success of CITES in protecting species from overutilization is its permit system. Once a species is included in the Appendices, the Parties have obligations to make biological and other findings before issuing permits for any trade in specimens of those species. These obligations vary depending on whether the species is in Appendix I or II.

The permit requirements vary depending on whether a specimen is exported, imported, or introduced from the sea. With respect to marine species, import and export relates to those specimens taken within the internal waters, territorial seas, and, where they exist, the exclusive economic zones of a State—an area up to 200 nautical miles from a State’s coastline—and transported to another State. Section A describes these rules. When a specimen of a CITES-listed species is taken on the high seas, the provisions for introduction from the sea apply. Section B describes these rules. Section C describes the situation involving fisheries conservation zones and whether catches in those zones fall within that State’s “jurisdiction” for purposes of introduction from the sea. In addition, CITES imposes separate rules for trade in specimens of species subject to another treaty that afford protection to marine species. Section D describes these rules.

A. General CITES Permit Requirements

As noted above, CITES establishes different permit provisions for species included in Appendix I and Appendix II. These provisions do not distinguish between marine and other species.

Appendix I. Trade in specimens of Appendix I species requires both an import permit and an export permit. The State of import must issue the import permit before the State of export may issue an export permit. Prior to issuing the import permit, the Scientific Authority of the State of import must determine that the import “will not be for

⁵ Memorandum of Understanding between the Food and Agriculture Organization of the United Nations (FAO) and the CITES Secretariat, para. 4, available at: <http://www.cites.org/eng/disc/sec/index.shtml>.

purposes which are detrimental to the survival of the species.” In addition, the Management Authority of the State of import must be satisfied that the specimen will not be used “for primarily commercial purposes” and that the recipient of any living specimen is suitably equipped to house and care for it.

The “primarily commercial purposes finding” prevents most trade in Appendix I specimens, because most imports of wildlife are for commercial purposes (e.g., souvenirs, pet trade, etc.). With respect to trade in commercially valuable marine species such as bluefin tuna, an Appendix I listing would effectively close those portions of the fishery designed for international trade. However, an Appendix I listing would not limit fisheries in waters under national jurisdiction of a country when the catch is destined for the national market of that same country. In this situation, the specimens (i.e., the fish) never cross national boundaries and thus does not constitute international trade within the meaning of CITES.

The European Union (EU) applies the prohibition against international trade for primarily commercial purposes to domestic trade in most Appendix I specimens as well. Under Article 8(1) of European Council Regulation 338/97, the purchase, sale, and use for commercial gain of “Annex A” specimens are prohibited. The list of Annex A species differs only slightly from the list of Appendix I species. However, an exception to this prohibition exists for specimens that originate in a Member State and were taken from the wild in accordance with the laws of that Member State.

After the State of import issues the import permit, the State of export must make the following findings before issuing an export permit: the specimen was legally obtained and, for any living specimen, the specimen will be so prepared and shipped as to minimize risk of injury or damage to health or cruel treatment. In addition, the State of export must determine that the export of the specimen will not be detrimental to the survival of the species. This is known as the “non-detriment finding” or NDF.

Appendix II. For trade in Appendix II species, CITES requires only an export permit. The criteria for issuing an export permit for an Appendix II specimen are the same as for issuing an export permit for an Appendix I specimen: the specimen was legally obtained, the export will not be detrimental to the survival of the species, and, for any living specimen, the specimen will be so prepared and shipped as to minimize risk of injury or damage to health or cruel treatment.

For Appendix II species, the key finding is the NDF. The Secretary General of the CITES Secretariat has called the issuance of adequate non-detriment findings “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.”⁶ Nonetheless, many Parties lack the technical expertise, financial resources, or political will to make appropriate non-detriment findings—problems that have been widely acknowledged. For example, the CITES Parties have noted that “[c]learly, action is needed to improve the

⁶ WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES 67 (7th ed. 2003).

situation and to assist Scientific Authorities in making non-detriment findings.”⁷ The International Union for the Conservation of Nature has reported that “many species continue to be traded in the absence of information about the impact of such exploitation on the wild population.”⁸ Perhaps obviously, any decision to consider an Appendix I listing versus an Appendix II listing must take into account these problems regarding NDFs.

B. Introduction from the Sea

Generally speaking, introduction from the sea (IFS) applies to specimens harvested on the high seas—areas beyond national jurisdiction—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. Because much of the Mediterranean Sea is considered high seas, the IFS provisions will have special relevance for an Atlantic bluefin tuna listing.

For an *Appendix I species*, Article III(5) requires the State of introduction to make an NDF. In addition, it must be satisfied that the specimen will not be used “for primarily commercial purposes” and that the recipient of any living specimen is suitably equipped to house and care for it. These are the same findings as for import of an Appendix I specimen. As with imports of Appendix I species, the key finding will be whether the introduction is for primarily commercial purposes.

For an *Appendix II species*, Article IV(6) requires the State of introduction to make an NDF and to ensure that any living specimen will be so handled as to minimize risk of injury, damage to health, or cruel treatment. As with exports of Appendix II specimens, the NDF is the key finding.

This general explanation of IFS masks a number of challenging questions, including whether the flag State or the port State is the State of introduction, whether IFS certificates should be issued before or after catching a specimen, and defining the role of Regional Fisheries Bodies.

Which State is the State of introduction—the flag State or the port State? The CITES Parties have not resolved this issue. Neither has the IFS Working Group, which completed its most recent discussions in September 2009. However, the authors of this assessment believe that CITES contemplates the port State as 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

⁷ CITES Inf. Doc. 11.3, *CITES Scientific Authorities Checklist to Assist in Making Non-Detriment Findings for Appendix II Exports*, 1.

⁸ 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).

of its object and purpose.”⁹ 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. As a practical matter, using the port State as the State of introduction might help combat IUU fishing, because vessels flying flags of convenience will not be able to rely on lax flag State control to issue IFS certificates.

When should IFS certificates be issued? Some people believe that IFS certificates are best issued prior to catching the CITES-listed specimen. In this way, the State of introduction can better influence the fishing practices of the vessel by defining, before a fish is caught, whether the catch is or is not detrimental to the survival of the species. There is much merit to this argument. Others believe that the IFS certificate may be issued at any time before the specimen clears customs in the State of introduction. Under this approach, the State of introduction would be able to take into account the most recent scientific information. As a legal matter, if the port State is the State of introduction, then the IFS certificate may be issued at any time “prior to” the specimen being introduced, i.e., at any time prior to the specimen clearing customs.

What is the Role of Regional Fisheries Bodies (RFBs)? Many believe RFBs are uniquely situated to help make an NDF. The RFB may also have relevant information about whether a particular fishing vessel is known to engage in IUU fishing. While it is generally agreed that a relevant RFB will have useful information to make an NDF and that the State of introduction should consult with the RFB, the State of introduction ultimately must make the NDF.

C. The Legal Status of Fisheries Conservation Zones

An important question relating to IFS concerns the legal status of fisheries conservation zones (FCZs), also known as fisheries protection zones and exclusive fisheries zones. Are FCZs under the “jurisdiction” of a State and thus subject to IFS requirements?

Article 86 of the United Nations Convention on the Law of the Sea (UNCLOS) defines the “high seas” as the area “not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.” Article 87 of UNCLOS makes clear that the high seas are “open to all States” and therefore *not* under the jurisdiction of any State. Thus, the area “beyond the jurisdiction of any State” includes the high seas—the area beyond a State’s internal waters, territorial sea, and/or exclusive economic zone.

⁹ 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].

But what about FCZs? Because UNCLOS excludes FCZs in its definition of what is not the high seas, one could argue that FCZs are part of the high seas. The better interpretation, however, is that an FCZ is a partial implementation of an exclusive economic zone (EEZ).¹⁰ UNCLOS does not restrict a coastal State's claim of sovereign rights to an EEZ only. Instead, Articles 55 and 57 of UNCLOS allow a coastal State to assert sovereign rights and jurisdiction over a variety of resources and activities in an EEZ—an area up to 200 nautical miles from the coast. However, a coastal State is not required to exercise sovereign rights over all natural resources or up to the 200-mile mark. It may, for example, exercise sovereign rights over a limited number of natural resources or up to 50 miles only. There is no doubt that a State would have “jurisdiction,” as that word is used in CITES, throughout a 50-mile EEZ.

Similarly, to the extent that a coastal State asserts sovereign rights for fisheries purposes only, as with an FCZ, that coastal State would also have “jurisdiction” within the meaning of CITES, provided that it meets the minimum obligations of UNCLOS for conservation and management of natural resources within an EEZ.¹¹ This is true because a coastal State may assert sovereign rights to natural resources over an area up to 200 nautical miles by virtue of UNCLOS directly or indirectly to the extent that UNCLOS's provisions have become customary international law.¹² The rights and duties of coastal

¹⁰ Others agree with this interpretation. See Claudiane Chevalier, *Governance of the Mediterranean Sea: Outlook for the Legal Regime*, 46 (IUCN Centre for Mediterranean cooperation, 2005) (stating, “Unlike broader sovereign rights conferred upon the coastal State in the EEZ, those enjoyed by it in a fishing zone are restricted to the exploration, exploitation, management and conservation of fisheries resources. The effect of establishing fisheries protection zones will be to reduce the area of high seas fishing, and thus to modify access rights to certain fisheries. Loss of access to fishing grounds that were previously part of the high seas could be overcome through the conclusion of bilateral fisheries access agreements.”). With respect to zones of ecological protection, Chevalier declares that “such a designation would enable the coastal State to assert some portion of the rights and controls it could apply if it declared an EEZ.” *Id.* at 47. See also Angela Del Vecchio Capotosti, In Maiore Stat Minus: *A Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea*, OCEAN DEVELOPMENT & INT'L L., vol. 39:3, 287, 288 (stating that the unilaterally established fisheries zones and special protected area “represent a partial implementation of the EEZ.”). Del Vecchio Capotosti further states that the fisheries zones of France, Spain, and Croatia constituted “partial” implementation of the EEZ, “because the coastal State’s jurisdiction is limited while other states’ freedoms are unchanged.” *Id.* at 293. Others write: “In the fishing zone the coastal State does not claim the full range of rights to which it is entitled under the exclusive economic zone regime, but only those relating to the exploration, exploitation, conservation and management of marine living resources.” LINES IN THE SEA 144 (G. Francalanci & T. Scovazzi eds., 1994).

¹¹ “[T]he rights and duties of states that enacted exclusive fishing zone legislation correspond to the applicable rights and duties set out in Part V [of UNCLOS] with regard to exploring and exploiting, and conserving and managing, living natural resources in the area in question.” THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, vol. II, page 510, para. v.33 (eds. Satya N. Nandan & Shabtai Rosenne, 1993); See also William T. Burke, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 43 (1994).

¹² *Case concerning the Continental Shelf (Tunisia v. Libya)* 1982 I.C.J. 18, 38, 47-49, 79; *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1885 I.C.J. 13, 33 (June 3) (“[T]he institution of the exclusive economic zone ... is shown by practice of states to have become part of customary law.”); See, e.g., WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 40 (1994).

States concerning fisheries under customary international law are closely related, if not the same as, those of UNCLOS.¹³

Thus, if a coastal State asserts its sovereign rights over living resources in an FCZ rather than an EEZ, that area falls within the “jurisdiction” of the coastal State for those resources, provided that it meets the minimum legal obligations of UNCLOS for the conservation of those resources. Fishing within these areas for CITES-listed species would *not* require IFS certificates. Catches within those FCZs may require an export permit if the vessel transports the catch to a State different from the one that established the FCZ. On the other hand, if the legal regime for an FCZ fails to meet the minimum legal obligations of UNCLOS, it does not constitute a valid exercise of sovereign rights or jurisdiction. Fishing in these areas thus requires the issuance of an IFS certificate.

D. The “Exception” for Species Subject to Another Treaty Affording Protection to Marine Species Included in Appendix II

Article XIV(4) of CITES raises a number of questions concerning the relationship of CITES to another treaty that affords protection to marine species included in Appendix II. Article XIV(4) provides that:

“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.”

In short, Article XIV(4) exempts Parties from issuing CITES permits when the following conditions are met:

1. *The other treaty entered into force before CITES on July 1, 1975.* Thus, the exception applies to treaties such as ICCAT and the International Convention for the Regulation of Whaling, which pre-date CITES. It would not apply to treaties, such as the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC), which came into force after July 1, 1975.
2. *The other treaty must afford protection to marine species.* In addition to pre-dating CITES, the other treaty must afford protection to marine species. This

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

requirement to “afford protection” raises at least three questions. First, because CITES addresses international trade in species, must the other treaty affording protection to marine species also manage trade? Second, does the phrase “afford protection” prevent the exemption from applying to other treaties whose primary purpose is the exploitation of species? Third, is the exemption limited to marine mammals? While ICCAT and other RFBs have a number of conservation and management measures, they remain principally treaties about exploitation of a species for commercial purposes.

The answer to these questions should be “no.” First, nothing in Article XIV(4) suggests that the other treaty must have some trade component to it. To the contrary, it refers to a species being “taken . . . in accordance with the provisions” of the other treaty. Thus, the critical issue appears to be compliance with the conservation and management provisions of the other treaty, not whether the other treaty includes trade provisions. Moreover, the drafters expressly contemplated that the other treaty would address exploitation of species. Second, at least two countries specifically noted during the negotiations that the exception was needed so that CITES would not affect the work of the IWC and other RFBs¹⁴—bodies established under treaties without trade components and with a focus on harvesting specimens of regulated species. Third, despite statements during the negotiations suggesting that the exception should apply only to marine mammals,¹⁵ neither Article XIV(4) itself nor Articles III and IV concerning IFS are limited to marine mammals. As such, the negotiators did not intend to limit the scope of Article XIV(4) to treaties affording protection to particular types of marine species, such as those relating to marine mammals. Thus, the Article XIV(4) exception applies to RFBs such as ICCAT.

3. *The CITES Party is also a Party to the other treaty.* The exception only applies where the CITES Party is also a Party to the other treaty. However, a question arises as to whether a State must be a Party to the other treaty at the time CITES entered into force. In the case of ICCAT, one could argue that ICCAT was not in force at the time CITES entered into force for Belize, because Belize did not become a Party to ICCAT until 2005. The argument is not a strong one, because Article XIV(4) speaks specifically to the marine convention being in force before CITES. It does not refer to that marine convention being in force for a particular State prior to the entry into force of CITES.

¹⁴ Plenipotentiaries Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, PA/XII/3 (Feb. 16, 1973) (statement of Australia); Plenipotentiaries Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, PA/XII/4 (Feb. 16, 1973) (statement of Japan).

¹⁵ Plenipotentiaries Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Summary Record–Fifteenth Plenary Session (Friday, Feb. 23, 1973), SR/15 (Final), at 4 (Mar. 5, 1973) (statement of the Ad Hoc Committee Chairman); Plenipotentiaries Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, Summary Record–Twenty-First Plenary Session (Friday, Feb. 28, 1973), SR/21 (Final), at 1 (Mar. 5, 1973).

4. *The specimen is a specimen of an Appendix II species.* The text of Article XIV(4) states clearly that the exception only applies to specimens of Appendix II species.
5. *The specimen is caught (1) in an EEZ and subsequently exported or (2) on the high seas and subject to IFS provisions.* Because CITES only relates to international trade, the exception only applies when an import, export, or introduction from the sea occurs.
6. *The specimen must be taken by a vessel flagged by the State using the exception.* Article XIV(4) relieves a State of its CITES obligations with respect trade in Appendix II specimens “taken by ships registered in that State.” By linking the State seeking the exception to the flag State of the vessel taking the specimen, Article XIV(4) prohibits the exception from applying when a specimen is transferred to a vessel flagged by another State. For example, if a Spanish vessel catches bluefin tuna on the high seas of the Mediterranean Sea and transfers the catch to a Japanese vessel for the Japanese market, Japan is not relieved of its duties to issue an IFS certificate.

Even where the exception applies, the export of specimens taken consistently with Article XIV(4) requires additional documentation. For these specimens, Article XIV(5) requires the Parties to issue “a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement in question.”

E. Article XIV(4) and Zero Quotas

A question arises as to the applicability of Article XIV(4) when a species is included in Appendix II of CITES subject to a zero quota. Article XIV(4) relieves a CITES Party of its CITES obligations with respect to “trade” in species of a species covered by another treaty that affords protection to that species. The use of the word “trade” suggests an intent to provide a broad exception. Thus, Article XIV(4) can be interpreted reasonably to mean that the zero quota would not apply to a State that is both a Party to CITES and, for example, ICCAT.

At the time CITES was drafted, however, CITES did not contemplate zero quotas. Thus, it may be possible to interpret Article XIV(4) as follows:

- When the elements of Article XIV(4) are met, but the species is not subject to a zero quota, a CITES Party is relieved of its duties to *issue an export permit* pursuant to Article IV of CITES.
- When the elements of Article XIV(4) are met, but the species is subject to a zero quota, all trade is prohibited. Thus, even though Article XIV(4) allows trade without permits, the zero quota prohibits permits from issuing. Thus, Article XIV(4) does not apply, because Article XIV(4) only exempts a Party from issuing permits.

The negotiating history, while not all that clear, suggests that the negotiators intended to exempt marine species covered by another treaty from all CITES trade requirements. Both Japan and Australia proposed to exempt such species from all the Convention's trade-related provisions, including the Convention's fundamental principles and exceptions.¹⁶ While the proposals of Japan and Australia were adopted in principle, many significant changes were made. Thus, it is not exactly clear what the final agreement was among the negotiators concerning Article XIV. However, it seems most likely that Article XIV(4) exempts Parties from a zero quota when the elements of Article XIV(4) are met.

V. CITES Permits and ICCAT's Bluefin Catch Document Scheme

ICCAT operates a catch document scheme for bluefin tuna known as the Bluefin Tuna Catch Document Program (BFTCDP). Under the BFTCDP, the fishing vessel master must complete a bluefin tuna catch document (BCD) that identifies, among other things, the number of tuna caught and the weight and average weight of the tuna caught.¹⁷ A BCD must accompany "[e]ach consignment of bluefin tuna domestically traded, imported into or exported or re-exported from its territories."¹⁸ The objective of this scheme is to identify the origin of bluefin tuna and support ICCAT's conservation and management measures,¹⁹ as well as "to ensure the reporting of all catches, whether they are destined for export, domestic consumption or farming purposes."²⁰

Despite the BFTCDP, the CITES permitting system would augment, not duplicate, ICCAT's BCD. First, it would help produce missing catch and trade data. Second, a CITES listing would support the recommendations of the ICCAT *Report of the Independent Review* by providing a "timeout for tuna."²¹

¹⁶ Plenipotentiaries Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, PA/XII/3 (Feb. 16, 1973) (statement of Australia); Plenipotentiaries Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, PA/XII/4 (Feb. 16, 1973) (statement of Japan).

¹⁷ ICCAT, Recommendation by ICCAT on an ICCAT Bluefin Tuna Catch Document Program, Recommendation 09-11, at Annex 1.

¹⁸ *Id.* at para. 3.

¹⁹ *Id.* at para. 1.

²⁰ ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 1, at 112 (2009) [hereinafter ICCAT Biennial Report 2008-2009, Vol. 1].

²¹ G.C. Hurry, M. Hayashi, & J.J. Maguire, Report of the Independent Review: International Commission for the Conservation of Atlantic Tunas (ICCAT), PLE-106/2008 (Sept. 2008), *available at*: www.iccat.int/Documents/Meetings/Docs/Comm/PLE-106-ENG.pdf [hereinafter ICCAT Independent Review].

A. Improve Data Collection

A CITES listing would help ICCAT members collect biological and harvest data with respect to bluefin tuna. The CITES permitting regime can thus help provide data so that ICCAT's scientific committee, the Standing Committee on Research and Statistics (SCRS), can obtain adequate catch data to recommend a total allowable catch, something it is frequently unable to do because of inadequate reporting of catch data within ICCAT.

As an initial matter, ICCAT's Contracting Parties and Cooperating non-Contracting Parties, Entities and Fishing Entities (CPCs) are not complying with the requirements for submission of BCDs. Although they are required to submit all validated BCDs to the ICCAT Secretariat within five working days following the date of validation, this is not happening. The ICCAT Secretariat has reported minimal compliance with the five-day reporting obligation; moreover, where CPCs have submitted BCDs, the data in many cases are incomplete, illegible, or not in compliance with applicable ICCAT Recommendations.²² At ICCAT's recent technical compliance meeting, which took place from 24 to 26 February 2010, the Secretariat reported that BCDs had been reported to the Secretariat for only 43% of the total catch.²³ As a result, ICCAT's BCD is not meeting its goals of reporting all catches, identifying the origin of bluefin tuna, and supporting conservation and management measures.

The permitting regime of CITES can fill the gaps, because the State of export must issue an export permit for any export of Appendix I or II specimens. The regulation of trade by CITES will help provide more accurate estimates of catches of Atlantic bluefin tuna. The ICCAT *Independent Review* wrote that “[a] consistent theme in a large number of the ICCAT reports and in reports from the SCRS to ICCAT is that data provision is unreliable, inaccurate, and not provided within the required time frame.”²⁴ These problems are particularly severe with respect to bluefin tuna, where the ICCAT *Independent Review* noted a “wilful disregard for ICCAT process.”²⁵ This wilful disregard has led to substantial over-fishing, with European Commissioner Borg stating that the European Community had “considerably overfished its quota.”²⁶ Not only has

²² ICCAT, Secretariat Report to the Compliance Committee, COC-303/2009, at 17-18 (Nov. 3, 2009) (stating, “In October 2009, some Contracting Parties sent hundreds of BCDs in a single dispatch related to June 2009 catches, which did not facilitate the Secretariat’s work. In order for the BCDs to be available in the database as soon as possible, it is urged that the BCDs be transmitted without delay, as indicated in the Recommendation.... As regards trade information, often the point of export and the point of import are not filled in. The information relative to the fishing gear or the geographic area is also not completed.”).

²³ ICCAT, 2010 COC Inter-sessional–BFT Catch Rep. Summary, Doc. No. COC-04B/i2010 (Feb. 26). The BCD scheme is designed to combat IUU fishing, but more than six months after the end of last year’s fishing season, only 8,614 tonnes of bluefin tuna out of a total catch of 19,808.79 tonnes in 2009 has been reported under the scheme.

²⁴ ICCAT *Independent Review*, *supra* note 21, at 69.

²⁵ *Id.* at 59.

²⁶ European Commission, Press Release, IP/08/961 (June 17, 2008) (Statement from Commissioner Borg: “Closing the Bluefin tuna fishery in order to secure its future”), *available at*: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/961&format=HTML&aged=0&language=EN&guiLanguage=en>

ICCAT failed to adopt precautionary measures consistent with the U.N. Fish Stocks Agreement,²⁷ but it has also failed to implement its own reasonable data collecting measures. Annex 1 below illustrates the scope of the problem.

Similarly, a CITES export permit must be based on a finding that the export will “not be detrimental to the survival of the species.” Making the non-detriment finding should require the collection of biological data that currently does not exist for bluefin tuna. Indeed, the ICCAT Independent Review Panel “was surprised to see how little information and data are available even for an iconic species like bluefin tuna.”²⁸ Again, CITES will help fill the gaps that ICCAT has been unable or unwilling to fill.

However, some of the data collection benefits of a CITES listing will be reduced if Atlantic bluefin tuna are listed in Appendix II and the exception of Article XIV(4) applies. If Article XIV(4) of CITES exempts all or most ICCAT Parties from their Appendix II permitting obligations for trade in bluefin tuna, then the State of Introduction must issue a certificate indicating that the specimen was taken in accordance with the provisions of the other treaty. CITES will still be able to track trade and thus catches of bluefin tuna, but there will be no requirement for a non-detriment finding.²⁹

B. A “Timeout for Tuna”: Implement a Harvest Suspension

A CITES Appendix I listing for Atlantic bluefin tuna would prohibit international trade for primarily commercial purposes. Because almost all international trade in Atlantic bluefin tuna is for primarily commercial purposes and most Atlantic bluefin tuna is exported to the United States and Japan,³⁰ an Appendix I listing would prohibit almost

²⁷ ICCAT Independent Review, *supra* note 21, at 15–16.

²⁸ ICCAT Independent Review, *supra* note 21, at 46. The SCRS has also noted “that it is timely to make a substantial increased investment to enhance the data collection and to tackle key and recurrent issues on bluefin tuna population dynamics. Without such a significant effort, it is unlikely that the Committee can improve, in the near future, its scientific diagnosis and management advice.” ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 2, at 103 (2009) [hereinafter ICCAT Biennial Report 2008-2009, Vol. 2].

²⁹ The European Commission believes that an Appendix II listing will have more significant implications vis-à-vis an Appendix I listing. It concluded that “an Appendix II listing would probably have little legal implications given the provisions in Article XIV(4) of the CITES Convention, and, as far as the issuing of CITES permits is concerned, would duplicate with the ICCAT bluefin tuna Catch Documentation Scheme.” European Commission, Commission Staff Working Document: Commission Services’ Assessment of CITES CoP15 Proposals Submitted by EU Member States and of Proposals Co-Sponsorship Tabled by Third States, SEC(2009) 1228 final, at 15 (Sept. 19, 2009). The Commission appears to have overlooked the effect of Article XIV(5), however.

³⁰ The most recent trade data for bluefin tuna can be found in ROBERTO MIELGO BREGAZZI, REQUIEM FOR A BLUEFIN TUNA: AN INTERNATIONAL TRADE ANALYSIS (1998/2009) (Atlantic Tuna Ranching Technologies, SL: 2009); *see also* ADVANCED TUNA RANCHING TECHNOLOGIES, SL, THE PLUNDER OF BLUEFIN TUNA IN THE MEDITERRANEAN AND EAST ATLANTIC IN 2004 AND 2005 – UNCOVERING THE REAL STORY, 26–36 (WWF-World Wide Fund for Nature: May 2006) [hereinafter THE PLUNDER OF BLUEFIN TUNA]. In the last few years, nearly all of the declared Atlantic bluefin tuna catch in the Mediterranean is exported overseas. ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 2, at 101 (2009) [hereinafter ICCAT Biennial Report 2008-2009, Vol. 2].

all trade in Atlantic bluefin tuna. Any trade, absent a CITES import permit documenting the shipment's noncommercial purposes, would be illegal.

As a consequence, a CITES Appendix I listing might encourage the closing of the Atlantic bluefin tuna fishery as recommended by the ICCAT *Report of the Independent Review*. This report found:

“management of fisheries on bluefin tuna in the eastern Atlantic and Mediterranean and regulation of bluefin farming to be unacceptable and not consistent with the objectives of ICCAT.”³¹

To rebuild the fishery, it recommended “the suspension of fishing on bluefin tuna in the eastern Atlantic and Mediterranean until CPCs fully comply with ICCAT recommendations on bluefin.”³² The suspension is necessary because “there is little doubt that bluefin tuna in the ICCAT area is far from B_{MSY} and there are indications that collapse could be a real possibility in the foreseeable future, particularly in the East Atlantic and Mediterranean.”³³

The Appendix I listing would not prohibit all existing trade in Atlantic bluefin tuna. CITES only covers international trade; it does not cover internal trade. Thus, a small amount of catch from the EEZs of some countries, such as the United States, could enter the markets of those countries.

Despite the CITES focus on international trade, European Council Regulation 338/97 defines “trade” as including the “movement and transfer of possession within the Community, including within a Member State” of CITES-listed specimens.³⁴ Moreover, Article 8(1) prohibits the purchase, sale, and use for commercial gain in “Annex A” specimens. The list of Annex A species is more or less the same as the list of species included in Appendix I.

Thus, bluefin tuna caught in the territorial waters and EEZs of EU Member States will be prohibited unless an exception applies. Article 8(3)(h) exempts from this prohibition, on a case-by-case basis, specimens that originate in a Member State and that were taken from the wild in accordance with the laws of that Member State. This exception could be used to allow trade within the EU in Atlantic bluefin tuna caught within EU waters (territorial seas, EEZs, and FCZs). Even if this exception is not used to allow trade in Atlantic bluefin tuna within the EU, political pressure is already building to create an exception specifically for tuna. The European Parliament, for example, supported the inclusion of Atlantic bluefin tuna in Appendix I but only if the European

³¹ ICCAT Independent Review, *supra* note 21, at 3.

³² *Id.* ICCAT's Standing Committee on Research and Statistics (SCRS) also recommended a time area closure, although not necessarily a total suspension of fishing for an indefinite period. ICCAT, Report for Biennial Period, 2008-2009, Vol. 2, *supra* note 13, at 101, 103 & 108.

³³ ICCAT Independent Review, *supra* note 21, at 46. B_{MSY} is a measure of the biomass (total weight of fish) that can support the harvest of the maximum sustainable yield.

³⁴ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, Official Journal L 061, 03/03/1997 P. 0001 – 0069, at Art. 2(u).

Commission, among other things, guaranteed that it would establish an exemption for domestic trade in order to allow traditional coastal fishing (“artisanal” fishing) to continue.³⁵ The exceptions contemplated by the EU at the moment are unlikely to defeat the benefits of an Appendix I listing.

In sum, an Appendix I listing for Atlantic bluefin tuna will largely close markets for Atlantic bluefin tuna and give the species the time to recover that scientists say is needed. European Council Regulation 338/97 would prohibit trade in Atlantic bluefin tuna caught in the territorial seas, EEZs, and FCZs of EU Member States and destined for the EU market. Catches from those same areas destined for external markets will be prohibited by the CITES prohibition on trade for primarily commercial purposes. Trade in bluefin tuna caught on the high seas, an area that encompasses much of the Mediterranean Sea³⁶ and Atlantic Ocean, will be prohibited under CITES as an “introduction from the sea” for primarily commercial purposes. Only a limited catch in non-EU countries destined for domestic markets will continue.

³⁵ European Parliament resolution of 10 February 2010 on the EU strategic objectives for the 15th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), to be held in Doha (Qatar) from 13 to 25 March 2010.

³⁶ Few countries have declared EEZs in the Mediterranean. As one reviewer of the legal status of the Mediterranean Sea writes:

Mediterranean States have so far been reluctant to proclaim an EEZ or, at least to give effect to such a claim in the Mediterranean. Among the reasons behind the choice of delaying the establishment of EEZ may be the existence of difficult problems of delimitation still to be settled in this relatively narrow sea and the desire of most States to preserve basin-wide access to fisheries. From a legal point of view, however, there is absolutely nothing to prevent Mediterranean States from establishing an EEZ if they wish to do so.

Claudiane Chevalier, *Governance in the Mediterranean Sea: Legal Regime and Prospectives*, 7 (undated), available at: cmsdata.iucn.org/downloads/legalspects_en_1.pdf.

Annex 1

Total Allowable Catches (TACs) and Actual Catches in the East Atlantic and Mediterranean Sea (in tonnes)

Year	SCRS Recommended TAC	Adopted TAC	Reported Catch	Estimated Catch	Comments
2004	“Not estimated” because of inadequate reporting of data, ³⁷ but “catch levels of 26,000 t or more are not sustainable over the long-term.” ³⁸	32,000 ³⁹	31,377 ⁴⁰	44,948 ⁴¹	Fishing mortality “may have been more than three times the level which would permit the stock to stabilize at the MSY level.” ⁴²
2005	Same as for 2004 ⁴³	32,000 ⁴⁴	35,845 ⁴⁵	45,547 ⁴⁶	SCRS reported that “current catch levels cannot be sustained in the long-term” ⁴⁷
2006	Not estimated ⁴⁸	32,000 ⁴⁹	30,647 ⁵⁰	50,000 ⁵¹	
2007	15,000 ⁵²	29,500 ⁵³	32,398 ⁵⁴	61,000 ⁵⁵	Catch was four times more than the sustainable catch. SCRS reported that “unenforced TACs are allowing under-reporting of overall catches, and incomplete compliance with size limit regulations may be affecting

³⁷ ICCAT, Report for Biennial Period, 2002-03 PART II (2003), Vol. 2, at 68 (2004) (SCRS “is unwilling to make definitive management recommendations” because of insufficient data resulting from the failure of ICCAT parties to report catches”).

³⁸ ICCAT, Report for Biennial Period, 2002-03 PART II (2003), Vol. 2, at 68 (2004).

³⁹ ICCAT, Recommendation by ICCAT Concerning A Multi-Year Conservation and Management Plan for Bluefin Tuna in the East Atlantic and Mediterranean, Rec. 2002-08, at 1 (2002).

⁴⁰ ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 2, at 108 (2009).

⁴¹ THE PLUNDER OF BLUEFIN TUNA, *supra* note 30, at 87, Table 072.

⁴² ICCAT, Report for Biennial Period, 2006-07 PART II (2007), Vol. 2, at 114 (2008).

⁴³ ICCAT, Report for Biennial Period, 2004-05 PART I (2004), Vol. 2, at 91–92 (2005) (stating that “[a]nalyse[s] suggest that at current levels of recruitment and the present level of large- and small-fish fisheries, catch levels of 26,000 t or more are not sustainable over the long-term).

⁴⁴ ICCAT, Recommendation by ICCAT Concerning A Multi-Year Conservation and Management Plan for Bluefin Tuna in the East Atlantic and Mediterranean, Rec. 2002-08, at 1 (2002) [hereinafter ICCAT, Rec. 02-08].

⁴⁵ ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 2, at 108 (2009).

⁴⁶ THE PLUNDER OF BLUEFIN TUNA, *supra* note 30, at 87, Table 072.

⁴⁷ ICCAT, Report for Biennial Period, 2004-05 PART I (2004), Vol. 2, at 89 (2005).

⁴⁸ ICCAT, Report for Biennial Period, 2004-05 PART II (2005), Vol. 2, at 85 (2006).

⁴⁹ ICCAT, Rec. 02-08, *supra* note 44.

⁵⁰ ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 2, at 108 (2009).

⁵¹ *Id.* at 104.

⁵² ICCAT, Report for Biennial Period, 2006-07 PART I (2006), Vol. 2, at 108 (2007).

⁵³ ICCAT, Recommendation by ICCAT to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean, Rec. 2006-05, at 2 (2006).

⁵⁴ ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 2, at 103 (2009). This is a preliminary reported catch.

⁵⁵ *Id.* at 104.

					information on catches of small bluefin.” ⁵⁶ SCRS reported that unless the current regulatory structure “is adjusted to impose greater control over the fisheries by improving compliance and to reduce fishing mortality rates, it will lead to further reduction in spawning stock biomass with high risk of fisheries and stock collapse.” ⁵⁷
2008	15,000 ⁵⁸	28,500 ⁵⁹			SCRS reported that “[a] collapse in the near future is a possibility given the 2006 stock assessment estimations of the SCRS of the fishing capacity of all fleets combined and current fishing mortality rates, unless adequate management measures are implemented and enforced.” ⁶⁰ SCRS reported the Commission’s management measures are “unlikely to rebuild the stock to the Convention objectives in 15 years with 50% probability.” ⁶¹ SCRS reported that “[e]ven in our most optimistic evaluation, assuming recruitment will not decrease if SSB continues to decline, substantial overfishing is occurring and spawning biomass is well below levels needed to sustain MSY.” ⁶²
2009	15,000 or less ⁶³	22,000 ⁶⁴			
2010	8,000 ⁶⁵	13,500 ⁶⁶			a reduction to 8,000 tonnes has only a

⁵⁶ ICCAT, Report for Biennial Period, 2006-07 PART I (2006), Vol. 2, at 107 (2007).

⁵⁷ ICCAT, Report for Biennial Period, 2006-07 PART I (2006), Vol. 2, at 107 (2007).

⁵⁸ ICCAT, Report for Biennial Period, 2006-07 PART II (2007), Vol. 2, at 114–115 (2008).

⁵⁹ ICCAT, Rec. 06-05, *supra* note 53.

⁶⁰ ICCAT, Report for Biennial Period, 2006-07 PART II (2007), Vol. 2, at 113 (2008).

⁶¹ ICCAT, Report for Biennial Period, 2006-07 PART II (2007), Vol. 2, at 114 (2008).

⁶² SCRS, Report of the 2008 Atlantic Bluefin Tuna Stock Assessment Session, at 27 (Madrid, Spain – June 23 to July 4, 2008).

⁶³ ICCAT, Report for Biennial Period, 2008-09 PART I (2008), Vol. 2, at 103 (2009).

⁶⁴ ICCAT, Recommendation by ICCAT Amending the Recommendation by ICCAT to Establish a Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean, Rec. 2008-05, at 2 (2008).

⁶⁵ U.S. National Oceanic and Atmospheric Administration, Press Release, “NOAA Issues Statement on ICCAT Annual Meeting,” (Nov. 16, 2009) (stating that “[t]he United States sought a package of measures for eastern Atlantic and Mediterranean bluefin tuna that would halt overfishing and provide for rebuilding by 2023 with a high probability of success. The science indicates that a total quota level of 8,000 metric tons or lower would have achieved that.”). The most recently published data from the SCRS in 2008 provides that to rebuild to the MSY level in 15 years with 50% probability “these scenarios involve a time-area closure including partial or full closure during the spawning season as well as much lower catches (TAC including all sources of fishing mortality) during the next few years (~15,000 t).” SCRS, Report of the 2008 Atlantic Bluefin Tuna Stock Assessment Session, at 37 (Madrid, Spain – June 23 to July 4, 2008).

⁶⁶ U.S. National Oceanic and Atmospheric Administration, Press Release, “NOAA Issues Statement on ICCAT Annual Meeting,” (Nov. 16, 2009).

		(reduced from 22,000 in Nov. 2009)			50% chance of allowing bluefin to recover by 2023
--	--	------------------------------------	--	--	---