PROTECTING ENDANGERED MARINE SPECIES: COLLABORATION BETWEEN THE FOOD AND AGRICULTURE ORGANIZATION AND THE *CITES* REGIME

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Multiple laws and institutions seek to address the increasing vulnerability of marine species. The separate treatment of species protection under the Convention on the International Trade in Endangered Species *('*CITES*'), and fisheries management and conservation according to the Food and Agriculture Organization ('FAO') is part of a general phenomenon of fragmentation of international law. While much of the fragmentation literature addresses conflicting norms, little attention has been given to the institutional collaboration and normative influences between overlapping regimes. This article explores regime interaction between the FAO fisheries management and* CITES *regimes, with particular attention to the development of a memorandum of understanding between the FAO and the* CITES *secretariat.*

CONTENTS

I INTRODUCTION

Growing fears about the global state of marine species are uniting previously diverse disciplinary responses from international lawyers. Sharks, tuna and other commercially significant and heavily traded marine species are increasingly threatened with depletion. Overfishing and international trade have placed

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pressure on stocks, and traditional legal responses, developed in a fragmented way within disparate legal 'regimes',[1] are deficient.

Several existing international regimes are relevant to this crisis, including fisheries and conservation measures under the law of the sea,[2] the United Nations Food and Agriculture Organization ('FAO'),[3] and, increasingly, trade restrictions for protected species under the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora* ('*CITES*').[4] These regimes have developed in largely autonomous ways, as part of a known phenomenon of fragmentation of international law. The situation of ongoing legal diversity presents a number of challenges for effective responses to the increasing vulnerability of marine species.

Recent literature has addressed the challenges of fragmentation, including an influential report by the International Law Commission ('ILC').[5] Yet these efforts are generally concentrated on the problem of conflicting norms, when different laws proscribe contradictory obligations for participating states. There is a need to investigate whether international responses to protect endangered marine species are legally incompatible, or whether instead norms are mutually supportive. The latter situation leads to a different set of research questions for international lawyers, which focus instead on regime interaction. Research into regime interaction must continue to acknowledge the discordant interests and political sensitivities which lie behind efforts to achieve 'coherence' in international law.[6] Crucially, such research must also assess the role of law in facilitating or obstructing coordination and collaboration between regimes.

States, international organisations and others are working towards enhanced coordination between regimes in fisheries governance. Recently, a Memorandum of Understanding ('MOU') was agreed between the FAO and the *CITES* Secretariat.[7] The MOU reveals much about institutional collaboration and coordination at international law. It evolved in the context of manifest disagreement about the restriction of trade in vulnerable marine species.[8] On the

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1 On 'regimes', see below pt IIA.

2 See *United Nations Convention of the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

3 The FAO is a specialised UN agency established in 1945: see *Charter of the United Nations* art 57 ('*UN Charter*'); *Constitution of the Food and Agriculture Organization* art XII ('*FAO Constitution*').

4 Opened for signature 3 March 1973, 933 UNTS 243 (entered into force 1 July 1975).

5 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.702 (18 July 2006) ('Report of the ILC Study Group'). See also associated analytical study finalised by the Chairman, UN GAOR, 58th sess, UN Docs A/CN.4/L.682 and Corr.1 (13 April 2006) ('ILC Analytical Study').

6 Such issues underlie the situation of conflicting norms: see Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

7 Agreed by *CITES* and FAO in September – October 2006. See *Strategic and Administrative Matters: Cooperation with the Food and Agriculture Organization of the United Nations*, *CITES* Standing Committee, 53rd mtg, *CITES* SC53 Doc 10.1 (27 June – 1 July 2005) and FAO, *Fisheries Report No 807: Report of the Tenth Session of the Sub-Committee on Fish Trade* (FAO, 2006) Appendix F ('*FAO/CITES Memorandum of Understanding*'). See below n 168 and accompanying text.

8 For an example of this disagreement, see the failed attempts to list bluefin tuna on the *CITES* appendices earlier this year: see below n 63 and accompanying text.

one hand, the MOU promises to enhance coordination and cooperation between the two regimes. On the other, the MOU is an instrument with which different countries sought to promote stronger or weaker rules. There is much to learn from a close investigation into the drafting of the MOU, when opposition to the restriction of trade in marine species played out in attempts to entrench primacy for FAO fisheries management over *CITES*, and from its subsequent operation.

This article investigates fragmentation and institutional collaboration on marine species protection by adopting a textual and empirically-based analysis. It proposes a framework of study that delves closely into the ongoing ability of the FAO and the *CITES* Secretariat to work together on marine issues. Attention is given to issues of mandate, expertise, bias and coherence between international organisations in fisheries management and conservation. These issues featured heavily in the lead-up to the MOU's joint signature by the FAO and the *CITES* Secretariat. Attention to these issues, and to the ongoing efforts at collaboration since the MOU was agreed, is revealing for fisheries governance and for the interaction between regimes in other contexts.

Part II of the article introduces the problem of endangered marine species, with a special focus on sharks, seahorses and bluefin tuna. It then provides an overview of the regimes that vie for relevance in efforts to combat the threats to such species, and describes the opposition to *CITES*'s role in marine issues. It contextualises this situation in the context of the broader fragmentation debate, and defends an analytic approach that centralises observations and textual investigations. In Part III, the article examines the legal status and evolution of the MOU, drawing on a detailed record of meetings and negotiating texts as well as doctrinal analysis of principles of international institutional law. The perspectives of delegates and secretariat staff provide additional information on the constraints of interaction between the *CITES* and FAO fisheries management regimes. Part IV then examines how interaction is entrenched in the MOU in areas such as information-sharing, reporting and capacity-building, drawing on both the written instrument and subsequent supporting practice. Finally, the article concludes on the prospects for regime interaction on marine species protection and in fisheries governance more generally.

II FRAGMENTED RESPONSES TO ENDANGERED MARINE SPECIES

Scientific and economic data demonstrate that marine species are increasingly over-fished or threatened.[9] This includes heavily traded species such as sharks, seahorses and perhaps the most prized of all fish species: the bluefin tuna. This Part provides background information on the state of these species, before assessing the fragmented legal responses.

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[9] For fish stock groups monitored by the FAO, 20 per cent are underexploited or moderately exploited, 52 per cent are fully exploited and 28 per cent are either over exploited, depleted or recovering from depletion: see FAO, *The State of World Fisheries and Aquaculture* (FAO, 2008) 7. Some scientists have projected the collapse of seafood-producing species stocks by 2048: Boris Worm et al, 'Impacts of Biodiversity Loss on Ocean Ecosystem Services' (2006) 314 *Science* 787, 790 (defining collapse as ten per cent of unfished biomass).

Sharks, the largest fish in the sea and the apex predators in the marine food chain,[10] are caught and traded in increasing numbers for their meat and fins. Shark meat consumption has grown steadily, with consumers often unaware that they are buying and eating shark species due to varying market names.[11] Shark meat is now produced by a wide range of countries, and major exporters include Canada, Indonesia, Japan, New Zealand, Spain, Taiwan, the United Kingdom and the United States.[12] In addition to shark meat, shark fins have become a highly traded and valued fish product.[13] The rise of average income levels in China has led to increased demand for the traditional delicacy of shark fin soup. China, India and Indonesia are the largest producers of shark fins.[14]

Sharks have suffered sudden and drastic population decline. In addition to the expanding catches of sharks due to the huge demand for shark meat and fins, sharks are often killed as bycatch in tuna and swordfish longline fisheries. They are also affected by marine pollution and by loss of their prey through other instances of overfishing. Population numbers are often unable to recover because sharks have slow growth and reproduction rates.[15] Over 135 shark species have been listed on the International Union for the Conservation of Nature and Natural Resources ('IUCN') Red List, and over 20 are listed as critically endangered or endangered.[16]

Seahorses are another commercially valuable marine species that is threatened due to overfishing, bycatch vulnerability and habitat loss.[17] Seahorses are harvested and traded for use in traditional medicine and aquariums, and are caught as bycatch in shrimp trawlers. Seahorses have an unusual biology, in which offspring are dependent on the male of the species for a prolonged period, and their site and mate fidelity makes them particularly vulnerable to depletion.[18] There are at least two endangered or critically endangered species and several vulnerable species of seahorse on the IUCN Red List.[19]

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10 The two largest fish are the whale shark and the basking shark respectively; both species are now recognised as under threat: see below n 55 and accompanying text.

11 For example, in Australia and the UK, picked dogfish and other species are marketed as 'flake': Stefania Vannuccini, 'Shark Utilization, Marketing and Trade' (Fisheries Technical Paper No 389, FAO, 1999) [6.1.1].

12 FAO statistics indicate that production of fresh, frozen and cured chondrichthyan meat and fillets increased from nearly 18 000 tonnes in 1976 to 34 500 tonnes in 1986 and 69 300 tonnes in 1997. Exports in 1997 were valued at US$131.5 million: ibid [6.1.3].

13 FAO statistics, which only partially record the relevant data due to incomplete reporting by countries, indicate that world production of shark fins has increased from 1800 tonnes in 1976 to 6030 tonnes in 1997: ibid [6.2.8].

14 1997 exports were valued at US$90.4 million: ibid.

15 See Terence I Walker, 'Can Shark Resources be Harvested Sustainably?' (1998) 49 *Marine and Freshwater Research* 553 (reviewing biological characteristics and noting different productivity rates of species).

16 Alok Jha, 'Shark Species Face Extinction amid Overfishing and Appetite for Fins' *Guardian* (London) 18 February 2008 11. See IUCN (2010) The IUCN Red List Website <www.iucnredlist.org>.

17 Pamela S Turner, 'Struggling to Save the Seahorse' *National Wildlife* (6 January 2005).

18 N C Perante et al, 'Biology of a Seahorse Species, *Hippocampus Comes* in the Central Philippines' (2002) 60 *Journal of Fish Biology* 821.

19 International Union for Conservation of Nature and Natural Resources (2010) The IUCN Red List Website <www.iucnredlist.org>.

Bluefin tuna are the 'ultimate political fish' for Japan and many North Atlantic fishing nations,[20] as well as southern nations such as New Zealand and Australia. There are two species, both highly migratory: the northern bluefin tuna (taken mainly in the Atlantic and also in the Pacific) and the southern bluefin tuna (from the southern Indian and Pacific Oceans). Both are highly valued and traded, especially for the Japanese sushi market, where one fish can command ¥16.3 million — about US$180 000.[21] Japan imports 90 per cent of bluefin tuna,[22] and is the world's largest consumer of the fish. Bluefin tuna are long-lived and slow to reproduce, and are generally considered to be severely depleted. The southern bluefin tuna is thought to be at risk of commercial extinction without significant conservation measures, and the northern bluefin tuna is thought to be depleted in the Atlantic and overfished in the North Pacific Ocean.[23]

The status of sharks, seahorses and bluefin tuna suggests a growing risk of depletion for many commercially fished and traded marine species. Depletion of such species has environmental, economic, cultural and other consequences. Marine biodiversity and ecology will clearly be affected, particularly if important predator species such as sharks are lost. Economically, whole fishing industries could collapse. Ecotourism operations such as whale shark viewing, which have increasing economic significance for developing countries (and potentially little environmental impact) will also suffer.[24] Food security is also at risk, especially for the significant proportion of people worldwide who rely on fish as their major source of protein.[25] The crisis has led to multiple suggestions about appropriate legal and regulatory responses at the international level, and there is an accompanying need to understand how environmental, trade and fisheries regimes interact.

A *Relevant Legal 'Regimes'*

The problem of endangered marine species has given rise to, and is impacted by, a number of discrete international laws and institutions. These can be grouped as separate 'regimes', a term that refers to sets of norms, processes and

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20 Josué Martínez-Garmendia and James L Anderson, 'Conservation, Markets, and Fisheries Policy: The North Atlantic Bluefin Tuna and the Japanese Sashimi Market' (2005) 21 *Agribusiness* 17, 17.

21 Robin McKie, 'Push to Ban Trade in Endangered Bluefin Tuna' *The Observer* (online) 14 February 2010 <http://observer.guardian.co.uk>.

22 Harry N Scheiber, Kathryn J Mengerink and Yann-huei Song, 'Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum' (2007) 30 *University of Hawai'i Law Review* 97, 111, citing the Japanese Ministry for Agriculture, Forest and Fishing.

23 Carolyn Deere, *Net Gains: Linking Fisheries Management, International Trade and Sustainable Development* (IUCN, 2000) 1991, and sources cited therein.

24 See, eg, the proposed or existing ecotourism operations based on whale shark viewing in Western Australia (Ningaloo Reef), KwaZulu-Natal (South Africa), Mozambique, Philippines, Seychelles, Maldives, parts of the Caribbean, and Gulf of California (Mexico); *Consideration of Proposals for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 12th mtg, Doc No Prop 12.35 (3–15 November 2002).

25 The FAO estimates that between 15 and 20 per cent of all animal proteins consumed worldwide come from aquatic animals: see FAO, *Focus: Fisheries and Food Security* (2010) <www.fao.org/FOCUS/E/fisheries/intro.htm>.

institutions that meet different functions as identified and agreed by states.[26] The trade regime headed by the World Trade Organization, for example, is commonly considered in isolation from other areas of international law,[27] and yet has major and potential effects on fisheries.[28] This section aims to provide a brief overview of the regimes that are currently most relevant to endangered marine species.[29] It identifies relevant provisions of the *UNCLOS* and the *Fish Stocks Agreement*.[30] It also describes key parts of the FAO fisheries management regime, which encompasses instruments that seek to promote state compliance with existing norms as well as voluntary measures. It then points to the *Convention on Migratory Species*[31] and the *Convention on Biological Diversity*,[32] which contain measures to arrest the decline of species or ecosystems, before moving to the potential impact of the *CITES* regime.

UNCLOS provides coastal states with the foremost responsibility to utilise and manage marine species within 200 nautical miles from their coast (exclusive economic zones ('EEZs')).[33] Yet where marine species straddle these zones or swim through to the high seas, the right to fish is not exclusive to any one

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26 In international relations scholarship, Stephen Krasner has defined regimes as 'sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations': Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in Stephen D Krasner (ed) *International Regimes* (1983) 1, 3. See also Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Cornell University Press, 1989). Other definitions have widened the term to include institutions: see, eg, Steven R Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *American Journal of International Law* 475, 485.

27 See, eg, Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of "Self-Contained Regimes": International Law and the WTO' (2006) 16 *European Journal of International Law* 857.

28 See, eg, efforts to restrain fisheries subsidies, which are discussed in Margaret A Young, 'Fragmentation or Interaction: the WTO, Fisheries Subsidies, and International Law' (2009) 8 *World Trade Review* 477.

29 The relevance of the WTO regime, whose growing impacts on endangered marine species such as turtles was demonstrated most famously in the *Shrimp/Turtle* cases (see Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) DSR 1998:VII, 2755 and WTO Doc WT/DS58/AB/RW (21 December 2001) DSR 2001:XIII, 6481) is considered elsewhere. See generally Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, forthcoming, 2011).

30 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 9 (entered into force 11 December 2001) ('*Fish Stocks Agreement*').

31 Signed 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) ('*CMS*'). For parties, see United Nations Environment Programme, *Parties to the Convention on the Conservation of Migratory Species of Wild Animals and Its Agreements* (10 October 2010) Convention on Migratory Species <http://www.cms.int/about/Partylist_eng.pdf>.

32 Opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*CBD*').

33 See *UNCLOS* arts 55–75, especially art 57. See generally William Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Oxford University Press, 1994).

state.[34] The *Fish Stocks Agreement* aims to enhance *UNCLOS* provisions relating to conservation and management of the high seas by obliging state parties to adopt necessary conservation and management measures.[35] Such measures are usually implemented through Regional Fisheries Management Organisations ('RFMOs').[36] Unfortunately, the *Fish Stocks Agreement*'s laudable goals are hampered by weak implementation by states and RFMOs.[37] This situation is made worse when vessels assume the nationality of non-complying states by flying 'flags of convenience'.[38]

Countries meeting at the FAO have sought to address endemic problems with compliance. The FAO is made up of several governing bodies including an influential Committee on Fisheries ('COFI').[39] The FAO *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*[40] and the *Code of Conduct for Responsible Fisheries*[41] emphasise responsible fishing. In addition, 'International Plans of Actions' ('IPOAs') provide clear guidelines for specific species and issues.[42]

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34 This leads to the scenario of tragedy of the commons, as most famously described by Hardin, where multiple users vie for access and face disincentives in attempts to adopt conservation measures (because such measures might benefit competitors that remain outside any regime): Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

35 *Fish Stocks Agreement* art 5.

36 Species-specific RFMOs such as the International Commission for the Conservation of Atlantic Tunas ('ICCAT') have a major role in the management of commercially exploited marine species, but are not considered separately in the current article. See generally M J Peterson, 'International Fisheries Management' in Peter Haas, Robert Keohane and Marc Levy (eds) *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press, 1993) 249 and Stuart Kaye, *International Fisheries Management* (Kluwer Law, 2001).

37 See generally Tore Henriksen, Geir Hønneland and Are Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Martinus Nijhoff, 2006).

38 This describes the situation when companies, mainly from the European Union and Taiwan, register their vessels with increasingly lax jurisdictions, such as Belize: see generally Matthew Gianni and Walt Simpson, 'The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing' (Independent report funded by Australian Government Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation and WWF International, October 2005).

39 There are 191 members of the FAO: FAO, *FAO Membership* (2010) <http://www.fao.org/unfao/govbodies/membernations3_en.asp>. FAO Members can apply to participate in COFI, which currently numbers 137 participants: see FAO, *Committee on Fisheries* (2010) <http://www.fao.org/fishery/about/cofi/en>. In 1986, COFI established a Sub-Committee on Fish Trade ('COFI-FT'): see FAO, *COFI Subcommittee on Fish Trade* (2010) Fisheries and Agriculture Department <http://www.fao.org/fishery/about/cofi/trade/en>.

40 Opened for signature 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003) ('*Compliance Agreement*'). The *Compliance Agreement* entered into force after its 25th acceptance: see art 11. Contracting parties include the European Community, Argentina, Benin, Canada, Cyprus, Georgia, Japan, Madagascar, Myanmar, Namibia, Norway, Seychelles, Sweden, Tanzania, US, Uruguay and Australia.

41 FAO, *Code of Conduct for Responsible Fisheries* (2005) ('*FAO Code of Conduct*').

42 See FAO, 'International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries' ('IPOA — Seabirds (1999)') and FAO, 'International Plan of Action for the conservation and management of sharks' ('IPOA — Sharks (1999)'); FAO, 'International Plan of Action for the Management of Fishing Capacity' ('IPOA — Capacity (1999)'); FAO, 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2001) ('IPOA — IUU Fishing').

The FAO IPOA — Sharks (1999), for example, provides a framework for shark conservation and management.[43] Yet it does not provide sanctions or incentives for states to implement its recommended measures, and there has been a lack of progress in the development by states of national plans to implement the IPOA.[44] In general, the FAO's attempts to improve fisheries management suffer from weak implementation, and reform has begun to focus on measures that might be taken by port states against non-complying fishing nations.[45]

The *CMS* provides for voluntary measures by 'range' states that are part of a route of listed migratory marine species. Unlike *CITES*, it does not seek to restrain or regulate international trade. Instead, the *CMS* concentrates on the taking of migratory species by the range states, and imposes obligations on these states to protect or restore habitat for certain species. For example, there are a number of shark species listed in the *CMS* Appendix II,[46] and participating states are expected to implement a non-binding agreement to conserve and manage migratory sharks that swim through their waters.[47] Similarly, the *CBD* seeks to protect marine biodiversity resources,[48] which it does by obliging coastal states to protect ecosystems and natural habitats in areas of national jurisdiction.[49]

Increasingly, states are seeking to add to these conservation and management mechanisms by restricting the trade in endangered marine species under the auspices of the *CITES* regime, as demonstrated by the recent proposal to include bluefin tuna on the *CITES* appendices. With a coverage of 175 parties, the *CITES* membership is slightly smaller than the FAO's 191 members, although it dwarfs any one RFMO.[50]

The *CITES* regime regularises the trade in certain species through a licensing system that authorises their import, export, re-export and 'introduction from the

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43 Ibid.

44 See also Holly Edwards, 'When Predators Become Prey: The Need for International Shark Conservation' (2007) 12 *Ocean and Coastal Law Journal* 305, 308, 323–4.

45 The new *Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, opened for signature 22 November 2009 (not yet in force) was adopted by the FAO in 2009 but has not yet entered into force. It is expected to have a major role in addressing the depletion of endangered marine species, especially through IUU fishing. It is not considered further in the present article.

46 *CMS* art IV states that Appendix II covers migratory species which have an unfavourable conservation status, or which have a conservation status 'which would significantly benefit from the international co-operation that could be achieved by an international agreement'.

47 See Third Meeting on International Cooperation on Migratory Sharks. Under the *Convention on Migratory Species*, 8–12 February 2010, Manila, Philippines (Signature by The Philippines, Senegal, Togo, USA, Republic of Congo, Costa Rica, Ghana, Guinea, Liberia and Palau): CMS, *Meeting on International Cooperation on Migratory Sharks under the Convention on Migratory Species* (2010) <www.cms.int/bodies/meetings/regional/sharks/sharks_meetings.htm>.

48 See *CBD* art 1: 'the conservation of biological diversity [including from all marine sources and aquatic ecosystems], the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources'. The incorporation of marine sources and aquatic ecosystems into the definition of biological diversity is found in art 2. See also *CBD*, 'Decision on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity of the Convention on Biological Diversity', A/51/312, annex II, decision II/10 ('Jakarta Mandate on Marine and Coastal Biodiversity').

49 The areas outside national jurisdiction are less certain: see Christopher C Joyner, 'Biodiversity in the Marine Environment: Resource Implications for the Law of the Sea' (1995) 28 *Vanderbilt Journal of Transnational Law* 635.

50 *CITES*, *List of Contracting Parties* (2010) <http://www.cites.org/eng/disc/parties/index.shtml>. For FAO membership, see above n 39.

sea'. Species threatened with extinction are listed in Appendix I and their trade is only permitted in exceptional circumstances. Appendix II contains species that may become threatened with extinction unless trade is subject to strict regulation. To export these species, exporting states must first obtain advice from their national scientific authorities that such export will not prove detrimental to the survival of the species. Exporting states' management authorities must be satisfied that the specimen was not obtained illegally, and that importing states have valid import permits.[51] Appendix III contains species that are subject to domestic protections because countries have sought assistance from other *CITES* parties to control external trade.

CITES Appendix II, in particular, has potential to enhance fisheries sustainability for a wide range of species. Commercial trade in Appendix II species is only permitted if such trade is not detrimental to the wild population. The requirement that management authorities produce 'non-detriment' certificates in order to trade in listed species is potentially useful in combating IUU fishing.[52] The ongoing review of significant trade of vulnerable Appendix II species by the *CITES* Animal Committee, as was done for the queen conch, is valuable for monitoring threats to marine species.[53]

The role of the *CITES* regime in addressing problems of fish stock sustainability was foreshadowed by *CITES* parties in 1994 when the ninth Conference of the Parties ('COP') recognised the conservation threat that international trade poses to sharks.[54] In the 12th COP in 2002, parties adopted proposals to restrict trade in several commercially-exploited marine species.[55] The Philippines and India's proposal to list the whale shark and the UK's proposal to list the basking shark were adopted by the *CITES* parties amidst vigorous opposition; Indonesia, Iceland, Japan, Korea and Norway made subsequent reservations to these Appendix II listings. The whale shark listing was particularly significant because the two countries that proposed it — India and the Philippines — are, together with Taiwan, the significant sites for the catching, landing or trading of the species.[56] The countries may well have decided to seek *CITES* listing due to the significant ecotourism opportunities in their territory for whale shark viewing.[57] The meeting also provided that the *CITES* Animals Committee would have involvement in reviewing the FAO's

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51 *CITES* art IV.

52 See, eg, WWF, TRAFFIC, IUCN, 'Regulating International Trade in Commercial Marine Fisheries Products' (2002) 4.

53 The reviews were instituted due to concern about a lack of implementation of *CITES* management measures such as population assessments: see *CITES* Resolution Conf 12.8 (Rev COP13). On queen conch, see *CITES* Doc AC19/WG3/Doc.1(2003) 35.

54 *CITES* Resolution Conf 9.17.

55 See generally Chris Wold, 'Natural Resource Management and Conservation: Trade in Endangered Species' (2002) 13 *Yearbook of International Environmental Law* 389, 646–7.

56 Stefania Vannuccini, *Shark Utilization, Marketing and Trade* (Fisheries Technical Paper No 389, FAO, 1999) Appendix II: Commercially Important Shark Species by Country (by Sei Poh Chen).

57 For comments on the Philippines's conflicting interests in whale shark meat and eco-tourism, see Wold, above n 55, 393.

IPOA on Sharks, and parties agreed to list all species of seahorses, which attracted similar levels of controversy.[58]

At the *CITES* COP in 2004, the Irrawaddy dolphin was transferred from Appendix II to Appendix I[59] and the great white shark was added to Appendix II.[60] Amongst multiple proposals to expand *CITES*'s coverage of marine species at the fourteenth COP in 2007,[61] the European eel was added to Appendix II. The bluefin tuna was suggested for listing at the 2010 COP, which the European Commission amongst others supported,[62] but the proposal was rejected after strong opposition from Japan and other countries.[63]

B *Opposition to the Role of* CITES

In response to the growing interest in *CITES* protections for marine species, some countries have expressed vigorous opposition. They have directed this opposition to *CITES*'s mandate, expertise, alleged 'bias' and the risk of conflicting rules and procedures in fisheries management, as detailed in this section.

1 *Mandate*

One set of concerns focuses on alleged uncertainties surrounding the legal applicability of *CITES* with respect to marine species. Concern about *CITES*'s mandate has focused on alleged uncertainties surrounding the express protection for marine species in the *CITES* text. *CITES* allows parties to restrict the trade in any species provided that the listings are agreed by the requisite majority of parties voting at the COP.[64] 'Trade' is defined as the 'export, re-export, import and introduction from the sea'.[65] The phrase 'introduction from the sea' is

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58 See generally Wold, above n 55, 393–4. Subsequent reservations to the seahorses listings were entered into by Indonesia, Japan, Norway and South Korea.

59 *CITES*, *Notification to the Parties: Amendments to the Appendices I and II of the Convention*, Notification No 2004/073 (19 November 2004) 3 <www.cites.org/eng/notif/2004/073.pdf> (*Orcaella brevirostris*). Japan, Norway, and Gabon opposed this proposal. Japan entered a reservation to the listing.

60 Ibid 4 (*carcharodon carcharias*). The listing of the great white shark, which already appeared in Appendix III, was proposed by Australia and Madagascar. Palau entered a reservation in 2004 and Iceland, Japan and Norway entered a reservation in 2005.

61 Proposals included extending *CITES* coverage to two other sharks, and certain species of coral, cardinelfish, sawfish and lobster: *CITES*, 'CITES Conference to Consider New Trade Rules for Marine, Timber and Other Wildlife Species' (Press Release, May 2007) <http://www.cites.org/eng/news/press/2007/0705_presskit.shtml>.

62 See 'EC Backs Proposed Bluefin Tuna CITES Addition', *Bridges Trade BioRes* (Geneva, Switzerland), 18 September 2009, 4; 'Bluefin Tuna Ban Receives Conditional Support from France', *Bridges Trade BioRes* (Geneva, Switzerland), 5 February 2010. Sweden and Kenya both sought unsuccessfully to list the Atlantic bluefin tuna on *CITES* in 1992 and 1994. See Erik Franckx, 'The Protection of Biodiversity and Fisheries Management: Issues Raised by the Relationship between CITES and LOSC' in David Freestone, Richard Barnes and David Ong (eds) *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 210, 216.

63 'CITES Member Countries Strike Down Bluefin Tuna Ban', *Bridges Trade BioRes* (Geneva, Switzerland), 19 March 2010.

64 *CITES* art XV.

65 Ibid art I(c).

further defined as 'transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State'.[66]

CITES requires that countries that introduce from the sea specimens of species listed in Appendices I and II must verify that the introduction will not be detrimental to the survival of the species involved.[67]

The inclusion of marine species in *CITES* has been the subject of considerable controversy dating from its original inception. During the original negotiations leading to *CITES*, Japan proposed the deletion of all references to 'introduction from the sea',[68] apparently due to concerns that whaling would become subject to *CITES* protections rather than its preferred forum, the *International Convention for the Regulation of Whaling*.[69] Australia, by way of compromise, proposed the inclusion of a clause to give deference to existing agreements that afforded protection to marine species.[70]

Although the parties to *CITES* agreed that it should extend protection to threatened marine species, the parties were unsure about how to conceptualise the way listed marine species entered international trade given that negotiations about sovereign coastal boundaries were ongoing. An EEZ of 200 miles was not finalised until the third Conference on the Law of the Sea was completed in 1982, and *CITES* expressly stated that it was without prejudice to these negotiations.[71] In 1979, the *CITES* COP adopted a resolution that stated that the jurisdiction with respect to marine resources in maritime areas adjacent to the coast of *CITES* parties 'is not uniform in extent, varies in nature and has not yet been agreed internationally'.[72] Participating states remained uncertain about whether 'introduction' occurred when a fishing vessel took a fish specimen on board (so that the flag state was the state of introduction) or whether introduction occurred when the fish was landed in a port. The practice of processing fish on board added to this complexity.[73] These concerns led to the 2002 recommendation of the Sub-Committee on Fish Trade that FAO Members adopt a work plan to investigate possible problems.[74]

In 2007, *CITES* parties sought to resolve this complexity by agreeing on a resolution affirming the applicability of *UNCLOS* provisions determining jurisdiction of marine areas.[75] The *CITES* reference to 'the marine environment not under the jurisdiction of any State' was agreed to mean 'marine areas beyond

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66 Ibid art I(e).

67 Ibid arts III(5), IV(6), IV(7).

68 *CITES*, *travaux preparatoires*, Summary Record — Tenth Plenary Session, 20 February 1973 *CITES* Doc SR/10 (Final) (5 March 1973) 3, cited in Franckx, above n 62, 224–5.

69 Opened for signature 2 December 1946, 161 UNTS 74 (entered into force 10 November 1948). See also the statement by the Delegate of Japan on 'Introduction from the Sea' (Doc PR/11, 21 February 1973) 2–3, cited in Franckx, above n 62, 224.

70 *CITES* arts XIV(4), XIV(5).

71 Ibid art XIV(6).

72 *CITES* Resolution Conf 2.8(1979) (now included in Conf 11.4 (Rev CoP12).)

73 FAO, *FAO Fisheries Report No 746: Report of the Expert Consultation on Legal Issues Related to CITES and Commercially-Exploited Aquatic Species* (FAO, 2004) ('*FAO Expert Consultation on Legal Issues*'), [18].

74 FAO, *Report No 673: Report of the Eighth Session of the Sub-Committee on Fish Trade* (FAO, 2002) [22], Appendix F. See also Franckx, above n 62.

75 *Introduction from the Sea*, *CITES* Conference of the Parties to CITES, 14th mtg, *CITES* Doc Resolution Conf 14.6 (3–15 June 2007).

the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in [*UNCLOS*]'.[76] On this basis, *CITES* regulation of trade extends to listed marine species that are 'introduced' into a state from a national vessel fishing in the high seas. Read together with the general definition of trade, *CITES* provisions thus apply to the introduction for *domestic* consumption of species from the high seas, in addition to the general import, re-export and import of *all* listed marine species (whether taken from within the EEZ or the high seas).

Given this definition, *CITES* will apply to both the international trade in fish and the fishing for domestic consumption from the high seas. It will not generally be used, however, for species that are harvested within a state's EEZ and consumed within that state; somewhat paradoxically, if there is no 'market' for the fish beyond this domestic consumption, the species may become over-fished with no available *CITES* protection.

Notwithstanding apparent agreement over the synergies in maritime jurisdictional provisions of *CITES* and *UNCLOS*, controversy about *CITES*'s role in fisheries has remained. States opposing the resolution in 2007 pointed out that *UNCLOS* did not enjoy universal jurisdiction and claimed that it represented a 'creeping jurisdiction' or 'sovereignization' of the sea.[77] They were apparently unhappy about the fact that the 'enclosure' of the EEZ in *UNCLOS* was being replicated by *CITES* — presumably giving an advantage to coastal states whose vessels could fish for listed *CITES* species within their EEZ and, provided they did not export the species, escape the *CITES* requirements. As such, the reconciliation of the *CITES* regime and the *UNCLOS* EEZ regime through a conference resolution agreed by *CITES* parties was unfavourable for some, and demonstrates the ongoing political sensitivities of *CITES*'s listings of marine species.

2 *Expertise and Institutional 'Bias'*

Opposition to the role of the *CITES* regime in marine issues has also pointed to its lack of expertise in fisheries management. The concerns have focused on alleged difficulties in listing marine species, as compared to land-based species. Information and understanding about the threat to marine species is important not only in decisions to add a particular marine species to one of the appendices, but in non-detriment findings and other assessments on viability.

The *CITES* COP is aided in its work by a number of committees that provide scientific and technical expertise. The permanent Standing Committee reports to the COP[78] and coexists as the senior committee to the Animals Committee, Plants Committee and Nomenclature Committee. Its Chair is elected from among the regional members.[79] Although the Animals Committee has expertise in

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76 Ibid.

77 See 'Interpretation and Implementation of the Convention: Trade Control: Introduction from the Sea' (15 August 2006) *CITES* Standing Committee, 54th mtg, *CITES* SC54 Doc 19 (2–6 October 2006) 4.

78 *CITES* Resolution Conf 11.1, 'Establishment of Committees', Conference of the Parties to *CITES*, 11th mtg (10–20 April 2000) (Rev COP14).

79 Ibid.

biology, its experience in marine matters has been minimal.[80] In addition, it is difficult for *CITES* parties and the committees to access information about marine species, especially for migratory species and species on the high seas, making decisions about proposals for listing and compliance measures very difficult.[81] This lack of information hampers the assessment of viability of trade for Appendix II species, which as described above is conditional on the production of a 'non-detriment' finding. *CITES* relies on states to provide non-detriment findings, yet the relevant national scientific authorities are often under-resourced or even non-existent.[82]

Apart from concerns about expertise, states have raised concerns that *CITES* is institutionally biased against the sustainable utilisation of fisheries. These can be grouped broadly into two complaints with the *CITES* regime: first, some countries make allegations about a structural bias against science; secondly, some countries make claims about a structural bias against economic development. The latter group of complaints focuses particularly on an alleged bias against 'utilisation' of marine species and consequent insensitivities towards the needs of developing countries.

The first set of concerns relates to *CITES*'s use of science. Some states have argued within the FAO that the listing of species in the Appendices is not sufficiently rigorous. The listing of species in the Appendices is conducted according to particular listing criteria.[83] These criteria include scientific methods to assess population levels for allegedly threatened species. Within the FAO, state members have expressed concern that these methods do not adequately account for the natural fluctuations of fish stocks or the requirement in *UNCLOS* for the use of the best scientific advice.[84] A related concern is that the process of transferring species within the Appendices is too onerous. *CITES* parties can vote to transfer species from Appendix I to Appendix II ('down-listing') and remove species from the appendices ('deletion') in circumstances when species numbers have recovered, but must exercise precaution in cases of scientific uncertainty.[85] Within the FAO, some state members have expressed concern that this approach will make it very difficult to down-list commercially exploited marine species.[86]

The concerns about science appear to demonstrate a direct conflict between the rationalities of science and the principle of precaution. This conflict is apparent in many examples of regime interaction, such as interaction between the

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80 Laura Little and Marcos A Orellana, 'Can CITES Play a Role in Solving the Problems of IUU Fishing? The Trouble with Patagonian Toothfish' (2004) 16 *Colorado Journal of International Environmental Law and Policy* 21, 77.

81 Ibid.

82 James B Murphy, 'Alternative Approaches to the *CITES* "Non-Detriment" Finding for Appendix II Species' (2006) 36 *Environmental Law* 531, 533.

83 *CITES* Resolution Conf 9.24 (Rev COP14), 'Criteria for Amendment of Appendices I and II', COP9 (7–18 November 1994), revised at COP14 (3–15 June 2007) ('*CITES* listing criteria (2007)').

84 See, eg, FAO, *Fisheries Report No 667: Second Technical Consultation on the Suitability of the CITES Criteria for Listing Commercially-Exploited Aquatic Species* (FAO, 2001).

85 *CITES* art XV; *CITES* listing criteria, above n 83, annex 4.

86 *FAO Expert Consultation on Legal Issues*, above n 73, [31].

WTO and environmental law.[87] There is a danger, however, that in conflating concerns about the use of science into conflicts between regimes, the complexities within regimes themselves are ignored. Within the regime of the law of the sea, for example, the precautionary approach is endorsed in the *Fish Stocks Agreement*[88] and the *FAO Code of Conduct*.[89] In addition, fisheries laws and institutions recognise the difficulties of producing and interpreting scientific data. For example, the FAO's role in providing information and recommending research with respect to fisheries and conservation is dependent on the provision of information by states and RFMOs.[90] Yet, while member states have obligations to report fisheries statistics under the *FAO Constitution*,[91] the FAO acknowledges the disincentives for fishers to report on sensitive commercial information about the location and numbers of fish.[92] These examples suggest that the precautionary approach is often followed in the law of the sea. As such, the suggestion that *CITES* is inappropriate because it applies a precautionary approach is incorrect.

The second set of concerns that has been expressed within the FAO is that the *CITES* regime is institutionally biased against the concept of sustainable utilisation in favour of its primary objective of preventing a species from becoming endangered.[93] This implies that in listing a species on Appendix II, *CITES*'s conservation objectives are insufficiently addressed to socio-economic factors. This concern has been framed, in particular, in the context of the employment, income and food security needs of developing countries, which are alleged by some to be disproportionately affected by a *CITES* listing.[94]

The presentation of concerns about economic biases as a conflict between institutions misstates the issue of resource utilisation within both *CITES* and the fisheries regimes. Within the *CITES* regime, for example, the issue of 'sustainable utilization' has been debated for many years. Parties' growing awareness of the lack of resources for conservation within developing countries led to a move away from an ethos of strict preservation to one of sustainable

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87 For example, the Biosafety Protocol to the *CBD* enshrines a precautionary approach in order that states importing genetically modified products exercise precaution in the face of scientific uncertainty, yet the application of the precautionary principle in the WTO is far from certain: see, eg, Margaret A Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case' (2007) 56 *International and Comparative Law Quarterly* 907, 915.

88 *Fish Stocks Agreement* art 6.

89 *FAO Code of Conduct* art 6.5.

90 The responsibilities of states and RFMOs for collecting and exchanging data for stock assessments are set out in: the *Fish Stocks Agreement* art 12; *FAO Code of Conduct* art 6.4; *Compliance Agreement*.

91 *FAO Constitution* art XI.

92 FAO, *Strategy for Improving Information on Status and Trends of Capture Fisheries* (FAO, 2003), approved by consensus at COFI on 28 February 2003. See also FAO, *The State of World Fisheries and Aquaculture* (FAO, 2002) 61, which states that 'deliberate misreporting or non-reporting by legal and illegal fishers and other participants (processors, traders) is cited by most managers as a key problem'.

93 See *FAO Expert Consultation on Legal Issues*, above n 73, [25].

94 FAO, *Report No 673*, above n 74, [16]; FAO, *FAO Fisheries Report No 741: Report of the Expert Consultation on Implementation Issues Associated with Listing Commercially-Exploited Aquatic Species on CITES Appendices* (FAO, 2004) [79]–[80] ('*FAO Expert Consultation on Implementation*').

utilisation. Revisions to the *CITES* listing criteria reflect this change,[95] and the tension between preservation and utilisation continues to inform proposals for listing and lobbying between states. In the law of the sea, the notion of 'sustainable utilization' is also not uncontested. For example, there is increasing recognition of an ecosystem approach to utilisation in such instruments as the *FAO Code of Conduct*.[96] This approach recognises that the allocation of 'maximum sustainable yields' for different species may still lead to degradation if the rest of the ecosystem is insufficiently protected. The ecosystem approach is adopted by the *CBD*.[97] As such, the suggestion that there is a conflict between the norms of 'utilisation' and 'conservation' in the meeting of fisheries and environmental regimes is an oversimplification.

It is also a misstatement to suggest that the law of the sea and *CITES* are in conflict due to their treatment of the needs of developing countries. *UNCLOS*, the *FAO Code of Conduct*, the *CBD* and *CITES* all formally endorse the need for special attention to the interests of developing countries.[98] The suggestion that the needs of developing countries are insufficiently met in *CITES* vis-à-vis fisheries regimes also fails to acknowledge the complexity of interests of developing countries. Developing country interests are plural and complex. While it is true that the fisheries sector is of major economic importance to developing countries,[99] such interests are not uniformly directed towards resource exploitation and trade. For example, India and the Philippines both proposed to list the whale shark under *CITES*, reportedly due to national interests in eco-tourism.[100]

It may be that some developing countries will indeed wish to avoid the listing of marine species, either because they have fishing industries that exploit the species or because they wish to provide lucrative licences to distant water fishing vessels through access agreements. Other developing countries, however, will

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95 *CITES* listing criteria, above n 83. Cooney discusses how initial prohibitions on the trade of such species as elephants had counterproductive effects in poor areas of developing countries because there were minimal incentives for local communities to protect species that could not be legally traded: Rosie Cooney '*CITES* and the *CBD*: Tensions and Synergies' (2001) 10 *Review of European Community and International Environmental Law* 259, 265–6; Timothy Swanson, 'The Evolving Trade Mechanisms in *CITES*' (1992) 1 *Review of European Community and International Environmental Law* 57, which argues that *CITES* failed to recognise that habitat loss and population pressures were the main factors in species extinction.

96 *FAO Code of Conduct* art 6.2; FAO Conference, *Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, 31st sess, FAO Doc C 2001/INF/25 Appendix I (13 November 2001); *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (26 August – 4 September 2002) 23 [30(d)]; Kaye, above n 36, 267–86.

97 *CBD* art 2; *CBD*, COP5 Decision, 'Ecosystem Approach', Nairobi, 15–26 May 2000 (Decision V/6); *CBD*, COP7 Decision, 'Ecosystem Approach', Kuala Lumpur, 9–20 February 2004 (Decision VII/11).

98 See, eg, *UNCLOS* Preamble, art 203; *Fish Stocks Agreement* Part VII (arts 25, 26 and 27); *FAO Code of Conduct* art 5.2; *CBD* Preamble, art 1. For approach within *CITES*, see above n 95.

99 FAO, *The State of World Fisheries and Aquaculture* (FAO, 2006) 44.

100 See Wold, above n 55, 393–4. Note also the 'global' nature of migratory fish resources, which contrast in practical terms with land-based species such as the elephants, whose listing on *CITES* was perceived by some as 'stealing opportunities' from African nations.

welcome listing under *CITES* but require technical and financial assistance for any resulting administrative burdens.

3 *Coherence in Fisheries Management*

A dominant theme in the complaints against *CITES*'s role is that there will be a lack of coherence in fisheries conservation and management, and the potential for conflicting rules and practices. For example, some FAO members that are coastal states have pointed to the possibility that their rights and obligations under *UNCLOS* will be different, and potentially abrogated, by a *CITES* listing of a species.[101]

Some states have pointed to conflicts between a *CITES* listing of marine species and alleged *UNCLOS* concepts of freedom of fishing in the high seas.[102] They argue that a conflict could occur where an Appendix I species could be lawfully harvested on the high seas but not allowed to be introduced into the port of a *CITES* Party.[103] A further concern has focused on the freedom within *UNCLOS* for coastal states to set allowable catch limits within their EEZ,[104] which some countries consider to be potentially restricted by a *CITES* listing under Appendix II.

These claims of conflict are overstated, at least in legal terms. For example, the claim that a *CITES* listing would abrogate an *UNCLOS*-sanctioned freedom to fish on the high seas fails to acknowledge that the freedom to fish is heavily qualified.[105] In addition, the concern of coastal states that their right to set allowable catch limits within their EEZ would be affected by an Appendix II listing is overblown given that *CITES* does not interfere with the coastal state's harvesting, for domestic consumption, of species within its own EEZ.[106]

The concerns reveal not just misunderstandings about *UNCLOS* freedoms, but also about trade freedoms. For example, experts consulted by the FAO considered that a potential conflict would arise if a *CITES* Party challenged a non-detriment finding made by other *CITES* parties and instituted stricter domestic measures that were inconsistent with the rights of coastal states to establish allowable catch limits within the EEZ.[107] This claim essentialises the *UNCLOS*, *CITES* and (implicitly) WTO regimes. The *UNCLOS* provision does not guarantee a right of coastal states to export. Moreover, rather than 'allowing' for stricter domestic trade measures, *CITES* merely preserves any existing right of states to adopt such measures.[108]

A further concern of FAO Members relates to the applicability of the *CITES* 'look-alike' clause to the fisheries context. When species are listed on Appendix

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101 *FAO Expert Consultation on Legal Issues*, above n 73.

102 Ibid [38].

103 Ibid.

104 *UNCLOS* arts 61, 297.

105 Ibid arts 116–19. This was also the conclusion of the *FAO Expert Consultation on Legal Issues*, above n 73.

106 *FAO Expert Consultation on Legal Issues*, above n 73, [34].

107 Ibid.

108 This right is also preserved by the WTO regime. See *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187, (entered into force 1 January 1948) art XX.

II of *CITES*, the *Convention* extends this listing to 'look-alike' species.[109] Listing of species that resemble the listed species is necessary for effectiveness and allows customs officials to check specimens without having to distinguish between closely resembling species. When all 32 species of seahorses were listed on Appendix II, for example, 26 were included under the look-alike provision.[110]

Some FAO Members have expressed concern that the application of the 'look-alike' clause will have negative impacts on the fishing industry and fishing communities, presumably because more species than necessary will be listed on this basis. They have also expressed concern that the regime will require large levels of monitoring and control.[111] A similar concern relates to the alleged incompatibility between the *CITES* regime and aquaculture. Aquaculture is a sector of growing economic importance in fisheries, and the query has been voiced within the FAO about whether *CITES* can cope with the distinction between wild and farmed fisheries.[112]

An additional concern has been raised by some countries about the listing of species in more than one appendix of *CITES* ('split-listing').[113] Split-listing aims to accommodate the fact that species may be threatened in one region but not another. For example, when the minke whale was added to the *CITES* Appendices, it was listed in Appendix I except for the population of West Greenland, which was listed in Appendix II. FAO Members have expressed concern that split-listing practices will require increased resources and will lead to the listing of some fish populations in Appendix II when they would otherwise not be included.[114]

The concerns about the *CITES* 'look-alike' clause and the 'split-listing' of species are based on overly rigid understandings of the *CITES* and FAO fisheries regimes. The practice of *CITES* in listing 'look-alike' species can adapt to the special situations of fisheries. Such adaptation is not new to the FAO, which is well-versed in the challenges of monitoring and controlling traded fish specimens. The FAO Sub-Committee on Fish Trade continues to consider initiatives such as traceability and labelling schemes. Indeed, when the FAO consulted experts in 2004 about *CITES* implementation issues, the experts noted that *CITES* and the FAO could collaborate on these initiatives as alternatives to the look-alike clause.[115] There is also sufficient flexibility with the *CITES* permit procedures to adequately accommodate fish stocks reared using aquaculture methods.[116] As such, the look-alike clause is not fundamentally inappropriate for fisheries but merely requires enhanced understanding of fisheries management methods.

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109 *CITES* art II(2)(b) states that Appendix II applies to 'other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control'. See also *CITES* listing criteria, above n 83, annex II(b).

110 *FAO Expert Consultation on Implementation*, above n 94, [50].

111 Ibid [49].

112 Ibid [85(9)].

113 *CITES* art I(a) allows species to be identified according to geographically separate populations.

114 *FAO Expert Consultation on Implementation*, above n 94, [61].

115 Ibid [85(6)].

116 Ibid [85(9)].

Moreover, the notion of 'split-listing' species between appendices is not unknown in fisheries management regimes. Addressing different degrees of endangerment for species according to different locations is a significant and ongoing challenge. Methods include the marking of fish stocks to identify and differentiate specimens.[117] Adapting these methods for the *CITES* licensing system may well require collaboration and additional resources, but it is not a basis for rejection if there are gains for fisheries conservation and management. The concerns raised about achieving a policy fit between the *CITES* and FAO fisheries management regimes thus point to questions about how the regimes can interact for the betterment of the conservation and management of endangered marine species.

C *From Normative Conflict to Regime Interaction*

My consideration of the concerns about *CITES*'s mandate, expertise and institutional bias suggests that the protection of endangered species gives rise to overlapping rather than conflicting obligations. This finding contrasts with other responses to the phenomenon of fragmentation of international law, which have concentrated in the main on the problem of conflicting norms. This section assesses the relevance of this question for endangered marine species before introducing the contextual inquiry into regime interaction between *CITES* and the FAO.

1 *Priority of Conflicting Norms*

The question of conflicting norms was considered by the ILC, which reported in 2006 on 'The Fragmentation and Diversification of International Law'.[118] The ILC recommended a 'toolbox' of principles to assist a wide range of situations where norms are found to conflict in international law. These included the principle of *lex posterior derogat legi priori*, which gives primacy to a more recent treaty over an earlier one,[119] and the principle of *lex specialis derogat legi generali*, which is based on the primacy of the specific over the general.[120] The harmonising effect of treaty interpretation[121] and the role of special treaty clauses[122] was also emphasised.

There is an identified potential for conflicting norms between the regimes relevant for endangered marine species. For example, Franckx analyses the potential listing of commercially exploited marine species on *CITES* in terms of allocating priority between regimes. For him, the central issue is the 'application

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117 Ibid [59].

118 Report of the ILC Study Group, UN Doc A/CN.4/L.702.

119 See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 30 ('*VCLT*'). See Report of the ILC Study Group, UN Doc A/CN.4/L.702, 17–19 conclusions (24)–(30).

120 Report of the ILC Study Group, UN Doc A/CN.4/L.702, 8–9 conclusion (5), citing, in particular, *The Mavrommatis Palestine Concessions (Greece v United Kingdom) (Judgment)* [1924].
PCIJ (ser A) No 2, 31.

121 *VCLT* art 31(3)(c): see Report of the ILC Study Group, UN Doc A/CN.4/L.702, 13–17 conclusions (17)–(23).

122 See, eg, *UN Charter* art 103; see Report of the ILC Study Group, UN Doc A/CN.4/L.702, 22 conclusion (36).

of successive treaties relating to the same subject-matter in general international law'.[123] His point of reference is a marine species that is covered by two or more instruments, and he gives the example of Atlantic bluefin tuna on the high seas, the regulation of which is addressed in *UNCLOS*, the *Compliance Agreement*, the *Fish Stocks Agreement* and, potentially, *CITES*.[124]

The central question for Franckx is to assess the priority of *CITES* vis-à-vis the other instruments and ask which instruments should take precedence. In answering this question, Franckx endorses the steps of first looking to conflict clauses, then using treaty interpretation to determine priority and, if these steps are inconclusive, applying the *lex posterior* rule.[125] These steps are consistent with the ILC's toolbox for dealing with problems of fragmentation. Franckx notes that *CITES* predates many fisheries instruments, and applies the *lex posterior* rule and the conflict clauses in *UNCLOS*, *CITES*, the *Fish Stocks Agreement* and other instruments to determine the relationship between them. Rather than stating which treaty has priority, Franckx concludes by noting the difficulties of applying the conflict clauses in practice and stating that much will depend upon the intentions of the parties.[126]

Franckx's conclusions are unsurprising given the difficulties of applying principles to determine the precedence between conflicting treaties. The ILC Study Group itself was wary of the challenges of establishing the priority of norms from different regimes.[127] More importantly, however, his starting assumption should be tested. Franckx assumes that there is a conflict between the relevant treaty provisions with respect to the listing of marine species. As described above, however, the concerns about *CITES*'s role in fisheries management reflect concerns about institutional expertise and bias but do not demonstrate conflicting norms. His approach also varies from the presumption against conflict, which requires an assumption that norms are in harmony unless disproved by evidence of real conflict.[128] A presumption, whether *for* or *against* conflict, has consequences for continuity and change in international law.[129] Such presumptions therefore need to be dealt with openly, and with an awareness of the likely impact for dominant regimes within fisheries governance.

Instead of determining the priority of norms protecting endangered marine species, the more pressing concern is to ascertain how *CITES*, *UNCLOS*, the *Fish Stocks Agreement* and the FAO instruments coexist in an effective way. Indeed, Franckx acknowledges this when he concludes his analysis of the priority of norms in fisheries management by observing that increased

123 Franckx, above n 62, 216.

124 Ibid.

125 Ibid 228.

126 Ibid 231–2.

127 Note the presentiment of the ILC itself on establishing the priority of norms from different regimes: see Report of the ILC Study Group, UN Doc A/CN.4/L.702, 17 conclusion (25).

128 See C Wilfred Jenks, 'Conflict of Law-Making Treaties' (1953) 30 *British Year Book of International Law* 401, 427–9.

129 Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003) 242–4: warning of the limits of the presumption against conflict, because if one presumes an absence of conflict, one might be biased towards continuity and away from change.

cooperation by regimes is 'the most urgent and overarching need'.[130] This supports an analytical approach that investigates the interaction between the regimes, and particularly the relevant stakeholders of the FAO and *CITES*.

2 *An Institutional Perspective*

In offering its toolbox for resolving norm conflicts, the ILC acknowledged that it had excluded an analysis of institutions.[131] It recognised a need to focus on 'the notion and operation of "regimes"'.[132] The present article responds to this need by moving from a discussion of normative conflict in the protection of endangered marine species towards an analysis of institutional collaboration. This approach accords with research that draws upon empirical accounts of the culture and 'vocabularies' within regimes, which have demonstrated certain biases and preferences.[133] Studies that address the law-making power of international organisations also provide a useful perspective,[134] as does international relations scholarship that considers the role of 'epistemic communities' in building and bridging regimes.[135] Scholars have begun to consider the interaction of institutions within the environmental and fisheries fields,[136] and the coordination by treaty negotiators of 'regime complexes'.[137] This article extends this literature by analysing the cooperative relationships between relevant institutions and the impact of law in marine species protection.

The analytical approach of the present study concentrates on institutional collaboration, the role of law in such collaboration and the 'politics of regime definition'.[138] It seeks to incorporate the sensitivities and preferences of states, institutions and other actors involved in the jostling between regimes, and to avoid essentialising particular characterisations of the regimes themselves. This approach flows from my analysis of the opposition to *CITES*'s role in marine species, where an irresolvable determination of the 'correct' forum gave way to

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130 Franckx, above n 62, 232, paraphrasing Birnie and Boyle's analysis of *CITES* and land-based species in Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford University Press, 2nd ed, 2002) 634–5.

131 The ILC's mandate is noted at ILC Analytical Study, above n 5, 13.

132 Ibid 249.

133 Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; Oren Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart, 2004). See also Galit Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009) 103 *American Journal of International Law* 647.

134 José Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005).

135 Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1.

136 See, eg, Olav Schram Stokke (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford University Press, 2001); see also Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergies and Conflict among International and EU Policies* (MIT Press, 2006).

137 Kal Raustiala and David Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277; Robert Keohane and David Victor, 'The Regime Complex for Climate Change' (Discussion Paper No 10-33, Harvard Project on International Climate Agreements, Belfer Center for Science and International Affairs, January 2010) <http://belfercenter.ksg.harvard.edu/publication>.

138 The phrase is from Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 27.

questions of regime interaction.[139] For example, open and accessible interaction between regimes can address institutional bias, actual and perceived. In addition, enhancing expertise within the *CITES* regime can attend to the perceived problems in listing look-alike species, splitting species between appendices and listing farmed fish.

The *CITES* regime already envisages inter-regime collaboration with fisheries organisations. There is a duty for the *CITES* Secretariat to consult with *CITES* parties, the FAO and relevant RFMOs on proposals by *CITES* parties that are related to marine species.[140] This consultation is aimed at obtaining scientific data and 'ensuring coordination with any conservation measures enforced by such bodies'.[141] The *CITES* Secretariat is required to 'communicate the views expressed and data provided by these bodies and its own findings and recommendations' to the *CITES* parties before they vote on the proposals.[142] Within the FAO, the *FAO Code of Conduct* encourages states to cooperate in complying with relevant international agreements regulating the trade in endangered species.[143] Yet such collaboration has been fraught and stymied by states and other actors who have sought to maintain their existing fisheries practices and their preferred legal forums. This situation has played out in the negotiation of a single and highly contested instrument: the MOU between the FAO and the *CITES* Secretariat.

III THE MEMORANDUM OF UNDERSTANDING BETWEEN *CITES* AND THE FAO

Proposals to formalise the interaction between the *CITES* regime and fisheries regimes have concentrated on an institutional agreement in the form of a memorandum of understanding between the *CITES* Secretariat and the FAO. This Part first describes the growing trend of MOUs between international organisations and draws on principles of international institutional law to assess their legal status. Next, it investigates how the MOU was negotiated. While the MOU is an apparent attempt to strengthen institutional collaboration, other strategic aims, such as the allocation of primacy of one regime over another in fisheries matters, apparently animated drafting proposals. This justifies a detailed examination of the evolution of the MOU. In the light of the struggle for legal primacy between regimes, the Part then examines the substantive and procedural constraints on the MOU. Finally, it considers the national policy coordination that allowed states to agree on a negotiating position that reconciled interests between disparate domestic agencies. Such coordination was important for finalising the MOU, but is also integral to wider interaction between the FAO fisheries and *CITES* regimes.

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139 This finding resonates with the development of new rules on fisheries subsidies at the WTO, where opposition to the role of the WTO gave way to inter-regime learning and the entrenchment of ongoing interaction between the WTO, FAO and other organisations and participants: see Young, 'Fragmentation or Interaction', above n 28.

140 *CITES* art XV(2)(b).

141 Ibid.

142 Ibid.

143 *FAO Code of Conduct* art 11.2.9.

A *Legal Status*

Agreements setting out means of cooperation and collaboration are increasingly used by intergovernmental organisations ('IGOs'). They are seen to be of particular value in ocean matters. The UN Consultative Process, which identifies areas where coordination and cooperation in ocean matters should be enhanced,[144] encourages organisations 'to conclude memorandums of understandings with a view to avoiding duplication of work and to designate focal points'.[145] MOUs between organisations are part of a wider corpus of agreements that involve IGOs, member states and non-member states.[146]

The capacity of IGOs to enter into MOUs is generally accepted,[147] although much depends on questions of legal personality, express or implied powers and the resulting character of the agreement itself. In contrast to the general view that an IGO must have international legal personality before entering into agreements with other organisations, some commentators have suggested MOUs are contracted without international legal personality.[148] Many IGOs have express powers to enter into international agreements, but for others the powers will be implied based on their functions and competences.[149] On this basis, MOUs between international organisations must be confined to whatever is necessary for the organisations to perform their functions, as expressed in their constitutions.[150]

The FAO has full legal status,[151] and its constituting documents expressly envisage that it will enter into relations with other international organisations.[152] Members have approved 'guiding lines' [sic] regarding relationship agreements between the FAO and IGOs,[153] which note the desirability of concluding such formal agreements. The guidelines contain criteria to be applied by the FAO for recognising the intergovernmental character of the partner IGO, which provide that the relevant IGO should be set up by a treaty between states, should be composed of members designated by governments and should receive income

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144 Established by the UN General Assembly in 1999: see *Results of the Review by the Commission on Sustainable Development of the Sectoral Theme of 'Oceans and Seas': International Coordination and Cooperation*, GA Res 54/33, UN GAOR, 54th sess, 62nd plen mtg, Agenda Item 40(c), UN Doc A/RES/54/33 (18 January 2000).

145 See *Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea*, UNGAOR, 63rd sess, Agenda Item 73(a), UN Doc A/63/174 (24 July 2008) [133].

146 See Henry Schermers and Niels Blokker, *International Institutional Law* (2003), 1114–17.

147 Ibid, and sources referred to therein.

148 Pieter Jan Kuijper, 'Some Institutional Issues Presently before the WTO' in Daniel Kennedy and James Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert E Hudec* (Cambridge University Press, 2002) 81, 108 (referring to agreements between the WTO Secretariat and other international secretariats).

149 On implied powers, see *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) ICJ Rep 174.

150 On other views, MOUs are not binding rules and are voluntary collaborations of a 'purely technical and financial' nature: Kuijper, above n 148, 108.

151 *FAO Constitution* art XVI(1).

152 Ibid art XIII(1). See also *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1986 (not yet in force). The FAO became a signatory to the agreement on 29 June 1987.

153 FAO, 'Part N — Guiding Lines regarding Agreements between FAO and IGOs' in FAO, *Basic Texts* (FAO, 2006 ed) vol II.

mainly, if not exclusively, from governments. The guidelines state that cooperative agreements should include methods of liaison and cooperation, such as information-sharing, reporting, a mutual right of agenda-setting and arrangements for reciprocal representation at meetings.[154]

The powers of the *CITES* Secretariat to enter into collaborative arrangements with other IGOs are less settled. The *CITES* treaty text authorises the Secretariat 'to arrange for and service meetings of the parties' and 'to perform any other function entrusted to it' by the parties.[155] By contrast to the FAO constitutive documents, and other MEAs such as the *CBD*,[156] the *CITES* treaty text does not make express reference to international personality. The COP is authorised to 'make such provision as may be necessary to enable the Secretariat to carry out its duties'.[157] To date, the COP has not made express reference to legal personality.[158] The *CITES* Secretariat operates under the assumption that it has international personality and the legal capacity to enter into MOUs,[159] and regularly enters into MOUs with other secretariats.[160]

If it is accepted that the *CITES* and FAO secretariats are empowered to enter into the MOU, the limitations of their express or implied powers should be noted because such limitations may constrain the substance of the MOU. There is a presumption that international organisations act within their powers,[161] but if the FAO and *CITES* secretariats were to conclude cooperative arrangements that exceeded their mandates, they would be acting ultra vires. With this constraint in mind, the following section examines the evolution of the MOU.

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154 Ibid [C].

155 *CITES* arts XII(2)(a), XII(2)(i).

156 *CBD* art 24(d).

157 *CITES* art XI(3)(a).

158 'Strategic and Administrative Matters: Legal Personality of the Convention and the Secretariat', *CITES* Standing Committee, 54th mtg, *CITES* SC54 Doc 8 (2–6 October 2006) [7]. This document contains a draft resolution recognising the independent legal personality of the *CITES* Secretariat.

159 Ibid [6].

160 See, eg, the memorandum of cooperation between the *CBD* and *CITES* secretariats referred to in *Cooperation and Synergy with the Convention on Biological Diversity*, Conference of the Parties to *CITES*, 10th mtg, *CITES* Resolution Conf 10.4 (Rev 14), (9–20 June 1997). See also Cooney, above n 95. Such practice is supported by an analysis of the COP-model: Robin Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623, 632–3, 655. See also Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd ed, 2003) 109.

161 *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 168 ('*UN Expenses*').

B *Evolution of the MOU*

There were seven drafts of the MOU agreed over the course of three years of meetings:

1 *CITES* Standing Committee Chair-led draft (2003);[162]
2 FAO COFI-led draft (2003) (also known as the Friends of the COFI-chair text);[163]
3 *CITES* draft (2004);[164]
4 FAO COFI-FT draft (2004) (also known as the Japan–US compromise text);[165]
5 FAO–*CITES* Secretariat negotiated draft (2004);[166]
6 *CITES* Standing Committee negotiated draft (2004) (also known as the Norway-Australia compromise text);[167] and
7 Final text (2006).[168]

The drafts reveal differing perspectives and strategies about *CITES*'s role in fisheries conservation and management, as described below.

1 *Proposals to Limit* CITES's *Role*

In February 2002, a meeting of the FAO's COFI-FT provided a forum for some states to express their concern about the impact of *CITES* on the areas of competence of the FAO and RFMOs. After discussing the increased inclusion of

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[162] *Strategic and Administrative Matters: Memoranda of Understanding*, *CITES* Standing Committee, 49th mtg, *CITES* SC49 Doc 6.3 (22–25 April 2003) ('*CITES* Standing Committee Chair-led draft (2003)').

[163] FAO Committee on Fisheries, Rome, 2003. Consensus was not reached on this text: see FAO, *Fisheries Report No 702: Report of the Twenty-Fifth Session of the Committee on Fisheries* (FAO, 2003) [48]. Reproduced at Appendix G of that Report ('FAO COFI-led draft (2003)').

[164] As finalised by the Chair of the *CITES* Standing Committee, *CITES*, January 2004 and circulated to Ninth FAO Sub-Committee on Fish Trade (copy on file with author).

[165] As endorsed by the Ninth Session of the FAO Sub-Committee on Fish Trade, Bremen, Germany, 10–14 February 2004 and reproduced in FAO, *Fisheries Report No 736*: *Report of the Ninth Session of the Sub-Committee on Fish Trade* (FAO, 2004) annex E ('FAO COFI-FT draft (2004)').

[166] *Strategic and Administrative Matters: Memorandum of Understanding with the Food and Agricultural Organization of the United Nations (FAO)*, *CITES* Standing Committee, 51st mtg, *CITES* SC51 Doc 8 (1 October 2004) annex ('FAO–*CITES* Secretariat negotiated draft (2004)').

[167] *Strategic and Administrative Matters: Cooperation with the Food and Agriculture Organisation of the United Nations*, *CITES* Standing Committee, 53rd mtg *CITES* SC53 Doc 10 (prepared by the Secretariat) (27 June – 1 July 2005) annex ('*CITES* Standing Committee negotiated draft (2004)').

[168] Agreed by *CITES* and FAO in September – October 2006. See *Strategic and Administrative Matters: Cooperation with the Food and Agriculture Organization of the United Nations*, *CITES* Standing Committee, 53rd *mtg CITES* SC53 Doc 10.1 (prepared by the Chair) (27 June – 1 July 2005) and FAO, *Fisheries Report No 807: Report of the Tenth Session of the Sub-Committee on Fish Trade* (FAO, 2006) Appendix F ('*FAO/CITES Memorandum of Understanding*').

marine species in the *CITES* appendices, the meeting noted its understanding of institutional competences in fisheries management:

> 18. Several countries reiterated their reservations about the role of CITES in relation to resources exploited by fisheries. The Sub-Committee held the view that FAO and the mandated regional fisheries management organizations (RFMOs) were the appropriate international bodies on fisheries and fisheries management. The Sub-Committee also underlined the importance of CITES Article 14 regarding the relationship between CITES and UNCLOS and its implementation agreement. The view was expressed that CITES should be seen as a complementary instrument in the protection of such resources, eg in cases where management regimes are not in place, and that a CITES listing should be limited to exceptional cases only and when all relevant bodies associated with the management of the species in question agreed that a listing would be advantageous. Some countries expressed support for the role of CITES in fisheries management, stating that it could not replace traditional fisheries management.[169]

This paragraph became important to drafts of the MOU, as I describe below, and as such its language warrants close attention. It affirms the role of the FAO and RFMOs in fisheries management. It then points to the *CITES* conflicts clause that recognises that *CITES* is without prejudice to the development of *UNCLOS* or present and future claims concerning the law of the sea.[170] The third sentence, beginning with the passive use of '[t]he view was expressed …', is the extreme position that FAO and RFMOs can overrule attempts to list marine species on *CITES*. The final sentence suggests that some members were not convinced of this extreme view.

The meeting resulted in a request for the Secretariats of FAO and *CITES* to coordinate the drafting of an MOU 'to facilitate dialogue and exchange of information', and urged the Secretariats to proceed in a manner so that the MOU could be considered and possibly approved at the 2003 meetings of the FAO Committee on Fisheries and the *CITES* Standing Committee.[171] The Sub-Committee recommended that the MOU describe a process by which FAO and *CITES* would coordinate scientific and technical advice on proposals to list commercially-exploited aquatic species.

In November 2002, the *CITES* COP met in Santiago, Chile and adopted proposals to list a number of commercially exploited marine species.[172] The US proposed that the MOU issue be considered by the COP,[173] and the *CITES* Secretariat sought direction on whether collaborative mechanisms with FAO should address both fish and timber sectors.[174] Japan proposed a resolution to progress the development of an MOU.[175] Under the heading of 'synergy and

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169 FAO, *Report No 673*, above n 74, [18].

170 *CITES* arts XIV(4), (6).

171 FAO, *Report No 673*, above n 74, Appendix F.

172 See above n 55 and accompanying text.

173 *Strategic and Administrative Matters: FAO Collaboration with CITES through a Memorandum of Understanding*, Conference of the Parties to *CITES*, 12th mtg, *CITES* COP12 Doc 16.2.2 (3–15 November 2002).

174 Ibid.

175 *Administrative Matters: Synergy and Cooperation CITES and FAO*, Conference of the Parties to *CITES*, 12th mtg, *CITES* COP12 Doc 16.2.1 (3–15 November 2002).

cooperation', this draft resolution proposed important changes to *CITES* competence, as demonstrated by excerpts from the draft resolution which:

> AFFIRMS that FAO and the mandated [RFMOs] are appropriate inter-governmental bodies responsible for fisheries and fisheries management;
>
> AGREES that, in cases where there is no responsible [RFMO] and where trade is having a significant negative impact on conservation, the listing of commercially-exploited fish species in the Appendices may temporarily serve a useful conservation purpose.[176]

The attempt to limit *CITES* role to marine areas without RFMOs, and even then for only temporary periods, was not adopted by the COP. Instead, a decision was made to direct the *CITES* Standing Committee to work with the FAO in the drafting of the MOU.[177] In addition, the *CITES* COP revised the *CITES* listing criteria, deleting its former reference to the competence of certain IGOs in marine species management and recalling instead the inter-agency consultation envisaged by *CITES* art XV.[178]

As the Standing Committee was not due to meet until after the next FAO forum in February 2003, the Chair of the Standing Committee instructed the Secretariat to develop, in consultation with him, a draft MOU ('*CITES* Standing Committee Chair-led draft').[179]

In its short preamble, this *CITES* Secretariat-led draft recognised 'that the aims and purposes of *CITES* and FAO are related and in conformity with each other and that strengthened cooperation between *CITES* and FAO would better ensure the achievement of those aims and purposes'.[180]

The draft identified (i) the need for a procedure for the scientific evaluation of proposals to list commercially-exploited aquatic species in the *CITES* Appendices; (ii) the need for capacity building for natural resource management; (iii) the need to identify technical and legal issues of common interest; (iv) the coordination of work through annual meetings and shared reporting; and (v) general provisions on termination and the maintenance of separate budgetary responsibility.

This *CITES* Secretariat-led draft was provided by a *CITES* representative to COFI at its meeting in Rome in February 2003. Instead of discussing the MOU in the Plenary session, COFI established a 'Friends of the COFI Chair Group'. After some members objected to the participation of the *CITES* Secretariat in the Group, representatives from the *CITES* Secretariat and all other IGOs and non-government organisations were expelled from its meetings.[181] After

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176 Ibid.

177 *Establishment of a Memorandum of Understanding between CITES and the Food and Agriculture Organization of the United Nations (FAO)*, Conference of the Parties to *CITES*, 12th mtg, *CITES* COP12 Decision 12.7 (3–15 November 2002).

178 See also *Interpretation and Implementation of the Convention: Criteria for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 12th mtg, *CITES* COP12 Doc 58 (3–15 November 2002) annex 3; *Interpretation and Implementation of the Convention: Criteria for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 13th mtg, *CITES* COP13 Doc 57 (2–14 October 2004).

179 *CITES* Standing Committee, above n 162.

180 Ibid.

181 *Summary Report*, *CITES* Standing Committee, 49th mtg, *CITES* Doc SC49 Summary Report (Rev 1) (22–25 April 2003) 3.

working separately from the Plenary for a number of days, the Group developed its own draft MOU, which differed substantially, both in substance and tone, from the *CITES* Secretariat-led draft.

The FAO COFI-led draft[182] contained a long preamble that recognised the 'primary role of sovereign states, FAO and regional fisheries management organisations in fisheries conservation and management' and noted that *CITES* could not replace traditional fisheries management. The COFI-led MOU draft then sought to narrow the jurisdiction of *CITES* in two ways. First, it expressed the view that *CITES* listing would only occur if agreement from relevant RFMOs had been obtained. Secondly, it provided that the *CITES* listing of commercially exploited aquatic resources should be limited to exceptional cases. Given there was no consensus between Group Members on this narrowing of *CITES*'s competences, these views were reproduced as square-bracketed text in both the preamble[183] and the draft articles.[184] The draft also included a preambular reference to the 'three medium-term strategic objectives for fisheries', none of which included *CITES* listing of endangered marine species.

When the COFI-led MOU draft was presented to the COFI plenary, some Members expressed further disagreement with its attempts to limit *CITES*'s competence.[185] The Committee agreed that an informal group should continue to work at the MOU 'at opportune times including at the Ninth Session of COFI-FT in 2004'.[186]

2 *Alternative Views*

In April 2003, the *CITES* Standing Committee met in Geneva. It considered the *CITES* Secretariat-led draft of the MOU described above, as well as a proposal by Japan to amend this draft.[187] Aiming to reach agreement on the text during the meeting, the Standing Committee established a working group which comprised Japan, Norway, Saint Lucia, the UK, the US, Australia, Chile, Egypt, the Secretariat and two NGOs.[188] This working group produced a draft but did not reach consensus on its contents.[189]

The Standing Committee considered further steps. Following a tight vote, it agreed that the *CITES* Secretariat-led MOU was the draft to work from. It decided that the Secretariat would invite comments from parties on this draft, make the comments available on the *CITES* website and that the Chair would

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182 FAO, *Fisheries Report 702*, Appendix G, above n 163.

183 Ibid (reproducing as square-bracketed text the view expressed within the Sub-Committee on Fish Trade (see above n 169 and accompanying text) that *CITES* listing 'should be limited to exceptional cases only').

184 Ibid draft art 6.

185 FAO, *Fisheries Report 702*, above n 163, [47] ('Some Members also expressed the view that FAO should produce a draft MOU containing a process for increased cooperation without policy pronouncements').

186 Ibid [48].

187 See *Proposal from Japan*, Informal document submitted to *CITES* Standing Committee, 49th meeting, *CITES* Doc SC49 Inf 3 (22–25 April 2003).

188 The two NGOs were the International Fund for Animal Welfare and the IWMC (formerly International Wildlife Management Consortium): see also below n 260 and accompanying text.

189 *CITES* Standing Committee, above n 181, [6.3], which stated that '[t]here were difficulties over semantics as well as fundamental principles'.

negotiate directly with the FAO and provide a resulting document to the next meeting of the Standing Committee for its consideration. An alternative proposal by Norway, who preferred that parties' comments on the draft MOU be provided to the Standing Committee to review before further involvement by the Chair, was not adopted.[190]

On the basis of this agreed process, the *CITES* Secretariat invited comments from the parties,[191] which were received up to June 2003 and posted on the website. The *CITES* Secretariat made some changes, although the result did not differ markedly from the original *CITES* Secretariat-led draft. On 5 January 2004, the Secretary-General of *CITES* wrote to the Director-General of FAO attaching the revised *CITES* draft ('*CITES* draft (2004)') for the consideration of FAO at the Sub-Committee on Fish Trade the following month.[192]

3 *Development of the FAO and CITES Drafts*

The FAO Sub-Committee on Fish Trade met in February 2004 in Bremen. Papers distributed to the parties included a copy of the COFI-led draft MOU on which consensus had not been reached at COFI, with square brackets around the contentious text. The revised *CITES* draft, which had been sent on 5 January, was not included in the conference papers,[193] a somewhat surprising omission given that other documents finalised at the end of January were included as informal papers for participants.[194]

The *CITES* draft was not circulated until the conclusion of the conference. The Sub-Committee Chair instead decided to establish a working group that would work in parallel to the Plenary. It was to be chaired by Japan and the US, and was to operate within a narrow mandate of considering only the COFI-led draft. It met for several hours in two separate sessions.

The working group produced its own draft MOU (reported as the 'Japan–USA compromise text'[195] and noted also as the FAO COFI-FT draft (2004)). This was based on the COFI-led draft but modified some of that draft's attempts at limiting *CITES* jurisdiction. It agreed that the contentious square-bracketed text in the preamble and body of the MOU (which sought to make listings contingent on RFMO and FAO approval, and only in exceptional cases)[196] could be deleted from the draft. However, the preamble continued to assert this controversial position, at least implicitly, by incorporating the 'results' of the 2002 COFI-FT meeting at which this view was expressed.[197] A new preambular paragraph also

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190 The conduct of the vote on Norway's proposal was contentious, with Norway alleging that rules of procedure were inappropriately applied in relation to a tied outcome: ibid.

191 *Memorandum of Understanding with the Food and Agriculture Organization of the United Nations (FAO)*, Notification to Parties to *CITES*, Doc No 2003/030 (6 May 2003) ('MOU').

192 See letter from Willem Wijnstekers, Secretary-General of *CITES* to Dr Jacques Diouf, Director-General of FAO dated 5 January 2004. See also above n 164.

193 See *CITES Issues with respect to International Fish Trade and the CITES/FAO MOU*, COFI-FT, 9th sess, Agenda Item 9, FAO Doc COFI:FT/IX/2004/3 (27–30 January 2003) (stating that papers are current to December 2003).

194 See, eg, *Report of the Expert Consultation on Fish Trade and Food Security*, COFI-FT, 9th sess, Agenda Item 9, FAO Doc COFI:FT/IX/2004/Inf.8 (27–30 January 2003).

195 FAO, *Fisheries Report No 736*, above n 165, annex E.

196 Ibid; see above nn 183, 184.

197 The Preamble continued to refer to the contentious para 18 noted above n 169: FAO, *Fisheries Report No 736*, above n 165, annex E.

affirmed the 'rights and duties of all States pertaining to fishing activities outlined in [*UNCLOS*]' and emphasised the goal of sustainable utilisation.[198]

The working group reported back to the Plenary with this compromise text, and recommended that it be sent to the Chair of the *CITES* Standing Committee with a request that it be considered at its next meeting. It also recommended that FAO staff be mandated to conclude the draft with *CITES*, but according to a strict process by which they would consult with certain members if substantive changes were involved:

> If, in discussions, *CITES* requested changes that the FAO Secretariat thought might be unacceptable to some Members, the FAO Secretariat would informally consult with *those* Members. If those Members did not raise any objections, the FAO Secretariat could sign the MOU.[199]

The working group did not identify the FAO members that might have found *CITES*'s requested changes unacceptable, but it presumably intended this paragraph to relate at least to Japan and Norway. When these recommendations were presented to the Plenary, Argentina challenged the working group's suggested process. It suggested that the word 'those' be deleted from the first line of the working group's recommendation, as reproduced above.

This small amendment would have changed the procedure from one of a potentially private discussion between FAO staff and interested parties such as Japan to a provision for multilateral consultation with the membership as a whole. However, although the Plenary appeared to accept Argentina's amendment, it was not reproduced in the final report.[200]

Argentina's concern about the suggested procedure is important. On one level, it is understandable that the FAO works closely with Members and is sufficiently aware of which members would find aspects of an MOU with *CITES* unacceptable. Yet this type of interaction may be indicative of the 'capture' of the FAO by particular states. The suggested procedure may also be inconsistent with the FAO's own rules on the procedure to be followed by the FAO in entering into collaborative arrangements, which state that 'proper consultation with governments' must be secured.[201] These rules are directed at collaborative arrangements between the Organization and national institutions or private persons, rather than MOUs with other IGOs. However, the emphasis in those rules on proper consultation is similarly persuasive for collaborative agreements between IGOs.

After the working group had presented the Japan–US compromise text, it reported on the *CITES* revised draft MOU. It stated that there were 'no substantive differences between that and the FAO proposal and there was nothing contradictory in the two texts',[202] a statement that is in direct contrast to the working group's concern that future negotiations with *CITES* would lead to unacceptable changes to the FAO proposal.

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198 Ibid.

199 See FAO *Fisheries Report No 736*, above n 165, [22] (emphasis added).

200 The apparent acceptance by Plenary of Argentina's amendment was recorded by the author, who attended the meeting as a non-government delegate with the Australian delegation.

201 *FAO Constitution* art XIII(4).

202 FAO, *Fisheries Report No 736*, above n 165, [24].

4 *Further Consideration of the FAO Draft*

Using the Japan–US compromise text agreed at the FAO Sub-Committee on Fish Trade as the basis for their negotiations, the FAO and the *CITES* Secretariat attempted to finalise the MOU in the course of 2004. The 'limited negotiating authority' of the FAO was later noted by the Chair of the *CITES* Standing Committee.[203] By the time of the next meeting of the *CITES* Standing Committee, in April 2004, there was still no agreed MOU text.[204]

By October 2004, a draft FAO–*CITES* negotiated MOU was ready for presentation to the *CITES* Standing Committee. It met twice in October in Bangkok during the *CITES* COP.[205] On 1 October 2004, the Chair presented the draft FAO–*CITES* negotiated MOU.[206] This text used the Japan–US compromise text agreed at COFI-FT as a base but included amendments aimed at bringing 'more balance to the text with regard to *CITES*'.[207] The preamble included square-bracketed text on which agreement had not been reached, which reflected disagreement over whether *CITES* 'cannot replace, but rather has sought to complement' or 'has not sought to replace but rather complement'.[208] In addition, the preamble recognised that 'peoples and States are and should be the best to conserve their own wild fauna and flora'.[209]

Some provisions of the MOU implied that *CITES* should be deferential to the FAO in proposals to amend its Appendices. For example, the draft reproduced the suggestion made by the FAO Committee of Fisheries about the use of FAO's reviews of proposals to amend *CITES* Appendices, as follows:

> In order to ensure maximum coordination of conservation measures, the CITES Secretariat will consider, to the greatest extent possible, the results of the FAO scientific and technical review of proposals to amend the Appendices, and technical and legal issues of common interest and the responses from all the relevant bodies associated with management of the species in question [as well as

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203 *Strategic and Administrative Matters: Memorandum and Understanding with the Food and Agriculture Organization of the United Nations (FAO)*, *CITES* Standing Committee, 51st mtg, *CITES* Doc SC51 Doc 8 (1 October 2004).

204 *Summary Report*, *CITES* Standing Committee, 50th mtg, *CITES* Doc SC50 Summary Report (15–19 March 2004).

205 This was the COP that agreed to transfer the Irrawaddy dolphin to Appendix I and add the great white shark to Appendix II: *CITES*, above n 59 and 60. The COP also removed the former requirement in the *CITES* listing criteria for proposing parties to 'consult in advance with the relevant competent intergovernmental organizations responsible for the conservation and management of species, and take their views fully into account', as well as provide information on trade and conservation efforts: *Criteria for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 9th mtg, *CITES* Doc Conf Resolution 9.24 (1994) annex 6 [4.1.2] ('*Format for Proposals to Amend the Appendices*'). Parties were instead required to provide details of relevant international instruments and provide an assessment of their effectiveness in ensuring conservation, protection and management: *Criteria for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 12th mtg, *CITES* Doc COP12 Doc 58 (2002) annex 3 ('*Explanation of the Proposed Amendments to Resolution Conf 9.24*'); *Criteria for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 13th mtg, *CITES* Doc COP13 Doc 57. See *CITES* listing criteria, above n 83, annex 6 [6], [8].

206 *CITES* Standing Committee, above n 203.

207 Ibid 1.

208 Ibid annex [10].

209 Ibid [1].

> the substance of the preambular paragraphs of this MOU] in its advice and recommendations to the CITES Parties.[210]

In providing that *CITES* would 'consider, to the greatest extent possible', the results of the FAO's scientific and technical review of proposals to amend the *CITES* Appendices, the MOU retreated from the FAO Committee of Fisheries' earlier language that *CITES* would 'incorporate to the greatest extent possible' such results.[211]

The *CITES* Standing Committee revised this draft but failed to agree to it, and instead the Standing Committee agreed that Australia and Norway should have bilateral discussions on the revised text. Interventions on the topic were made by four countries, two observers and two NGOs — the Humane Society International [212] and Defenders of Wildlife.[213]

At the 52nd meeting of the *CITES* Standing Committee on 14 October 2004, Australia reported that it had produced a text with Norway. This text had been circulated to parties by the Chair on 7 October 2004.[214] Two Committee Members objected to substantive discussion on it.[215] The Standing Committee agreed that discussion be postponed until the 53rd meeting.[216]

In March 2005, the FAO Committee on Fisheries met in Rome. FAO staff members described how they had agreed on a compromise text with the *CITES* Standing Committee Chair. This was the draft FAO–*CITES* negotiated MOU presented to the Standing Committee a few months before.[217] Some COFI Members disputed that the secretariats should be able to conclude such a text, and asserted that the only 'official FAO text' was the one agreed by a majority of members of the Sub-Committee on Fish Trade in Bremen.[218]

Again, the Committee considered it necessary to establish a separate working group. Within that group, many Members considered that the FAO–*CITES* negotiated MOU[219] was the appropriate draft to work from, but there was no consensus on this view. The Committee resolved this impasse in the following

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210 Ibid [17].

211 See FAO COFI-led draft (2003), above n 163, draft art 6; FAO COFI-FT draft (2004), above n 165, draft art 6.

212 The Humane Society International 'works with national and jurisdictional governments, humane organizations, and individual animal protectionists in countries around the world to find practical, culturally sensitive, and long-term solutions to common animal issues, and to share an ethic of respect and compassion for all life.' See Humane Society International, *About Us* (2010) <http://www.humanesociety.org/about>.

213 The 'Defenders of Wildlife is a national, nonprofit membership organization dedicated to the protection of all native animals and plants in their natural communities.': see Defenders of Wildlife, *About Us* (2010) <www.defenders.org/about_us/index.php>. Its international office 'has a long history of advocacy on behalf of threatened marine species. This advocacy has focused on conserving dolphins, sharks, and sea turtles.'): see Defenders of Wildlife, *International Conservation* (2010) <www.defenders.org/programs_and_policy/international_conservation/index.php>.

214 *CITES* Standing Committee negotiated draft (2004), above n 167.

215 *Strategic and Administrative Matters: Cooperation with the Food and Agriculture Organisation of the United Nations*, *CITES* Standing Committee, 53rd mtg *CITES* SC53 Doc 10 (prepared by the Secretariat) (27 June – 1 July 2005) [7].

216 Ibid.

217 FAO–*CITES* Secretariat negotiated draft (2004), above n 166.

218 FAO, *Fisheries Report No 780: Report of the 26th Session of the Committee on Fisheries* (FAO, 2005) [58], referring to the FAO COFI-FT draft (2004).

219 FAO–*CITES* Secretariat negotiated draft (2004), above n 166.

way. First, it agreed that the text produced by the Secretariats was unofficial, and that the only draft MOU approved by the FAO body was the text agreed in Bremen.[220] Secondly, it recognised that the *CITES* Standing Committee would be free to consider any text for an MOU.[221] The Committee then said the matter would be reconsidered again in Bremen by the Sub-Committee on Fish Trade at its 10th session after feedback from *CITES*.[222] The Committee encouraged Members to coordinate with their domestic fisheries and environmental agencies to achieve a consistent position on the MOU.[223]

5 *Finalising the MOU*

The *CITES* Standing Committee met for its 53rd session in June 2005 in Geneva. The MOU text negotiated between Australia and Norway in Bangkok, which updated the FAO–*CITES* negotiated draft, was included in the meeting materials.[224] The text was different from the draft FAO–*CITES* negotiated MOU in several ways. For example, the Preamble was rephrased to emphasise the jurisdiction of *CITES*. Instead of *CITES* having 'a role in regulating international trade' in threatened species, *CITES* had 'a primary role'.[225] In addition, the preamble no longer included the aim of 'maintaining the goal of sustainable utilisation as stated in the *FAO Code of Conduct* for Responsible Fisheries'.

In the main body, the provision that stated that FAO would continue to provide advice to *CITES* on, and be involved in future revision of, the *CITES* listing criteria was now a square-bracketed item.[226] Moreover, notifications of proposals to amend Appendices no longer had to be provided to FAO 'as soon as possible'.

The provision that set out a procedure for the *CITES* Secretariat's consideration of the results of the FAO scientific and technical review of proposals was also changed.[227] On the one hand, instead of merely '*considering*, to the greatest extent possible' these results, the *CITES* Secretariat was now required to '*respect* [them], to the greatest extent possible'.[228] Weakening this provision, however, was the fact that the *CITES* Secretariat's 'respect' for the FAO's scientific and technical review was no longer to be expressly reflected in its recommendations to the *CITES* parties on whether a marine species should be listed. In addition, the *CITES* Secretariat was also no longer required to consider the substance of the Preamble during this listing procedure.

Some members continued to express dissatisfaction with this draft, so the Chair suspended discussions and suggested that he conduct informal

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220 FAO, *Fisheries Report No 780*, above n 218, [60].
221 Ibid.
222 Ibid [61].
223 Ibid [62] ('The Committee agreed on the importance of ensuring that there was consistency in the positions of Members at meetings of FAO and *CITES* on the issue of an MOU').
224 *CITES* Standing Committee negotiated draft (2004), above n 167.
225 Ibid.
226 Ibid [14].
227 Ibid [17].
228 Ibid (emphasis added).

consultations.[229] On the basis of the consultation, the Chair then produced a revised document.[230]

The revised draft deleted the entire Preamble. In addition, the square brackets around the following phrase had been removed:[231] 'FAO will continue to provide advice to *CITES* on, and be involved in any future revision of, the *CITES* listing criteria.'

The text providing that *CITES* would 'respect, to the greatest extent possible' the results of the FAO scientific and technical review of listing proposals was retained.[232]

Mexico complained that it had been excluded from the informal consultations that led to the revised text.[233] It contested the agreed procedure for the *CITES* Secretariat's consideration of FAO scientific and technical reviews of specific proposals to list marine species. It stated that the Spanish version contained the phrase 'take into account', rather than 'respect' and this version should be reflected in the English text. In response, Iceland expressed its regret for not involving other members in coming to the consensus text but stated that it refused to replace the word 'respect' with 'take into account' or 'consider'. Japan agreed that the word 'respect' should be maintained.[234] The FAO and the Humane Society International also made interventions, although the substance of their comments is not on record.[235] The Standing Committee approved this draft and agreed that it be forwarded to FAO for consideration.

The FAO Sub-Committee on Fish Trade met from 30 May to 2 June 2006. The Sub-Committee agreed to the MOU, although many Members thought its wording was 'not perfect'.[236] The procedure for the *CITES* Secretariat's consideration of FAO's scientific and technical reviews of proposals to amend the Appendices continued to attract controversy. Brazil expressed its concern that the phrase 'respect to the greatest extent possible' was used and would have preferred 'take into account'.[237] The Philippines was dissatisfied with the termination arrangements of the MOU and would have preferred to allow only for its modification.[238]

C *Substantive and Procedural Constraints*

Before assessing the MOU's impact on regime interaction between the FAO and *CITES*, I conclude this section by highlighting some institutional and procedural problems with the development of the MOU. In particular, I place in legal context the attempt by key states to shape regime interaction by reinforcing the 'primary' role of FAO and RFMOs in the MOU. This requires a revisit to

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229 *Summary Record*, *CITES* Standing Committee, 53rd mtg, *CITES* Doc SC53 Summary Record (Rev 1) (27 June – 1 July 2005).
230 *CITES* Standing Committee, above n 168.
231 Ibid [3].
232 Ibid [6].
233 *CITES* Standing Committee, above n 229, [10].
234 Ibid.
235 Ibid.
236 FAO, *Fisheries Report No 807*, above n 168, [24].
237 Ibid [25].
238 Ibid.

principles of international institutional law, and an investigation into treaty law and legal process. My findings have important consequences for the use of cooperative agreements between secretariats as tools of regime interaction.

1 *International Institutional Law*

Japan's proposal to insert into the MOU a requirement that the prior approval of the FAO, or of its subsidiary bodies or RFMOs, be granted before commercially-exploited marine species could be listed in the *CITES* Appendices, can be assessed according to the implied powers of the *CITES* and FAO secretariats described above. The *CITES* treaty text contains no requirement that the views of the FAO should prevail on issues relating to trade restrictions for marine species. Japan's attempted revisions to the role of the FAO is thus inconsistent with the *CITES* treaty text. Japan's proposal was not accepted in the final MOU, but if it had been, the resulting provision may well have exceeded the express and implied powers of the FAO and *CITES* Secretariat.

The consequences of the FAO and *CITES* secretariats acting ultra vires in this way are unclear. On one view, an MOU is void if it exceeds the secretariats' powers. Yet a key question is whether there is an organ that can rule upon a claim that a secretariat has acted ultra vires. Establishing such an organ requires agreement, and the international procedures are unwieldy and undeveloped compared to the European legal context.[239] Agreement to challenge the acts of international organisations as ultra vires could in theory be forthcoming in a dispute where states consented to the compulsory jurisdiction of the ICJ. Alternatively, the ICJ could exercise its advisory jurisdiction.[240] These avenues will differ depending on the constituting documents within the regimes themselves; in the WTO regime, for example, there is no procedure to challenge as ultra vires the acts of the organisation.[241]

Related to the question of whether the FAO and *CITES* Secretariat could be found to be acting ultra vires is the question of whether the MOU is binding. This is a matter of some uncertainty. MOUs between *states* are generally considered to be non-binding instruments, unless it can be shown that the parties intended otherwise.[242] For such agreements, intention is to be gauged from the wording of the text.[243]

The decision to include termination provisions in the MOU has bearing on its legal status. Amongst some opposition, the MOU provides for both termination

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239 See also Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press, 2005) 108, 119–20 (considering measures a state can take against an organisation on which it has conferred powers and comparing legal remedies for ultra vires acts in the context of the EC and the ECJ); see also José Alvarez, 'The New Treaty Makers' (2002) 25 *Boston College International and Comparative Law Journal* 213.

240 *UN Expenses* (1962) ICJ Rep 151. See also Schermers and Blokker, above n 146, 592.

241 Pauwelyn, above n 129, 44–5, 144–5, 285–6.

242 Anthony Aust, 'The Theory and Practice of Informal International Instruments' (1986) 35 *International and Comparative Law Quarterly* 787, 800–4 (writing on international instruments between states).

243 On agreements between states that are equivocal on whether they are binding, see ibid; see also Kelvin Widdows, 'What is an Agreement in International Law' (1979) 50 *British Year Book of International Law* 117; Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 *American Journal of International Law* 296.

and amendment by the FAO and *CITES* secretariats.[244] Such a provision is usually indicative of the binding nature of the agreement.[245] However, the MOU also contains the cooperative verb 'will' rather than 'shall', which has been considered in other contexts to indicate a non-binding arrangement.[246] The level of agreement or opposition to the MOU is also relevant,[247] and the contentiousness with which the issue of cooperation has been treated in meetings of the FAO might on the one hand indicate a failure of the MOU to bind or, on the other, that the MOU represents an important and binding compromise about a difficult topic.

2 *Treaty Amendment and Modification*

Aside from issues of institutional law, the negotiation of the MOU gives rise to important issues of treaty law. There are a number of constraints on the ability of states to amend or modify treaties. These constraints become relevant because the wrangling between states during the negotiation of the MOU could lead to a particular characterisation of the MOU. Rather than an agreement between international organisations, the MOU could be seen as an agreement to amend the core treaty text of *CITES*.

As I demonstrate above, *CITES* expressly recognises its potential role in the listing of marine species. The strategy of Japan and others, in attempting to limit the role of *CITES* in marine listings, could be considered an amendment of the Convention.

Treaty amendment must conform to the law of treaties, as codified in the *VCLT*. This provides for the inter se modification of a treaty where 'two or more parties to a multilateral treaty … conclude an agreement to modify the treaty as between themselves alone'.[248] Inter se modification is permissible if the possibility of such a modification is provided for by the treaty, and provided it does not affect the rights or obligations of the other parties.

Reservations and denunciation are available within *CITES*.[249] However, any amendment requires a two-third majority of an extraordinary meeting of the *CITES* COP.[250] As such, the attempts to limit *CITES*'s role in the protection of endangered marine species by the Japanese-led MOU drafts could not be considered as lawful inter se modification unless they were announced as such and were voted upon.

This finding accords with the need for treaty law to provide consistency and stability. Admittedly, this need must always be balanced with law's

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244 MOU art 8; note opposition by the Philippines: see above n 238 and accompanying text.

245 See, eg, Churchill and Ulfstein, above n 160, 651.

246 Ibid 650–1 (considering the MOU between the COP of the UNFCCC and the Global Environment Facility).

247 In relation to declarations of states within international forums see, eg, *Military and Paramilitary Activities in Nicaragua (Merits)* [1986] ICJ Rep 14 [203]–[205], where the Court considered the general consensus accompanying a relevant UN Declaration in its reliance on it.

248 *VCLT* art 41.

249 *CITES* arts XXIII, XXIV.

250 Ibid art XVII.

receptiveness to changing conditions,[251] and a finding that MOUs could never modify the constitutive treaties of IGOs would be overly formalist. The acknowledgment that international law is a process does not preclude the finding, however, that a party to *CITES* may not limit its jurisdiction unless it has followed set procedures for open and participatory amendment.

3 *Uses and Abuses of Rules of Procedure*

A further aspect of international law of relevance to the development of the MOU is the nature and use of rules of procedure in international forums. The constitutive instruments of the *CITES* Secretariat[252] and the FAO[253] contain rules for access, representation and participation by international bodies, including IGOs and NGOs. These instruments also allow for the development and application of other rules of procedure, such as the provision for committees described as 'Friends of the Chair' or 'working groups' which operate in secret. These rules of procedure had significant impact upon the development of the MOU.

In the 2003 meeting of COFI, the representative of the *CITES* Secretariat had been invited to assist in the drafting of the MOU. A working group, comprising Japan, the US and others, was established to consider the issue of the MOU, and it was to report back to the plenary. The working group wished to conduct its deliberations in secret, excluding the *CITES* representative and any other representatives from IGOs or NGOs.[254] This action seems to be in line with a rule of procedure which provides that the Committee may decide to restrict attendance at private meetings to representatives of member states 'in exceptional circumstances'.[255] That the Committee considered the drafting of an MOU to facilitate cooperation with another IGO amounted to 'exceptional circumstances' reflects the contentiousness with which certain states viewed *CITES*'s role. Such contentiousness will often be present in regime interaction, but it is doubtful that closed meetings are the most useful response.

The tension between the need for efficiency and free debate was apparent in the conduct of the working groups themselves. During the working group at the 2004 Sub-Committee on Fish Trade, participating members were told by the US and Japan that debate would not be opened on the substantive sections of the draft MOU that had already been agreed at COFI. This effectively removed the ability of the parties to debate any language used in the draft *CITES* MOU, and

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251 This is demonstrated most clearly by the use of custom in international law: see, eg, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 18–22.

252 *CITES* art XI(7) states that the COP is open to representatives from IGOs and NGOs that are 'technically qualified in protection, conservation or management of wild fauna and flora'; See also *CITES, Rules of Procedure of the Standing Committee* (2009).

253 See FAO, 'Part B — General Rules of the Organization' in FAO, *Basic Texts* (FAO, 2006 ed) r XVII. See also FAO, 'Part M — Cooperation with International Governmental Organizations' in FAO, *Basic Texts* (FAO, 2006 ed); FAO, 'Part N — Guiding Lines regarding Agreements between FAO and IGOs' above n 153; FAO, 'Part O — Cooperation with International Non-Governmental Organizations' in FAO, *Basic Texts* (FAO, 2006 ed); FAO, 'Part Q — Granting of Observer Status (in Respect of International Governmental and Non-Governmental Organizations)' in FAO, *Basic Texts* (FAO, 2006 ed).

254 *CITES* Standing Committee, above n 181 and accompanying text.

255 FAO, *Rules of Procedure of the Committee of Fisheries*, r III(3)(c).

any other aspect of the FAO draft. Instead, debate was to concentrate on the square-bracketed texts. Whether an appropriate balance between efficiency and openness was reached is questionable.

Of interest too is the decision to delay the distribution of the *CITES* draft MOU at the 2004 Sub-Committee on Fish Trade. During the initial stages of the Plenary, staff from the FAO intimated that the revised *CITES* draft had been received. After rumblings from the floor (but no formal interventions), in which a number of parties suggested that their views had not been taken into account in the *CITES* process, the Chair decided to defer its distribution. This action is in apparent breach of the FAO's rules of procedure, which provide that the views of intergovernmental organisations are to be circulated freely and without abridgement.[256]

These examples suggest that certain states used, and sometimes extended, FAO rules of procedure to constrain open debate and collaboration in the development of the MOU. Within the *CITES* regime, too, my examples demonstrate that rules of procedure impacted substantively on the MOU text, although the *CITES* procedures gave rise to different challenges. The *CITES* procedures provide somewhat more fulsome rights to participate. The Chair of the *CITES* Standing Committee may invite any person, including a representative of any body or agency, to attend as an observer, provided that 'any such person, body or agency is technically qualified in protection, conservation or management of wild fauna and flora'.[257] Such observers have the right to participate on certain agenda items as agreed by the Committee, but not to vote.[258] The Committee can withdraw the right of any observer to participate.[259]

Challenges arose in the negotiations leading to the MOU due to the disparate and sometimes contradictory interests of the non-state participants. There is a strong tension between the two NGOs that participated in the *CITES* Standing Committee working group to negotiate the MOU. One group, the International Fund for Animal Welfare, campaigns on animal welfare and protection.[260] The other, the IWMC, is a pro-utilisation group that seeks to 'protect the sovereign rights of independent states in their conservation efforts'.[261] The draft preamble of the *CITES*-Secretariat-led MOU drafts reproduced the view 'that peoples and States are and should be the best to conserve their own wild fauna and flora', suggesting that the IWMC successfully influenced the Standing Committee. However, most advocates of fisheries conservation, including most NGOs, would probably not share this wholescale endorsement of the current ability of states to conserve fisheries. This example demonstrates the difficulties of finding

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256 FAO, 'Part B — General Rules of the Organization' in FAO, *Basic Texts* (FAO, 2006 ed) r XVII.

257 *CITES Rules of Procedure of the Standing Committee* (2009) r 6.1.

258 Ibid.

259 Ibid.

260 The International Fund for Animal Welfare seeks to 'achieve lasting solutions to pressing animal welfare and conservation challenges': International Fund for Animal Welfare, *Who We Are* (2010) <http://www.ifaw.org/ifaw_united_states/who_we_are/index.php>.

261 The mission of the IWMC, formerly the International Wildlife Management Consortium, is to 'promote sustainable use of wild resources' whilst protecting the independence of states: IWMC, *Statement of Purpose* (2010) <www.iwmc.org/iwmcinfo/statement.htm>.

the 'voice' for marginal interests, including interests in fish sustainability, in regime interaction.

D *National Policy Coordination*

At various times during the fraught negotiations over the MOU, it was clear that states were unable to reconcile competing interests within their domestic agencies. Fisheries policy and environment protection policy are often developed by different domestic government portfolios and implemented by different agencies. The domestic agencies do not always coordinate or collaborate on marine issues. This problem is exacerbated when domestic agencies have not implemented the core requirements for even one regime. For the *CITES* regime, for example, approximately half of all *CITES* parties lack appropriate legislation to implement their obligations.[262]

The lack of national policy coordination impinged upon the development of the MOU. In response to problems in finalising the MOU, the FAO Committee on Fisheries recommended that fisheries delegates work with environmental delegates to achieve a consistency of position.[263] Collaboration between relevant domestic agencies within countries was therefore seen as a precursor to collaboration between *CITES* and the FAO.

The need for national policy coordination is not limited to the wrangling over the MOU. Collaboration between domestic agencies is also important for subsequent implementation of *CITES* obligations. National departments responsible for *CITES* permits and licences are commonly different from fisheries departments. In Hong Kong, for example, the domestic management authority responsible for administering the *CITES* licensing scheme is the Agriculture, Fisheries and Conservation Department specific to the Special Administrative Region of Hong Kong. The designated scientific authority is the People's Republic of China's Endangered Species Advisory Committee.[264] These functions are separate from Hong Kong's Trade and Industry Department. In Australia, the management authority and the scientific authority are located in the Department of Environment and Water Resources. This is a separate department from Australia's Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade. By contrast, the US houses the *CITES* management authority and scientific authority in the Department of the Interior, which includes the United States Fish and Wildlife Service. Its Department of Agriculture's Animal and Plant Health Inspection Service and the Department of Homeland Security take on enforcement responsibilities for plants. The US has reported that coordination of these agencies takes place through a *CITES* Coordinating Committee, in which the United States Trade

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262 *Interpretation and Implementation of the Convention: National Laws for Implementation of the Convention*, Conference of the Parties to *CITES*, 15th mtg, *CITES* Doc COP15 Doc 20 (13–25 March 2010) [3].

263 See above n 223.

264 As well as being available via the *CITES* directories, this information was provided by Hong Kong to the WTO: *Paragraph 31(i) of the Doha Declaration — Specific Trade Obligations Set Out in Multilateral Environmental Agreements: Implementation of CITES in Hong Kong, China*, WTO Doc TN/TE/W/28 (30 April 2003) (Submission by Hong Kong, China) annex art II ('*Hong Kong Submission*').

Representative participates, and in subcommittees, including a subcommittee exclusively devoted to marine issues.[265]

The issue of national policy coordination has gained attention in other areas of fisheries governance. In 2006, delegates to the UN Consultative Process commented on the 'serious coordination and cooperation gap among the [many intergovernmental] organizations and agencies themselves and between national governmental bodies.'[266] Some delegates concluded that the responsibility for remedying this situation lay with the countries themselves:

> It was noted by some that States are responsible for ensuring the necessary cooperation and coordination among the various agencies and that their delegates should better cooperate and coordinate their work through international organizations. Such cooperation and coordination posed a challenge at the national level, where many departments might have oceans-related mandates but did not always work in a coordinated manner.[267]

An improvement to national policy coordination is increasingly discussed as a means of resolving uncertainties about conflicting treaty obligations and other issues associated with the fragmentation of international law. For example, in negotiations over the relationship between WTO agreements and specific trade obligations in MEAs, Australia and the US have submitted that the solution to potential conflicts between treaties lies within domestic coordinating bodies.[268] This has led, in particular, to the provision about information on domestic policy coordination of *CITES* commitments by WTO Members.[269] Although it can never be the sole means of achieving regime interaction, national policy coordination is clearly of major importance to fragmented fisheries governance.

IV ENTRENCHING INTERACTION THROUGH THE MOU

The MOU between the FAO and *CITES* Secretariat entrenches regime interaction. As described in this Part, the final text[270] requires ongoing exchange of information and sets out a degree of responsibility of each organisation to have regard to that information. Other that this, there is no delimitation of organisational roles. In contrast to the draft proposals described in the previous

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265 See *Sub-Paragraph 31(i) of the Doha Declaration*, WTO Doc TN/TE/W/40 (21 June 2004) (Submission by the United States) [15]–[18] ('*US Submission*').

266 *Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea*, UN GAOR, 61st sess, UN Doc A/61/156 (17 July 2006) [106]. The resolution establishing the Consultative Process is noted above n 144.

267 Ibid.

268 See, eg, *US Submission*, WTO Doc TN/TE/W/40; *Paragraph 31(i) of the Doha Declaration: Australia's Experience*, WTO Doc TN/TE/W/45 (12 October 2004) (Submission by Australia) ('*Australian Submission*'). For national policy coordination in the context of WTO negotiations on fisheries subsidies, see Young, 'Fragmentation or Interaction', above n 28, 492–4.

269 See *Hong Kong Submission*, WTO Doc TN/TE/W/28; *US Submission*, WTO Doc TN/TE/W/40; *Australian Submission*, WTO Doc TN/TE/W/45, *Putting MEA/WTO Governance Into Practice: The EC's Experience in the Negotiation and Implementation of MEAs*, WTO Doc TN/TE/W/53 (4 July 2005) (Submission by the European Communities); *The Relationship between Existing WTO Rules and Specific Trade Obligations (STOS) Set Out in Multilateral Environmental Agreements (MEAs)* WTO Doc TN/TE/W/58 (6 July 2005) (Submission by Switzerland).

270 Final text agreed by the *CITES* Secretariat and the FAO in September – October 2006: see above n 168.

Part, the MOU makes no reference to any relative competences between the FAO and *CITES* Secretariat. Instead, it provides for cooperation over marine species conservation in five major areas: information sharing and observation; capacity-building; joint involvement in the *CITES* listing criteria; consultation and review by FAO of *CITES* listing proposals; and resource allocation and reporting.

A *Information-Sharing and Observership*

The MOU provides for communication and regular information-exchange between the FAO and *CITES* Secretariats, as follows:

> The signatories will communicate and exchange information regularly and bring to each other's attention general information of common interest and areas of concern where there is a role for the other to play. The signatories will be invited as observers to meetings under their respective auspices where subjects that are of common interest will be discussed.[271]

This provision for observership first appeared in the MOU drafts discussed within the FAO; the original *CITES* draft did not refer to it. Unusually, the MOU drafts did not reflect the possibility of routine observership, as is regularly practised, for example, in some WTO Committees such as the WTO Committee on Trade and Environment. Instead, the MOU provides for ad hoc observership 'where subjects that are of common interest will be discussed'.

The issue of 'common interest' may prove contentious in future applications of the MOU. Its characterisation remains within the discretion of each secretariat. A number of factors could facilitate the awareness of issues of 'common interest' and information-exchange outside of the provisions of the MOU. For example, Schermers and Blokker suggest that 'the prestige of the international civil service' may stimulate collaboration between IGOs.[272] On the other hand, they note an opposite effect caused by rivalry between secretariats.[273] The social and professional norms of the FAO and *CITES* Secretariats may change through practices that develop outside of the context of the MOU, such as staff exchanges,[274] workshops in other forums[275] and even through the increasing public awareness of fisheries depletion.

The MOU does not address RFMOs and it is unclear whether the information exchange between *CITES* and the FAO will further facilitate cooperation between *CITES* and RFMOs. Such cooperation could improve the conservation measures of both *CITES* and RFMOs, but currently face much resistance, as the example of the Patagonian toothfish — commonly known in North America as Chilean sea bass — makes clear.

In 2002, attempts were made to improve cooperation between *CITES* and the regional fisheries management organisation of the Antarctic region, *Convention*

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271 Ibid art 1.

272 Schermers and Blokker, above n 146, 1087.

273 Ibid.

274 See, eg, ibid 1099 (approving exchanges between Secretariats to enhance collaboration).

275 See, eg, multi-stakeholder workshops by the United Nations Environment Programme and others discussed in Young, 'Fragmentation or Interaction', above n 28, 496–8.

on the Conservation of Antarctic Marine Living Resources.[276] Australia sought to address IUU fishing of Patagonian toothfish by linking *CITES* certification requirements with the catch documentation scheme of *CCAMLR*.[277] The COP resolved that *CITES* parties should adopt the relevant catch document used by *CCAMLR* and implement requirements for verification.[278] The resolution also provided for information sharing and a promotion of the *CCAMLR* conservation regime among *CITES* parties. *CITES* parties were directed to report to the *CITES* Secretariat on the use and verification requirements of the *CCAMLR* catch documentation.[279] The *CITES* Secretariat was directed to compile information on parties' practices in this regard and invite *CCAMLR* to consider, at its meetings, how further cooperation between *CITES* and *CCAMLR* could be progressed.[280]

Attempts by Australia to update these requirements were not accepted at the following COP in 2004.[281] The *CITES* Secretariat noted that the *CITES* treaty text could not serve as a basis for an ongoing reporting mechanism within *CITES* for the Patagonian toothfish, and that *CITES* parties should report on their use and verification requirements of the *CCAMLR* catch documentation scheme directly to *CCAMLR*, because of 'insufficient resources [for the *CITES* Secretariat] to serve as an intermediary for ongoing reporting related to non-CITES species'.[282]

The Patagonian toothfish example is important in two major respects. First, it suggests that a failure to achieve lasting cooperation between *CITES* and RFMOs such as *CCAMLR* may be attributed to the background political controversies over the species at issue. The Patagonian Toothfish is imminently endangered. Indeed, Australia had originally sought its listing on *CITES* Appendix II at the COP in 2002, but withdrew its proposal before the matter went to vote due to opposition from *CCAMLR* members.[283] Such controversies will often accompany marine species, as is obvious from the discussion on sharks, seahorses and bluefin tuna. Perhaps if the MOU had called for cooperation between *CITES* and RFMOs (or indeed a new MOU between *CITES* and *CCAMLR*) the cooperation between secretariats would have been less dependent on the opposing wills of states. Secondly, the fact that the Patagonian toothfish has not been accepted as warranting listing in *CITES*, at least for the present, may be attributed to the problems over institutional collaboration. Commentators have noted that cooperation over documentation and permit schemes is

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276 Opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982) ('*CCAMLR*').

277 *Interpretation and Implementation of the Convention: Conservation of Trade in Dissostichus Species*, Conference of the Parties to *CITES*, 12th mtg, *CITES* Doc COP12 Doc 44 (1 October 2002) [6].

278 *Cooperation between CITES and the Commission for the Conservation of Antarctic Marina Living Resources regarding Trade in Toothfish*, Conference of the Parties to *CITES*, 12th mtg, *CITES* Doc Resolution Conf 12.4 (3–15 November 2002).

279 *CITES* COP12 Decision 12.57 (3–15 November 2002) (trade in toothfish). See also *Trade in Toothfish*, Notification to Parties to *CITES*, Doc No 2003/081 (16 December 2003).

280 *CITES* COP12 Decisions 12.58, 12.59 (3–15 November 2002) (trade in toothfish).

281 *Strategic and Administrative Matters: Revision of Resolution Conf 12.4 on Cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources regarding Trade in Toothfish*, Conference of the Parties to *CITES*, 13th mtg, COP13 Doc 12.3 (16 August 2004).

282 Ibid 2.

283 Little and Orellana, above n 80, 24.

dependent on the prior *CITES* listing of a species.[284] The implication is that cooperation will only occur *after* a species is listed, or at least when a relevant proposal for listing has been lodged with *CITES*.

B *Involvement in CITES Listing Criteria*

The *CITES* listing criteria, which set out biological, trade and other factors for parties to consider when they vote on listing proposals, have been highly controversial in the marine species context.[285] Revisions to the listing criteria agreed by *CITES* parties are suggestive of an increasing preference among states for regime interaction, rather than an *ex ante* assessment of competences.[286]

The MOU provides that the FAO and *CITES* Secretariat will continue to cooperate on the *CITES* listing criteria and that the FAO will be involved in future revisions.[287] As described above with reference to the *CITES*-led drafts, *CITES* had not originally endorsed the need for the FAO to provide advice or be involved in the revision of *CITES* listing criteria. In lawyer slang, the matter appeared to be a 'deal-breaker' in the final discussions leading to the conclusion of the MOU.

The FAO drafts also implied that the listing criteria were not the only basis for the FAO and *CITES* Secretariats' evaluation of proposals for amendments to the *CITES* Appendices. The following additional sentence questioned the sole basis of the listing criteria for the evaluation of proposals to amend the Appendices: 'These criteria will be the primary basis for the evaluation of proposals for amendment of the *CITES* Appendices by the FAO and the *CITES* Secretariat and for subsequent actions of all *CITES* Parties.'[288]

Other states opposed the notion that there were additional sources from which to evaluate proposals to amend the *CITES* Appendices and it was not reproduced in the final MOU. Instead, the MOU provides that the FAO and *CITES* will work together in their evaluation of proposals to amend the *CITES* appendices 'based on the criteria agreed by the parties to *CITES*'.[289]

The controversies over the *CITES* listing criteria demonstrate a large disparity between the views of states and the relevant secretariats. The status of, and method of revising, the *CITES* listing criteria were clearly controversial for some FAO Members. Yet for the secretariats themselves, collaboration was ongoing and successful in this area. The 'epistemic communities' within FAO and *CITES* had already embraced the need for shared understanding about specific scientific and technical issues relevant to aquatic species.[290]

For example, when the *CITES* listing criteria was revised at the 13th *CITES* COP in Bangkok in 2004,[291] the FAO contributed to the revisions. It had convened a technical consultation on the 'suitability of the *CITES* Criteria for

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284 Murphy, above n 82, 556.
285 See above n 84.
286 See, eg, revisions at Conferences of the Parties to *CITES* in 2002 (above n 178) and 2004 (above n 205).
287 MOU art 3.
288 FAO COFI-FT draft (2004), above n 165, art 4.
289 MOU art 4.
290 On 'epistemic communities', see Haas, above n 135.
291 *CITES* COP, above n 205.

listing commercially-exploited aquatic species' in 2001.[292] This technical consultation was endorsed by the FAO Sub-Committee on Fish Trade, which conveyed it to the *CITES* Secretariat as the formal input to the *CITES* review process.[293] The *CITES* Secretariat appreciated 'the fresh perspectives that the involvement of FAO had brought to the process'.[294] Revisions to the listing criteria may be attributed to the FAO's input. For example, the Preamble now states:

> NOTING the objective to ensure that decisions to amend the Convention's Appendices are founded on sound and relevant scientific information, take into account socio-economic factors, and meet agreed biological and trade criteria for such amendments;[295]

This inclusion may be attributed to the FAO's emphasis on the 'best scientific information available',[296] although it may well be attributed to the *CITES*'s own documents.[297] At any rate, viewed in the light of ongoing collaboration on revisions to the *CITES* listing criteria, the final MOU reflects a fully established practice between the two IGOs, rather than a novel activity that required agreement by states.

A final point of note about the *CITES* listing criteria is the relevance of national policy coordination, as described above. When the results of the FAO's technical consultation on the suitability of *CITES* listing criteria to commercially exploited aquatic species was conveyed to FAO Members in 2002, FAO Members were reminded that decisions made to list species were made by *CITES* parties, and that national delegations at *CITES* meetings should be 'properly briefed … to take into account the views of the fisheries authorities if fishery matters were to be promoted'.[298] This view was reiterated by the representative of *CITES* present at the meeting. He stated that countries should 'resolve internally any differing views amongst their relevant agencies and departments on the role of *CITES* and the listing criteria if effective progress was to be made'.[299] Secretariat collaboration and national policy coordination were thus both clearly important in effective regime interaction in the endangered marine species context.

C *Consultation and Review of Listing Proposals*

The text of *CITES* requires the *CITES* Secretariat to consult with the FAO on listing proposals, 'especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring coordination with any conservation measures enforced by such bodies'.[300] This had led to useful practices, such as scientific and technical evaluations by the FAO on all of the marine species that were proposed for inclusion on the Appendices at the 13th COP. This

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292 Above n 84.
293 FAO, *Fisheries Report No 673*, above n 74, [16].
294 Ibid [19].
295 *CITES* listing criteria, above n 83.
296 FAO, *Fisheries Report No 673*, above n 74, [16].
297 *CITES* COP12 Doc 58, above n 178 (noting *CITES*'s strategic vision objective 2.2).
298 FAO, *Fisheries Report No 673*, above n 74, [15].
299 Ibid [19].
300 *CITES* art XV(2)(b).

accompanied other collaboration, such as the heavy involvement of the FAO in the review by the Animal Committee of the significant trade in queen conch. Moreover, the collaboration has worked both ways: the *CITES* Animal Committee, for example, participated in the development of the FAO IPOA — Sharks (1999)[301] and FAO representatives participated in a *CITES* workshop on legal issues relating to 'introduction from the sea'.[302]

The MOU builds on these efforts and sets out a process for the FAO to consult with *CITES* when it evaluates proposals to include, transfer or delete commercially-exploited aquatic species in the *CITES* Appendices.[303] It is helpful to break the process of consultation down into five steps:

1 The *CITES* Secretariat will inform the FAO of 'relevant' proposals;
2 The FAO will carry out a scientific and technical review of the proposals (usually done by an ad hoc expert panel);
3 The FAO will transmit the result to the *CITES* Secretariat;
4 The *CITES* Secretariat will make its own findings and recommendations on the proposals. In doing so, it will take 'due account' of the FAO review. In order to ensure 'maximum coordination of conservation measures', it will also 'respect, to the greatest extent possible' (A) the FAO review of proposals, (B) the technical and legal issues of common interest, and (C) the responses from all the relevant bodies associated with the management of the species in question; and
5 The *CITES* Secretariat will communicate the FAO views and data, in addition to its own findings and recommendations, to the Parties.

The decision to include a process for consultation over *CITES* listing is in variance to previous drafts of the MOU. The *CITES* drafts did not endorse a process for consultations over *CITES* listings. The FAO drafts, however, had originally indicated that *CITES* listings should be limited to exceptional cases only and should be contingent on agreement from all relevant management organisations.[304] The FAO drafts also provided that the *CITES* Secretariat 'will incorporate to the greatest extent possible' the position of the FAO and RFMOs when it gave advice and recommendations to the *CITES* parties on species listing proposals.[305]

The final MOU is a rather confused compromise that appears to provide two standards for the *CITES* Secretariat's deference to the FAO review. On the one hand, the *CITES* Secretariat is to take 'due account' of the FAO review in its evaluation of proposals to amend Appendices I or II.[306] In addition, there is a general reference to the need for *CITES* to 'respect, to the greatest extent

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301 *CITES* Resolution Conf 12.6, *Conservation and Management of Sharks*, Conference of the Parties to *CITES*, 12th mtg (3–15 November 2002); *CITES* Decision 13.42, 13th meeting (2–14 October 2004).

302 *Cooperation with the Food and Agriculture Organization of the United Nations*, Conference of the Parties to *CITES*, 14th mtg, *CITES* Doc COP14 Doc 18.1 (3–15 June 2007). This led to resolution 14.6: *Introduction from the Sea*, *CITES* Doc Resolution Conf 14.6.

303 MOU arts 4–6.

304 See square-bracketed text of COFI-led draft (2003) noted above nn 183, 184.

305 See FAO COFI-led draft (2003), above n 163, draft art 6 and FAO COFI-FT draft (2004), above n 165, draft art 6.

306 MOU art 5.

possible' the position of the FAO and RFMOs in conservation measures.[307] This terminology remains controversial for several states.[308] The final phrasing means that it remains unclear whether the standard of deference to the FAO and RFMOs that the *CITES* Secretariat must follow in its recommendations on proposals for listings of marine species is one of 'due account' or one of the greatest possible 'respect'.

Recent practice has demonstrated the difficulties of implementing this arrangement. In 2007, Germany proposed the Appendix II listing of two shark species.[309] The FAO convened an ad hoc expert panel which reviewed the proposals and concluded that the available evidence did not support the proposed listing on Appendix II.[310] Germany did not agree with the FAO conclusions on the grounds of disputed methodology.[311] The FAO responded with a detailed defence of its methodology by reference to the *CITES* listing criteria.[312] When the proposals came to be voted upon, they each failed to meet the required two-thirds majority and were rejected.[313]

The difference in interpretation (or, at the least, application) of the *CITES* listing criteria between the FAO and *CITES* Secretariat has caused some tension between the organisations.[314] It is clear that the MOU's provision for the *CITES* Secretariat to 'respect' and take 'due account' of FAO recommendations will remain as controversial as the underlying political issues relating to the species themselves. This is also clear from the reporting practices of the secretariats, which form a separate area of potential cooperation under the MOU.

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307 Ibid art 6.

308 *CITES* Standing Committee, above n 229.

309 The two shark species were the *Lamna nasus* (porbeagle) and the *Squalus acanthias* (spiny dogfish). See *Consideration of Proposals for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 14th mtg, *CITES* Doc COP14 Prop 15 (18 April 2007) and *Consideration of Proposals for Amendment of Appendices I and II*, Conference of the Parties to *CITES*, 14th mtg, *CITES* Doc COP14 Prop 16 (24 April 2007).

310 The ad hoc panel met from 26–30 March 2007: see FAO, *Fisheries Report No 833: Report of the Second FAO Ad Hoc Expert Advisory Panel for the Assessment of Proposals to Amend Appendices I and II of* CITES *concerning Commercially-Exploited Aquatic Species* (FAO, 2007), submitted to *CITES* as *CITES* Doc COP14 Inf 38.

311 *CITES* COP14 Inf 48, 'Comments on the FAO Assessment of the *CITES* Amendment' (7 June 2007).

312 *The Interpretation of Annex 2a (Criteria for the Inclusion of Species in Appendix II in accordance with Article II, Paragraph 2(a), of the Convention) and Annex 5 (Annex 5 Definitions, Explanations and Guidelines) of Resolutions Conf 9.24 (Rev COP13) in relation to Commercially-Exploited Aquatic Species* (14 June 2007), Conference of the Parties to *CITES*, 14th mtg, *CITES* Doc COP14 Inf 64 (3–15 June 2007).

313 The porbeagle shark proposal was rejected with 54 votes in favour and 39 against. The spiny dogfish proposal was rejected with 57 votes in favour and 36 against. The EU sought successfully to reopen debate at the plenary, but the proposal was rejected in a secret ballot, with 55 votes in favour and 58 against: see IISD, 'Summary of the Fourteenth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora' (2007) 21 *Earth Negotiations Bulletin* 61.

314 Interview by author with staff members of the FAO (Rome, 2 July 2008). Tensions may also be arising over the funding of the ad hoc panel's work, with Japan seeking to be a primary supporter and other members preferring funding from the regular programme: see FAO, *Fisheries Report No 830* (2007) [35] and FAO, *Fisheries and Aquaculture Report No 902* (2009) [32].

D *Reporting and Resource Allocation*

The MOU provides that the FAO and the *CITES* Secretariat will allocate specific resources for activities carried out jointly under the MOU.[315] It further provides that the secretariats to *CITES* and the FAO will periodically report on work completed under the MOU to the *CITES* COP and the FAO Committee on Fish Trade, respectively.[316] This provision reflects some of the suggestions for review made by the *CITES* drafts. Left out of the final MOU, however, was a process by which the secretariats would meet annually to discuss implementation and prepare joint work plans, which was suggested by the *CITES* drafts. FAO member states appeared to have preferred a unilateral review of the *CITES* COP. An example is the FAO's review on the assessment of proposals to amend the *CITES* Appendices, which are conducted by ad hoc FAO Expert Advisory panels.[317] The FAO Sub-Committee on Fish Trade has resolved that after each *CITES* COP, the FAO 'should undertake an evaluation of whether the recommendations of the ad hoc Expert Advisory Panel had been taken into account and, if not, why they had not been'.[318]

E *Capacity Building and Compliance*

The MOU provides for cooperation between the Secretariats to facilitate capacity building:

> The signatories will cooperate as appropriate to facilitate capacity building in developing countries and countries with economies in transition on issues relating to commercially-exploited aquatic species listed on the CITES Appendices.[319]

The *CITES*-led drafts had sought cooperation on capacity building for a wider range of issues. Cooperation was sought on the building of capacity for a broad range of issues relating to commercially exploited aquatic species,[320] regardless of whether such species had been listed on the *CITES* Appendices. The final MOU limits the ambit of cooperation to species that have already entered *CITES*'s jurisdiction by dint of inclusion in the Appendices. This constraint also exists for information-sharing and observership, as noted above.[321]

The *CITES*-led drafts also sought cooperation to build capacity for law enforcement.[322] The final MOU did not reproduce this provision, although the need for cooperation to build the capacity of states to enforce compliance with *CITES* may be implied by the reference to cooperation on 'issues relating to commercially exploited aquatic species listed on the *CITES* Appendices'.[323] The lack of express recognition of the benefits of cooperation in enforcement has

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315 MOU art 9.
316 Ibid art 7.
317 Conference of the Parties to *CITES*, COP14 Doc 18.1, above n 302.
318 FAO, *Fisheries Report No 807*, above n 168, [35].
319 MOU art 2.
320 *CITES* Standing Committee Chair-led draft (2003), above n 162, draft art 2(1); *CITES* draft (2004), above n 164, draft art 2.
321 See above n 284 and accompanying text.
322 *CITES* Standing Committee Chair-led draft (2003), above n 162, draft art 2(1); *CITES* draft (2004), above n 164, draft art 2.
323 MOU art 2.

implications not only for *CITES* obligations but also for the compliance of related FAO instruments.

Compliance with *CITES* obligations is currently rather weak. *CITES* relies on individual parties to enforce international trade restrictions within their borders, yet national implementation rates are poor.[324] Similarly, the FAO instruments such as the IPOA — Sharks (1999) suffer from poor implementation, and the measures such as the *FAO Code of Conduct* are voluntary and unenforceable. That is not to say that these instruments have no effect on conservation, but rather that there is real scope for improvement of compliance within both regimes.

A lack of capacity is often a core reason for non-compliance.[325] The MOU addresses capacity-building.[326] Yet, it does not include suggested provisions that would have provided for cooperation in enforcement.[327] The lack of recognition of the benefits of cooperation in enforcement might be a missed opportunity, not only for enforcement of *CITES* obligations but also for related compliance issues for FAO instruments and other obligations arising from the law of the sea. Observers of overlapping fisheries regimes have suggested that the effectiveness of regimes is enhanced when 'capabilities under one regime are used to induce compliance under another'.[328] I have made similar observations with respect to the interaction between the WTO and fisheries regimes elsewhere.[329]

Monitoring is considered to be one of the most important measures for effective international policies for transboundary and common problems.[330] Monitoring could be enhanced by the use of disparate techniques such as *CITES*'s certification requirements and the FAO's monitoring of stocks. The regular information sharing and observership entrenched in the MOU may well facilitate such ideas. Yet the MOU does not entrench periodic review of its *own* provisions. Ongoing monitoring of the collaborative arrangements between the FAO and the *CITES* Secretariat is instead subject to unilateral initiatives. That said, the high political and economic stakes in the listing of marine species probably means that attention and interest in the MOU will not wane.

V CONCLUSION

This article has examined regime interaction in efforts to protect endangered marine species. Under the auspices of the *CITES* regime, member states are increasingly seeking to restrict the trade of commercially lucrative species such as sharks, seahorses and bluefin tuna. Moves to restrict trade will affect

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324 See Conference of the Parties to *CITES*, COP15 Doc 20, above n 262.

325 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995) 13–15.

326 MOU art 2.

327 See above n 322.

328 Olav Schram Stokke, 'Conclusions' in Olav Schram Stokke (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford University Press, 2001) 303, 349.

329 Young, 'Fragmentation or Interaction', above n 28.

330 See Robert Keohane, Peter Haas and Marc Levy, 'The Effectiveness of International Environmental Institutions' in Peter Haas, Robert Keohane and Marc Levy (eds) *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press, 1993) 3, 16. See also Elinor Ostrom, *Governing the Commons: the Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).

significant political and economic interests, and some states prefer alternative conservation and management tools that are used in regimes such as the FAO. Opposition to *CITES*'s role has therefore been expressed against the background of a fragmented international legal order. Several states have sought to restrict *CITES*'s role by drafting provisions in a Memorandum of Understanding between the FAO and the *CITES* Secretariat that would give the former a power of veto in proposals to list marine species. This is an example of the complexities of regime interaction and the article has sought to investigate the development and application of the MOU in this context.

Although the opposition to *CITES*'s listing of marine species has been presented by some states as a response to potentially 'conflicting norms', there is a large degree of compatibility between the law of the sea, the FAO fisheries management regime and *CITES*. Instead, allegations of conflicting norms are often forum-shopping strategies by major fishing states that oppose *CITES*'s listing of marine species or are concerned about increased costs and a perceived lack of expertise and institutional bias within *CITES*. This suggests that international lawyers should critically consider the interaction between relevant regimes, and the motives of those seeking 'coherence', before they deploy techniques to resolve conflicting norms. Indeed, in the *CITES*–FAO context, attempts to resolve conflicting norms, such as according priority to successive treaties, are inconclusive. More understanding is needed about regimes and the interaction between them if problems of fragmentation and the diversification of international law are to be addressed,[331] and the article sought to contribute to such an understanding. It did so by adopting an institutional perspective that detailed the interests and sensitivities within states and organisations, as well as the impacts of laws and processes for collaboration.

Documenting the regime interaction between *CITES* and the FAO requires a close understanding of the regimes themselves. Concepts that are represented by some states as 'agreed' within regimes should be subject to ongoing scrutiny. For example, in opposing the role of *CITES*, some states implied that the *CITES* regime embraced a precautionary approach to regulation while fisheries laws required more rigorous scientific results. Contrary to these claims, however, the law of the sea, the FAO regime and *CITES* all adopt precautionary approaches in different contexts. As a further example, some states misrepresented the discourse of 'development' to claim within the FAO that the *CITES* regime disadvantaged developing countries. These arguments fail to acknowledge the pluralist interests of developing countries. The article has demonstrated the need to avoid essentialist and simplistic assumptions about regimes when investigating (or entrenching) regime interaction.

An understanding of the political sensitivities behind debates over legal fragmentation is also essential when examining the interaction between regimes. It is useful, for example, to place the motives of the states that contested *CITES*'s role in a wider context. Japan, as just one illustration, has been a party to *CITES* since 1980, *UNCLOS* since 1996, and the *Fish Stocks Agreement* since 2006. It has been a member of the FAO since 1951. Its opposition to *CITES* is not based on a lack of consent to international fisheries law, but rather by its preference for

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331 ILC Analytical Study, above n 5, 249 [493(b)].

a form of fisheries management that does not involve restricting trade through *CITES* listings. Like its opposition to the development of fisheries subsidies disciplines in the WTO,[332] Japan's motivation to question the competence of *CITES* is based on a desire to control the form of international fisheries management, and perhaps even the forum.

In the context of the high political and economic stakes involved in *CITES* listings of marine species, the article described in detail the negotiations to develop the MOU. Attempts made over the course of three years to restrict *CITES*'s role in listing marine species demand legal analysis. If, for example, the attempts to restrict *CITES*'s role are conceived as a form of treaty amendment, the MOU as proposed by Japan would have been subject to additional procedural requirements for *CITES* parties. However, the MOU is more correctly assessed as an agreement between the FAO and the *CITES* Secretariat, rather than between their respective members. As such, the FAO and the *CITES* Secretariat must act within their powers in agreeing on an MOU, and any amendment to *CITES*'s role in listing marine species would have been ultra vires.

The article revealed that rules of procedure within the FAO and *CITES* regime served to facilitate or constrain discussion on the MOU. Observers and even participating states were excluded from certain working groups. A further impediment to the MOU's development was a lack of national policy coordination on fisheries issues. By contrast, several procedures for cooperation between the epistemic communities within the FAO and the *CITES* Secretariat were being followed well before, and perhaps *despite*, the development of the MOU.

Now entrenched, the MOU itself provides promising indications for cooperation, although there are a number of constraints. One is the ad hoc nature of mutual observership, which is tied to a rather disputable concept of 'common interest'. Although capacity building is a welcome development, it could have been extended further to cover species that are not yet listed on the *CITES* Appendices. In addition, the requirement that the *CITES* Secretariat must 'respect, to the greatest extent possible' and take 'due account' of the FAO review of listing proposals is rather fraught, as the recent attempt to list two shark species demonstrates. Furthermore, when considered in the context of the need to enhance compliance with *CITES* and FAO instruments, the MOU could have generated more proactive management, especially of enforcement.

The example of the institutional collaboration between the FAO and *CITES* Secretariat has wider implications. As a model for promoting institutional collaboration between regimes, the *CITES*–FAO MOU may be a potentially significant precedent, with some states already calling for a similar agreement between the FAO and the WTO.[333] This article's close description and analysis of regime interaction in efforts to protect endangered marine species will be invaluable given the increased pressures on international regimes to work together to address global problems. Equally important is a consideration of how regime interaction *should* occur, as informed by the challenges and problems

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332 See Young, 'Fragmentation or Interaction', above n 28.

333 FAO, *Fisheries and Aquaculture Report No 902* (2009) [33].

encountered in the protection of endangered marine species. That normative question, however, must be saved for another time.[334]

[334] See Young, *Trading Fish, Saving Fish*, above n 29, 267–306.