

COMMENTS

ALTERNATIVE APPROACHES TO THE CITES “NON-DETRIMENT” FINDING FOR APPENDIX II SPECIES

BY

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Despite its reputation as the flagship international wildlife conservation treaty, Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) struggle to perform accurate assessments of the impact of trade on the survival of species. Lack of funding, capacity, and sometimes political will hampers the effectiveness of the conservation regime because Parties export specimens without the necessary finding that trade in the specimen will not be detrimental to the survival of the species as a whole. While Parties struggle to gather the necessary biological information, other organizations already engage in this analysis. For CITES to fully achieve its conservation goals, the Parties must explore methods of combining efforts with these non-CITES organizations. This Comment evaluates potential opportunities to synthesize the conservation efforts of CITES with those of Regional Fisheries Management Organizations and third party certification organizations.

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I. INTRODUCTION

Although widely perceived as the flagship international agreement protecting wildlife,¹ the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)² faces major challenges to its implementation. Lack of accurate information on the health of a species as a

¹ John Lanchbery, *Long-Term Trends in Systems for Implementation Review in International Agreements on Fauna and Flora*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS* 69 (David G. Victor et al. eds., 1998); see also Chris Huxley, *CITES: The Vision*, in *ENDANGERED SPECIES, THREATENED CONVENTION* 3, 11 (Jon Hutton & Barnabas Dickson eds., 2000) ("CITES is regarded by many as the world's leading, most successful international conservation convention.")

² Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

whole, its populations, and levels of trade consistently hampers the ability of member States to make the requisite finding that exports of CITES protected species "will not be detrimental to the survival of the species."³ As a result of this information gap, CITES parties export species without undertaking the necessary evaluation of the export's impact on the species through this "non-detriment" finding.⁴ The non-detriment finding is particularly important for restricting levels of trade to sustainable levels for species listed in Appendix II of CITES, such as the great white shark, polar bear, and hippopotamus,⁵ because the non-detriment finding is the only significant check on commercial trade in specimens of Appendix II species. Unlike species currently threatened with extinction for which trade is prohibited except in exceptional circumstances,⁶ Appendix II species can be traded commercially.⁷ As a result of the Appendix II allowance for commercial trade, the non-detriment determination is critical for ensuring trade does not jeopardize the survival of the species. Additionally, 32,540 of the 33,658 species regulated by CITES are included in Appendix II.⁸ The magnitude of this problem is obvious: The combination of the commercial trade allowance for Appendix II species, and the overwhelming percentage of total CITES species regulated in Appendix II (over ninety-six percent) demonstrates that accurate, non-detriment findings are critical to achieving CITES' goal of guaranteeing that international trade does not threaten the survival of wild animals and plants.⁹

Unfortunately, CITES' initial reliance solely on states to provide non-detriment findings has inadequately protected many Appendix II species because many states lack sufficient information on these species. For example, the national Scientific Authority,¹⁰ which is charged with making the non-detriment finding, is under-resourced, under-staffed, and in some cases, non-existent or marginalized in many countries.¹¹ CITES also requires that each State designate a Management Authority to grant permits and implement measures necessary to protect species.¹² This scheme of national implementation requires parties to invest substantial resources to determine on a species-by-species, export-by-export basis whether a species has been negatively impacted. The thousands of already regulated species and the increase in regulated species since the treaty's entry into force in 1975 further exacerbate this burden.

³ *Id.* art. IV.2(a).

⁴ ROSALIND REEVE, *POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE* 152 (The Royal Inst. of Int'l Affairs et al. eds., 2002).

⁵ CITES, *supra* note 2, Appendix II, available at <http://www.cites.org/eng/app/appendices.shtml>.

⁶ *Id.* at Appendix I (listing species currently threatened with extinction).

⁷ CITES, *supra* note 2, art. II.2; REEVE, *supra* note 4, at 29–30 (noting conditions).

⁸ CITES, *The CITES Species*, <http://www.cites.org/eng/disc/species.shtml> (last visited Apr. 23, 2006).

⁹ CITES, *What is CITES?*, <http://www.cites.org/eng/disc/what.shtml> (last visited Apr. 23, 2006).

¹⁰ CITES, *supra* note 2, arts. IX.1(b), IV.3.

¹¹ REEVE, *supra* note 4, at 54, 152–54.

¹² CITES, *supra* note 2, arts. IX.1(a), IV.3.

The CITES parties have developed strategies to overcome the well-recognized problems associated with non-detriment findings, but these approaches, specifically national export quotas and Significant Trade Review,¹³ also suffer from inadequate information. The quota concept stems from ad hoc approaches to curb population declines in a few severely threatened species.¹⁴ As a result of the unstructured birth of the use of quotas in CITES, no specific mandate exists for their use in particular circumstances, and several different quota regimes have been established.¹⁵ Many Parties view these quotas as a de facto, non-detriment finding even though the specific quotas are often set without accurate or up to date information. In 1999, for example, sixty-nine quotas were potentially exceeded and about half of the overages exceeded the reported quota by at least 150%.¹⁶ Often incorporating quotas but more comprehensive in scope, Significant Trade Review attempts to compel enforcement for significantly traded Appendix II species. The Animals or Plants Committee of CITES conducts reviews of the levels of trade and population levels of these highly traded species. After this analysis, the respective Committee recommends actions to improve CITES compliance, including changes in national management and legislation and set quotas that are enforceable with the threat of sanctions to States that exceed them. Many criticize this process for being complex, difficult to understand, and ineffective.¹⁷ One study indicates that between 1994 and 1999 quotas established under the Significant Trade Process were consistently exceeded, were not based on accurate biological information, and even omitted exporting states.¹⁸

Because of the limitations of the current system to make accurate non-detriment findings, delegating the role of national Scientific and Management Authorities to third parties to make non-detriment findings for specific species provides a new approach capable of remedying problems with the current scheme of national implementation. Regional Fisheries Management Organizations (RFMOs), such as the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),¹⁹ currently monitor population levels and trade flow data on commercial marine species and require permits for their trade, such as Patagonian toothfish, a species considered for an Appendix II listing at the twelfth meeting of the Conference of the Parties (COP). Additionally, certification organizations,

¹³ CITES, *Conference Resolution 12.8 (Rev.)*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

¹⁴ REEVE, *supra* note 4, at 36–37.

¹⁵ *Id.*; WILLEM WJNSTEKERS, THE EVOLUTION OF CITES 391–403 (7th ed. 2003).

¹⁶ REEVE, *supra* note 4, at 36–37 (citing CITES, *Doc. 50.2*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002)).

¹⁷ Angela Barden & Teresa Mulliken, *The Significance of Significant Trade*, 19 TRAFFIC BULLETIN 66 (November 2002), available at <http://www.traffic.org/bulletin/Nov2002/editorialvol19no2.pdf>; REEVE, *supra* note 4, at 181.

¹⁸ REEVE, *supra* note 4, at 181 (citing ANN MICHELS, HISTORY OF SPECIES REVIEWED UNDER RESOLUTION CONF. 8.9 (REV.): PART I: AVES (2001)).

¹⁹ Convention for the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, 19 I.L.M. 841 (entered into force Apr. 7, 1982) [hereinafter CCAMLR]. Articles VII–XIII of the Convention establish the Commission, which implements the provisions of the Convention. *Id.* arts. VII–XIII, at 33 U.S.T. 3482–87, at 19 I.L.M. 845–50.

such as the Forest Stewardship Council (FSC), currently certify sustainable timber takings, including mahogany, already listed in Appendix II. Drawing upon the resources and expertise of an established and funded organization can remedy some of the informational deficiencies in the current approach to non-detriment determinations. For non-CITES organizations to become part of the CITES framework, however, they must demonstrate legal compatibility with CITES, political feasibility, and sufficient ability to make the non-detriment finding.

Because CITES requires a Party's Scientific Authority to make a non-detriment finding and its Management Authority to issue permits based on this finding,²⁰ the provisions of non-CITES organizations must meet or exceed the substantive requirements of CITES. The Parties must also develop an appropriate legal mechanism to link the conservation measures of non-CITES organizations to the permit requirements of CITES. Permits and documents, population assessment methods, harvest limits, measures to verify the legality of harvest, and species-specific requirements must all demonstrate compatibility to establish an effective, legally sound synthesis of conservation efforts.

This Comment argues that third parties can perform non-detriment findings for Appendix II species accurately and in compliance with the procedural mandates of CITES. Part II of this Comment provides a general overview of CITES and its basic requirements, focusing particularly on the procedural framework for non-detriment findings and related implementation problems. Part III discusses methods CITES has used to address inadequate compliance with the non-detriment finding requirement, specifically quotas and the Significant Trade Review process, and looks at the limitations of these approaches. Part IV explores the idea of using RFMOs to make non-detriment findings, with specific investigation into the relationship between CITES and CCAMLR concerning Patagonian toothfish. Part V analyzes the potential for third party certification organizations to provide non-detriment findings, using FSC certification of sustainable mahogany logging as an example. This Comment concludes in Part VI with suggestions for making accurate, scientifically based non-detriment findings that effectively protect Appendix II species.

II. OVERVIEW OF CITES

*A. Basic Procedural Requirements*²¹

CITES regulates international trade in exports, re-exports, imports, and introduction from the sea of specimens of wild fauna and flora, which include live and dead animals, as well as plants species, subspecies, and populations, and their parts and derivatives.²² CITES developed "in response to concerns that unregulated international trade . . . was having a

²⁰ CITES, *supra* note 2, art. IV.2.

²¹ For a thorough summary of CITES and its provisions, see WIJNSTEKERS, *supra* note 15.

²² CITES, *supra* note 2, art. I.

detrimental impact on species and their ecosystems.”²³ It seeks to ensure that no species of wild fauna or flora becomes or remains subject to unsustainable exploitation because of international trade.²⁴ For CITES Parties, all international trade in listed species must be in accordance with the terms of the Convention.²⁵ The 169 Parties to CITES²⁶ regulate listed species based on a system of permits and certificates, which can be issued if certain conditions are met and that must be presented before consignments of specimens are allowed to leave or enter a country.²⁷ Specimens of listed species not entering international trade, however, are not subject to regulation under CITES.²⁸

The animal and plant species subject to different degrees of regulation are listed in three appendices. Appendix I includes specimens threatened with extinction, for which trade must be subject to particularly strict regulation, authorized only in exceptional circumstances, and allowed only for non-commercial purposes.²⁹ Appendix II species are not necessarily now threatened with extinction but may become so unless trade is strictly regulated.³⁰ Appendix II further contains so-called “look-alike” species, which are controlled because of their similarity in appearance to other regulated species.³¹ Decisions about the listing of species on Appendices I and II are taken by the COP,³² which meets every two years.³³ Only Parties may submit proposals, and any proposal to amend Appendix I or II requires a two-third majority of the voting Parties to be adopted.³⁴ Appendix III contains specimens that are subject to regulation within the jurisdiction of a Party and for which the cooperation of other Parties is needed to control the trade.³⁵ Parties may include species in Appendix III unilaterally.³⁶

International trade in an Appendix II species requires an export permit³⁷ or a certificate of introduction from the sea for marine species taken outside

²³ WORLD WILDLIFE FUND, CITES APPENDIX II LISTING AND FSC CERTIFICATION: COMPLEMENTARY STRATEGIES FOR CONSERVATION AND SUSTAINABLE MANAGEMENT OF TIMBER SPECIES? 5 (2002); CITES, *supra* note 2, pmb1.

²⁴ CITES, *supra* note 2, pmb1.

²⁵ *Id.* art. II.4.

²⁶ CITES, *Member Countries*, <http://www.cites.org/eng/disc/parties/index.shtml> (last visited Apr. 22, 2006).

²⁷ CITES, *supra* note 2, art. VI; WIJNSTEKERS, *supra* note 15, at 17.

²⁸ CITES, *supra* note 2, art. II.4 (binding Parties to prohibit “trade” except in accordance with the convention); *id.* art. I(c) (defining “trade” as “export, re-export, import, and introduction from the sea”); WORLD WILDLIFE FUND, *supra* note 23, at 5.

²⁹ CITES, *supra* note 2, arts. II.1, III. Article III of CITES requires the importing state and state of introduction from the sea to verify that the specimen listed in Appendix I “is not used for primarily commercial purposes.” The Parties have defined this phrase broadly to include any transaction that is not wholly non-commercial. CITES, *Conference Resolution 5.10*, *in PROCEEDINGS OF THE FIFTH MEETING OF THE CONFERENCE OF THE PARTIES* (1985).

³⁰ CITES, *supra* note 2, art. II.2(a).

³¹ *Id.* art. II.2(b).

³² *Id.* art. XI.3(b).

³³ *Id.* art. XI.2.

³⁴ *Id.* art. XV.1(b).

³⁵ *Id.* art. II.3.

³⁶ *Id.* arts. V.2, XVI.

³⁷ *Id.* art. IV.2.

the jurisdiction of a State.³⁸ Both exporting and importing States must verify this permit before allowing trade to proceed.³⁹ The Management Authority⁴⁰ of the exporting State can issue export permits if 1) the Scientific Authority⁴¹ of the exporting State advises that the trade is not detrimental to the survival of the species, 2) the Management Authority verifies the specimen was not obtained in contravention of the laws of that State for the protection of flora and fauna, and 3) the Management Authority verifies humane transport of live specimens.⁴² For marine species, Article IV.6 of CITES requires the prior grant of a certificate from the Management Authority of the State of introduction when harvests are brought into port.⁴³ This certificate, termed "introduction from the sea" under CITES, resembles an export permit because it requires the non-detriment finding⁴⁴ and humane treatment.⁴⁵ There is no requirement that the Management Authority determine the catch was legally obtained.⁴⁶ When information about the health of a species is limited, CITES recommends use of the precautionary principle whereby a Party acts in the best interest of the conservation of the species.⁴⁷

The monitoring of trade is an essential tool for achieving the aims of the Convention. Scientific Authorities must monitor export permits granted for Appendix II species as well as actual exports and advise their Management Authorities of suitable measures to limit the issue of export permits whenever they determine those exports should be limited.⁴⁸ Additionally, Parties must keep trade records and report them to the Secretariat on an annual basis.⁴⁹ The annual reports of all Parties together should provide statistical information on the total volume of world trade in CITES species,⁵⁰ which is invaluable for assessing their conservation status. The reports also reflect the performance of Parties regarding CITES implementation when all reported exports and re-exports are compared with all reported imports.⁵¹

Compliance with CITES provisions is promoted through two major mechanisms, trade suspension and Significant Trade Review. If countries are persistently non-compliant, the Standing Committee or the Parties can recommend trade sanctions with the non-compliant Party.⁵² Threats of trade

³⁸ *Id.* art. IV.6.

³⁹ *Id.* arts. IV.2, IV.4.

⁴⁰ Parties must designate one *or more* Management Authorities. *Id.* art. IX.1(a).

⁴¹ Parties must designate one *or more* Scientific Authorities. *Id.* art. IX.1(b).

⁴² *Id.* art. IV.2.

⁴³ *Id.* art. IV.6.

⁴⁴ *Id.* art. IV.6(a).

⁴⁵ *Id.* art. IV.6(b).

⁴⁶ *Id.* art. IV.6.

⁴⁷ CITES, *Conference Resolution 9.24 (Rev.)*, in PROCEEDINGS OF THE NINTH MEETING OF THE CONFERENCE OF THE PARTIES (1994). For an analysis of the role of the precautionary principle in CITES, see Barnabas Dickson, *Precaution at the Heart of CITES?*, in ENDANGERED SPECIES, THREATENED CONVENTION 38, 41–42 (Jon Hutton & Barnabas Dickson eds., 2000).

⁴⁸ CITES, *supra* note 2, art. IV.3.

⁴⁹ *Id.* arts. VIII.6(b), VIII.7(a).

⁵⁰ WJNSTEKERS, *supra* note 15, at 18.

⁵¹ *Id.*

⁵² CITES, *supra* note 2, art. XIII.3; CITES, *Conference Resolution 11.3 (Rev.)*, in PROCEEDINGS OF THE ELEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (2000). Prior to

suspensions have proved highly effective in encouraging countries to improve their implementation and enforcement.⁵³ Significant Trade Review and its limitations are discussed below in section III.B.

B. Non-Detriment Finding Limitations

When performing non-detriment findings, Scientific Authorities suffer from lack of adequate information about the conservation status of species, funding, technical expertise to determine the status, and, in some cases, political will to make the finding.⁵⁴ Without sufficient information developed from scientific research and fieldwork, CITES cannot operate effectively.⁵⁵ Because scientific non-detriment findings are key to determining that trade of a specimen will not harm the survival of the species as a whole, the Management Authority of the exporting State must consult with the Scientific Authority before granting an export permit.⁵⁶ The Scientific Authority advises the Management Authority on suitable measures to limit the grant of export permits when the population status of a species so requires.⁵⁷ This advice is essentially a veto power over exports.⁵⁸ CITES does not specify the manner by which a State makes a non-detriment finding, so there is no uniformity among countries, although CITES does recommend that Scientific Authorities base their findings “on the scientific review of available information on the population status, distribution, population trend, harvest and other biological and ecological factors, as appropriate, and trade information relating to the species concerned.”⁵⁹ Additionally, CITES has provided several guidance documents to assist States when making non-detriment findings.⁶⁰

recommending trade sanctions, the Parties usually direct the Secretariat to undertake an investigation as to whether party-adopted criteria for sanctions have been met. Conference Resolution 11.3 does not explicitly provide for trade sanctions, but this non-compliance response has evolved through practice based on the advice of the Secretariat. REEVE, *supra* note 4, at 91–95.

⁵³ WORLD WILDLIFE FUND, *supra* note 23, at 6.

⁵⁴ REEVE, *supra* note 4, at 152–54.

⁵⁵ See CYRILLE DE KLEMM, GUIDELINES FOR LEGISLATION TO IMPLEMENT CITES 23 (1993) (stating that the functions of the Scientific Authority “should be considered as absolutely essential for the implementation of the Convention”).

⁵⁶ CITES, *supra* note 2, art. IV.2(a).

⁵⁷ *Id.* art. IV.3. “[E]xport of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I” *Id.*

⁵⁸ DE KLEMM, *supra* note 55, at 23.

⁵⁹ CITES, *Conference Resolution 10.3*, in PROCEEDINGS OF THE TENTH MEETING OF THE CONFERENCE OF THE PARTIES (1997).

⁶⁰ See, e.g., A.R. ROSSER & M.J. HAYWOOD, GUIDANCE FOR CITES SCIENTIFIC AUTHORITIES: CHECKLIST TO ASSIST IN MAKING NON-DETRIMENT FINDINGS FOR APPENDIX II EXPORTS (2002), available at http://www.iucn.org/themes/ssc/our_work/wildlife_trade/citescop13/CITES/CITES-guidance-prelims.pdf (providing technical guidance on the scientific data necessary to perform non-detriment findings).

These guidance documents contain Party submissions describing limitations of their Scientific Authorities and demonstrate the inability of many countries to make accurate non-detriment findings.⁶¹ For example, China has twenty-seven staff for their Scientific Authority, and they lack a strong biological background. The Scientific Authority has inadequate funds to work independently, and, for some species, it does not have even basic biological information. What information is available is incomplete, decentralized, and sometimes inaccessible. The information used by the Scientific Authority only reflects the staff's own knowledge rather than the best information available.⁶² Other countries submitting reports, including Namibia, Togo, Cameroon, and Bolivia, echoed China's concerns about lack of personnel, funding, and accurate biological information.⁶³

Difficulties in implementation also extend to the United States. A 2004 report by the Government Accountability Office found CITES compliance increasingly difficult, work intensive, and costly since the treaty's entry into force in 1975.⁶⁴ The number of protected animal species has increased about 320% since the early years of the Convention.⁶⁵ As the number of protected species has increased, the number of permits reviewed has also grown. From 1999 through 2003, the permitting workload increased by almost 9%, with over 28,000 permits issued and 200 permits denied over that time period.⁶⁶ Additionally, the criteria for identifying species that require protection has become more science based, and the associated information gathering has required additional staff and time.⁶⁷ In 2003, the Fish and Wildlife Service (FWS)⁶⁸ allocated forty-nine full-time-equivalent staff to issue and review permits, coordinate U.S. proposals at the COP, and perform other tasks.⁶⁹ From 1995–2003, the FWS spent about \$37 million to perform these tasks, with approximately \$4.5 million spent in 2003.⁷⁰ Although the trend toward sound science based decisions is generally positive, complying with the increasingly rigorous monitoring and reporting requirements has been difficult for all countries and particularly challenging for countries that lack the necessary capacity and resources.⁷¹ CITES has attempted to remedy

⁶¹ *Id.* pt. II.

⁶² *Id.* pt. II, at 20–21.

⁶³ *Id.* pt. II, at 23, 25, 26, 29.

⁶⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-964, PROTECTED SPECIES: INTERNATIONAL CONVENTION AND U.S. LAWS PROTECT WILDLIFE DIFFERENTLY 2–4 (2004), available at <http://www.gao.gov/new.items/d04964.pdf>.

⁶⁵ *Id.* at 15. In 1976, Appendices I and II listed about 28,000 species; currently, they list more than 33,000 species. *Id.*

⁶⁶ *Id.* at 16.

⁶⁷ *Id.* at 21, 23.

⁶⁸ In the United States, the Secretary of the Interior, through the Fish and Wildlife Service, is responsible for implementing the Convention. *Id.* at 12.

⁶⁹ *Id.* at 29. This figure does not include staff time spent on enforcement of the Convention, including inspection of shipments and investigation into illegal activities. *Id.*

⁷⁰ *Id.* at 28–29. This figure does not include money spent on enforcement of the Convention, including inspection of shipments and investigation into illegal activities. *Id.* By comparison, the Fish and Wildlife Service spent nearly \$132 million in 2003 to implement the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000). *Id.* at 28 n.9.

⁷¹ *Id.* at 24.

these resource deficiencies by internalizing non-detriment findings through the establishment of national export quotas and Significant Trade Review, discussed below in Section III.

III. EXISTING EFFORTS TO IMPROVE "NON-DETRIMENT" FINDINGS ARE INSUFFICIENT

A. Quotas

Although the text of the Convention does not reference a quota system, the setting of export quotas, initially introduced as exceptional measures for leopard skins and African elephant ivory, has evolved to become standard practice.⁷² Without any specific mandate, quotas have replaced the case-by-case non-detriment finding provided for in Article IV, but the quota system is uncontrolled, has no scientific basis, and is open to abuse.⁷³ The COP can set quotas, but it usually only does so for species of special concern, such as those on Appendix I or transferred from Appendix I to II. In practice, Parties voluntarily set most quotas, but there is no uniform quota-setting framework that bases them on non-detriment findings, includes regular monitoring and annual reviews, or addresses quota overages. It is unclear whether the approval of a nationally established export quota equates to a non-detriment finding because "there currently is no requirement that published quotas be based on a valid non-detriment finding."⁷⁴ CITES Resolution 9.21 states the establishment of export quotas satisfies the required non-detriment findings, but this Resolution only applies to Appendix I species.⁷⁵ There is no similar statement as applied to Appendix II species. As a result, many if not most export quotas are not based on scientific information, due to a lack of resources and capacity to undertake population monitoring and other necessary biological studies.⁷⁶ Additionally, quotas can only be monitored retrospectively through annual trade reports, which are often delayed. Finally, Parties regularly exceed quotas. In 1999, sixty-seven quotas were potentially exceeded for fauna and two for flora. About half of the overages were exceeded by at least 150% and two were exceeded by over 1000%.⁷⁷

⁷² REEVE, *supra* note 4, at 36; WIJNSTEKERS, *supra* note 15, at 391–403.

⁷³ REEVE, *supra* note 4, at 36–37.

⁷⁴ CITES, *Doc. 49*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

⁷⁵ CITES, *Conference Resolution 9.21 (Rev.)*, in PROCEEDINGS OF THE NINTH MEETING OF THE CONFERENCE OF THE PARTIES (1994).

⁷⁶ Int'l Env'tl. Law Project, IELP Comments on Resolutions Being Considered by the United States for CITES COP Thirteen 22 (Mar. 11, 2004) (unpublished comments) (on file with author).

⁷⁷ CITES, *Doc. 50.2*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

B. Significant Trade Review

Concerned about the lack of appropriate non-detriment findings, the Parties established an ongoing process to review trade volumes and identify species for which trade volumes appear to be significant and thus potentially detrimental.⁷⁸ The process provides for CITES Animals or Plants Committee⁷⁹ review of trade volumes and identification of species facing particular problems. If necessary, the respective committee makes recommendations for action by the range state, with time limits for their implementation. The relevant committee can recommend annual export quotas, assistance to undertake field studies, and development of technical and administrative capacity.⁸⁰ The process can result in corrective or punitive measures, including trade restrictions or bans, when the range state fails to implement CITES provisions.⁸¹

The Significant Trade Review process has proven successful in some cases. The committees have reviewed over 200 animal taxa, and there are numerous cases where trade volumes have been reduced to non-detrimental levels.⁸² The process has also promoted increased cooperation among range states in addressing the conservation needs of species of shared concern, for example, with Caspian Sea range states regarding sturgeon and paddlefish.⁸³

The process has not always proven successful, however, because of the same informational and funding deficiencies plaguing state non-detriment findings. The Animals or Plants Committee can recommend field studies, for example, but if the funding for these studies is not available, then they are not undertaken, and "only a small proportion of the developing countries . . . required to undertake fieldwork have been able to do so."⁸⁴ Additionally, some Parties perceive the Review as potentially abusive and a "back-door" mechanism used to achieve the same effect as an Appendix I listing—essentially a commercial trade ban.⁸⁵ The Review has also "faced increasing criticism for being complex and difficult to understand, particularly by new parties to CITES."⁸⁶

Although there has been no comprehensive review of the process itself, one study indicates significant problems in implementation.⁸⁷ The Species Survival Network's review of international trade in birds found nine species

⁷⁸ CITES, *Conference Resolution 12.8 (Rev.)*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

⁷⁹ CITES, *Conference Resolution 11.1 (Rev.)*, in PROCEEDINGS OF THE ELEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (2000).

⁸⁰ CITES, *Conference Resolution 12.8 (Rev.)*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

⁸¹ *Id.*

⁸² Barden & Mulliken, *supra* note 17, at 66.

⁸³ *Id.*

⁸⁴ Robert W.G. Jenkins, *The Significant Trade Process: Making Appendix II Work*, in ENDANGERED SPECIES, THREATENED CONVENTION 45, 54 (Jon Hutton & Barnabas Dickson eds., 2000).

⁸⁵ *Id.*

⁸⁶ REEVE, *supra* note 4, at 181.

⁸⁷ *Id.* (citing ANN MICHELS, HISTORY OF SPECIES REVIEWED UNDER RESOLUTION CONF. 8.9 (REV.): PART I: AVES (2001)).

of birds and thirteen countries for which quotas established under the significant trade process had been exceeded between 1994 and 1999.⁸⁸ Cameroon, for example, after the lifting of a trade suspension, exceeded quotas for gray parrots by over 7,000 specimens in a two-year period. The study also found omitted range states in fifteen reviews of significantly traded birds, quota-setting in the absence of biological information, lack of peer review of field studies, use of questionable survey techniques, lack of uniform standards for non-detriment findings, and lack of follow-up recommendations.⁸⁹ Additionally, the study found importing States not complying with trade suspensions.⁹⁰ Finally, the Review, by its nature, only addresses implementation problems for a few significantly traded species at one time. Thus, the Review fails to address the issues facing the vast majority of species and States. Because Significant Trade Review is limited to a few select species and is not consistently effective, it cannot adequately remedy the widespread capacity and funding limitations of Scientific Authorities to make accurate non-detriment findings.

IV. PROPOSAL: SYNTHESIZE CONSERVATION EFFORTS OF RFMOs AND CITES

Regional Fisheries Management Organizations (RFMOs)⁹¹ gather and analyze precisely the information CITES Scientific Authorities often lack—information on the health status of and levels of trade in a species. Based upon this information, RFMOs establish annual harvest quotas for fisheries within their Convention Areas. Additionally, RFMOs employ various mechanisms to regulate and monitor trade, including catch documents, satellite monitoring of vessels, and vessel inspection. Because RFMOs currently gather biological information and manage harvest levels, they are already performing the requirements of CITES Scientific and Management Authorities for regulation of Appendix II species. RFMOs, however, have not succeeded in preventing unsustainable levels of fishing because of limited membership, limited territorial jurisdiction, and lack of enforcement. CITES can compensate for these limitations by providing near global membership, expanded territorial jurisdiction, and enforcement mechanisms.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Regional fishery management organization refers to an “intergovernmental fisheries organization or arrangement . . . that has the competence to establish fishery conservation and management measures.” U.N. FOOD & AGRIC. ORG., INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING para. 6(c) (2001), available at http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/003/y1224e/y1224e00.HTM. The term “regional fishery management organization” (RFMO) is narrower than the term “regional fishery body or arrangement.” There are more than 30 international institutions that have some responsibility for fisheries issues. These institutions generally, if not universally, have scientific committees that evaluate biological information concerning relevant populations of marine species. A number of these institutions, however, have no mandate for *fishery management* and consequently would not be covered by the term “RFMO.” U.N. FOOD & AGRIC. ORG. FISHERIES DEP’T, IMPLEMENTATION OF THE INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING n.109 (2002), available at <ftp://ftp.fao.org/docrep/fao/005/y3536e/y3536e00.pdf>.

A. RFMOs Unable to Adequately Protect Commercial Marine Species

1. General Problems with Conservation Methods of RFMOs

Because of the central role RFMOs play in the conservation of marine species, all states involved in commercial fishing must apply the conservation methods of RFMOs to ensure the sustainability of the world's fisheries. Many of the most valuable stocks of fish, and a large number of those stocks most subject to significant illegal, unreported, and unregulated (IUU) fishing,⁹² fall under the purview of RFMOs.⁹³ RFMOs usually suffer from at least one of three deficiencies: limited membership, limited territorial jurisdiction, and lack of enforcement. For example, the International Commission for the Conservation of Atlantic Tunas (ICCAT),⁹⁴ which manages bluefin tuna and swordfish, has sufficient territorial jurisdiction and enforcement measures, including trade sanctions. ICCAT has significant problems due to its limited membership.⁹⁵ Bluefin tuna harvesting operations are increasingly located at and operated by non-

⁹² Illegal, unreported, and unregulated fishing constitute major challenges to maintaining sustainable fisheries. The United Nations Food and Agriculture Organization defines each of these forms of unsustainable fishing:

Illegal fishing refers to activities: [1] conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations; [2] conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or [3] in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

U.N. FOOD & AGRIC. ORG., *supra* note 91, para. 3.1.

Unreported fishing refers to fishing activities: [1] which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or [2] undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Id. para. 3.2.

Unregulated fishing refers to fishing activities: [1] in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or [2] in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

Id. para. 3.3.

⁹³ U.N. FOOD & AGRIC. ORG. FISHERIES DEP'T, *supra* note 91, at 55.

⁹⁴ For more information on ICCAT, see International Commission for the Conservation of Atlantic Tunas, About ICCAT, <http://www.iccat.es/introduction.htm> (last visited Apr. 23, 2006).

⁹⁵ WORLD WILDLIFE FUND, WWF BRIEFING ON ATRT'S "THE TUNA-RANCHING INTELLIGENCE UNIT" REPORT, ISSUED ON 21 SEPTEMBER 2004, 7-9 (2004).

ICCAT members.⁹⁶ As a result, ICCAT is unable to effectively prevent non-members from entering ICCAT jurisdiction and harvesting tuna without being subjected to ICCAT's conservation measures. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), particularly with respect to toothfish conservation, suffers from all three problems discussed below in section IV.A(3).

2. Patagonian and Antarctic Toothfish Survival Threatened

The popularity of the Patagonian toothfish (*Dissostichus eleginoides*) and Antarctic toothfish (*Dissostichus mawsoni*) in commercial markets has led to concerns about the long-term conservation status of the species and the future of toothfish fisheries. The high commercial value of toothfish has led to the species being termed "white gold" and created a lucrative legal and illegal market for the fish. Dockside prices range as high as \$10 to \$12 per pound, and a good catch can bring in \$3 million.⁹⁷ Additionally, at least 50% of international trade in toothfish comes from IUU fishing. For example, between 1998 and 2001, approximately 243,282 tonnes of Patagonian toothfish were traded in international markets, with only 123,165 tonnes legally caught.⁹⁸ In combination with the lucrative market for toothfish, the species' biological characteristics make them particularly vulnerable to overexploitation. Both species of toothfish exhibit large size, longevity, late maturation, and low fecundity. One research study found that the total amount of toothfish biomass in a small area of the Southern Ocean east of South America fell from well over 60,000 tonnes in 1986 to less than 25,000 tonnes in 1999.⁹⁹ The United Nations Food and Agriculture Organization stated: "[T]he continuation of IUU fishing could reduce toothfish stocks to levels from which they cannot recover."¹⁰⁰ CCAMLR has also expressed "its extreme concern about the high level of IUU fishing for toothfish (*Dissostichus* spp.) in its Convention Area, a concern that has been echoed by the International Tribunal for the Law of the Sea."¹⁰¹ Despite CCAMLR's concerted efforts to protect toothfish, it has been unable to adequately stem the decline in toothfish populations.

⁹⁶ *Id.*; see also CAROLINE RAYMAKERS & JACQUI LYNHAM, SLIPPING THE NET: SPAIN'S COMPLIANCE WITH ICCAT RECOMMENDATIONS FOR SWORDFISH AND BLUEFIN TUNA 28 (TRAFFIC) (1999) ("A number of those interviewed expressed concern about undeclared catches of Bluefin Tuna from non-ICCAT countries and from ships with flags of convenience.").

⁹⁷ NAT. ENVTL. TRUST, BLACK MARKET FOR WHITE GOLD 7 (2004), available at http://www.net.org/reports/csb_report.pdf.

⁹⁸ SPECIES SURVIVAL NETWORK, THE SPECIES SURVIVAL NETWORK JOINS AUSTRALIA IN CALLING ON THE WORLD TO PROTECT "CHILEAN SEA BASS" 1 (2002).

⁹⁹ NAT. ENVTL. TRUST, *supra* note 97, at 8 (citing P. GASIUKOV & R. DOROVSKIKH, RESULTS OF D. ELEGINOIDES STOCK ASSESSMENT FOR SUBAREA 48.3 USING A DYNAMIC AGE STRUCTURED PRODUCTION MODEL (2000)).

¹⁰⁰ U.N. FOOD & AGRIC. ORG. FISHERIES DEP'T, *supra* note 91, at 2, n.5.

¹⁰¹ *Id.* at 2.

3. Limitations of CCAMLR's Current Protection of Toothfish

Although CCAMLR provides scientific analysis of and conservation measures for toothfish, the limited membership of the Commission, the limited jurisdiction of the Convention, and its lack of enforcement mechanisms hamper its effectiveness. CCAMLR has a broad objective to conserve, manage, and rationally use Antarctic marine living resources.¹⁰² To give effect to these objectives, CCAMLR requires its Commission compile data and adopt conservation measures based on the best scientific evidence available. Based on information from the CCAMLR Scientific Committee,¹⁰³ the Commission sets a harvest quota, termed "total allowable catch" (TAC), on an annual basis for each fishery and applies it to each statistical sub-area within the CCAMLR Convention Area.¹⁰⁴ Other conservation measures, as applied to toothfish, include on-board observers, a catch document system (CDS), Port State inspection of vessels, and a vessel monitoring system (VMS) that tracks a vessel's location, speed, and direction via satellite. The CDS is designed to provide a comprehensive paper trail for toothfish products from the catching vessel through the final point of inspection.¹⁰⁵

The first major limitation of CCAMLR's conservation methods is the limited membership of the Commission, currently thirty-one Members.¹⁰⁶ Most of the states involved in the toothfish trade and harvest are members of the Commission; however, many vessels fly a "flag of convenience." Flag of convenience vessels are registered in a different country from where the ship is beneficially owned.¹⁰⁷ The Flag State is generally a non-CCAMLR Member and a developing country that registers vessels for the purpose of raising revenue.¹⁰⁸ These States rarely exercise control over their vessels.¹⁰⁹ Vessels flagged by non-CCAMLR Members are not required to comply with CCAMLR's regulations, so another method of applying CCAMLR's conservation methods to these unregulated vessels must be developed. Additionally, because there is no obligation for the Port State to verify where catches were taken, fishing activity by these vessels is largely unregulated.¹¹⁰

The second limitation of CCAMLR's conservation protocol is that the Convention Area, although covering the majority of known waters containing toothfish, does not contain all toothfish fisheries.¹¹¹ Outside the CCAMLR Convention and State jurisdiction, there are no conservation

¹⁰² CCAMLR, *supra* note 19, arts. II.1, II.2; CCAMLR, *CCAMLR's Mandate*, http://www.ccamlr.org/pu/E/e_pubs/am/man-ant/p1.2.htm (last visited Apr. 23, 2006).

¹⁰³ CCAMLR, *supra* note 19, arts. XIV–XVII.

¹⁰⁴ ANNA WILLOCK, UNCHARTED WATERS: IMPLEMENTATION ISSUES AND POTENTIAL BENEFITS OF LISTING TOOTHFISH IN APPENDIX II OF CITES 22 (TRAFFIC 2002), *available at* http://www.traffic.org/news/uncharted_waters.pdf.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ CCAMLR, *Membership*, <http://www.ccamlr.org/pu/e/ms/intro.htm> (last visited Apr. 23, 2006).

¹⁰⁷ WILLOCK, *supra* note 104, at 12.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 7. FAO Statistical Area 51 and areas along the Patagonian slope, for example, contain toothfish populations but are not part of the Convention Area. *Id.* at 9–10, 24.

measures or controls, so vessels avoid CCAMLR's TAC limits, the CDS, and VMS requirements. As a result, many vessels misreport catch as being taken outside the Convention Area when the catch is actually within it. Without VMS, it is nearly impossible for the Port State to verify the location of the catch.¹¹² Some Members voluntarily require VMS verification of all catches landed in their ports, but not all Members have this requirement, so misreported catch still hampers the effectiveness of CCAMLR.¹¹³ Additionally, because no regulations are in place outside the Convention Area and State jurisdiction,¹¹⁴ harvests in these areas are reducing fish stocks to unsustainable levels.

The third major limitation of CCAMLR's conservation scheme is a lack of enforcement. The Commission has limited enforcement capacity and instead relies on Members and cooperating non-Parties to effectively implement and regulate agreed conservation measures.¹¹⁵ Not all countries involved in the toothfish trade, including Members, are fully applying CCAMLR's conservation measures, particularly the CDS, which undermines the effectiveness of the regime.¹¹⁶

B. Cooperation Between CITES and RFMOs

1. Benefits of CITES Listing

Cooperation between CITES and RFMOs provides reciprocal benefits to CITES Parties and RFMO Members. CCAMLR, for example, suffers from inadequate membership, territorial jurisdiction, and enforcement. First, CITES provides near global membership, so an Appendix II listing of toothfish would require non-CCAMLR members to apply CCAMLR conservation measures. Second, CITES can remedy the failure of the CCAMLR Convention Area to include the entire range of the toothfish. CITES would apply CCAMLR's conservation methods beyond the Convention Area because toothfish harvested outside the Convention Area would be subject to CITES introduction from the sea requirements, which includes a non-detriment finding. Third, through the threat of trade sanctions and suspensions, CITES could bolster enforcement of CCAMLR's conservation measures. CCAMLR currently has no capacity to suspend trade with non-compliant Members. CITES could fill this void with threats of and actual trade sanctions for persistently non-compliant Parties.

CITES Scientific Authorities, on the other hand, suffer from inadequate biological information and capacity. CCAMLR already monitors harvest and

¹¹² Although VMS does not verify the location of the catch itself but only the vessel, it does show whether vessels have entered the Convention Area. Vessels with VMS records demonstrating entry into the Convention Area but claiming harvests only outside of it would be suspected of engaging in unreported fishing. Additionally, on-board observers could corroborate the time of the catch with a specific location.

¹¹³ WILLOCK, *supra* note 104, at 12.

¹¹⁴ *Id.* at 24.

¹¹⁵ *Id.* at 13.

¹¹⁶ *Id.* For example, Canada has not implemented the CDS despite repeated requests from the Commission. *Id.*

trade levels of marine species and engages in conservation efforts, including catch limits, catch documents, and vessel monitoring. Therefore, if CCAMLR's monitoring and conservation methods meet the substantive requirements of CITES, its efforts could compensate for the funding and informational deficiencies of CITES Scientific Authorities.

2. Legal and Technical Compatibility

Because Article IV of CITES requires a Party's Scientific Authority to make a non-detriment finding and its Management Authority to determine that a specimen was legally obtained and humanely transported,¹¹⁷ CCAMLR's provisions must meet the substantive requirements of Article IV. The Parties must also develop an appropriate legal mechanism for linking CCAMLR's regime to CITES' permit requirements. This section investigates the compatibility between the provisions of CCAMLR and CITES.

a. Non-Detriment Finding

CCAMLR's scientific research and assessment methods meet or exceed the requirements of CITES. CITES requires the Scientific Authority of the State of export to advise the State's Management Authority that export of a specimen will not be detrimental to the survival of the species.¹¹⁸ Similar to this non-detriment finding, CCAMLR bases its annual total allowable catch (TAC) on an ecosystem and precautionary approach, which accounts for historical catches, uncertainties, and lack of information.¹¹⁹ TACs "reflect the best available information on . . . sustainable level[s] of catch and also take into account the impact of catches on the broader ecosystem."¹²⁰ CCAMLR sets TACs well above the level necessary to ensure that a species is not harvested and traded to the detriment of the species and bases them on estimates of sustainable catch projected over a twenty-year plus timeframe. Based on information from the CCAMLR Scientific Committee, the Commission sets the TAC on an annual basis for each fishery and applies it to each statistical sub-area within the CCAMLR Convention area.¹²¹ The CCAMLR Secretariat monitors reported catches against the TAC and closes the sub-area fishery when the TAC is reached.¹²² Because over ninety percent of toothfish are traded commercially, the TAC would correlate closely with non-detrimental levels of trade.¹²³ The TAC could then be used as a scientifically sound export quota under CITES. CITES can place limits, or quotas, on the total number of specimens that can be traded each year.¹²⁴

¹¹⁷ CITES, *supra* note 2, art. IV.2.

¹¹⁸ *Id.* art. IV.2(a).

¹¹⁹ Chris Wold, CITES, Toothfish, and CCAMLR 2 (Oct. 25, 2002) (unpublished recommendation to CITES Parties, on file with author).

¹²⁰ WILLOCK, *supra* note 104, at 22.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See supra* Part III.

For shared stock species, range states agree on catch and export quotas and then manage their share of the stock under CITES permit requirements.¹²⁵ Scientific Authorities then make their non-detriment findings in reference to the national quota, or in this case, the CCAMLR TAC. Because CITES does not provide a uniform definition of “non-detrimental,” the scientifically based TAC would fall within the definition and would provide the additional benefit of uniformity among parties for toothfish non-detriment findings.¹²⁶ The location of the catch, however, affects whether TAC can serve as a quota under CITES and creates different challenges to implementation. Two variables, whether the catch is within the CCAMLR Convention Area and whether the catch is within the jurisdiction of a state, create four potential scenarios that require investigation into separate CITES provisions.

First, inside both the CCAMLR Convention Area and the jurisdiction of a state, substituting TACs as quotas for non-detriment findings presents few implementation problems. CCAMLR sets TACs for these waters based on either the advice of the Scientific Committee or through an internal process undertaken by the state with notification to CCAMLR. The TAC is therefore similar to a range state quota under CITES because an individual country controls the harvests in these waters.¹²⁷

Second, although TACs are not required outside the CCAMLR Convention Area and inside state jurisdiction, CCAMLR Members do implement management measures for the protection of toothfish in these waters.¹²⁸ Non-detriment findings for catches outside the CCAMLR Convention area but inside state jurisdiction would thus be based on the management measures of the relevant state, which could be a TAC or some other form of control on harvests in the area.¹²⁹

Third, outside the Convention Area and state jurisdiction, CITES Parties would need to issue non-detriment findings consistent with Article IV since CCAMLR does not set TACs outside its mandate. A zero quota for these areas probably best serves conservation goals since harvests outside of the CCAMLR area are significantly contributing to depleted fish stocks and limited information exists as to sustainable catch amounts.¹³⁰ Additionally, without a zero quota, the current loophole would persist and vessels could continue to misreport catch as taken outside CCAMLR and state jurisdictions when actually taken within them. CITES parties could adopt an annotation¹³¹ to an Appendix II listing that establishes a zero quota and

¹²⁵ WILLOCK, *supra* note 104, at 22.

¹²⁶ Wold, *supra* note 119, at 2.

¹²⁷ WILLOCK, *supra* note 104, at 22.

¹²⁸ *Id.* For example, the Chilean Artisanal fishery and Australia’s Macquarie Island fishery are both outside CCAMLR jurisdiction. *Id.* Article XI of the Convention charges the Commission with cooperating with Members exercising jurisdiction in marine areas adjacent to the Convention Area with the goal of harmonizing conservation measures. CCAMLR, *supra* note 19, art. XI.

¹²⁹ WILLOCK, *supra* note 104, at 22.

¹³⁰ *Id.* at 24.

¹³¹ The COP can accompany Appendix I and II listings or amendments with an annotation, which clarifies specifics of the listing or provides substantive requirements to facilitate the listing. CITES, *Conference Resolution 11.21 (Rev.)*, in PROCEEDINGS OF THE ELEVENTH MEETING

prohibits trade in specimens taken outside the CCAMLR Convention Area and state jurisdiction, verified by the CDS and VMS. Alternatively, Scientific Authorities could perform non-detriment findings for each traded catch, determining that all such catches taken outside CCAMLR and state jurisdictions are per se detrimental.

Fourth, inside the CCAMLR Convention Area and outside state jurisdiction, several potential implementation methods exist. Article IV.7 of CITES allows consultation with "international scientific authorities" when issuing an introduction from the sea certificate.¹³² The consultation allowance facially appears to provide a mechanism for linking CCAMLR's TAC with CITES' non-detriment finding, but Article IV.7 also links the consultation allowance with a time period and a total number of specimens to be introduced within that period.¹³³ As a result of the time and total number factors, Article IV.7 provides a poor link to CCAMLR's toothfish protection measures.¹³⁴ Toothfish harvests are recorded in weight with large numbers of specimens, often partially processed at sea, so it is impractical to determine the total number of specimens. Additionally, vessels are unable to accurately predict total amounts of catch for introduction from the sea certificates because harvests vary from season to season. For Article IV.7 to serve as the mechanism linking CCAMLR's TAC with a non-detriment finding, the COP would need to pass a resolution¹³⁵ or an annotation to an Appendix II listing of toothfish allowing a flexible interpretation of Article IV.7 that accounts for harvesting methods.¹³⁶ Even assuming Article IV.7 could provide a legal mechanism to allow consultation with CCAMLR, the Scientific Authority still must perform the non-detriment finding, implicating the same funding and capacity limitations. For example, Scientific Authorities would still need to issue certificates of introduction from the sea. Relying upon CCAMLR advice, however, can minimize the amount of scientific study required by individual parties' Scientific Authorities.

CITES Article XIV.4, which allows compliance with the provisions of a marine organization to substitute for compliance with CITES, potentially provides another legal mechanism to link CCAMLR's and CITES' provisions.¹³⁷ Article XIV.4 does not apply to marine treaties that entered

OF THE CONFERENCE OF THE PARTIES (2000).

¹³² CITES, *supra* note 2, art. IV.7.

¹³³ *Id.* "Certificates . . . may be granted on the advice of a Scientific Authority, in consultation with . . . international scientific authorities, in respect of periods not exceeding one year for total numbers of specimens to be introduced in such periods." *Id.*

¹³⁴ WILLOCK, *supra* note 104, at 23.

¹³⁵ The COP can pass a resolution, which is a recommendation for improving the effectiveness of the Convention. CITES, *supra* note 2, art. XI.3(e).

¹³⁶ WILLOCK, *supra* note 104, at 23.

¹³⁷ CITES, *supra* note 2, art. XIV.4.

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

into force after CITES, such as CCAMLR,¹³⁸ so another method of substitution consistent with Article IV obligations under CITES is required for such treaties. The COP could amend Article XIV.4 to permit use of treaties that entered into force after CITES, but the amendment process is slow and rarely used.¹³⁹ Alternatively, the COP could pass an annotation to an Appendix II listing that incorporates CCAMLR's TAC, thus making it approved and binding on the Parties. Any changes in a TAC would also need to be binding on CITES Parties.¹⁴⁰ CITES Resolution 10.14 concerning quotas for leopard skins provides precedent for quotas approved by the COP to be considered as the equivalent of a non-detriment finding provided that the export is within the quota.¹⁴¹ Finally, the Resolution would need to make clear that trade inconsistent with CCAMLR measures is inconsistent with CITES and therefore can trigger the enforcement provisions of CITES.¹⁴²

For catches taken inside the CCAMLR Convention Area, CITES parties should designate CCAMLR as the CITES Scientific Authority for purposes of issuing non-detriment findings for toothfish. This designation directly links the non-detriment finding to the TAC set by CCAMLR. Although this designation only applies within the CCAMLR Conservation Area, it would be valid both for export permits and certificates of introduction of the sea.¹⁴³

b. Legally Obtained

CCAMLR's conservation methods also meet or exceed CITES' requirements. CITES requires the Management Authority of the State of export to determine specimens were not obtained in contravention of national laws before granting the export.¹⁴⁴ This requirement applies to exports and not introduction from the sea,¹⁴⁵ so it only applies to fish caught within the jurisdiction of a CITES Party. CCAMLR uses a Catch Document

accordance with the provisions of such other treaty, convention or international agreement.

Id. The Management Authority of the State of introduction must still grant a certificate indicating that the specimen was taken in accordance with the relevant treaty, convention, or international agreement. *Id.* art. XIV.5; *see also* Wold, *supra* note 119, at 3 (describing the use of Article XIV.4 to link CITES and CCAMLR).

¹³⁸ CCAMLR entered into force on April 7, 1982. CCAMLR, *supra* note 19. CITES entered into force on July 1, 1975. CITES, *supra* note 2.

¹³⁹ The Parties adopted the Bonn amendment on June 22, 1979, to allow the COP to permit the Secretariat to adopt financial provisions, but it entered into force nearly ten years later on April 13, 1987. CITES, *Bonn Amendment to the Text of the Convention*, <http://www.cites.org/eng/disc/bonn.shtml> (last visited Apr. 22, 2006). The Parties adopted the Gaborone amendment in 1983 and it has yet to enter into force. CITES, *Gaborone Amendment to the Text of the Convention*, <http://www.cites.org/eng/disc/gaborone.shtml> (last visited Apr. 22, 2006).

¹⁴⁰ Wold, *supra* note 119, at 3.

¹⁴¹ CITES, *Conference Resolution 10.14 (Rev.)*, in PROCEEDINGS OF THE TENTH MEETING OF THE CONFERENCE OF THE PARTIES (1997).

¹⁴² Wold, *supra* note 119, at 3.

¹⁴³ *Id.* at 4.

¹⁴⁴ CITES, *supra* note 2, art. IV.2(b).

¹⁴⁵ *Id.* art. IV.6.

System (CDS) and requires issuance of *Dissostichus* Catch Documents (DCD) at the time of the catch. The CDS requires a Party to take steps to determine whether toothfish were "caught in a manner consistent with CCAMLR measures."¹⁴⁶ The Party may issue catch documents only to vessels authorized to catch toothfish, and each landing and transshipment must be accompanied by a completed catch document. Additionally, vessels must be registered and use a vessel monitoring system (VMS) that records the location of the vessel. CITES does not include violations of RFMO conservation measures or international law in the Management Authority's determination that specimens were legally obtained, so the basis for this finding cannot be a violation of CCAMLR's conservation measures on its face.¹⁴⁷ Because CCAMLR measures must be implemented through national legislation, however, CCAMLR requires a party verify that toothfish are caught consistent with national legislation.¹⁴⁸ Thus, CCAMLR's measures are equivalent to CITES' Article IV requirement that a specimen was not taken in contravention of national laws before granting an export or re-export permit. VMSs further ensure that toothfish are caught consistently with national laws and establish mechanisms to assist Parties to make that finding. Additionally, the CCAMLR requirement is broader than CITES' requirement because it applies in the Convention Area, much of which is beyond national jurisdiction where domestic laws do not apply.¹⁴⁹

Introduction from the sea certificates do not require a finding that a specimen was legally obtained. Rather, Management Authorities would make this finding only if such specimens are exported. As a result, a State would allow specimens to be landed in its ports, processed, and only then determine if they had been legally obtained at the time of export.¹⁵⁰ Ideally, the Management Authority would verify catch documents and the VMS at the time of introduction, which would prevent vessels from misreporting catch as taken outside the Convention Area, which is particularly problematic if the harvest is not exported. Otherwise, CCAMLR cannot accurately compare the actual level of total harvest with the TAC. To make a "legally obtained" finding at the time of introduction, part of the basis for a non-detriment finding should be whether vessels use the CDS and VMS. Management Authorities would need to verify the location of the catch and catch documents for Scientific Authorities to accurately determine whether the catch was non-detrimental. This verification is consistent with CCAMLR's current provisions for issuing a Certificate of Origin under the CDS.¹⁵¹ Essentially, the non-detriment finding would be based in part on whether the catch was legally obtained in accordance with CCAMLR's conservation measures. The COP would need to pass a resolution requiring that only vessels authorized to fish under CCAMLR measures would be granted an

¹⁴⁶ CCAMLR, CONSERVATION MEASURE 10-05, CATCH DOCUMENTATION SCHEME FOR *DISSOSTICHUS SPP.* (2004), available at http://www.ccamlr.org/pu/e/e_pubs/cm/04-05/10-05.pdf.

¹⁴⁷ WILLOCK, *supra* note 104, at 21.

¹⁴⁸ Wold, *supra* note 119, at 2.

¹⁴⁹ *Id.*

¹⁵⁰ WILLOCK, *supra* note 104, at 24.

¹⁵¹ *Id.*

export permit or introduction from the sea certificate.¹⁵² Otherwise, the State of introduction would be unable to verify the location of the catch and thus would be unable to make the requisite “legally obtained” finding.

To enable the link between CITES and CCAMLR, the Parties should designate port authorities competent to issue and validate CCAMLR catch documents as the CITES Management Authority. This designation would apply for catches both inside and outside the Conservation Area, and ensures that CITES permit requirements and the CDS are not duplicated since the same entity issues the permit.¹⁵³

c. Humane Transport

CITES’ additional requirement—Management Authority verification that living specimens were prepared and shipped to minimize injury before granting an export permit, re-export permit, or certificate of introduction from the sea¹⁵⁴—does not apply in the context of toothfish. Although CCAMLR has no similar provision, toothfish entering trade are dead and usually partially processed at sea. Therefore, the CITES requirement for living specimens would not apply.¹⁵⁵

d. Additional Potential Pitfalls

Beyond the compatibility of CITES Article IV requirements with CCAMLR’s TACs and CDS, several implementation issues potentially scuttle use of CCAMLR’s provisions for CITES findings. Problems associated with regulating commercial marine species must be settled before the two management systems can be synthesized.

i. Split Catches

Catches split between State jurisdiction and the high seas require a practical approach when issuing export permits and introduction from the sea certificates. One fishing vessel is capable of fishing both inside and outside State jurisdiction in a single trip. As a result, a single harvest could be subject to an introduction from the sea certificate and either an export permit or no CITES provisions, depending on whether the fish are traded.¹⁵⁶ The COP would need to pass either a resolution or an annotation to an Appendix II listing that would subject all split catch to a single requirement, preferably the most stringent.¹⁵⁷ Therefore, catch split between export permit and introduction from the sea requirements would be subject to

¹⁵² *Id.*

¹⁵³ Wold, *supra* note 119, at 4.

¹⁵⁴ CITES, *supra* note 2, art. IV.2(C).

¹⁵⁵ Wold, *supra* note 119, at 2–3.

¹⁵⁶ WILLOCK, *supra* note 104, at 20.

¹⁵⁷ *Id.* at 21.

export permit requirements, and catch split between introduction from the sea and no CITES provisions would be subject to introduction from the sea requirements.¹⁵⁸ This solution, however, applies CITES provisions beyond the scope of the Convention by requiring introduction from the sea certificates when none were previously mandated. The Parties will need to demonstrate flexibility and liberally interpret Article IV for this approach to succeed. Alternatively, vessels could keep toothfish separated in different holds based on the location of the catch.

ii. Separation of Patagonian and Antarctic Toothfish

CCAMLR does not set TACs for Patagonian and Antarctic toothfish based on the species classification, which differs from individual species listings under CITES. CCAMLR implicitly sets TACs for each species by basing them on statistical sub-areas within which one of the two species is likely to occur, rather than setting catch limits based on the individual species. Patagonian and Antarctic toothfish habitat does not significantly overlap, thus vessels primarily catch one of the two species.¹⁵⁹ Additionally, the market does not discriminate between the two species, and they are usually sold under the same commercial name. CITES, on the other hand, lists species individually and requires annual reporting and permitting based on that species name. Therefore, CCAMLR must take measures to distinguish between the two species. Although TACs have not been established for each toothfish species, the CDS and DCDs require vessels to separately record the two species.¹⁶⁰ CCAMLR has also recommended that its members use separate trade codes for the two species. To date, only the United States and New Zealand have issued separate codes while other major importers of toothfish do not distinguish between the two.¹⁶¹ In order for CCAMLR and CITES provisions to be compatible, the CCAMLR recommendation for separate codes should be required of all CCAMLR members.

iii. Look-alikes

Because toothfish are usually partially processed at sea, the potential for smuggling under the name of another fish species needs to be addressed by CITES parties. First, Patagonian and Antarctic toothfish appear similar as whole fish and indistinguishable in fillet form.¹⁶² Although Patagonian toothfish are more often the target of IUU fishing, Antarctic toothfish are also traded at levels incompatible with their survival and, as a result, would need to be listed in Appendix II. Alternatively, Antarctic toothfish could be considered under the "look-alike" provisions of CITES. Article II.2(b)

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 25.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

requires that other species be listed if necessary to ensure effective regulation of a listed species.¹⁶³ This listing may occur when “specimens of the species in the form in which they are traded resemble specimens of a species included in Appendix II . . . such that enforcement officers . . . are unlikely to be able to distinguish between them,” or other compelling reasons exist.¹⁶⁴ Thus, CITES would allow either an independent listing of both species of toothfish or a look-alike listing of the non-listed species. Second, toothfish are quite distinct from other fish species, even in fillet form because of their extremely white flesh and oily sheen.¹⁶⁵ Highly processed toothfish becomes less visually distinct, however, so the risk exists of toothfish being laundered as another fish species. These other fish species could be listed under CITES’ look-alike provisions, but then a non-detriment finding and the other CITES requirements would apply to the look-alike species, without the necessary information to adequately perform a non-detriment finding. Therefore, the best approach would be to establish a monitoring program to assess the extent of toothfish laundering as a non-listed fish species.¹⁶⁶

e. Permits, Certificates, and Documents

CCAMLR’s CDS and DCD must satisfy CITES permit requirements or both a CITES permit and a DCD must be issued for each specimen. To minimize the burden on Management Authorities, only one permit should be required. CITES Resolution 12.3 contains a list of information that should be included in permits as well as a permit template and states “that the data carried on permits and certificates must supply maximum information . . . to allow verification of the conformity between the specimens and the document.”¹⁶⁷ The Resolution also recommends standardization of permit and certificate forms and allows modifications with advice from the Secretariat, but it does not require uniformity.¹⁶⁸ Although the method by which the information appears in the DCD varies from the export permit template contained in Resolution 12.3, the purpose of the information is largely comparable. There are only two information requirements for CITES permits not already displayed on a DCD: the CITES Appendix listing and the purpose of the transaction. Presumably, this additional information could be

¹⁶³ CITES, *supra* note 2, art. II.2(b).

¹⁶⁴ CITES, *Conference Resolution 9.24 (Rev.)* Annex 2b(A), in *PROCEEDINGS OF THE NINTH MEETING OF THE CONFERENCE OF THE PARTIES* (1994).

¹⁶⁵ WILLOCK, *supra* note 104, at 25.

¹⁶⁶ *Id.* at 26. Willock discusses two other alternatives to listing look-alike species but concludes a monitoring program would best address the possibility of toothfish laundering. The first alternative is for CITES to require toothfish be traded only in recognizable forms, but this approach may result in full processing at sea preventing the application of any CITES provisions because unrecognizable parts are not regulated. The second alternative is to mandate the use of an existing DNA test for toothfish, but this test is costly and could meet resistance in implementation. *Id.*

¹⁶⁷ CITES, *Conference Resolution 12.3 (Rev.)*, in *PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES* (2002).

¹⁶⁸ *Id.* § I.

readily added to the CDS.¹⁶⁹ The CDS also has additional information not generally included in CITES permits related to the source of the toothfish, which is designed to track catches and maintain the integrity of CCAMLR conservation measures.¹⁷⁰ This additional information clearly does not add any additional burden on CCAMLR members. The addition could be burdensome on CITES Parties who are not CCAMLR Members, however, tracking catches is a necessary protection against IUU fishing and one of the key benefits of using the CDS.

CITES Resolution 12.3 also recommends inclusion of additional information on permits and certificates for species subject to quotas.¹⁷¹ For both voluntary national quotas and quotas set by the COP, permits and certificates should display the total annual quota for the species and the current number already exported during the year. The quota information is not required, however, and CCAMLR's TAC is not technically a voluntary national quota or a quota set by the COP. As a result, inclusion of TAC levels on the DCD would not be necessary. Additionally, the vessel's Flag State electronically transmits DCDs to CCAMLR resulting in no lag time comparing TACs with actual catch levels.¹⁷²

3. Political Feasibility

Despite the potential benefits and legal compatibility of cooperation between CITES and CCAMLR, political dimensions at CITES threaten an Appendix I or II listing for toothfish. At COP 12, Australia proposed to substitute CCAMLR's TAC and CDS for CITES permit requirements.¹⁷³ Chile, a range state of the Patagonian toothfish, resisted Australia's proposal, instead proposing a non-binding recommendation for cooperation between CCAMLR and CITES and voluntary use of the CDS.¹⁷⁴ Ultimately, Chile's proposal passed¹⁷⁵ and cooperation lasted until COP 13 in 2004, when the Parties voted to end further cooperation.¹⁷⁶ The Secretariat recommended ceasing cooperation in the absence of a listing on one of the Appendices due to insufficient resources and a lack of implementation of any of the

¹⁶⁹ WILLOCK, *supra* note 104, at 29–31.

¹⁷⁰ *Id.* at 30–31.

¹⁷¹ CITES, *Conference Resolution 12.3 (Rev.)* § VIII, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

¹⁷² WILLOCK, *supra* note 104, at 8.

¹⁷³ CITES, *Doc. 44*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002). Australia withdrew its proposal to list both Patagonian and Antarctic toothfish at COP 12. CITES, *Proposals for Amendment of Appendices I and II: Results* (2002), available at <http://www.cites.org/eng/news/world/10.pdf>.

¹⁷⁴ CITES, *Doc. 16.1*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

¹⁷⁵ CITES, *Conference Resolution 12.4*, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

¹⁷⁶ CITES, *Doc. 12.3*, in PROCEEDINGS OF THE THIRTEENTH MEETING OF THE CONFERENCE OF THE PARTIES (2004). The proposal to continue cooperation between CITES and CCAMLR failed by a close vote of the COP with 44 "yes" votes, 24 "no" votes, and 21 abstentions (64.71% "yes"). A two-thirds majority is required to pass resolutions of the COP.

voluntary measures.¹⁷⁷ The Secretariat's position indicates that voluntary compliance with TACs and the CDS is not probable and that an Appendix listing is necessary to manage toothfish fisheries effectively. Additionally, Japan, Norway, and other CITES Parties dependent upon commercial marine species as a major food source have consistently resisted attempts to list these species on Appendix I or II.¹⁷⁸ These countries defend their position primarily on the grounds that other organizations, such as the United Nations Food and Agriculture Organization (FAO) and RFMOs, already address the problem of declining marine fish stocks.¹⁷⁹ This argument holds less weight given the current CCAMLR management regime's failure to protect toothfish fisheries. Furthermore, the combination of CCAMLR requirements with CITES alleviates this concern since there would be no additional burden on Parties that harvest or import toothfish. Japan, for example, is already a party to CCAMLR and uses the CDS. However, a curtailment of IUU fishing would likely cause the price of toothfish to rise from its already high price, which could create resistance to further protections. On the whole, it is likely another proposal to combine CCAMLR and CITES would meet with the same resistance as at COP 12.

V. PROPOSAL: SYNTHESIZE CONSERVATION EFFORTS OF THIRD PARTY CERTIFICATION ORGANIZATIONS AND CITES

In addition to international institutions like CCAMLR and other RFMOs, CITES can benefit from cooperation with non-governmental organizations that gather biological information on CITES listed species. These third party certification bodies can provide CITES with scientific information on the health of Appendix II species and valuable expertise on maintaining sustainable levels of trade. This section investigates the possibility of tapping into the resources of third party certification organizations when making non-detriment findings.

¹⁷⁷ *Id.*; see also CITES, *Doc. 36*, in PROCEEDINGS OF THE THIRTEENTH MEETING OF THE CONFERENCE OF THE PARTIES (2004) ("As CCAMLR members have not yet addressed the nature of and mechanism for formal cooperation with CITES, it is not possible for CITES to provide much assistance to CCAMLR beyond the exchange of relevant information. Moreover, the tools of the Convention cannot be used in relation to toothfish because *Dissostichus* species are not listed in the CITES Appendices.").

¹⁷⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 64, at 24–27. The reservations entered by the Parties reflect these countries' resistance to the listing of marine species. Japan, for example, has entered reservations for eight of the thirteen species of marine mammals listed in Appendix I and all three shark species listed in Appendix II. CITES, *Specific Reservations Entered By Parties*, available at <http://www.cites.org/eng/notif/2005/E050607b.pdf>. A reservation allows a Party to unilaterally state that it will not be bound by the provisions of the Convention for a particular listed species, and are made in accordance with Articles XV, XVI, and XXIII. CITES, *Reservations*, available at http://www.cites.org/eng/app/reserve_intro.shtml.

¹⁷⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 64, at 24–27.

A. Overview of Conservation Efforts of Third Party Certification Organizations

Third party certification organizations attempt to conserve natural resources through market forces and consumer preference. Certification organizations usually either directly certify products as sustainable according to their own principles and criteria, or accredit other organizations to certify products according to principles and criteria of the accrediting body. Although they vary in their methods, certification organizations generally engage in eco-labeling, such as the Marine Stewardship Council (MSC) logo for sustainable seafood products.¹⁸⁰ Beyond eco-labeling, these organizations certify production operations based upon compliance with their principles and criteria, collect data and monitor certified operations with on-site inspection, and maintain a chain of custody document system used to verify the product is produced or harvested in a sustainable manner.

The MSC, for example, creates guidelines for chain of custody systems for fishing operations so that "products can be traced from their suppliers and tracked to their buyers."¹⁸¹ These guidelines provide for separation of fish stocks, data collection on volumes and weights of certified and non-certified fish, and a system for ensuring secure packaging, storage, handling, and delivery.¹⁸² The guidelines also provide for the maintenance of records showing the name of the supplier, the supplier's certificate number, and evidence of certificate validity.¹⁸³ In 2004, the MSC certified the South Georgia and South Sandwich Islands (SGSSI) toothfish fishery as meeting its principles and criteria for sustainable fishing.¹⁸⁴ Then in 2005, the MSC certified six companies as meeting its chain of custody standards and permitted these companies use of the MSC logo on toothfish products from the SGSSI fishery.¹⁸⁵ Although the biological impact of the certification is not yet known, it is unlikely to sufficiently conserve toothfish without a CITES listing because many fisheries are already overexploited and require more dramatic conservation efforts.¹⁸⁶ However, the combined efforts of CITES,

¹⁸⁰ The Marine Stewardship Council (MSC) is an independent, global non-profit organization that sets environmental standards for sustainable and well-managed fisheries. It uses a product label to reward environmentally responsible fishery management and practices. The WWF and Unilever, the world's largest buyer of seafood, established the MSC in 1997. Marine Stewardship Council, *About MSC*, http://www.msc.org/html/content_462.htm (last visited Apr. 23, 2006).

¹⁸¹ MARINE STEWARDSHIP COUNCIL, MSC CHAIN OF CUSTODY STANDARD 4 (2004), *available at* http://www.msc.org/assets/docs/Chain_of_custody/CoC_Standard_03_August_05_Version_2_Final.pdf.

¹⁸² *Id.* at 5–6.

¹⁸³ *Id.* at 5, 7.

¹⁸⁴ World Wildlife Fund, *Patagonian Toothfish Fishery Receives MSC Certification*, http://www.panda.org/news_facts/newsroom/news/index.cfm?uNewsID=12003&uLangID=1 (last visited Apr. 23, 2006).

¹⁸⁵ Marine Stewardship Council, *South Georgia Patagonian Toothfish*, http://www.msc.org/html/content_1227.htm (last visited Apr. 23, 2006).

¹⁸⁶ See Nat. Envtl. Trust, *South Georgian Toothfish Fishery Certified By Marine Stewardship Council: Environmental Group Disagrees With Decision*, <http://www.net.org/proactive/newsroom/release.vtml?id=28516> (last visited Apr. 23, 2006). Gerald Leape, Vice

CCAMLR, and third party certification organizations like the MSC to conserve toothfish fisheries could serve as a model for the conservation of other overexploited species.

In order to be compatible with CITES requirements, these certification organizations must have principles and criteria that effectively monitor certified operations, collect accurate data on the health of harvested species, and employ a chain of custody system to verify the products are certified. The Forest Stewardship Council (FSC), in its certification of big-leaf mahogany, meets the substantive mandates of CITES, but has institutional deficiencies that impede its ability to perform non-detriment findings under CITES.

B. Mahogany Survival Threatened

Big-leaf mahogany (*Swietenia macrophylla*) demonstrates “signs of population decline and fragmentation in many parts of its range.”¹⁸⁷ It is a slow-growing species, distributed patchily at low densities from southern Mexico through Central America and into South America as far south as Brazil and Bolivia.¹⁸⁸ The other two species of mahogany (*S. mahogani* and *S. humilis*) have been logged for international trade to the point of commercial extinction, which demonstrates the drastic consequences of unsustainable trade on mahogany populations.¹⁸⁹ After ten years of debate among Parties to CITES, COP 12 listed big-leaf mahogany on Appendix II.¹⁹⁰ When it became apparent an Appendix II listing would occur, the International Tropical Timber Organization held a meeting of all stakeholders in May 2004 in Pucallpa, Peru with the goal of encouraging and informing non-detriment findings for the three key mahogany-producing countries, Bolivia, Brazil, and Peru.¹⁹¹

The Pucallpa workshop found that the three major range states encountered common barriers to the development of robust non-detriment findings. The states lack information on mahogany stocks, distribution, and the regeneration and ecology of the species. Additionally, “[r]egulatory authorities lack capacity and resources for monitoring and control, and

President for Marine Conservation, National Environmental Trust and member of the MSC stakeholder council; stated, “If the U.K. government is serious about establishing an effective chain of custody for the fish, they should insist that stronger international protections for this fish be enacted by the Convention on International Trade in Endangered Species (CITES) A CITES listing is the only way to effectively protect the worldwide Chilean Sea Bass population.”
Id.

¹⁸⁷ INTERNATIONAL TROPICAL TIMBER ORGANIZATION (ITTO), MAKING THE MAHOGANY TRADE WORK: REPORT OF THE WORKSHOP ON CAPACITY-BUILDING FOR THE IMPLEMENTATION OF THE CITES APPENDIX-II LISTING OF MAHOGANY 11 (2004), available at http://www.itto.or.jp/live/Live_Server/798/ts22e.pdf.

¹⁸⁸ *Id.* at 11.

¹⁸⁹ *Id.* at 3.

¹⁹⁰ CITES, *Proposals for Amendment of Appendices I and II: Results 4* (2002), available at http://www.cites.org/eng/news/world/cop12_prop_results.pdf. All species in the genus *Swietenia* are now included on Appendix II: *S. humilis* was added in 1975, and *S. mahogani* in 1992. ITTO, *supra* note 180, at 3.

¹⁹¹ ITTO, *supra* note 187, at 8, 16.

transparency, communication, and information systems need to be improved."¹⁹² Furthermore, customs officials have problems verifying that shipments conform to documentation.¹⁹³ Due to the lack of information and resources necessary to perform accurate non-detriment findings, there are opportunities for synergy with the FSC.

C. Legal and Technical Compatibility

Because Article IV of CITES requires a Party's Scientific Authority to make a non-detriment finding and its Management Authority to determine that a specimen was legally obtained and humanely transported, FSC's provisions for certification must meet the substantive requirements of Article IV. The Parties must also develop an appropriate legal mechanism to link FSC's certification regime to CITES's permit requirements. This section investigates the compatibility between the provisions of the FSC and CITES.

1. Non-Detriment Finding

FSC certification of sustainable logging operations can serve as a de facto non-detriment finding because the FSC's principles and criteria are more stringent than CITES's requirements. FSC is internationally recognized as the most credible timber certification organization and is widely accepted as the "gold standard" of good forest management.¹⁹⁴ FSC certification recognizes the full range of forest values, including wildlife habitat, biodiversity, soil conditions, land-tenure issues, watershed, cultural and archaeological values, and long-term revenue potential from timber and non-timber resources.¹⁹⁵ FSC accredits certifiers, such as the Rainforest Alliance,¹⁹⁶ that adhere to the principles and criteria established by the FSC. The accredited certifiers perform the certification of sustainable forest operations in accordance with the principles and criteria.

FSC Principle 6 concerns environmental impact and states, "Forest management shall conserve biological diversity and its associated values . . . and, by doing so, maintain the ecological functions and the integrity of the forest."¹⁹⁷ This requirement mirrors the language of CITES Article IV, insisting that trade in listed species be non-detrimental and limited to maintain the species throughout its range at levels consistent with its role in the ecosystem in which it occurs.¹⁹⁸ Therefore, Principle 6 would satisfy CITES non-detriment finding requirements.

¹⁹² *Id.* at 23.

¹⁹³ *Id.* at 8.

¹⁹⁴ WORLD WILDLIFE FUND, *supra* note 23, at 2.

¹⁹⁵ FOREST STEWARDSHIP COUNCIL, FSC PRINCIPLES AND CRITERIA FOR FOREST STEWARDSHIP PRINCIPLES 2-6 (2004), available at http://www.fscus.org/images/documents/FSC_Principles_Criteria.pdf; WORLD WILDLIFE FUND, *supra* note 23, at 2.

¹⁹⁶ Rainforest Alliance, *Smartwood*, <http://www.rainforest-alliance.org/programs/forestry/smartwood/> (last visited Apr. 23, 2006).

¹⁹⁷ FOREST STEWARDSHIP COUNCIL, *supra* note 195, at 4.

¹⁹⁸ CITES, *supra* note 2, art. IV.3.

FSC Principle 8 concerns monitoring and assessment and states, "Monitoring shall be conducted . . . to assess the condition of the forest, yields of forest products, chain of custody, management activities and their social and environmental impacts."¹⁹⁹ This monitoring requirement resembles the monitoring of export permits and actual exports by CITES Scientific Authorities to inform non-detriment findings.²⁰⁰ Additionally, Principle 8 states that research and data collection needs to monitor, at a minimum, yield of all forest products harvested, growth rates, regeneration, forest condition, composition and observed changes in flora and fauna, and environmental impacts of harvesting.²⁰¹ Similarly, CITES recommends Scientific Authorities review population status, distribution, population trend, harvest, and other biological and ecological factors.²⁰² The type of necessary information is largely comparable between FSC Principle 8 and CITES provisions.

CITES does not have any specific provision related to non-detriment findings and timber species akin to Article IV.7 for marine species,²⁰³ however, CITES Resolution 10.13 encourages consultation with non-governmental organizations (NGO) when proposing to list a timber species.²⁰⁴ This recommendation applies at the listing stage, but indicates the important role of NGOs for timber species and the willingness of parties to engage NGOs in the area of timber conservation.

To enable the link between the FSC and CITES, parties could designate the FSC accredited certifier as the CITES Scientific Authority for making non-detriment findings for particular exports of mahogany. Management Authorities would then automatically issue export permits to shipments of wood products from sources certified by FSC accredited organizations, relieving these exports of regulatory burdens and expense.²⁰⁵ The compatibility of CITES requirements and Principles 6 and 8 illustrates the validity of this approach.

Alternatively, the COP could pass an annotation to the Appendix II listing of mahogany that sets export quotas based upon the level of timber harvested from certified forests. The COP can set export quotas based upon geographically distinct populations of species,²⁰⁶ so it could base the quota on the certifiers' projected amounts of certified wood, or the previous year's harvest amount. Furthermore, the COP could limit, or set a zero quota for non-certified mahogany, resulting in a strong incentive for wood producers

¹⁹⁹ FOREST STEWARDSHIP COUNCIL, *supra* note 195, at 6.

²⁰⁰ CITES, *supra* note 2, art. IV.3.

²⁰¹ FOREST STEWARDSHIP COUNCIL, *supra* note 195, at 6–7.

²⁰² CITES, *Conference Resolution 10.3*, para. h, in PROCEEDINGS OF THE TENTH MEETING OF THE CONFERENCE OF THE PARTIES (1997).

²⁰³ CITES, *supra* note 2, art. IV.7; *see supra* section IV.B(2)(a).

²⁰⁴ CITES, *Conference Resolution 10.13 (Rev.)*, in PROCEEDINGS OF THE TENTH MEETING OF THE CONFERENCE OF THE PARTIES (1997).

²⁰⁵ WORLD WILDLIFE FUND, *supra* note 23, at 9.

²⁰⁶ CITES, *Conference Resolution 11.21 (Rev.)*, in PROCEEDINGS OF THE ELEVENTH MEETING OF THE CONFERENCE OF THE PARTIES (2000). Annotations can specify "the inclusion or exclusion of designated geographically separate populations, subspecies, species, groups of species, or higher taxa, which may include export quotas." *Id.*

to seek certification. Some parties, particularly those without certified forests, may see this as unduly restrictive, however. This potential problem is discussed below in section V.D.

2. Legally Obtained

FSC Principle 1 requires compliance with national laws in the same manner as CITES Article IV. Principle 1 states, “Forest management shall respect all applicable laws of the country in which they occur, and international treaties and agreements to which the country is a signatory”²⁰⁷ This requirement closely resembles the responsibility of the Management Authority in Article IV—to ensure that specimens were taken in accordance with national laws. Additionally, FSC uses a chain of custody documentation system, which helps ensure that forest products were legally acquired.²⁰⁸

To enable the link between the FSC and CITES, the COP could pass a resolution allowing the Management Authority to use FSC certification as evidence of legal acquisition. This approach would conserve Management Authority resources by essentially outsourcing the legally obtained requirement.

3. Humane Transport

CITES’s additional requirement—Management Authority verification that living specimens were prepared and shipped to minimize injury before granting an export permit, re-export permit, or certificate of introduction from the sea²⁰⁹—does not apply in the context of mahogany. Mahogany is logged prior to export and is not traded as a live specimen. Therefore, the CITES requirement for living specimens would not apply.

4. Permits and Certification

CITES permits and FSC documentation need to demonstrate compatibility, or both documents must be issued. Within CITES, there is a trend towards standardization of permits.²¹⁰ CITES does not mandate standardization, however, so the potential exists for FSC documents to serve as an export permit. Although FSC chain of custody documents track the movement of forest products, they do not contain any information about CITES, such as the purpose of the transaction or the appendix number. FSC would need to modify its documentation to include this information or the COP would need to allow flexibility regarding the information contained in export permits. The FSC logo itself has a unique tracking number for the shipment, but contains no additional information required by CITES. It does

²⁰⁷ FOREST STEWARDSHIP COUNCIL, *supra* note 195, at 2.

²⁰⁸ *Id.* criteria 8.3, at 7.

²⁰⁹ CITES, *supra* note 2, art. IV.2(3).

²¹⁰ CITES, *Conference Resolution 12.3 (Rev.)* § I, in PROCEEDINGS OF THE TWELFTH MEETING OF THE CONFERENCE OF THE PARTIES (2002).

not appear, however, that issuing export permits based on FSC chain of custody documentation would be particularly burdensome on Management Authorities because they would only need to fill out and issue the permit based on the documentation provided by the FSC certifier.

D. Political Feasibility

Despite the technical compatibility of the requirements of CITES and certification organizations, FSC certification as a substitute for CITES's conservation measures faces several challenges. First, few certified mahogany logging operations currently exist, resulting in many CITES parties facing an immediate reduction in mahogany exports. Emerging operations in Guatemala, Honduras, and Mexico demonstrate that the number of certified forests is growing.²¹¹ Additionally, Rainforest Alliance has certified one mahogany logging operation in Peru.²¹² Because few parties currently have certified mahogany producers, these parties would likely view certification, at least in the short term, as a substantial trade restriction. Relying upon certification as a basis for non-detriment findings, however, would create a strong incentive for mahogany producers to obtain certification since they would be unable to export legally under CITES without certification.²¹³

Second, despite its reputation as the "gold standard" for certification,²¹⁴ FSC accredited certifiers have failed to consistently apply FSC's Principles and Criteria.²¹⁵ Vested corporate interest in ensuring successful outcomes to certification assessments has caused certifiers to grant certificates to forest managers who are in breach of both FSC's Principles and Criteria and the certifiers' own assessment requirements.²¹⁶ Certifiers also have a vested interest in granting chain of custody certificates.²¹⁷ Additionally, certifiers' interpretations of the Principles and Criteria vary, resulting in assessment systems not fully incorporating the Principles and Criteria.²¹⁸ Furthermore, the absence of agreed-upon definitions of "major failures" within the Principles and Criteria²¹⁹ results in essentially arbitrary certification

²¹¹ TRAFFIC, MAHOGANY MATTERS: THE U.S. MARKET FOR BIG-LEAFED MAHOGANY AND ITS IMPLICATION FOR THE CONSERVATION OF THE SPECIES (TRAFFIC N. Am. 2000), <http://www.traffic.org/mahogany/us.html> (last visited Apr. 23, 2006).

²¹² RAINFOREST ALLIANCE, PROFILES IN SUSTAINABLE FORESTRY: A ROAD TO RESPONSIBLE FURNITURE-MAKING, *available at* <http://www.rainforest-alliance.org/programs/profiles/pdfs/south-cone.pdf>.

²¹³ Depending on how the COP sets the quota, producers may be able to export a low level of non-certified mahogany. *See supra* Part V.C(1).

²¹⁴ WORLD WILDLIFE FUND, *supra* note 23, at 2.

²¹⁵ SIMON COUNSELL & KIM TERJE LORAAS, TRADING IN CREDIBILITY: THE MYTH AND REALITY OF THE FOREST STEWARDSHIP COUNCIL 5 (Rainforest Foundation 2002), *available at* <http://www.rainforestfoundationuk.org/files/Trading%20in%20Credibility%20full%20report.pdf>.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ FOREST STEWARDSHIP COUNCIL, *supra* note 195, intro., 2. "[M]ajor failures in any individual Principles will normally disqualify a candidate from certification, or will lead to decertification." *Id.*

decisions.²²⁰ Also, the public cannot independently verify chain of custody certification as accurate.²²¹ Finally, because chain of custody does not require certification of wholesalers and retailers, it allows for entry of non-certified products into the certified trade chain.²²² These problems indicate that FSC requires significant improvement before it can serve as a substitute for non-detriment findings.

VI. CONCLUSION

Although compatibilities exist between CITES and other organizations, increased cooperation is not a panacea for the informational deficiencies currently plaguing the ability of CITES Parties to make accurate non-detriment findings. Toothfish and mahogany are only two out of the tens of thousands of species either currently listed or considered for listing in Appendix II. Certainly, cooperation solely for these species does not result in more accurate non-detriment findings across the board. Evaluation of the use conservation measures of CCAMLR and certification organizations under CITES does, however, demonstrate the potential for CITES to look beyond national Scientific Authorities to make more accurate non-detriment findings. Cooperation with CCAMLR for toothfish establishes precedent for CITES to use a flexible approach to non-detriment findings, which takes advantage of established efforts to conserve species. Rather than choosing *not* to list species that are protected by other organizations, CITES Parties can use the nearly worldwide membership of the Convention to bolster regional organizations' efforts. Similarly, regional organizations and certification organizations strengthen the conservation efforts of CITES by providing accurate, scientifically based information for non-detriment findings. With the growing number of species facing threats to survival, efforts should not be duplicated but synthesized, so that more species benefit from CITES' protections.

²²⁰ COUNSELL & LORAAS, *supra* note 215, at 6.

²²¹ *Id.* at 7.

²²² *Id.*