



Mitigating Zoonotic Risk Through a Protocol to CITES: A Legal Analysis and Comparison with the Amendment Option

I. Introduction

In response to COVID-19, many CITES stakeholders have made suggestions regarding the role that CITES might play to reduce the risk of the emergence of new zoonotic diseases. Of these suggestions, at least two raise question of international law and law-making. These proposals include amendments to CITES¹ and the development of an “addendum.”²

Legally, the proposal for an “addendum” to CITES seems to amount to a protocol to CITES (hereinafter, “Zoonosis Protocol”). Within the world of multilateral environmental agreements (MEAs), protocols are often associated with framework treaties that explicitly contemplate the creation of such instruments. However, looking beyond MEAs, it is clear that protocols come in many varieties; the term is flexible as a matter of international law. With respect to CITES in particular, there are no obvious legal barriers to the Parties, or a subset thereof, forging a protocol to address zoonotic risk associated with trade and other uses of wild fauna and flora. In contrast to an amendment, a protocol would allow Parties to craft an agreement that builds upon the CITES framework without altering the treaty.

This paper explores a few of the initial legal matters regarding the possibilities of both amendment and adoption of a new protocol; in doing so, it also provides some reflections on policy considerations. While this paper concludes that a Zoonosis Protocol may be a more workable alternative to meet the goal of managing zoonotic disease risk, it is not a full survey of international options. Rather, this paper is meant to assess the initial legal viability of a Zoonosis Protocol alongside the amendment alternative.

II. The Amendment Option

¹ See, e.g., Dan Ashe & John E. Scanlon, *A Crucial Step Toward Preventing Wildlife-Related Pandemics*, SCIENTIFIC AMERICAN (June 15, 2020), available at <https://www.scientificamerican.com/article/a-crucial-step-toward-preventing-wildlife-related-pandemics/>; John E. Scanlon, *Outline of Possible Amendments to Wildlife Trade Laws*, Global Initiative to End Wildlife Crime (undated), available at <https://endwildlifecrime.org/cites-amendments/>.

² See Bruce J. Weissgold, *et al.*, *How We Can Use the CITES Wildlife Trade Agreement to Help Prevent Pandemics*, SCIENTIFIC AMERICAN (Aug. 24, 2020), available at <https://www.scientificamerican.com/article/how-we-can-use-the-cites-wildlife-trade-agreement-to-help-prevent-pandemics/>.

One of the more obvious ways to amend CITES to confront zoonotic disease risk is through the development of a new Appendix IV that expands the universe of regulated species and regulatory options.³ Conceivably, this new Appendix IV could be populated in a variety of ways. However, the most plausible approaches are as follows:

- (1) species that pose a high risk of propagating zoonotic disease, regardless of presence in international trade and regardless of conservation status; or
- (2) species that pose a high risk of propagating zoonotic disease, where such species are in international trade, but regardless of conservation status.

Under both options, some species that are not currently eligible for listing on Appendix I or II—by virtue of those Appendices’ biological and trade criteria—would be eligible for listing on a new Appendix IV. Additionally, the first option would entail a further expansion of CITES’ reach to cover species not even potentially found in international trade.

Further amendments could stretch the treaty to cover domestic commerce and other domestic activity. In other words, this iteration suggests not only a new Appendix IV populated with species using distinct biological or health criteria—along with regulation of international trade of such species—but also enlargement of the treaty, at least as concerns those species, to reach activities that have no connection to international trade. This would require amendments to CITES beyond mere changes to the provisions that provide for the Appendices; it would necessitate changes to a series of Articles and possibly the creation of one or more new Articles.

A. Risks and Costs to Pursuing Amendments

Many reactions to the amendment idea have focused on “big picture” policy considerations, including the wisdom of pushing CITES beyond its historical regulatory sphere. These reactions have rarely touched on the legal issues, both substantive and procedural, that would arise from an amendment proposal. Key substantive issues include the range of textual changes that would be necessary in light of CITES’ current scope, the listing criteria for a new Appendix IV, and the regulatory scheme applicable to Appendix IV species. Procedural issues include questions about

³ This characterization of a possible amendment proposal draws in part from a recent publication by the Global Initiative to End Wildlife Crime. See John E. Scanlon, *Outline of Possible Amendments to Wildlife Trade Laws*, Global Initiative to End Wildlife Crime (undated), available at <https://endwildlifecrime.org/cites-amendments/>. It also finds inspiration from an earlier article written by Dan Ashe and John Scanlon. See Dan Ashe & John E. Scanlon, *A Crucial Step Toward Preventing Wildlife-Related Pandemics*, SCIENTIFIC AMERICAN (June 15, 2020) (advocating for “listing new species on health grounds,” the need “to include a broader health-related mandate,” and efforts “to close wildlife markets when they threaten human and animal health”), available at <https://www.scientificamerican.com/article/a-crucial-step-toward-preventing-wildlife-related-pandemics/>. Of course, an amendment package intended to mitigate zoonotic risk could take myriad forms. Note, also, that an Appendix IV currently exists. Serving as the “Model Export Permit,” the current Appendix IV would presumably be renumbered as Appendix V.

the amendment process, particularly as concerns its flexibility, breadth, and duration. The following sections set forth these substantive and procedural issues, answering some questions and flagging unknowns where they exist.

i. Substantive Issues Flowing from Current Limitations on CITES’ Scope

Under the terms of the Convention, the universe of regulated species is cabined by both biological and trade criteria. As regards biological criteria—and apart from the special cases of Appendix III species and so-called “look-alike” Appendix II species—CITES only reaches species to the extent that they (a) are “threatened with extinction” (Appendix I), or (b) may become “threatened with extinction” in the absence of trade controls (Appendix II). Many species that do not meet these criteria are possible vectors of zoonotic disease.

The universe of CITES is further limited through trade criteria. Appendix I only reaches species “which are or may be affected by trade.” Appendix II only reaches species where trade is a conservation risk. “Trade” is defined as “import, export, re-export, and introduction from the sea”; the term does not cover domestic commerce.

“Trade” is the core regulated activity under CITES. Articles III and IV regulate import, export, and introduction from the sea of Appendix I and Appendix II species, respectively. They do not establish an international regulatory regime for domestic activities, such as take, transport, and sales.⁴

With the foregoing in mind, an amendment proposal along the lines described above would need to secure changes to many of the treaty’s provisions.⁵ Specifically, amendments would be required to

- establish additional definitions in Article I (Definitions) and additional text in Article II (Fundamental Principles) in order to create listing criteria for Appendix IV species;
- introduce a new Article V bis. (styled “Regulation of Trade in Specimens of Species Included in Appendix IV” or the like);

⁴ For this reason, recent resolutions touching on the issue of domestic markets have focused on the link to illegal trade. For instance, in Resolution Conf. 10.10 (Rev. CoP18), the CoP recommended “that all Parties and non-Parties in whose jurisdiction there is a legal domestic market for ivory that is contributing to poaching or illegal trade, take all necessary legislative, regulatory and enforcement measures to close their domestic markets for commercial trade in raw and worked ivory as a matter of urgency[.]” Resolution Conf. 10.10 (Rev. CoP 18), *Trade in Elephant Specimens*, available at <https://cites.org/eng/res/10/10-10R16.php>. The references to trade, which act as delimiters to the scope of the resolution, were deemed necessary by at least some Parties to achieve harmony with the treaty.

⁵ Note: The amendments described in this section do not track, verbatim, those described by John Scanlon on the Global Initiative to End Wildlife Crime website. See John E. Scanlon, *Outline of Possible Amendments to Wildlife Trade Laws*, Global Initiative to End Wildlife Crime (undated), available at <https://endwildlifecrime.org/cites-amendments/>. However, review of that site shows many similarities.

- make at least minor, and possibly major, modifications to Article VI (Permits and Certificates);
- introduce possible new exemptions or other tailoring for Appendix IV species in Article VII (Exemptions and Other Special Provisions Relating to Trade);
- make at least some adjustments to Article VIII (for example, the remedy of “return to the State of export” seems questionable in the case of specimens of species that pose a risk of zoonotic outbreak);
- make changes to Article XI (Conference of the Parties) to account for Appendix IV business;
- add language to Article XII (The Secretariat) to reflect the broader mandate;
- secure changes to Article XIII (International Measures) to (a) reflect new Appendix IV, and (b) add situations other than “trade” as sufficient to trigger the Article XIII process;
- make at least minor adjustments to Article XIV (Effect on Domestic Legislation and International Conventions) to reflect the adoption of an Appendix IV;
- add language to Article XV (Amendments to Appendices I and II) to cover listings of Appendix IV species, as well as reservations to those listings; and
- make at least minor changes to Article XXIII (Reservations) to account for the addition of Appendix IV.⁶

In short, amending CITES to regulate zoonotic risk could necessitate significant re-working of the treaty, affecting numerous Articles. Even if some of the changes could be characterized as “non-substantive” or “pro forma,” others could significantly alter the treaty and its operation.

ii. Procedural Issues

a. The CITES Amendment Procedure and the Possibility of Multiple Amendment Proposals

At a basic level, the procedure for amending the Convention text is clear. Article XVII allows one-third of the Parties to present a written request to the Secretariat calling for the consideration and adoption of an amendment. Assuming one-third of the Parties support the request, the Secretariat then convenes an extraordinary meeting of the Conference of the Parties (CoP). The Secretariat must communicate the text of any proposed amendment to all Parties at least 90 days before the extraordinary meeting. The proposed amendment is adopted if supported by a two-thirds majority of Parties present and voting, where “present and voting” means those Parties “present and casting an affirmative or negative vote.”

These rules are basic—and because the rules provide only minimal procedural outlines, many have questioned whether initiating an amendment process could result in the possibility of an amendment “free for all.” The most extreme version contemplates a scenario where once an

⁶ Amendment of the Preamble would also be logical, if not required.

extraordinary session has been convened, any Party may at any time propose amendments to the text of the Convention, including amendments beyond the scope of the triggering proposal.

The CITES amendment process is essentially a four-stage process. The first stage comprises triggering an extraordinary session in order to consider amendments to the Convention. The second stage accounts for the 90-day deadline for the Secretariat to share proposed amendments. The third stage is the extraordinary meeting itself (or many extraordinary meetings). The fourth stage involves ratification and entry into force of the amendments. These stages reflect both the text of CITES and international treaty law.

Although the Convention text is clear as to how the amendment process unfolds, it is not clear regarding the scope of potential amendments to be considered at an initial extraordinary session. Based on conversations with international and CITES lawyers, it seems that two main interpretations have been articulated (at least informally). The first interpretation concludes that a “free for all” is unlikely. Proponents of this interpretation argue that (a) the written request of one-third of the Parties for an extraordinary session sets out the proposed amendments as the basis for the request, and (b) this written request thus limits the substantive deliberations of the extraordinary session. In other words, under this interpretation, the written request put forward by at least one-third of the Parties functions as the Terms of Reference (TOR) for the extraordinary session. In calling for amendments to CITES, John Scanlon, on behalf of the “End Wildlife Crime” coalition, summarized the view as follows: “The amendments that are considered by the CoP are only the proposed amendments submitted in writing by the one third of Parties requesting the consideration and adoption of such amendments.”⁷ Textually, this interpretation arguably finds support in Article XVII’s statement that “[a]n extraordinary meeting of the Conference of the Parties shall be convened . . . on the written request of at least one-third of the Parties to consider and adopt amendments” and that “[s]uch amendments shall be adopted by a two-thirds majority of Parties present and voting.” By using the word “such” to qualify the word “amendments,” Article XVII could be read as referring only to those amendments backed by the written support of at least one-third of the Parties. But even assuming satisfaction of the one-third and timing variables, whether additional requests for an extraordinary meeting that convey other potential amendments could or would be consolidated into a single request and one extraordinary meeting is an open question. Accordingly, even under the first interpretation, it seems at least possible that multiple amendment proposals could be on the table at once.

⁷ John E. Scanlon, *Outline of Possible Amendments to Wildlife Trade Laws*, Global Initiative to End Wildlife Crime (undated), available at <https://endwildlifecrime.org/cites-amendments/>. It appears that Willem Wijnstekers may also subscribe to this interpretation, although his analysis is limited. See Willem Wijnstekers, *The Evolution of CITES*, p. 518 (2018) (11th Edition) (“The initiative of a Party (or Parties) to have an extraordinary meeting of the Conference of the Parties convened obviously requires careful planning. The Secretariat should be consulted at an early stage and be kept informed of developments throughout the entire process. At least one-third of the Parties must not only be convinced of the need to consider an amendment to the text of the Convention but must be made to support the request for an extraordinary meeting in writing.”).

The second interpretation concludes that an extraordinary session could consider any amendments, whether or not supported by one-third of the Parties, so long as they were communicated to the Secretariat and to Parties prior to the 90-day deadline for circulation. Whereas the first interpretation emphasizes language in the first paragraph of Article XVII, the second interpretation focuses on that Article's second paragraph. Article XVII(2) clearly suggests that the extraordinary meeting is limited in scope to debating the amendments circulated 90 days in advance of that meeting—but it says nothing about a one-third requirement. According to Article XVII(2), “[t]he text of *any* proposed amendment shall be communicated by the Secretariat to all Parties at least 90 days before the meeting.” Under this interpretation, amendments beyond the initial, triggering amendment proposal could be considered at the same extraordinary session so long as the Secretariat circulated the additional proposed amendments to the Parties at least 90 days before the meeting. According to this view, the one-third requirement articulated in Article XVII(1) applies only to triggering the extraordinary meeting in the first instance.

Significantly, while the interpretations disagree over the role of the one-third requirement, both interpretations conclude that proposed amendments failing to satisfy the 90-day rule may not be raised and considered at the extraordinary session. Under either approach, only amendments circulated 90 days before the meeting may be debated at the extraordinary session. On the other hand, neither approach seems to foreclose the possibility of successive extraordinary sessions to consider successive amendment proposals submitted beyond the 90-day deadline. Thus, no matter the interpretation, a series of extraordinary sessions is conceivable.

b. CITES' Rules on Entry into Force of an Amendment: A Slow Process

For an amendment to be adopted, two-thirds of the Parties present and voting at the extraordinary CoP must signal their approval. In theory, then, adoption could be swift. Entry into force, on the other hand, might not be.

Pursuant to Article XVII, entry into force of an amendment does not occur, for any Party, until 60 days after two-thirds of the Parties have deposited an instrument of acceptance with the Depository Government. As the Gaborone Amendment demonstrates, adoption does not guarantee speedy entry into force.⁸ The extraordinary CoP at which the Gaborone Amendment was adopted occurred on April 30, 1983. Yet the Gaborone Amendment did not enter into force until November 29, 2013, 60 days after 54 (two-thirds) of the 80 States that were party to CITES on April 30, 1983 deposited their instrument of acceptance of the amendment. Importantly, even after entry into force, an amendment only applies to those States that ratified the amendment. For other States, the amendment enters into force either (a) 60 days following the State's deposit of acceptance,

⁸ *Gaborone Amendment to the Convention*, available at <https://www.cites.org/eng/disc/gaborone.php>.

where the State was a Party prior to the original entry-into-force date, or (b) automatically for any State that becomes a Party after the entry-into-force date.⁹

In short, even if a proposed amendment enjoys broad support, sufficient to secure its adoption at an extraordinary CoP, entry into force can take years or even decades. That being said, entry into force could also be a slow process for a Zoonosis Protocol. Although the Parties would negotiate the entry-into-force clause of the new Protocol and could thus make it as onerous or as simple as they desired, it could nonetheless take significant time for a new Protocol to enter into force.

c. Amending CITES Could Lead to Two CITES

The amendment process and entry-into-force rules effectively mean that amendments can give rise to a fractured treaty community, where some Parties are subject to the amendments but others are not. While the two-thirds provisions ensure that a supermajority of CITES Parties is beholden to any successful amendment, the possibility of CITES Parties not ratifying the amendments could create considerable confusion and complication. Those Parties that did not ratify the amendment would remain Parties to the unamended CITES text. For those Parties, the treaty would operate as it does today. For those that ratified the amendment, they would be Parties to the revised Convention text.

This scenario generates complex implementation and administrative issues. One concerns decision-making at meetings of the COPs. Distinguishing between decision-making under the original CITES versus the revised CITES and tracking which Parties can participate in which decisions would make already burdensome meetings—meetings that increasingly rely on the management and legal advice of the Secretariat—even more divisive and difficult.

iii. Policy Considerations and Other Issues

In addition to the more technical, legal questions concerning an amendment targeting zoonotic risk, there are no shortage of prudential concerns. Ultimately, the question is whether it “makes sense” or is “sound policy” to amend CITES. When analyzing that question, the following points bear consideration.

a. The Risk of Distraction from a New Mandate

Expert and casual observers alike frequently deem CITES the “most effective” MEA. In large part, this is due to some of the more controversial aspects of CITES—the Appendix I commercial trade bans, the strong compliance regime and the use of trade suspensions, and super-majority decision-making. Yet, while this reputation is well-deserved in many respects, CITES is far from perfect when measured against its own goals. These two seemingly incongruous characteristics—

⁹ *Id.*

a relatively impressive reputation standing alongside genuine shortcomings—make amendments a risky proposition in two respects. First, initiating an amendment process would allow Parties an opportunity to fundamentally re-design CITES’ structure and mechanics—aspects largely responsible for CITES’ reputation as a successful MEA. Second, amending CITES would almost certainly distract Parties from the original purpose of preventing overexploitation of species due to international trade. In light of the extinction crisis and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services’ (IPBES) clear statements that CITES is not living up to its potential, the area in need of “fixing” is arguably the treaty’s need to advance its original goals, not its failure to address public health. In other words, CITES has yet to fulfill its original mandate, and the chances of it ever doing so diminish significantly if it is pulled in other directions.

If amended, CITES would have at least two broad mandates: (1) protecting species of wild fauna and flora against over-exploitation through international trade, and (2) protecting human health from the risks of zoonotic disease flowing from certain activities related to wildlife. Absent a massive increase in funding and other resources, the CITES community (including Parties, the Secretariat, and other stakeholders) could be forced to triage.

b. Exacerbation of Funding and Staffing Shortages

If CITES is stretched too thin as is, funding and staffing shortages are undoubtedly part of the problem. A new zoonosis mandate, if adopted by amendment, could exacerbate the problem. CITES would have to secure new funding streams, enhance existing funding streams, or both. The Secretariat’s latest reports on finance and budget disclose a raft of budgetary concerns and constraints:

- As of December 31, 2018, USD 1,155,758 (approximately 19%) remained as owed to the CITES Trust Fund for the 2018 year, negatively impacting the “Secretariat’s ability to fund its daily operations as the cash balance available is low compared to actual expenditure for the year.”¹⁰
- When added to other outstanding debts owed to the CITES Trust Fund (CTL), total unpaid contributions as of December 31, 2018 stood at USD 1,877,213. Some of these are long-standing unpaid assessed contributions classified as “doubtful debts.”¹¹
- The contribution shortfall is a recurring issue, despite the fact that the Secretariat sends reminder letters twice yearly.¹²

¹⁰ CoP18 Doc. 7.3, *Administrative and Financial Matters: Administration, Finance and Budget of the Secretariat and of Meetings of the Conference of the Parties: Financial Reports for 2016-2019*, available at <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-007-03.pdf>.

¹¹ *Id.*

¹² *Id.*

- Partially as a result of budget shortfalls—and despite the existence of a supplementary external Trust Fund (QTL)—the Secretariat’s staffing resources have been unable to keep up with the demands of its growing CITES workload. In fact, “overall staffing resources available to the Secretariat have been declining over the past decades from 26 core funded positions in 2000 down to 24.25 in 2017, while at the same time the number of Parties has continued to grow from 152 in 2000 to 183 in 2017.”¹³ In addition to the sheer number of Parties, “the organization of the governing bodies’ and scientific committees’ meetings have become increasingly demanding[.]”¹⁴ Furthermore, the number of Resolutions and Decisions adopted at each CoP is growing. In the area of Decisions alone, Decisions directed to the governing bodies, scientific committees, and Secretariat ballooned from 126 at CoP15 to 265 at CoP17.¹⁵
- Given the totality of the circumstances, the Secretariat has stated that the current model is unsustainable: “The limited staffing resources to the Secretariat coupled with the significant increase in the workload over time continues to place the Secretariat under enormous pressure and is not sustainable in the long term.”¹⁶

In sum, CITES already suffers from a funding and human-resources deficit. Amplifying the treaty’s mandate would necessarily lead to more work for the Secretariat and Parties, many of which struggle to pay their contributions as it is. At a minimum, a public-health mandate would lead to more Resolutions and Decisions, the need for more staff (presumably specialized in zoonotic disease) for both the Secretariat and Parties, new Working Groups, new duties for Scientific and Management Authorities (or the creation of a new Authority), and a longer meeting of the CoP. More likely, there would be other costs—both to the Secretariat and Parties—including the possible creation of a “Public Health Committee” or “Pandemic Risk Committee” to complement the work of the Plants Committee and Animals Committee. Granted, similar financial costs would be associated with a Zoonosis Protocol. But, as discussed below, a Zoonosis Protocol would provide an opportunity to create a new or separate financial mechanism, as well as alternative or additional Secretariat staff, if desired.

III. A Zoonosis Protocol: Legal and Practical Considerations

As illustrated above, amending CITES presents risk to the underlying treaty. Yet the notion of an international instrument designed to address public health risks associated with trade and use of wildlife is in itself a meritorious idea. As an alternative to an amendment, Parties could consider the possibility of a Zoonosis Protocol to CITES. Whereas opening the treaty to amendment could

¹³ CoP18 Doc. 7.1, *Administrative and Financial Matters: Administration, Finance and Budget of the Secretariat and of Meetings of the Conference of the Parties: Administration of the Secretariat*, available at <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-007-01.pdf>

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

produce unforeseen consequences, possibly to the detriment of CITES' integrity, a Zoonosis Protocol could avoid these risks because it would not alter the terms or basic functioning of the treaty. At the same time, a Zoonosis Protocol could achieve many of the core outcomes of an amendment package. However, a Zoonosis Protocol would be not entirely free of costs and risks.

To evaluate the viability of a Zoonosis Protocol, this section begins with a discussion of the universe of protocols and the legitimacy of a Zoonosis Protocol under international law. It then canvasses some of the costs and risks that would accompany a Zoonosis Protocol. It ends with an analysis of managing perceived conflicts with CITES.

A. Legal Authority for a Zoonosis Protocol to CITES

Unlike some other treaties, CITES does not explicitly contemplate “protocols” or similar adjacent or subsidiary agreements, however termed.¹⁷ This silence, juxtaposed with the existence of treaties that explicitly authorize protocols, raises concerns that a protocol associated with CITES may be impermissible. However, both treaty practice and treaty law suggest that lack of explicit permission is not a barrier to a protocol.

The use of protocols within the context of MEAs is most strongly associated with the United Nations Framework Convention on Climate Change (UNFCCC), which gave rise to the Kyoto Protocol; the Convention on Biological Diversity (CBD), which gave rise to the Cartagena Protocol and the Nagoya Protocol; and the Vienna Convention for the Protection of the Ozone Layer, which gave rise to the Montreal Protocol. Each of the conventions contain language explicitly authorizing the creation of protocols.¹⁸ These treaties were negotiated as “framework” treaties, with the explicit recognition that further agreements would be negotiated and adopted by the Parties. In contrast, CITES is silent on the matter.

The term “protocol” is used in several different contexts. Although the precise title of a given instrument (as opposed to its substance) makes little difference in the eyes of international law,¹⁹ the United Nations Treaty Reference Guide states that “[t]he term ‘protocol’ is used for agreements less formal than those entitled ‘treaty’ or ‘convention.’”²⁰ But this language refers merely to when an agreement is titled “Protocol” as opposed to “Treaty” or “Convention”; in fact, “protocols” are frequently “treaties” as a matter of international law. An agreement is a “treaty” under international law when it meets the parameters as identified in the Vienna Convention on the Law

¹⁷ To be sure, the title of a given instrument makes no difference insofar as international law is concerned. See Lori F. Damrosch, *et al.*, INTERNATIONAL LAW: CASES AND MATERIALS, at 451 (4th Ed. 2001) (“The particular appellation give to an agreement has in itself no legal effect.”).

¹⁸ United Nations Framework Convention on Climate Change, Art. 17; Convention on Biological Diversity, Art. 28; Vienna Convention for the Protection of the Ozone Layer, Art 8.

¹⁹ See Lori F. Damrosch, *et al.*, INTERNATIONAL LAW: CASES AND MATERIALS, at 451 (4th Ed. 2001).

²⁰ United Nations Treaty Reference Guide, *available at* https://www.gc.noaa.gov/documents/gcil_treaty_guide.pdf.

of Treaties—namely, that it is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”²¹

The designation of such an agreement as a “protocol” typically reflects a relationship with another international agreement. In many cases, “protocol” is a term used for an agreement negotiated by the Parties to an existing agreement with the intention that the new agreement has some relationship or interface with the existing agreement. The UN Treaty Reference Guide identifies several categories of commonly used protocols, including a “Protocol as a supplementary treaty,” a “Protocol based on a Framework Treaty,” a “Protocol of Signature,” an “Optional Protocol,” and a “Protocol to amend.”²²

Given the examples provided, it seems most likely that a Zoonosis Protocol to CITES could plausibly be characterized as either a “Protocol as a supplementary treaty” or an “Optional Protocol.” The UN Treaty Reference Guide states that the former is “an instrument which contains supplementary provisions to a previous treaty,”²³ while it describes the latter as follows:

An Optional Protocol to a Treaty is an instrument that establishes additional rights and obligations to a treaty. It is usually adopted on the same day, but is of independent character and subject to independent ratification. Such protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the general treaty and to which not all parties of the general treaty consent, creating a “two-tier system.”²⁴

A Zoonosis Protocol might be either a protocol functioning as a supplemental treaty or an optional protocol. The following section explores examples of both types of protocols, comparing and contrasting them with a Zoonosis Protocol. Ultimately, the type of protocol that the Zoonosis Protocol might be does not matter—the key is that protocols, like the Zoonosis Protocol, are a common way of developing new international law on emerging or unregulated issues.

On one hand, a Zoonosis Protocol could certainly be thought of as “an instrument which contains supplementary provisions to a previous treaty.” And judged against the UN Treaty Reference Guide’s use of the Protocol Relating to the Status of Refugees as an example of a “protocol as a supplementary treaty,” a Zoonosis Protocol to CITES could be analogous. The Protocol Relating to the Status of Refugees expands the rights and duties enshrined in the earlier United Nations Convention Relating to the Status of Refugees by creating a new regime that does not include the

²¹ Vienna Convention on the Law of Treaties, Art. 2.1(a), 1155 U.N.T.S. 331, *entry into force* 27 Jan. 1980.

²² United Nations Treaty Reference Guide, *available at*

https://www.gc.noaa.gov/documents/gcil_treaty_guide.pdf. It is important to note, however, that the UN Treaty Reference Guide does not purport to be the final word on all possible permutations of “protocols.”

²³ *Id.*

²⁴ *Id.*

geographic and temporal restrictions contained within the Convention.²⁵ By expanding the field of obligations, rights, and regulated subject-matter, the contemplated Zoonosis Protocol would be a “protocol as a supplementary treaty.” To be sure, the Zoonosis Protocol would supplement, not supplant, the associated Convention. CITES would not become obsolete or irrelevant following entry into force of a Zoonosis Protocol; it would stand on its own and be built upon as a baseline set of obligations. Parties to CITES would still remain subject to that treaty as they are today, while Parties to the Zoonosis Protocol that are also Parties to CITES would need to comply with distinct rules under the two instruments.

On the other hand, the “Optional Protocol” category also seems to describe the contemplated Zoonosis Protocol. Again, the UN Treaty Reference Guide begins by stating that “[a]n Optional Protocol to a Treaty is an instrument that establishes additional rights and obligations to a treaty.”²⁶ So far, that sounds a lot like the contemplated Zoonosis Protocol. The UN Treaty Reference Guide goes on to state that an Optional Protocol “is usually adopted on the same day [as the associated treaty], but is of independent character and subject to independent ratification.”²⁷ Of course, the “same day” adoption would not hold true in the case of a Zoonosis Protocol; however, that seems to be of little legal consequence. Finally, the UN Treaty Reference Guide observes that “[s]uch protocols enable certain parties of the treaty to establish among themselves a framework of obligations which reach further than the general treaty and to which not all parties of the general treaty consent, creating a ‘two-tier’ system.”²⁸ This accurately describes the approach of a Zoonosis Protocol.

International practice in the context of human rights and diplomatic relations treaties shows that Optional Protocols are popular mechanisms when Parties desire to forge an agreement that builds upon an underlying, existing treaty. Examples of Optional Protocols include the following:

1. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes;²⁹

²⁵ See Office of the United Nations High Commissioner for Human Rights, 1967 Protocol Relating to the Status of Refugees, Art. 1 ¶¶ 2-3 (“For the purpose of the present Protocol, the term ‘refugee’ shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and . . .’ and the words ‘. . . as a result of such events’, in article I A (2) were omitted. The present Protocol shall be applied by the States Parties hereto without any geographic limitation . . .”).

²⁶ United Nations Treaty Reference Guide, *available at* https://www.gc.noaa.gov/documents/gcil_treaty_guide.pdf.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Optional Protocol Concerning the Compulsory Settlement of Disputes, 596 U.N.T.S. 487, *entry into force* 19 March 1967.

2. Optional Protocol to the Convention on the Rights of the Child, on the sale of Children, Child Prostitution and Child Pornography;³⁰
3. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women;³¹
4. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;³²
5. Optional Protocol to the International Covenant on Civil and Political Rights;³³ and
6. Second Optional Protocol to the International Covenant on Civil and Political Rights.³⁴

Significantly, none of the conventions associated with these Optional Protocols explicitly contemplated or authorized the creation of “protocols.” For instance, while the Convention on the Rights of the Child provides that Parties “shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict,” it does not mention a protocol, optional or otherwise, as a means to achieve this.³⁵ The closest any of these conventions come to contemplating “protocols” is the Vienna Convention on Consular Relations, whose Article 73 provides that “[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof[.]”³⁶ But even that seems to be little more than an affirmation of a basic right that would exist regardless of Article 73. In each case, a willing set of States negotiated, adopted, and ratified the Optional Protocol in question, establishing an additional agreement while preserving the underlying treaty’s text.

Although the descriptions in the UN Treaty Reference Guide are helpful to understand the different situations in which protocols have been used to develop international law, the explicit identification of a protocol as “optional,” for example, is an indicator of the culture of a particular

³⁰ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, A/RES/54/263, *entry into force* 18 January 2002.

³¹ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, A/RES/54/4, *entry into force* 22 December 2000.

³² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, A/RES/54/263, *entry into force* 12 February 2002.

³³ Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entry into force* 23 March 1976.

³⁴ Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, A/RES/44/128, *entry into force* 11 July 1991.

³⁵ Other Articles of the Convention on the Rights of the Child do suggest the possibility of further agreements, but even then they do not use the word “protocol.” See e.g., Art. 11 (“1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad. 2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.”).

³⁶ Vienna Convention on Consular Relations, Art. 73.1, 500 U.N.T.S. 95, *entry into force* 19 March 1967.

treaty context. In the case of the human rights treaties, the fact that the additional protocols are explicitly “optional” is of negotiated importance. Functionally, any protocol to CITES would also be “optional,” as it would only apply to those States that submitted a letter of ratification or accession. Importantly, whether considered an “Optional Protocol,” a “Protocol supplementary to a treaty,” or something else entirely, a Zoonosis Protocol appears fully legitimate as a matter of international law.

While international law and practice clearly does not prohibit the CITES Parties from adopting and ratifying a protocol, Article XIV of CITES arguably goes further, providing evidence that the drafters may have contemplated something like a Zoonosis Protocol. Although XIV is perhaps best known for its affirmation of Parties’ right to maintain “stricter domestic measures,” Article XIV also recognizes that Parties may enter into other agreements that intersect with CITES’ subject matter. Specifically, Article XIV provides that “[t]he provisions of the present Convention shall in no way affect . . . the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.” While this language may not contemplate “protocols” in the conspicuous fashion of the UNFCCC or CBD, it clearly recognizes that Parties can regulate trade, taking, possession, and transport of CITES-listed species through another international agreement—and a Zoonosis Protocol would be just that. Moreover, Article XIV explicitly cites “public health” as an area that may be subject to separate agreements.

B. Procedural Considerations

Although the UN framework for negotiating treaties has dominated the international environmental landscape recently, treaties may be negotiated and drafted in any setting. In fact, CITES originated as text drafted by IUCN and subsequently shared with governments. With this in mind, CITES Parties could adopt a Decision calling for the negotiation of a Zoonosis Protocol and establish the format and process for those negotiations. The work to draft the protocol could occur during one or more extraordinary meetings, through a Working Group, or in any other way decided by the Parties.

The only restrictions presented by international treaty law occur at the stage of authentication, adoption, and signature of the text of the draft treaty as the official, final text. According to Article 7 of the Vienna Convention on the Law of Treaties, these acts occur only by those vested with “full powers.”³⁷ Thus, although the drafting of a Zoonosis Protocol may proceed in any manner

³⁷ Vienna Convention on the Law of Treaties, Art. 7.

the Parties decide, authentication, adoption, and signature must occur at a meeting with representatives assigned “full powers.” This is called a meeting of plenipotentiaries.

C. Risks and Costs Inherent to a Zoonosis Protocol

Even if legally viable, a Zoonosis Protocol would not be free of complications. Pursuing a Zoonosis Protocol in lieu of amendments would avoid the drawbacks associated with opening the treaty to textual change, but other risks and costs would remain.

First, like amendment of CITES, negotiating a Zoonosis Protocol would require a significant investment of time and human resources. Just like amendments, the Zoonosis Protocol would involve difficult decisions touching on a range of economic and social interests. It is not clear that participating States would find the negotiating any easier, or quicker, in the context of a Zoonosis Protocol. Further, as mentioned above, authentication, adoption, and signature of a Zoonosis Protocol would need to occur at a meeting of plenipotentiaries. While the draft text could be negotiated in a variety of ways, it could only be made final and official by representatives with “full powers.”

Second, and as also discussed in the context of amendments to CITES, years could pass before a Zoonosis Protocol entered into force. Presumably, the negotiating States would include an entry-into-force clause designed to ensure that the Zoonosis Protocol only becomes effective upon adoption by some number of States. This could resemble CITES’ entry-into-force provision (*i.e.*, 90 days following the tenth instrument of ratification, acceptance, approval, or accession), or it could be entirely unique. Either way, a significant amount of time could elapse between finalization of the official text and entry into force.

Third, like amendments to CITES, a Zoonosis Protocol would place additional burdens on participating States. A Zoonosis Protocol would ask States to take on new responsibilities (*e.g.*, by verifying that trade and other activities conform to new veterinary and public health safety standards). This protocol would also presumably require a new Secretariat for administration and coordination—a benefit over the amendment option, but a task for Parties in that it would require establishment and funding.

Finally, creation of a Zoonosis Protocol could require Parties to navigate perceived inconsistencies or conflicts with CITES. Because the analysis here requires a fuller discussion, it is set forth in its own section immediately below.

D. Navigating Possible Conflicts or Inconsistencies

One concern regarding a Zoonosis Protocol, or any new treaty to address zoonotic disease risk, is the potential to create conflicts—whether genuine or perceived—with CITES. For instance, a Zoonosis Protocol could create stricter rules for trade in a specimen of a species listed under both

CITES and the Protocol. Whether viewed through the lens of CITES itself, the Vienna Convention on the Law of Treaties, or customary international law, the answer appears to be the same: As between States that are Parties to both CITES and the Zoonosis Protocol, the stricter rule contained in the Zoonosis Protocol would prevail in the event of inconsistency. In the situation where only one State is a Party to both CITES and the Zoonosis Protocol, and the other State is a party to CITES but not the Zoonosis Protocol, the first State would still be bound by the stricter rule from the Zoonosis Protocol, depending on the text of the Protocol—for example, the text of the Protocol could contain, just like CITES, a provision on trade with non-Parties.

Looking only at CITES, Article XIV clearly envisions Parties striking separate agreements that address trade and associated activities involving wild fauna and flora. Again, that Article provides that “[t]he provisions of the present Convention shall in no way affect . . . the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.” This provision makes clear that Parties to CITES are free to agree to stricter rules for trade in species covered by CITES for “public health” reasons or otherwise. In the event of overlapping regulation, Article XIV serves as a savings clause—otherwise known as a conflict clause or compatibility clause. Thus, in the event of conflict, a Party would not be breaching CITES; rather, it would be acting in fidelity with Article XIV. This outcome is also consonant with Article XIV’s instruction that Parties remain free to adopt stricter domestic measures “regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof[.]”

The Vienna Convention on the Law of Treaties seems to provide a similar answer, although it may not even apply. The Vienna Convention includes a system for navigating “successive treaties that relate to the same subject matter[.]”³⁸ As a threshold matter, whether CITES and a Zoonosis Protocol would qualify as “relat[ing] to the same subject matter” is unclear.³⁹ The history of Article 30 suggests that it was primarily designed to address truly successive treaties, such as GATT 1947 and GATT 1994, “rather than for completely separate agreements that overlap.”⁴⁰ In this vein, Sir Ian Sinclair opined that “it would seem that the expression ‘relating to the same subject-matter’ must be construed strictly.”⁴¹ Although an argument exists that CITES and a Zoonosis Protocol would “relate to the same subject matter” for purposes of Article 30, a stronger argument exists that a Zoonosis Protocol would not relate to the “same subject matter” in the sense that it would (a) focus on at least some different species, (b) regulate some different forms of

³⁸ Vienna Convention on the Law of Treaties, Art. 30.

³⁹ Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution*, 26 *Env’tl. L.* 841, 910 (1996).

⁴⁰ *Id.*

⁴¹ Sir Ian M. Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 98 (2d ed. 1984).

conduct, and (c) engage in regulation for different reasons. On the other hand, if the two instruments were held to be “successive treaties that relate to the same subject matter,” the following Article 30 rule would control the analysis:

- Article 30(2): If a treaty “specifies that it is subject to, or is not to be considered as incompatible with,” another treaty (whether earlier or later), that other treaty will prevail.⁴² CITES states as much in Article XIV.

Certainly, a Zoonosis Protocol could co-exist with CITES without giving rise to intractable interpretive or compatibility problems. CITES, the Vienna Convention, and customary international law all provide a clear roadmap for the resolution of any inconsistencies or conflicts.

IV. Conclusion

A Zoonosis Protocol presents an opportunity to design an instrument that addresses genuine needs while avoiding unnecessary disruption of CITES. There are no obvious legal barriers to a group of willing Parties forging a Zoonosis Protocol that would then co-exist with CITES. Compared to an amendment package, a Zoonosis Protocol may pose less risk to the existing mandate of CITES while offering equally effective treatment of zoonotic issues.

⁴² Vienna Convention on the Law of Treaties, Art. 30(2).