

# The Relationship Between CITES and UNCLOS

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Draft paper submitted for distribution at the Symposium:  
“The Law of the Sea Convention - 10<sup>th</sup> Anniversary”

as organised by

The British Society of International Law & The Society of Legal Scholars

London

22-23 March 2003

\*\*\*NOT TO BE QUOTED\*\*\*

The issue of the legal and institutional implications of listing commercially exploited aquatic species in the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>1</sup> in relation to other multilateral agreements concerning fisheries, such as the 1982 United Nations Convention on the Law of the Sea,<sup>2</sup> the 1993 Food and Agriculture Organization<sup>3</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,<sup>4</sup> and the so-called 1995 UN Fish Stocks Agreement,<sup>5</sup> has been placed on the international agenda recently.

This has to be explained by the fact that until recently, the parties to CITES did not seem to contemplate to apply the conventional provisions to commercially-exploited aquatic species. This changed during the end of the 1990s when it became clear that, because of the continuing decline of some of these commercially-exploited aquatic species, some states may well be tempted to turn to CITES in an attempt to reverse this trend. Recently, an increasing number of proposals for listing relate to such economically important species. Being a system based on trade restrictions that relies for its implementation on the state parties through a system of import and export permits and certificates, it proved an attractive alternative to some to try to reverse the so-called tragedy of the commons. Especially the very large participation in CITES at present, enhances its appeal in this respect.

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<sup>1</sup> 993 UNITED NATIONS TREATY SERIES pp. 243-417. This convention, signed on 3 March 1973, entered into force on 1 July 1975. Hereinafter cited as CITES. At the time of writing 167 states are party to this convention.

<sup>2</sup> 1833 UNITED NATIONS TREATY SERIES pp. 3-581. This convention, signed on 10 December 1982, entered into force on 16 November 1994. Hereinafter 1982 Convention (or sometimes UNCLOS in quotations). At the time of writing 147 states and the European Community are party to this convention.

<sup>3</sup> Hereinafter FAO.

<sup>4</sup> 10 INTERNATIONAL LEGAL MATERIALS pp. 417-425 (1995). This agreement, approved by Resolution 15/93 on 24 November 1993, has entered into force on 24 April 2003. Hereinafter 1993 FAO Compliance Agreement. At the time of writing 28 states and the European Community are party to this agreement.

<sup>5</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (U.N. Doc. A/CONF.164/37), reprinted in 34 INTERNATIONAL LEGAL MATERIALS pp. 1542-1580 (1995). This agreement, signed on 8 September 1995, entered into force on 11 December 2001. Hereinafter 1995 UN Fish Stocks Agreement. At the time of writing 51 states and the European Community are party to this agreement.

Since then, this relationship has drawn increased attention, not only within the CITES conventional framework, but also outside of it. The concern existed that the applicable CITES listing criteria may not be appropriate to deal with aquatic species harvested on a large-scale commercial basis. International organizations established to regulate fisheries, be they global like the FAO or regional, like the Commission for the Conservation of Antarctic Marine Living Resources,<sup>6</sup> have therefore become more and more involved.

After having explained the antecedents (chapter II), the present study will focus on the application of successive treaties relating to the same subject matter (chapter III). If the ocean related treaties mentioned above do certainly not need any introduction in a symposium gathering law of the sea specialists, the same may not necessarily be true with respect to CITES, which is primarily land-based. A brief chapter will therefore precede this analysis explaining the salient features of the latter convention.

## I Introduction to the functioning of CITES

CITES aims at the protection of wild fauna and flora through the regulation of international trade. Starting from the premise that states are the best protectors of their own wild fauna and flora,<sup>7</sup> this goal is attained through the issuing of permits and certificates for the export, re-export and import of live and dead animals. Since not all of them are threatened to the same extent, a differentiation is made between three categories: Those species that are threatened with extinction whose trade must be strictly regulated, meaning that trade can be authorized only in exceptional circumstances; those that are not necessarily now threatened with extinction, but may become so unless trade is restricted to ensure their survival; and finally those that in the eyes of the state, that has jurisdiction over their exploitation, need the cooperation of other states to prevent or restrict their exploitation.<sup>8</sup> These three categories just distinguished are placed on three different lists, i.e. Appendices I to III respectively, to which different regimes for export and import apply. The most stringent controls apply to Appendix I specimen of species, requiring not only an export but also an import permit.<sup>9</sup> Appendix II specimen of species also require an export permit but no import permit.<sup>10</sup> Finally, trade in Appendix III specimen of species, on the

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<sup>6</sup> 1329 UNITED NATIONS TREATY SERIES pp. 47-106. This convention, signed on 20 May 1980, entered into force on 7 April 1982. Hereinafter CCAMLR. At the time of writing 30 states and the European Community are party to this Convention.

<sup>7</sup> CITES, Preamble, recital 3.

<sup>8</sup> CITES, Art. II.

<sup>9</sup> The export permit requires a scientific authority of that state to advise that export will have no negative impact on the survival of that species, and a management authority of that same state to be satisfied that *primo* the specimen was not obtained in contravention of its nature protection laws, *secundo* that live specimen will shipped with a minimum of risk as to injury, damage to health or cruel treatment, and *tertio* an import permit has been delivered. The import permit requires a scientific authority of that state *primo* to advise that import will have no negative impact on the survival of that species and *secundo* to be satisfied that live specimen will find a suitable home, and a management authority of that same state to be satisfied that the specimen is not used for primarily commercial purposes. CITES, Art. III (2 & 3).

<sup>10</sup> The export permit requires a scientific authority of that state to advise that export will have no negative impact on the survival of that species, and a management authority of that same state to be satisfied that *primo* the specimen was not obtained in contravention of its nature protection laws, and *secundo* that live specimen will shipped with a minimum of risk as to injury, damage to health or cruel treatment. The importing country only

lower end of the scale, also requires an export permit, but with less conditions attached to it than export permits for Appendices I and II.<sup>11</sup>

For the present study, a few elements need to be highlighted. First, the approach of CITES to control *import* and *export* was certainly not new in 1973, but the fact that this convention applied it on a global scale on the contrary was innovatory.<sup>12</sup> Second, between these two concepts, CITES places the crux of the regulatory power on the export side of the medal, and not the import side.<sup>13</sup> Third, CITES regulates *international* trade. This means that CITES is not concerned with what happens within the boundaries of its member states. To give but one prominent example illustrating the consequences of this approach are the developments within the European Community which adopted a new Regulation (EC 338/97) on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein at the end of 1996.<sup>14</sup> This regulation, which harmonizes the laws of the different member states on this subject, abolishes the internal borders and stresses the need for stricter controls at the external borders.<sup>15</sup>

## II Antecedents leading up to the present study

Interaction between CITES and FAO was initiated around the turn of the century. At the request of the FAO Committee on Fisheries Sub-Committee on Fish Trade, gathered in Bremen, Germany, in June 1998, an *ad hoc* group was created to make suggestions concerning the application of CITES listing criteria to commercially-exploited aquatic species. The *ad hoc* group in turn proposed to hold a technical consultation on the issue, which took place in Rome, Italy, during the month of June 2000. This consultation stressed the potential synergy between CITES and FAO but could not conclude its work. A second Technical Consultation was convened in Windhoek, Namibia, in November 2001. This meeting concluded that important improvements could be made to the existing CITES criteria.<sup>16</sup>

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needs to verify whether such an export permit is present. CITES, Art. IV (2 & 4).

<sup>11</sup> The export permit only necessitates that the management authority of the state that listed the species to be satisfied that *primo* the specimen was not obtained in contravention of its nature protection laws, and *secundo* that live specimen will be shipped with a minimum of risk as to injury, damage to health or cruel treatment. CITES, Art. V (2).

<sup>12</sup> Birnie, P. & Boyle, A., *INTERNATIONAL LAW AND THE ENVIRONMENT*, Oxford, Oxford University Press, p. 626 (2002). It should moreover be stressed that in principle CITES does not require specific permits or certificates for transit states. See CITES, Art. VII (1). But the potential for abuse has made the parties, *en cours de route*, to interpret this provision in a way that transit states do have certain obligations imposed on them in order to fight illegal trade. See Wijnstekers, W., *THE EVOLUTION OF CITES*, Geneva, CITES Secretariat, pp. 139-140 (2003).

<sup>13</sup> Lyster, S., *INTERNATIONAL WILDLIFE LAW: AN ANALYSIS OF INTERNATIONAL TREATIES CONCERNED WITH THE CONSERVATION OF WILDLIFE*, Cambridge, Grotius Publications p. 479 (1985).

<sup>14</sup> *Official Journal of the European Communities* L.61, 3 March 1997, pp. 1-69. This regulation entered into force on 1 June 1997.

<sup>15</sup> *Id.*, Preamble, recital 2.

<sup>16</sup> *Recommended Comments on CITES Notification to the Parties No. 2001/037*. This document was attached as Appendix F to *Report of the Second Technical Consultation on the Suitability of the CITES Criteria for Listing Commercially-Exploited Aquatic Species, Windhoek, Namibia, 22-25 October 2001*, FAO FISHERIES REPORT No. 667 (FAO Doc. FIRM/R667(Tri)), pp. 54-64.

The results of this second consultation were subsequently endorsed by the Sub-Committee on Fish Trade at its eighth session, held in Bremen, Germany, during the month of February 2002. In its Recommendations on Developing a Workplan for Exploring CITES Issues with respect to International Fish Trade and a Process for Scientific Evaluation of Relevant CITES Listing Proposals, it was recommended to the Committee on Fisheries that expert consultations should be convened on a number of issues, one of which related to the

“analysis of the legal implications of the existing CITES listing criteria in relation to the UN Convention of the Law of the Sea (UNCLOS) and related international law covering fisheries, and of any changes in those implications resulting from adoption of the proposals included in Appendix F to the Report of the Second Technical Consultation”.<sup>17</sup>

At its twenty-fifth session, the Committee on fisheries complied with the request by adopting the terms of reference of such consultation.<sup>18</sup> Two consultations were then organised during the next year.<sup>19</sup>

Also CITES has acted upon these recent developments as indicated by Decisions 13.18 and 13.19 adopted at the last Conference of the Parties held in Bangkok, Thailand, on 2-14 October 2004.<sup>20</sup>

Since a couple of years now, both organisations have moreover been trying to work out a co-operation agreement between them, but so far without success.<sup>21</sup>

<sup>17</sup> *Report of the Eighth Session of the Sub-Committee on Fish Trade, Bremen, Germany, 12-16 February 2002*, FAO FISHERIES REPORT NO. 673 (FAO Doc. FIIU/R673 (Tri)), para. 21.

<sup>18</sup> *Report of the Twenty-fifth Session of the Committee on Fisheries, Rome, 24-28 February 2003*, FAO FISHERIES REPORT NO. 702 (FAO Doc. FIPL/R702(En)), para. 48 and Appendix F.

<sup>19</sup> For the first consultation, see *Report of the Expert Consultation on Implementation Issues Associated with Listing Commercially-exploited Aquatic Species on CITES Appendices, Rome, 25-28 May 2004*, FAO FISHERIES REPORT NO. 741 (FAO Doc. FIR/R741) 17 pp. A second one was organised about a month later, namely the Expert Consultation on Legal Issues Related to CITES and Commercially-exploited Aquatic Species, Rome, Italy, 22-25 June 2004.

<sup>20</sup> As available on Internet at <[www.cites.org/eng/dec/index.shtml](http://www.cites.org/eng/dec/index.shtml)> (last visited on 20 March 2005). In these decisions the Standing Committee of CITES is directed to convene a workshop to consider implementation and technical issues “taking into consideration the two Expert Consultations of the Food and Agriculture Organisation of the United Nations on implementation and legal issues”, while the Secretariat is directed to assist the Standing Committee in this respect. In these two FAO consultations, it should be noted, CITES participated by sending twice an expert in the area concerned by the consultation. It should therefore not come as a surprise that the present decision stipulates that two representatives from FAO will be invited to participate in the proposed workshop.

<sup>21</sup> The Committee on Fisheries of FAO was unable to reach consensus on a proposed draft Memorandum of Understanding during the month of February 2003. See *Report of the Twenty-fifth Session of the Committee on Fisheries, Rome, 24-28 February 2003*, *supra* note 18, para. 48, where it is stated that no consensus could be reached, and Appendix G, where the text of the proposed Memorandum of Understanding can be found. This point was further discussed at the ninth meeting of the Sub-committee on Fish Trade of the Committee on Fisheries of FAO early 2004. See *CITES Issues with Respect to International Fish Trade and the CITES/FAO MoU, Bremen, Germany, 10-14 February 2004, Agenda Item 5*, FAO Doc. COFI:FT/IX/2004/3, as available on Internet at <[ftp.fao.org/fi/document/COFI/cofift\\_9/3e.pdf](ftp://ftp.fao.org/fi/document/COFI/cofift_9/3e.pdf)> (last visited on 20 March 2005). For the steps already undertaken in the framework of CITES, see for instance CoP 13 Doc. 12.4, *Cooperation with the Food and Agriculture Organization of the United Nations (FAO)*, submitted by Japan to the thirteenth conference of the parties to be held at Bangkok, Thailand, in 2004, as available on Internet at <[www.cites.org/common/cop/13/raw-docs/JP02.pdf](http://www.cites.org/common/cop/13/raw-docs/JP02.pdf)> (last

### III Application of successive treaties relating to the same subject-matter

The central theme when trying to analyse the institutional implications of listing commercially exploited aquatic species in the CITES appendices in relation to the 1982 Convention, the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement and other international instruments relative to fisheries management, is the application of successive treaties relating to the same subject-matter in general international law. This part will first look into the general provisions on the law of treaties. Secondly, the relationship between the 1982 Convention and other international agreements will be analysed in order to find out whether it had an impact *a posteriori* on the content of CITES. Thirdly, the relationship between CITES and the other international instruments relative to fisheries management, including the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement, will be addressed. Since CITES predates most of these agreements, especially the influence of a later treaty on a previous one treating the same subject-matter will retain our attention.

#### A The law of treaties

Contemporary international law is characterized by the conclusions of a growing number of treaties. This quite naturally increases the possibility that successive treaties may be treating either a related, a similar or sometimes even exactly the same subject-matter and this possibly, but not necessarily, between the same contracting parties.<sup>22</sup>

The natural point of departure is the Vienna Convention on the Law of Treaties.<sup>23</sup> The basic rules contained therein concerning the application of successive treaties relating to the same subject-matter, are as follows:

- “2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the treaty do not include all the parties to the earlier one:
  - a) as between States parties to both treaties the same rule applies as in paragraph 3;
  - b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”<sup>24</sup>

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visited on 20 March 2005), p. 2, paras 3-8, where an overview is given.

<sup>22</sup> See for instance Shaw, M., *INTERNATIONAL LAW*, Cambridge, Cambridge University Press, p. 834 (2003), indicating that the problem raised by successive treaties is becoming a serious one under in present-day international law.

<sup>23</sup> 1155 UNITED NATIONS TREATY SERIES pp. 331-512. This Convention, signed on 23 May 1969, entered into force on 27 January 1980. Hereinafter 1969 Vienna Convention. At the time of writing 100 states are party to this agreement.

<sup>24</sup> 1969 Vienna Convention, Art. 30.

Because very few governments reacted in a critical manner to this draft article when first proposed by the International Law Commission, the argument has been made that it therefore reflected pre-existing customary law at the time of codification.<sup>25</sup> On the other hand, it cannot be denied that three consecutive special rapporteurs of the International Law Commission in charge of this issue all held different positions:<sup>26</sup> Lauterpacht started out by claiming the later treaties should be considered void if their implementation would breach earlier treaty commitments, i.e. the rule of the *lex prior*. Fitzmaurice abandoned this lead, arguing that no priority should be assigned. Waldock, finally, reintroduced the principle of priority into the draft articles, but this time in reversed order by proposing the *lex posterior* rule instead.

P. Reuter seems to doubt whether Art. 30 of the 1969 Vienna Convention forms today part of customary law, when he states:

“Mais, en-dehors ... [d]es déclarations de compatibilité, il n'existe pas ‘de principe général de priorité’ mais de ‘simples directives d’interprétation’.”<sup>27</sup>

Others, on the other hand, seem to be in favour of the proposition that Art. 30 of the Vienna Convention does form part of customary law.<sup>28</sup>

In the specialized literature Art. 30 of the Vienna Convention has moreover been described as “in many respects not entirely satisfactory”.<sup>29</sup> The question how to date a treaty, in order to be able to determine the earlier and later treaty, remains for instance unsettled.<sup>30</sup> The 1982 Convention may serve as example here for a difference of not less than 14 years is involved depending on whether one relies on the date of opening for signature or rather the date of entry into force, indicating the kind of fundamental problems which this article does not resolve.<sup>31</sup> Furthermore Art. 30 of the Vienna Convention does not give expression to the principle of *lex*

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<sup>25</sup> Mus, J., *Conflicts Between Treaties in International Law*, 45 NETHERLANDS INTERNATIONAL LAW REVIEW p. 208, 213 (1998).

<sup>26</sup> *Id.*, pp. 227-231. See also Fox, G., *International Organizations: Conflicts of International Law*, 95 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS p. 183, 185 (2001). See also the further reference to be found in these two sources.

<sup>27</sup> Reuter, P., DROIT INTERNATIONAL PUBLIC, Paris, Thémis, p. 55 (1983).

<sup>28</sup> Aust, A., MODERN TREATY LAW AND PRACTICE, Cambridge, Cambridge University Press, p. 181 (2000); Mus, J., *supra* note 25, p. 213; and Sinclair, I., THE VIENNA CONVENTION ON THE LAW OF TREATIES p. 98 (1984). The latter author, who served as rapporteur to the *Institut de Droit International*, seems to restate this position with respect to Art. 30 in his 1995 report on the problems arising from a succession of codification conventions on a particular subject, even though some doubt may remain. As available on Internet at <[www.idi-iil.org/idiE/resolutionsE/1995\\_lis\\_01\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/1995_lis_01_en.pdf)> (last visited on 20 March 2005).

<sup>29</sup> Aust, A., *supra* note 28, p. 174 and Sinclair, I., *supra* note 28, p. 98.

<sup>30</sup> See in this respect the thorough analysis by Vierdag, B., *The Time of the ‘Conclusion’ of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 59 BRITISH YEARBOOK OF INTERNATIONAL LAW pp. 75, 82-103 (1988). This author makes a further distinction between conflicts between concrete rights on the one hand, and between abstract norms on the other. *Id.*, p. 94. See also Mus, J., *supra* note 25, pp. 220-222.

<sup>31</sup> Or as concluded by Fox, G., *supra* note 26, p. 185: “[T]he failure to fix a precise date would seem to doom Article 30 to chronic indeterminacy.”

*specialis derogat generali*,<sup>32</sup> which seems nevertheless well established in case law<sup>33</sup> as well as in the specialized literature.<sup>34</sup> But there are still other points of critique: The question of conflicting obligations towards different states is not covered, regional treaties are not taken into account, *erga omnes* obligations are left out of the picture, and the term treaty does not appear crystal clear.<sup>35</sup>

Whatever the correct answer to the question, the fact remains that even if Art. 30 of the 1969 Vienna Convention were to be considered part of customary international law today, the rules contained in that article remain residual in nature.<sup>36</sup> It remains therefore of the greatest importance to respect the will of the parties, especially when the latter is reflected in conventional provisions which *expressis verbis* regulate the relationship with other treaties. This occurs by means of what the International Law Commission has called conflict clauses.<sup>37</sup> The following sections will focus on such conflict clauses to be found in a number of global and regional fishery management conventions.

## B The 1982 Convention

Making use of this just-mentioned possibility under general international law for parties to determine the relationship between a treaty they create and other relevant international agreements,<sup>38</sup> the drafters of the 1982 Convention did conceive a specific rule, to be found in Art. 311, which regulates this relationship in general. Of specific importance for the present study are the following paragraphs:

“2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or performance of their obligations under this Convention.

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5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.”<sup>39</sup>

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<sup>32</sup> This has been defined by the *DICIONNAIRE DE DROIT INTERNATIONAL PUBLIC* (Salmon, J., ed.), Bruylant, Brussels, p. 652 (2001), as: “Principe de solution à un conflit entre une norme générale et une norme particulière, selon lequel la loi spéciale l’emporte.”

<sup>33</sup> See *id.*, for the examples provided there.

<sup>34</sup> 1 *OPPENHEIM’S INTERNATIONAL LAW* (Jennings, R. & Watts, A., eds), London, Longman, p. 1280 (1996).

<sup>35</sup> Sadat-Akhavi, S., *METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES*, Leiden, Martinus Nijhoff, pp. 70-84 (2003), also making reference to the difficulty of distinguishing between prior and later treaties.

<sup>36</sup> Sinclair, I., *supra* note 28, p. 97. See in this respect also Reuter, P., *supra* note 27 and accompanying text, who starts out by saying that the rules are subjected to what parties may have provided themselves. See finally also the 1969 Vienna Convention, Art. 30 (2), as reprinted *supra* note 24 and accompanying text, which precedes the paragraph giving expression to the *lex posterior* principle.

<sup>37</sup> *Reports of the International Law Commission*, 2 ILC *YEARBOOK* p. 214 (1966). The following definition is provided: “A clause [in a treaty] intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals.”

<sup>38</sup> See *supra* note 36 and accompanying text.

<sup>39</sup> 1982 Convention, Art. 311.

Even though Paragraph 2 has been said to be derived from Art. 30 (3 & 4) of the 1969 Vienna Convention,<sup>40</sup> it is rather far-reaching and appears to go well beyond paragraphs 3 & 4 of that Art. 30 for it implies in fact the priority of the 1982 Convention in relation to all other treaties, already concluded or still to be concluded by states that are a party to the 1982 Convention.<sup>41</sup> The universalism of the latter has been said to be a relevant factor in applying other related instruments.<sup>42</sup> One author even compared this particular paragraph to Art. 103 of the Charter of the United Nations,<sup>43</sup> since it pretends to prevail over all other treaties concluded in the area of the law of the sea that alter the rights and duties of states parties under the 1982 Convention.<sup>44</sup>

This provision is a clear departure from the situation as it existed under the 1958 conventional system. Not only was there no general overall rule on the subject, but the only provision treating the issue went the other way around by giving priority to the previously concluded agreements.<sup>45</sup> The innovatory character of Art. 311 (2) can therefore hardly be denied.

Nevertheless, its practical application is very much tempered in at least two respects. First, the negotiators at the third United Nations Conference on the Law of the Sea<sup>46</sup> did not want the article to result in automatic abrogations, especially of the many technical treaties adopted under the auspices of the International Maritime Organization, eventually creating a legal vacuum.<sup>47</sup> Secondly, the fear for too strict an application is alleviated by the provision that the 1982 Convention itself can derogate from this rule.<sup>48</sup> The latter provision is often relied upon for in not less than one sixth of the total number of articles contained in the 1982 Convention, derogations of this kind are included.<sup>49</sup> Some of them even subtract whole parts of the 1982 Convention from the application of the general rule contained in Art. 311 (2).<sup>50</sup> For present

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<sup>40</sup> Oxman, B., *The Third United Nations Conference on the Law of the Sea: The Ninth Session* (1980), 75 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 211, 249 (1981).

<sup>41</sup> Anon, *Article 311*, in 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Rosenne, S. & Sohn, L., eds), Dordrecht, Martinus Nijhoff, p. 299, 243 (1989), where it is stated that paragraph 2 of this article implies “a measure of priority for the 1982 Convention in the sense that it provides a yardstick against which the compatibility of those other agreements is to be measured.”

<sup>42</sup> *Id.*, p. 241. See in this respect also Sadat-Akhavi, S., *supra* note 35, p. 131, stressing the package deal nature of the 1982 Convention, which would be negated if pre-existing treaties would trump the specific provisions constituting an integral part of that package.

<sup>43</sup> This article reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

<sup>44</sup> Vukas, B., *The Law of the Sea Convention and the Law of Treaties*, in LIBER AMICORUM GÜNTHER JAENICKE -- ZUM 85. GEBURTSTAG (Götz, V., Selmer, P. & Wolfrum, R., eds), Berlin, Springer, p. 631, 649 (1998).

<sup>45</sup> It concerns the Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 UNITED NATIONS TREATY SERIES pp. 285-342. This convention, signed on 29 April 1958, entered into force on 20 March 1966. At the time of writing 37 states are party to this Convention. Art 1 (1) reads: “States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations ...”.

<sup>46</sup> Hereinafter UNCLOS III.

<sup>47</sup> Sadat-Akhavi, S., *supra* note 35, p. 127 note 97.

<sup>48</sup> 1982 Convention, Art. 311 (5), as reprinted *supra* 39 and accompanying text.

<sup>49</sup> For a listing, see Anon, *supra* note 41, p. 240.

<sup>50</sup> See for instance 1982 Convention, Art. 237, excluding the 45 articles of Part XII, Protection and Preservation of the Marine Environment, from its application. For an analysis of this article, see Sadat-Akhavi, S., *supra* note 35, pp. 131-133.

purposes it is important to note that so-called straddling stocks,<sup>51</sup> anadromous stocks,<sup>52</sup> and catadromous stocks<sup>53</sup> all fall under the application of Art. 311 (5), and that with respect to highly migratory species<sup>54</sup> and marine mammals<sup>55</sup> the 1982 Convention mentions cooperation through appropriate international organizations, which in the latter case is expressly allowed to take more restrictive measures than those provided in the convention itself. Also Art. 116 falls under the application of Art. 311 (5) since it rephrases Art. 1 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.<sup>56</sup> The vast majority of the commercially exploited aquatic species in which CITES might become interested in trying to reverse the tragedy of the commons,<sup>57</sup> in other words, do fall under the rule of Art. 311 (5) rather than Art. 311 (2) of the 1982 Convention.

At least one adjudicatory proceeding has so far been confronted with the application of Art. 311 (2) in practice. It concerns the arbitral award between Canada and France of 1986, concerning a French fishing vessel, *La Bretagne*.<sup>58</sup> The Canadian authorities had refused an authorization to fish in the Gulf of St. Lawrence to this vessel. According to Canada, the filleting of fish on board vessels, an activity which this country excluded its own vessels from undertaking, could be forbidden with respect to French vessels on the basis of an agreement concluded between both parties in 1972. The fundamental question, of particular concern here, was whether the term “fishery regulations” as used in that agreement was restricted to catch regulations, or whether the processing of fish, especially the filleting at sea by means of freezer-trawlers, was also covered. Canada argued that the law had changed substantially between 1972 and 1986 because of UNCLOS III and the signing of the 1982 Convention. This point of view was opposed by France. Even though both states ratified the 1982 Convention well

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<sup>51</sup> 1982 Convention, Art. 63.

<sup>52</sup> 1982 Convention, Art. 66.

<sup>53</sup> 1982 Convention, Art. 67.

<sup>54</sup> 1982 Convention, Art. 64.

<sup>55</sup> 1982 Convention, Art. 65.

<sup>56</sup> See *supra* note 45.

<sup>57</sup> This means in the supposition that the conference of the parties of CITES came to accept that the expression “not under the jurisdiction of any state” excludes the exclusive economic zone from falling under the application of CITES. It should be remembered that most of the so-called high seas species cross the 200-mile limit at some stage of their life cycles and can therefore be considered, biologically, to be straddling stocks. Stressing this point, see Hayashi, M., *The Role of the United Nations in Managing the World's Fisheries*, in *THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES* (Blake, G., Hildesley, W., Pratt, M., Ridley, R. & Schofield, C., eds), London, Graham & Trotman, p. 373, 374 (1995) and by the same author, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Session*, 11 *OCEAN YEARBOOK* pp. 20, 21-22 (1994), both referring to a study by the FAO, *World Review of High Seas and Highly Migratory Fish Species and Straddling Stocks*, Rome, FAO Fisheries Circular 868 (1993), preliminary version. Beyond the field of application of the 1995 UN Fish Stocks Agreement, therefore, not much other living resources may in principle remain on the high seas. As stressed by Lucchini, L. & Vœlckel, M., *DROIT DE LA MER*, Tome 2, Vol. 2, Paris, Pédone, p. 690 (1996) and Momtaz, D., *L'Accord relatif à la conservation et la gestion des stocks de poissons chevauchants et grands migrants*, 41 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* p. 676, 681 (1995). As will be seen *infra* note 88 and accompanying text, the 1995 UN Fish Stocks Agreement gives precedence to the 1982 Convention in the relationship between these two documents.

<sup>58</sup> *Tribunal Arbitral institué par le compromis du 23 octobre 1985 entre le Canada et la France: Différend concernant le filetage à l'intérieur du Golfe du Saint-Laurent*, 90 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL* pp. 713-786 (1986). Hereinafter 1986 Award.

after the rendering of this award,<sup>59</sup> the tribunal was of the opinion that the concepts of fishing zone, as claimed by Canada, and exclusive economic zone, as claimed by France, as well as the rights exercised therein with respect to the living resources, were equivalent and formed part of international law.<sup>60</sup>

The tribunal explicitly referred to Art. 311, but then decided not to apply it. It justifies this approach by emphasizing that the 1982 Convention at that time had not yet entered into force. Unless the provisions in question reflected customary international law applicable to the parties before it, the tribunal could not take them into account.<sup>61</sup> Since the tribunal was of the opinion that provisions regulating the powers of the coastal states in fishery or exclusive economic zones did not form part of customary international law,<sup>62</sup> it reached the conclusion that the 1982 Convention did not trump the 1972 Agreement *in casu*. The tribunal even reasoned that in case the 1982 Convention would have governed the relationship between the two parties to the dispute, *quod non*, the 1972 Convention would have prevailed anyway.<sup>63</sup> W. Burke, in an unusually sharp critical comment on this award, believed on the other hand that the rules in question had in the mean time crystallized into customary international law, and therefore stated:

“The Tribunal ultimately and specifically held that provisions of the LOS Convention are inconsistent with the 1972 Agreement and that the latter prevails!”<sup>64</sup>

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<sup>59</sup> Both countries had signed the 1982 Convention before the rendering of the award, but Canada ratified that document only on 7 November 2003, France on 11 April 1996.

<sup>60</sup> 1986 Award, para. 49.

<sup>61</sup> *Id.*, para. 51.

<sup>62</sup> *Id.* Stressing this distinction that the tribunal accepted the concept of the exclusive economic zone, but not its content codified in the 1982 Convention, as forming part of international law, see Arbour, J., *L’Affaire du chalutier-usine ‘La Bretagne’ ou les droits de l’Etat côtier dans sa zone économique exclusive*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW p. 61, 72 (1986). Arguing that there exists a difference in methodology between the approach of the tribunal in this case and the International Court of Justice, see Colliard, C.-A., *Le différend franco-canadien sur le ‘filetage’ dans le golfe du Saint-Laurent (sentence arbitrale du 17 juillet 1986)*, 92 REVUE GÉNÉRALE DE DROIT INTERNATIONAL p. 275, 285 (1988).

<sup>63</sup> 1986 Award, para. 51. The tribunal stated: “Même si la Convention des Nations Unies sur le droit de la mer faisait actuellement droit entre les deux Parties, le Tribunal note qu’elle ne porterait cependant pas atteinte au régime conventionnel établi par l’Accord de 1972, en raison de la clause contenue dans son article 311, paragraphe 2”. Specifically mentioning this passage, see McDorman, T., *French Fishing Rights in Canadian Waters: The 1986 La Bretagne Arbitration*, 4 INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW p. 52, 57 (1989), who explains this by the fact that the tribunal considered that the term management used in the 1982 Convention did not include processing (*id.*). The dissenting opinion of D. Pharand does not touch upon the interpretation of Art. 311 (2). *Id.* pp. 757-786.

<sup>64</sup> Burke, W., *Coastal State Fishery Regulation under International Law: A Comment on The Bretagne Award of July 17, 1986 (The Arbitration between Canada and France)*, 25 SAN DIEGO LAW REVIEW p. 495, 518 (1988). According to this author “[t]he decision by the Tribunal in the *La Bretagne* case has little substance that makes it worthy of consideration or adoption. The majority opinion does not merit emulation either for the process of legal analysis, for its approach to treaty interpretation, for its use of prior decision, or for its views about substantive international law for fisheries” (*id.*, p.500); “the opinion and underlying rationale are flawed, deliver general pronouncements which raise serious questions, and reach conclusions unsupported by international law” (*id.*, p. 502); and he concludes by stating that “the Award is not reliable authority for the process of treaty interpretation, the substantive positions it holds regarding the specific issues in dispute, or the general implications of the propositions offered in support of its conclusions. The opinion is flawed not only in its general approach to coastal state fishery management authority, but also as a dependable source of guidance for smooth fishery relations between Canada and France” (*id.*, p. 533).

This award, in other words, even though it specifically addressed its attention to Art. 311 (2) of the 1982 Convention, was not willing to apply it in the case at hand since that convention had not yet entered into force. Nevertheless, authors have implied from the reasoning of the tribunal that, because of this article, in the eyes of the majority the 1982 Convention

“should be used as the yardstick against which the compatibility of other agreements are to be measured”.<sup>65</sup>

As was the case with the 1969 Vienna Convention,<sup>66</sup> it must be concluded that also the 1982 Convention contains a simple set of provisions, which seem to apply to a very wide spectrum of different eventualities. Art. 311 (2) has however been criticized for the clumsy manner in which it established priority of the 1982 Conventions over all other conventions, existing or future.<sup>67</sup> The eventuality that this particular innovative paragraph may well give rise to disputes in the future has therefore already been contemplated in the literature.<sup>68</sup>

## C CITES and other relevant international instruments relative to fisheries management

### a CITES

Unlike the 1982 Convention, CITES shows much more deference to previously concluded agreements by a state party. In general, the convention subordinates itself to any other treaty, already concluded or still to be concluded, by a state party to CITES:

“2. The provisions of the present Convention shall in no way affect the provisions of any domestic measures or 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.”<sup>69</sup>

Of particular importance for the present study are moreover the particular paragraphs in this article relating to other international treaties already concluded by state parties relating to marine species included in Appendix II:

“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

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<sup>65</sup> McLaughlin, R., *Settling Trade-related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW p. 29, 58 (1997). Using almost identical wording, see also Anon, *supra* note 41, p. 243, as reproduced in that note. The exact content of the yardstick *in casu* was however for from clear. Compare the opinion of the tribunal (*supra* note 63 and accompanying text) with the way others have understood the essence of the case (*supra* note 64 and accompanying text).

<sup>66</sup> See Sinclair, I., *supra* note 28, pp. 94-95, who writes: “Indeed, it is their very simplicity which may occasion some concern, given the varying types of situations which they are designed to cover.”

<sup>67</sup> Vukas, B., *supra* note 44, p. 650. It for instance does not make any distinction between agreements concluded between all parties of two consecutive agreements, and the eventuality that the contracting parties to the two instruments differ. *Id.*, pp. 249-250.

<sup>68</sup> Anon, *supra* note 41, p. 243.

<sup>69</sup> CITES, Art. XIV.

in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement.

5. Notwithstanding the provisions of Articles III, IV and V, any export of a specimen taken in accordance with paragraph 4 of this Article shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement in question.”<sup>70</sup>

It will be clear that even in this case CITES tries, as much as possible, to accommodate the existence of such previously concluded instruments into the CITES system. But unlike paragraph 2, paragraphs 3 and 4 only relate to previously concluded agreements.

It might be important here to try to reveal the genesis of these particular paragraphs of Art. XIV of CITES, in order to clarify the intention the drafters had in mind when including these provisions in the article on international conventions. Because even though the precursor of Art. XIV (2) was already present in the working paper, which served as basis for the conference, the present paragraphs 4 and 5 on the contrary were not.<sup>71</sup> The inclusion of these latter two paragraphs, in fact, was closely linked to the final inclusion of the much contested concept “introduction from the sea”.<sup>72</sup> It turned out to be the central feature of a compromise formula devised by Australia in order to find some middle ground between those in favour of inclusion of marine species under CITES, and those objecting to such inclusion, for it would ensure that

“marine species not the subject of other international agreements, e.g. dugongs and turtles, would be given protection”.<sup>73</sup>

In the explanation attached to the concrete proposal submitted by this country, it was stated that its object was to ensure that other international agreements relating to marine species that ensure the survival of the species concerned would not be affected.<sup>74</sup> According to this proposal, the treaties in question would be listed in an appendix to the convention.<sup>75</sup> Even though Japan had proposed the deletion of all references to “introduction from the sea” in the working paper,<sup>76</sup> this country nevertheless believed the relationship with other treaties to be an entirely different matter and proposed an amendment of the article dealing with other conventions explicitly excluding

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<sup>70</sup> *Id.*

<sup>71</sup> Plenipotentiary Conference to Conclude an International Convention on Trade in Certain Species of Wildlife, held at Washington, United States of America, 16 February-3 March 1973 (hereinafter CITES, *travaux préparatoires*), *Working Paper* (Doc. 3, 21 November 1972), p. 18. It concerns Art. XII of these draft articles.

<sup>72</sup> This point was developed in some detail by the present author at the occasion of a contribution to the last Annual Conference of the Society of Legal Scholars, held in Sheffield on 14 September 2004. Hereinafter Sheffield Conference.

<sup>73</sup> CITES, *travaux préparatoires*, *Summary Record - Tenth Plenary Session, Tuesday, February 20, 1973* (Doc. SR/10 (Final), 5 March 1973), p. 3.

<sup>74</sup> CITES, *travaux préparatoires*, *Proposals Relating to Article XII of the Working Paper (Doc. 3) (Submitted by the Delegation of the Australia)* (Doc. PA/XII/3, 20 February 1973), p. 1.

<sup>75</sup> *Id.*

<sup>76</sup> CITES, *travaux préparatoires*, *Proposed Amendment to the Working Paper (Doc. 3) (Submitted by the Delegation of Japan)* (Doc. PA/Gen/1, 17 February 1973), p. 1.

international conservation measures which were already in force.<sup>77</sup> The concrete proposal of Japan also would have listed the concrete proposals in appendix.<sup>78</sup> The idea of a special appendix was also retained in the draft submitted by the relevant *ad hoc* committee, but did not find its way into the final version of CITES.<sup>79</sup> This short parenthesis on the *travaux préparatoires* can therefore be concluded by saying that the insertion of paragraphs 4 and 5 of Art. XIV is not unrelated to the fact that CITES finally was able to include marine species as a matter of principle in its scope of application. Even though Japan's preoccupation clearly related to whaling, and was thinking of only one other convention at that time,<sup>80</sup> the idea of listing such relevant treaties by name in an appendix, which floated for some time during the negotiations, was not retained in the end.

Finally, for the sake of completeness, reference should also be made in the framework of the present study to the paragraph in this article concerning the relationship between CITES and UNCLOS III:

“6. Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.”<sup>81</sup>

As it has already been argued in some detail by the present author elsewhere, this provision has lost most, if not all of its meaning at present.<sup>82</sup>

#### b 1993 FAO Compliance Agreement

Contrary to the 1982 Convention and CITES, the 1993 FAO Compliance Agreement does not contain a specific article regulating the relationship of this agreement with other possible treaty obligations of its states parties. Nevertheless, by means of its definition of the term “international conservation and management measures”, which forms a corner stone in the set-up of this agreement, a link is made with the 1982 Convention, since all such measures are to be “adopted and applied in accordance with the relevant rules of international law as reflected in” the 1982 Convention, whether they are formalized by global, regional or subregional fishery organizations or directly by treaty between the parties involved.<sup>83</sup>

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<sup>77</sup> Statement by Mr. T. Yamazaki, Delegate of Japan on “Introduction from the Sea” (Doc. PR/11, 21 February 1973), pp. 2-3, indicating: “We have in mind two conventions at this moment. These are the International Convention for the Northwest Atlantic Fisheries and the International Whaling Convention”.

<sup>78</sup> CITES, *travaux préparatoires*, Proposed Amendment to Article XII of the Working Paper (Doc. 3) (Submitted by the Delegation of Japan) (Doc. PA/XII/4, 16 February 1973), p. 1, making reference in the explanation to the same two conventions.

<sup>79</sup> CITES, *travaux préparatoires*, Article XII (Submitted by Ad-Hoc Committee) (Doc. Ad Hoc Cmte./1, 23 February 1973), p. 1. See para. 4.

<sup>80</sup> See *supra* notes 77-78. These were also the two only examples relied upon by this country during its oral intervention in plenary. See CITES, *travaux préparatoires*, Summary Record - Tenth Plenary Session, Tuesday, February 20, 1973 (Doc. SR/10 (Final), 5 March 1973), pp. 2-3.

<sup>81</sup> CITES, Art. XIV.

<sup>82</sup> Point developed by the present author at the occasion of the Sheffield Conference, *supra* note 72.

<sup>83</sup> 1993 FAO Compliance Agreement, Art. 1 (b).

### c 1995 UN Fish Stocks Agreement

This agreement, once again, contains a specific provision entitled “Relation to other agreements”. Its content, however, is a mere copy of the similar provisions which appeared in the 1982 Convention.<sup>84</sup> Reference to what has already been said with respect to Art. 311 (2) of the 1982 Convention may therefore suffice.<sup>85</sup> It will be remembered that, as a consequence, the content of Art. 44 of the 1995 UN Fish Stocks Agreement is quite far-reaching, for it provides that the provisions of this convention will trump all other agreements, existing or future, not compatible with it and affecting the rights and obligations of other states parties to it. If this seems arguable in a convention which has been called the constitution of the oceans,<sup>86</sup> its mere copy and paste into a convention that apparently has much more difficulty to establish itself as an international standard for the states directly concerned, seems to make this line of reasoning somewhat more difficult to sustain.<sup>87</sup>

But having two agreements claiming precedence over all other agreements, as is thus the case with the 1982 Convention and the 1995 UN Fish Stocks Agreement as just explained, may create delicate problems in the relationship between these two instruments themselves, since both cannot simultaneously have precedence over the other. That is probably why the 1995 UN Fish Stocks Agreement received a special article outlining its relationship with the 1982 Convention.<sup>88</sup>

### d Other international instruments relative to fisheries management

It can hardly be the intention of the present paper to give an exhaustive overview of all the agreements setting up regional fisheries management organizations,<sup>89</sup> even though this might be the only manner in which to determine the exact legal relationship existing between each one of them and the above-mentioned treaties and agreements, as well as between the RFMOs *inter se*. For a more detailed analysis of a number of them, at least as far as their relation with the 1993 FAO Compliance Agreement and 1995 UN Fish Stocks Agreement is concerned, reference can be made to a FAO Legislative Study which appeared in 2001.<sup>90</sup>

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<sup>84</sup> The only changes concern punctuation and the replacement of the term Convention by Agreement. 1995 UN Fish Stocks Agreement, Art. 44 (1, 2 & 3) correspond to 1982 Convention, Art. 311 (2, 3 & 4).

<sup>85</sup> See *supra* notes 39-68 and accompanying text.

<sup>86</sup> As coined by the President of UNCLOS III, T. Koh. Text available on Internet at <[www.un.org/Depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf)> (last visited on 20 March 2005). See also the large number of states which are at present bound by this document, as already mentioned *supra* note 2.

<sup>87</sup> See also the relative small group of states that are parties to this agreement, as already mentioned *supra* note 5.

<sup>88</sup> 1995 UN Fish Stocks Agreement, Art. 4, which reads: “Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the [1982] Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the [1982] Convention.” For a more detailed analysis of this particular aspect, see Sadat-Akhavi, S., *supra* note 35, pp. 117-118.

<sup>89</sup> Hereinafter RFMO.

<sup>90</sup> Franckx, E., FISHERIES ENFORCEMENT: RELATED LEGAL AND INSTITUTIONAL ISSUES: NATIONAL, SUBREGIONAL OR REGIONAL PERSPECTIVES, FAO Legislative Study # 71, Rome, Food and Agriculture Organization, 180 pp. (2001), as available on Internet at <[www.fao.org/Legal/legstud/list-e.htm](http://www.fao.org/Legal/legstud/list-e.htm)> (last visited on 20 March 2005). The RFMOs covered by this study were CCAMLR, the European Community (hereinafter EC), the South Pacific Forum Fisheries Agency (hereinafter FFA), the International Commission for the Conservation of Atlantic Tunas

Only CCAMLR will be addressed here in some detail, because of the issue of the catch documentation scheme which has some resemblances with the CITES system.<sup>91</sup> Moreover, closer cooperation with CCAMLR was apparently a *quid pro quo* for the Australian withdrawal of its proposal to nominate the Patagonian toothfish for consideration as possible Appendix II species, which it had introduced in June 2002.<sup>92</sup> The founding document of this RFMO is very selective in determining the relationship with other treaties. Given the specific setting in which it was created, a special relationship exists with the 1959 Antarctic Treaty.<sup>93</sup> Because membership does not necessarily correspond, parties to CCAMLR which are not a party to the 1959 Antarctic Treaty are required at least to be bound by the obligations contained in Arts I, V, IV and VI of the latter document.<sup>94</sup> Such states must furthermore acknowledge the special obligations and responsibilities of the so-called consultative parties under the 1959 Antarctic Treaty and commit themselves to observe measures concerning the conservation of Antarctic fauna and flora recommended by these consultative parties.<sup>95</sup> The resources covered specifically exclude whales and seals, since CCAMLR provides:

“Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.”<sup>96</sup>

The commission set up under CCAMLR should also, according to its founding document, try to develop cooperation with intergovernmental and non-governmental organizations, of which the International Whaling Commission is *inter alia* mentioned by name.<sup>97</sup>

## VI Conclusions

The brief overview of conflict clauses to be found in a number of global and regional fisheries management organizations, demonstrates that the latter normally heed the advice of scholars that drafters should always take the time to elaborate such a clause in line with the will of the parties.<sup>98</sup> Such a clause can take different forms as indicated by the definition given to it

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(hereinafter ICCAT), the Indian Ocean Tuna Commission (hereinafter IOTC), the North East Atlantic Fisheries Commission (hereinafter NEAFC), the Northwest Atlantic Fisheries Organization (NAFO), the Multilateral High Level Conference (MHLIC), and the South East Atlantic Fisheries Organization (SEAFO). See respectively pp. 60-63 (CCMLAR); pp. 73-74 (EC); p. 78 (FFA); pp. 83-84 (ICCAT); pp. 86-87 (IOTC); p. 95 (NEAFC); pp. 104-105 (NAFO); pp. 117-122 (MHLIC); and pp. 131-135 (SEAFO).

<sup>91</sup> Bialek, D., *Sink or Swim: Measures Under International Law for the Conservation of Patagonian Toothfish in the Southern Ocean*, 34 OCEAN DEVELOPMENT AND INTERNATIONAL LAW pp. 105, 128-129 (2003).

<sup>92</sup> *Id.*, p. 127.

<sup>93</sup> 402 UNITED NATIONS TREATY SERIES pp. 71-102. This treaty, signed on 1 December 1959, entered into force on 23 June 1961. Hereinafter 1959 Antarctic Treaty. At the time of writing 43 states are party to this treaty.

<sup>94</sup> CCAMLR, Arts III & IV.

<sup>95</sup> CCAMLR, Art. V.

<sup>96</sup> CCAMLR, Art. VI. Sadat-Akhavi, S., *supra* note 35, p. 124, explaining this rule of conflict by the fact that the prior conventions contain much more detailed provisions for the one particular resource they are concerned with.

<sup>97</sup> CCAMLR, Art. XXIII (3).

<sup>98</sup> Mus, J., *supra* note 25, p. 232, who concludes: “This contribution shows that including conflict clauses in treaties may be of great value in determining priority between conflicting treaties.”

by the International Law Commission.<sup>99</sup> In the present paper the examples encountered concern instances of prior treaties, which the treaty in question tries either to adapt<sup>100</sup> or subject itself to;<sup>101</sup> instances of future treaties to which the treaty in question subjects itself;<sup>102</sup> and finally instances covering past as well as future treaties which the treaty in question either subjects itself to<sup>103</sup> or, on the other hand, tries to have priority over.<sup>104</sup> It will be easily understood that a combination of all these possible inter-linkages, and some not covered in the overview presented here,<sup>105</sup> will easily lead to situations which might become rather confusing, especially if one includes still further complicating factors like different states parties to the two instruments or difficulties related to distinguishing prior from later treaties. Some of these situations so encountered might even simply be unresolvable.<sup>106</sup> But if they are, J. Mus provides the following road map:

“One should look for conflict clauses in both conflicting treaties for resolving the conflict and, in the absence of any clause whatsoever, one should try to interpret both treaties, especially the later one, on the basis of Articles 31 and 32 of the 1969 Vienna Convention, in order to see which treaty should take priority. When a treaty interpretation appears to be inconclusive, the *lex posterior* rule should be applied in the last resort.”<sup>107</sup>

In order to illustrate how much the intention of the parties still permeates these legal rules conceived for settling disputes relating to the application of successive treaties relating to the same subject-matter, it might be instructive to consider the application made of them before and

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<sup>99</sup> The definition reprinted *supra* note 37 continues: “Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometime to any treaty past or future.”

<sup>100</sup> CITES, Art. XIV (4 & 5), *supra* note 70 and accompanying text.

<sup>101</sup> CCAMLR, Arts III, IV, V, and VI, *supra* notes 94-96 and accompanying text.

<sup>102</sup> 1993 Compliance Agreement, Art. 1 (b), *supra* note 83 and accompanying text. At the time of the adoption of this agreement, the 1982 Convention had not yet entered into force.

<sup>103</sup> CITES, Art. XIV (2), *supra* note 69 and accompanying text.

<sup>104</sup> 1982 Convention, Art. 311 (2) and 1995 UN Fish Stocks Agreement, Art. 44 (1), *supra* notes 39 and 84 respectively.

<sup>105</sup> For a much more overview, see Sadat-Akhavi, S., *supra* note 35, pp. 87-96, distinguishing between two broad categories (those clauses giving priority to the treaty in which they are incorporated, and those giving priority to other treaties) with three subcategories each (priority over/of existing treaties, future treaties or both).

<sup>106</sup> If the conflict clauses in two treaties are complementary to one another, that is of course the ideal world. See for instance the relationship between the 1982 Convention and the Convention on Biological Diversity (1760 UNITED NATIONS TREATY SERIES pp. 142-382. This convention, signed on 5 June 1992, entered into force on 29 December 1993. Hereinafter CBD. At the time of writing 187 states and the European Community are party to this convention). CBD, Art. 22 (2), which requires that convention to be implemented consistent with the rights and obligations of states under the law of the sea, and Art. 311 of the 1982 Convention both indicate that in case of conflict the 1982 Convention takes precedence over CBD. Allen, C., *Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-sea Vent Resource Conservation and Management*, 13 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW p. 563, 607-608 (2001). *A contrario*, one could think of two treaties, each of them subjecting themselves to the other, or *vice versa* both claiming priority over the other. An example of the former can be found in the relationship between the Convention on the Conservation of Migratory Species of Wild Animals (1651 UNITED NATIONS TREATY SERIES pp. 355-490. This convention, signed on 23 June 1979, entered into force on 1 November 1983. Hereinafter CMS. At the time of writing 88 states and the European Community are party to this convention.), and CITES, since they both subject themselves to the other. See CMS, Art. XII (2) and CITES, Art. XIV (2), respectively.

<sup>107</sup> Mus, J., *supra* note 25, p. 231. See also Sadat-Akhavi, S., *supra* note 35, p. 249, ending up with a similar list of steps to follow.

after the creation of the World Trade Organization<sup>108</sup> in 1994 in its relation to CITES and other multinational environmental agreements.<sup>109</sup> Before 1994 authors had, in principle, no difficulty with the application of the *lex posterior* principle. Since the norms of CITES and those of the GATT proved inconsistent, as subsections (b) and (c) of Art. XX of the latter agreement have been found to have no application to natural resources situated outside the jurisdiction of the trade-restricting state,<sup>110</sup> states parties to both agreements would nevertheless have to apply CITES on the basis of Art. 30 (3) of the 1969 Vienna Convention.<sup>111</sup> But even then, Art. 30 (4)(b) created a problem if a particular state was not party to CITES, for in that case GATT provisions would remain operational.<sup>112</sup> This was not a negligible problem, for the majority of trade restricting provisions of for instance CITES would most probably be challenged by non-parties. Because states parties to CITES have freely committed themselves one could expect that they would not normally challenge such provisions before GATT. Non-parties, on the other hand, have not consented and, moreover, very often are the prime target of such restrictive measures.<sup>113</sup>

This tone however drastically changed after 1994, because by resetting the date from 1947 to 1994,<sup>114</sup> the new WTO Agreement would leapfrog over most environmental treaties using trade measures, including CITES.<sup>115</sup> Suddenly, the approach based on Art. 30 (3) of the 1969

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<sup>108</sup> Hereinafter WTO.

<sup>109</sup> Agreement Establishing the World Trade Organization, 1867 UNITED NATIONS TREATY SERIES pp. 3-507. This agreement, signed on 15 March 1994, entered into force on 1 January 1995. Hereinafter WTO Agreement. At the time of writing 146 states and the European Community are party to this agreement. This organization was created during the Uruguay round of trade negotiations held in the framework of the General Agreement on Tariffs and Trade (hereinafter GATT), established in 1947. The WTO Agreement is an umbrella agreement which, besides creating the WTO, also brought GATT within its structure. For a succinct description, see Sands, P. & Klein, P., *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS*, London, Sweet & Maxwell, pp. 116-118 (2001)

<sup>110</sup> And since CITES does allow states parties to protect non-domestic species through trade restrictions, the latter would seem to violate GATT since such actions would be considered quantitative restrictions. See Houseman, R. & Zaelke, D., *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW p. 535, 582 (1992).

<sup>111</sup> See for instance in chronological order: Cameron, J. & Robinson, J., *The Use of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT*, 2 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW p. 3, 16 (1992); Schoenbaum, T., *Free International Trade and Protection of the Environment*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 700, 720 (1992); Mayer, D. & Hoch, D., *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AMERICAN BUSINESS LAW JOURNAL pp. 187, 219-221 (1993). Rare were those authors which made reference in this framework to CITES, Art. XIV (2) (see *supra* note 69 and accompanying text), indicating this could possibly undermine this reasoning. Caldwell, D., *International Environmental Agreements and the GATT: An Analysis of the Potential Conflict and the Role of a GATT 'Waiver' Resolution*, 18 MARYLAND JOURNAL OF INTERNATIONAL LAW AND TRADE p. 173, 188 note 99 (1994).

<sup>112</sup> Schoenbaum, T., *supra* note 111, p. 720, suggesting an implied modification of GATT, or better still its amendment.

<sup>113</sup> Caldwell, D., *supra* note 111, p. 188.

<sup>114</sup> See *supra* note 109.

<sup>115</sup> Schultz, J., *The GATT/WTO Committee on Trade and the Environment – Toward Environmental Reform*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 423, 434 (1995). See also Ahn, D., *Environmental Disputes in the GATT/WTO: Before and After US–Shrimp Case*, 20 MICHIGAN JOURNAL OF INTERNATIONAL LAW pp. 819, 855-856 (1999), arguing that the application of Art. 30 of the 1969 Vienna Convention after 1994 results in the fact that “most international environment agreements that included trade provisions will be judged by the WTO on their merit.”

Vienna Convention was labelled “out of place”,<sup>116</sup> “difficult to reconcile with the expectations of nations”,<sup>117</sup> “does not offer a desirable solution”,<sup>118</sup> “may provide a convenient solution in a specific case, but not in general where the conflict between multilateral environmental agreements and GATT rules emerges”,<sup>119</sup> and “arbitrarily applies the principle of *lex posterior*”.<sup>120</sup> Solutions were found, *inter alia*, in the *lex specialis* principle,<sup>121</sup> which was believed to offer relief since multilateral environmental agreements in general, and CITES in particular, are much more specific than the general provisions of the WTO Agreement.<sup>122</sup> Some have even looked at Art. 311 of the 1982 Convention as antidote in this respect, in order to conclude that

“it is reasonable to believe that a future international tribunal could choose to disregard WTO/GATT if the implementation of its provisions are found to be incompatible with the object and purpose of UNCLOS.”<sup>123</sup>

But if Art. 311 of the 1982 Convention can come in handy when trying to downgrade the impact of the leapfrogging effect of the creation of WTO, the reverse side of the medal is that this same article can play a similar role with respect to the treaties it tries to protect from the WTO logic. Indeed, in the same way as the prior versus later treaty is essential in the determination of the relationship between WTO/GATT and multilateral environmental agreements, Art. 311 (2) governs the relationship between the 1982 Convention and other international agreements relating to law of the sea issues by providing in principle precedence of the former over the latter.<sup>124</sup> This precedence also covers international environmental agreements,<sup>125</sup> including CITES. Here the main defence has been to insist that the 1982 Convention itself relies on treaties

<sup>116</sup> Fox, G., *supra* note 26, p. 186.

<sup>117</sup> Winter, R., *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?*, 11 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY p. 223, 237 (2000). Using almost identical language, see also Voon, T., *Sizing Up the WTO: Trade-environment Conflict and the Kyoto Protocol*, 10 JOURNAL OF TRANSNATIONAL LAW AND POLICY p. 71, 77 (2000).

<sup>118</sup> Winter, R., *supra* note 117, p. 237.

<sup>119</sup> Brunner, A., *Conflicts Between International Trade and Multilateral Environmental Agreements*, 4 ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW p. 74, 88 (1997).

<sup>120</sup> Hicks, B., *Treaty Congestion in International Environmental Law: The Need for Greater International Coordination*, 32 UNIVERSITY OF RICHMOND LAW REVIEW p. 1643, 1661 (1999).

<sup>121</sup> See *supra* note 32 and accompanying text.

<sup>122</sup> See for instance Brand, R., *Sustaining the Development of International Trade and Environmental Law*, 21 VERMONT LAW REVIEW p. 823, 868 (1997); Brunner, A., *supra* note 119, pp. 88-89; Voon, T., *supra* note 117, p. 77, arguing that Art. 30 of the 1969 Vienna Convention potentially conflicts with this rule; and Winter, R., *supra* note 117, pp. 237-238.

<sup>123</sup> McLaughlin, R., *supra* note 65, pp. 58-59.

<sup>124</sup> See for instance Young, A., *Antarctic Resource Jurisdiction and the Law of the Sea: Question of Compromise*, 11 BROOKLYN JOURNAL OF INTERNATIONAL LAW pp. 45, 63-65 (1985), trying to restrict the powers of the parties under the Antarctic Treaty system with respect to carrying out commercial enterprises there; and Walker, G., *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter with Admiralty Law*, 20 TULANE MARITIME LAW JOURNAL pp. 217, 224-225 (1996), arguing that older conventions relating to shipping should also be checked against the 1982 Convention.

<sup>125</sup> Burke, W., *Implications for Fisheries Management of U.S. Acceptance of the 1982 Convention on the Law of the Sea*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 792, 800 (1995), arguing that in theory the 1992 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, prohibiting high seas Salmon fishing there, might be contrary to the 1982 Convention, Art. 66 (3)(a) permitting such fishing if causing economic dislocation.

such as CITES for more specific rules and enforcement, since such specialized fora are best suited for this task.<sup>126</sup>

It seems therefore safe to conclude from the analysis above that no hard-and-fast rule exists in contemporary international law regulating the relationship between the different treaties concerned with the conservation and management of commercially exploited aquatic species. Much will depend from the conflict clauses to be found in these different instruments, but even then, disregarding for a minute the many difficulties encountered when trying to apply these provisions in practice, a teleological approach appears to be present in state practice in order to arrive at the most desired end result.<sup>127</sup> Each case, as a result, will have to be analysed and evaluated on its own merits taking into account all the relevant circumstances in order to arrive at the highest possible common denominator acceptable to the states parties to the agreements in question.

And here one touches upon “the most urgent and overarching need” in this area, and that is increased co-operation.<sup>128</sup> Even though P. Birnie and A. Boyle consider CITES in a chapter on land-based species, a similar remark is certainly not out of place with respect to marine living resources.<sup>129</sup> Since all systems have their strong and weak points,<sup>130</sup> a closer co-operation could significantly enhance the global level of protection.

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<sup>126</sup> Vice, D., *Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution*, 29 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS p. 577, 619 (1997).

<sup>127</sup> Another striking example may be the relationship between the CBD and the 1982 Convention. As mention *supra* note 106, both agreements point at the priority of the latter over the former, something which is recognized in the literature. But if the application of the supremacy would lead to the general principles of the law of the sea endangering the biological diversity, authors are less certain and offer a “better reading”. See for instance Rieser, A., *International Fisheries Law, Overfishing and Marine Biodiversity*, 9 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW pp. 251, 257-258 (1997).

<sup>128</sup> Birnie, P. & Boyle, A., *supra* note 12, pp. 634-635.

<sup>129</sup> Churchill, R. & Ulfstein, G., *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW pp. 623, 658-659 (2000).

<sup>130</sup> Koester, V., *The Five Global Biodiversity-Related Conventions: A Stocktaking*, 11 REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW pp. 96-103 (2002), including CITES in his overview.

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