Applications of the term "Introduction from the sea"

Prof. Dr. Erik Franckx

The terminology "introduction from the sea" has lived a remarkable quiet life within the framework of the Convention on International Trade in Endangered Species of Wild Fauna and Flora[1] for almost 30 years now. Not much attention was paid to it in the literature, most probably because the parties to CITES did not seem to contemplate to apply the conventional provisions to commercially-exploited aquatic species. For the reasons explained by the present author elsewhere,[2] the situation has changed recently. An increasing number of proposals for listing are being introduced lately within CITES relating exactly to such economically important species.

Since then, the notion "introduction from the sea" has drawn increased attention. It is against this general background that the present study has been written. The following structure will be followed: First the immediate antecedents leading up to the present request for clarification will be outlined. A second part will then give a short introduction to the functioning of CITES. A third part will subsequently analyse the exact meaning of the term "introduction from the sea" under the conventional framework of CITES. A fourth part will appraise the application of this term *de lege lata*. The paper will conclude by means of a final part that will look into possible solutions *de lege ferenda*.

I Antecedents leading up to the present study

The general interaction between CITES and the Food and Agriculture Organization,[3] which was initiated around the turn of the century and has already been described by the present author elsewhere,[4] finally resulted in the recommendation by the Sub-Committee on Fish Trade of the FAO Committee on Fisheries in 2002 to convene a number expert consultations, one of which should concern

> "the application of the phrase 'introduction from the sea' in the definition of trade in Article I".[5]

The Committee on Fisheries complied with this request at its twenty-fifth session by adopting the terms of reference for this consultation.[6] It is in preparation of that expert consultation that the present paper has been prepared.

---

[1] 993 UNITED NATIONS TREATY SERIES pp. 243-417. This convention, signed on 3 March 1973, entered into force on 1 July 1975. At the time of writing, there are 166 state parties to this Convention. Hereinafter cited as CITES.

[2] Franckx, E., *Legal and Institutional Implications of Listing Commercially Exploited Aquatic Species in CITES Appendices*, paper prepared for an expert consultation to be held at FAO Headquarters, Rome, 22-25 June 2004. See the general introduction.

[3] Hereinafter FAO.

[4] Franckx, E., *supra* note 2, *sub* I.

[5] *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.

[6] *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.

II 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,[7] 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.[8] 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.[9] Appendix II specimen of species also require an export permit but no import permit.[10] Finally, trade in Appendix III specimen of species, on the lower end of the scale, also requires an export permit, but with less conditions attached to it than export permits for Appendices I an II.[11]

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.[12] Second, between these two concepts, CITES places the crux of the regulatory power on the export side of the medal, and

---

[7] CITES, Preamble, recital 3.

[8] CITES, Art. II.

[9] 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).

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

[11] 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).

[12] 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).

not the import side.[13] 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.[14] 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.[15]

III The conventional framework of CITES

A The convention itself

CITES uses the term "introduction from the sea" in its 25 articles only four times. Two times in the article on definitions[16] and, substantively, in the fundamental articles dealing with the regulation of trade in specimens of species either included in Appendices I or II.[17] These provisions read as follows:[18]

Primo, the definition of the term trade:

> "'Trade' means export, re-export, import and *introduction from the sea*".[19]

Secundo, the definition of the term "introduction from the sea":

> "'*Introduction from the sea*' means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State".[20]

Tertio, relating to Appendix I specimen of species:

> "The *introduction from the sea* of any specimen of a species included in Appendix I shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:
> (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;
> (b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
> (c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes."[21]

---

[13] Lyster, S., INTERNATIONAL WILDLIFE LAW: AN ANALYSIS OF INTERNATIONAL TREATIES CONCERNED WITH THE CONSERVATION OF WILDLIFE, Cambridge, Grotius Publications p. 479 (1985).

[14] *Official Journal of the European Communities* L.61, 3 March 1997, pp. 1-69. This regulation entered into force on 1 June 1997. Hereinafter Council Regulation 338/97.

[15] *Id.*, Preamble, recital 2.

[16] CITES, Art. I.

[17] CITES, Arts III and IV respectively.

[18] Our emphasis.

[19] CITES, Art. I (c).

[20] CITES, Art. I (e).

[21] CITES, Art. III (5).

Quarto, relating to Appendix II specimen of species:

> "The *introduction from the sea* of any specimen of a species included in Appendix II shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:
> (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and
> (b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment."[22]

For the sake of completeness, the last paragraph of Art. IV can be added, since it is directly linked to the previous paragraph just mentioned:

> "Certificates referred to in paragraph 6 of this Article may be granted on the advice of a Scientific Authority, in consultation with other national scientific authorities or, when appropriate, international scientific authorities, in respect of periods not exceeding one year for total numbers of specimens to be introduced in such periods."[23]

Since a full-fledged definition is given of the expression "introduction from the sea" in the founding document of CITES,[24] one could be tempted to stop the analysis right there. This would be, however, a premature conclusion, for as heeded by the Secretary-General of CITES in his reference to the convention: "The text of the Convention itself contains only very few definitions and most of them have been refined through Resolutions".[25]

B Resolutions adopted by the conference of the parties

a State practice

These resolutions are adopted based on the conventional article that allows the conference of the parties, i.e. the two-yearly gatherings of states for which CITES has entered into force,[26] to make "recommendations for improving the effectiveness" of that convention.[27] Since the first meeting in 1976, these recommendations have taken the form of resolutions.[28] Besides the resolutions, which today tend to have a more permanent nature, these recommendations have also taken the form of decisions since the ninth conference of the parties, held at Fort Lauderdale, United States, in 1994. Decisions tend to be more specific and are either implemented or simply

---

22 CITES, Art. IV (6).

23 CITES, Art. IV (7).

24 See *supra* note 20 and accompanying text.

25 Wijnstekers, W., *supra* note 12, p. 19.

26 Combined reading of CITES, Arts I (h) and XI (2).

27 CITES, Art. XI (3)(e).

28 More than 200 such resolutions have been adopted over the years, even though only 71 of them remain valid today. "CITES Resolutions: Introduction", official webpage of CITES, as available on Internet at <www.cites.org/eng/resols/intro.shtml> (last visited on 26 May 2004).

become redundant or obsolete after a while.[29] Consequently, especially the resolutions will deserve special attention in the present study.[30]

In order to have a correct understanding of the definition of the expression "introduction from the sea", therefore, one also has to turn, besides the founding document itself, to the resolutions adopted by the subsequent conferences of the parties.[31] Many of them indeed clarify specific provisions *expressis verbis* used in the convention,[32] provide definitions of terms not to be found in the convention itself but encountered in its implementation,[33] interpret whole articles of the convention,[34] and even clarify[35] or refine[36] procedures in view of the difficulties encountered in practice.

With respect to the term here under consideration, four resolutions presently in effect have to be mentioned. A first resolution explicitly mentioning "introduction from the sea", namely Conf. 5.10,[37] has only an indirect influence on the correct understanding of the term. In fact by providing a definition for the term "primarily commercial purposes", it has an impact on specimen of Appendix I species introduced from the sea, because the management authority of the state of introduction will have to be satisfied that no such primarily commercial purposes are present before granting a certificate.[38] The same can be said with respect to resolution Conf. 10.3 clarifying the designation and role of the scientific authorities.[39] Since the scientific authority of the state of introduction have to advise that the introduction will not be detrimental to the survival of the species, as well for Appendix I as Appendix II specimen of species,[40] this resolution only indirectly clarifies the concept here under consideration. It should moreover be noted in this respect that Art. IV (7),[41] touching upon international scientific authorities which

---

[29] "Decisions of the Conference of the Parties", official webpage of CITES, as available on Internet at <www.cites.org/eng/decis/intro.shtml> (last visited on 26 May 2004).

[30] Indeed, the term "introduction from the sea" does not appear once in the decisions that are in effect after the twelfth meeting of the conference of the parties, held at Santiago, Chile, in 2002. As available on Internet at <www.cites.org/eng/decis/index.shtml>.

[31] All the resolutions which are presently still in effect can be found on Internet at <www.cites.org/eng/resols/index.shtml> (last visited on 26 May 2004).

[32] See for instance Conf. 5.10 "Definition of 'primarily commercial purposes'", adopted at the fifth conference of the parties, held at Buenos Aires, Argentina, in 1985.

[33] See for instance Conf. 11.10 "Trade in stony corals", adopted at the eleventh conference of the parties held at Gigiri, Kenya, in 2000, where in Annex concrete definitions can be found of terms like coral sand, coral fragments, coral rock, dead coral and live coral.

[34] See for instance Conf. 4.27 "Interpretation of Article XVII, paragraph 3, of the Convention", adopted at the fourth conference of the parties, held at Gaborone, Botswana, in 1983. Since a wide and narrow interpretation of that article were apparently possible, the option was lifted to adhere to the narrow interpretation.

[35] See for instance Conf. 4.25 "Effects of reservations", adopted at the fourth conference of the parties, held at Gaborone, Botswana, in 1983. Here too, parties had given different interpretations to the relevant conventional provisions.

[36] See for instance Conf. 9.5 "Trade with States not party to the Convention", adopted at the ninth conference of the parties, held at Fort Lauderdale, United States, in 1994.

[37] "Definition of 'primarily commercial purposes'", adopted at the fifth conference of the parties, held at Buenos Aires, Argentina, in 1985.

[38] CITES, Art. III (5)(c).

[39] "Designation and role of the Scientific Authorities", adopted at the tenth conference of the parties, held at Harare, Zimbabwe, in 1997.

[40] CITES, Arts III (5)(a) and IV (6)(a) respectively.

[41] As reprinted *supra* note 23 and accompanying text.

can assist the scientific authorities of states of introduction in formulating their advise, are not covered by this resolution.[42] Also resolution Conf. 12.8 falls into a similar category.[43] This resolution further clarifies and simplifies the Review of the Significant Trade procedure of Appendix II species to be followed by the Animals and Plants Committees, as first regulated by resolution in 1992. Since this procedure is not specific to the specimen of Appendix II species introduced from the sea, but also to Appendix II export permits and exports in general, it has to be concluded that also this resolution has only an indirect impact on the term "introduction from the sea".

The only resolution deserving special attention here because of its direct impact on the clarification of the term "introduction from the sea", is therefore resolution Conf. 11.4.[44] In the operative part of this resolution, where the term "introduction from the sea" does appear, it is again simply used to urge parties not to issue certificates for introduction from the sea for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling if that introduction was primarily intended for commercial purposes. Far more important for the present analysis are however the recitals 7 and 8 which read:

> "RECOGNIZING that the jurisdiction of the Parties with respect to marine resources in their adjacent seas is not uniform in extent, varies in nature and has not yet been agreed internationally;
> DESIRING that the maximum protection possible under this Convention be afforded to the cetaceans listed in the Appendices".[45]

Of importance here is also to recall resolution Conf. 2.8, which is explicitly repealed by this just-cited resolution Conf. 11.4 *in fine*, because that is where these recitals find their origin. This resolution, adopted in 1979, stated in full:

> "RECOGNIZING that Articles III, paragraph 5 and IV, paragraph 6, of the Convention prohibit the transportation into a Party State of specimens (including any readily recognizable part or derivative thereof) of any species listed in Appendix I or II to the Convention which were taken in the marine environment not under the jurisdiction of any state without prior grant of a certificate from a Management Authority of the State of introduction;
> RECOGNIZING that the jurisdiction of the Parties with respect to marine resources in their adjacent seas is not uniform in extent, varies in nature and has not yet been agreed internationally;

---

[42] The third preamble of this resolution, listing the concerned articles of the convention, indeed omits making reference to Art. IV (7).

[43] "Review of Significant Trade in specimens of Appendix-II species", adopted at the twelfth conference of the parties, held at Santiago, Chile, in 2002.

[44] "Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission", adopted at the eleventh conference of the parties held at Gigiri, Kenya, in 2000. This resolution was revised at the twelfth conference of the parties, held at Santiago, Chile, in 2002. The revision however, besides a few cosmetic changes, only concerned the introduction of a new section relating to the cooperation in monitoring illegal trade in whale parts and derivatives. As a consequence, it has no impact on the issue here at hand.

[45] Resolution Conf. 11.4, recitals 7 & 8.

> DESIRING that the maximum protection possible under this Convention be afforded to cetaceans listed on the appendices;
> CONSIDERING that the International Whaling Commission has asked for the support of the Parties in protecting certain stocks and species of whales.
> THE CONFERENCE OF THE PARTIES TO THE CONVENTION
> RECOMMENDS that the Parties use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans."[46]

The wording of these two resolutions is relied upon by the Secretary-General of CITES when he explains the notion "introduction from the sea" in his reference work to the convention. After having textually cited the definition provided in Art. I (e)[47] he continues by saying that,

> "**Resolution Conf. 11.4 (Rev. CoP12)** (ex Resolution Conf. 2.8) recognizes that the jurisdiction of the Parties with respect to marine resources in their adjacent seas is not uniform in extent, varies in nature and has not yet been agreed internationally, but recommends that the Parties use their best endeavours to apply their responsibilities under the Convention in relation to cetaceans."[48]

b Legal effect of resolutions on the interpretation of CITES

As regards the authentic interpretation of the provisions of CITES, it should be noted that, as a matter of principle, the states parties do posses the authority to make definitive interpretations of the terms of the treaty. In this respect, the World Court's jurisprudence is well-established:

> "According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted 'in their context and in the light of its object and purpose' and there shall be
>
> > 'taken into account, together with the context:
> > ...
> > (b) any subsequent practice in the application of the treaty which establishes *the agreement of the parties* regarding its interpretation'.
>
> The Court has had occasion to apply this rule of interpretation several times (see *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, *Judgment of 31 July 1991*, *I.C.J. Reports 1991*, pp. 69-70, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgment of 11 September 1992*, *I.C.J. Reports 1992*, pp. 582-583, para. 373 and p. 586, para. 380; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *I.C.J. Reports 1994*, pp. 21-22, para. 41; *Maritime Delimitation and Territorial Questions between*

---

[46] "Introduction from the sea", adopted at the second meeting of the parties, held at San José, Costa Rica, in 1979. *Proceedings of the Second Meeting of the Conference of the Parties, San José, Costa Rica, 19 to 30 March 1979*, Vol. I, p. 44 (1980).

[47] See *supra* note 20 and accompanying text.

[48] Wijnstekers, W., *supra* note 12, p. 24. The first and fourth recital of resolution Conf. 2.8 are also to be found in resolution Conf. 11.4. See recitals 6 and 9 respectively. The former was slightly expanded, because the words "of specimens which" were replaced by "into a party State of specimens (including any readily recognizable parts or derivative thereof) of any species listed in Appendix I or II to the Convention that". It was only the operative part of this resolution Conf. 2.8 which did not find its way into resolution Conf. 11.4.

Qatar and Bahrain (Qatar v. Bahrain), *Jurisdiction and Admissibility*, *Judgment, I.C.J. Reports 1995*, p. 18, para. 33)".[49]

The question remains, however, whether the procedure followed by conference of the parties under CITES to adopt resolutions represents an agreement of the parties, as emphasized in the just-mentioned excerpt of the 1969 Vienna Convention on the Law of Treaties.[50] Even though the present rules of procedure provide that draft resolutions will, as far as possible, be adopted by consensus,[51] it is also specified that if this does not prove possible a vote will be taken.[52] This vote will require a two-thirds majority of the representatives present and voting.[53] This has however not always been the case, since CITES itself provides that the parties may, at any meeting, determine and adopt rules of procedure for the meeting.[54] Up till the fifth conference of the parties these rules of procedure provided that a simple majority was sufficient.[55]

Resolution Conf. 11.4 was adopted by a vote of show of hands by 41 in favour, 5 against and 31 abstentions.[56] Two countries clarified their concerns. Japan stressed that new scientific findings with respect to cetaceans were not taken into account, and therefore rendered the proposed resolution obsolete. Together with Australia, it furthermore had difficulties with recital 19 which implied the acceptance by the conference of the parties in 2000 of a text adopted by the International Whaling Commission in 1978. No indication however is found that recitals 7 and 8 caused any particular difficulty to the parties. Resolution Conf. 2.8 was adopted by simple majority,[57] without any substantial discussion in Plenary, upon a proposition initiated by the United Kingdom, which emphasized that its main purpose was to draw attention to the implementation of CITES to cetaceans.[58]

The rules of procedure do not qualify the legal nature of the resolutions so adopted, but since their legal basis is to be found in Art. XI (3)(e) of CITES,[59] they are to be considered mere recommendations to the states for which the convention has entered into force. This is probably

---

[49] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 75, para. 19. See also, *LaGrand* Case *(Germany v. United States of America), Judgment, I.C.J. Reports 2001*, para. 99. Our emphasis.

[50] 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. The number of states parties to this convention as well as the fact that the convention only applies to treaties concluded after its entry into force (see Art. 4), are both immaterial for present purposes, since the International Court of Justice is clearly of the opinion that this particular rule of interpretation reflects customary international law.

[51] Rules of Procedure, Rule 21 (1), as available on Internet at <www.cites.org/eng/cop/13/docs/13-01-2.pdf> (last visited on 26 May 2004). Hereinafter Rules of Procedure.

[52] Rules of Procedure, Rule 21 (2).

[53] Rules of Procedure, Rule 26 (1).

[54] CITES, Art. XI (5).

[55] Wijnstekers, W., *supra* note 12, p. 343.

[56] Within the CITES framework, parties abstaining are not normally counted when calculating the qualified majority. This is the case with respect to amendments to Appendices I and II, as well as concerning amendments to the convention itself. See CITES, Arts XV (3) and XVII (1) respectively. The rules of procedures follow this lead. See Rules of Procedure, Rule 26 (2).

[57] See *surpa* note 55 and accompanying text.

[58] *Proceedings of the Second Meeting of the Conference of the Parties, San José, Costa Rica, 19 to 30 March 1979*, Vol. I, p. 170 (1980). The original British proposal can be found in *id.*, Vol. II, p. 1123.

[59] See *supra* note 27 and accompanying text.

also the reason why no reservation procedure is provided for in this respect. On the contrary, such procedure is to be found with respect to the adoption of amendments to Appendices I and II[60] which otherwise enter into force 90 days after the meeting of parties for *all* states for which the convention has entered into force.[61] Also with respect to Appendix III listings, which take effect 90 days after their communication to the parties by the Secretariat, the possibility of making reservations has been provided.[62] This frames in the general CITES policy which does not allow for general reservations, but only specific ones, the latter being strictly limited to the two articles just mentioned.[63]

As such, this system very much resembles the powers of the General Assembly of the United Nations, where it has become recognized that non-binding resolutions of this body,[64] especially when it is interpreting its own constitution, carry a special weight.[65] Or as noted by the International Court of Justice in 1996:

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value."[66]

A similar evaluation can be found in the literature about the legal nature of CITES resolutions. After having mentioned the non-legally binding nature of such resolution as one of the structural weaknesses of CITES, Birnie and Boyle nevertheless add in the next paragraph that this weakness is not insurmountable since member states do have the competence to clarify textual ambiguities.[67]

This power of the conference of the parties under CITES to make recommendations is very broad, since it is only tied to the goal of improving the effectiveness of that document.[68] What the conference of the parties can however not formally do by way of recommendations, is

---

[60] CITES, Art. XV (1)(c), (2)(e & f), and (3).

[61] As provided in CITES, Art. XV (1)(c). Our emphasis.

[62] CITES, Art. XVI (2).

[63] CITES, Art. XXIII (1), referring back to Arts XV and XVI.

[64] Some recommendation relating to the internal working of the organization do create direct legal obligations, such as the approval of the budget, elections to various organs, or creation of subsidiary organs (Charter, Arts 17, 18 and 22 respectively). The vast majority of the recommendations adopted by the General Assembly, however, do no have legally binding effect.

[65] See generally Sands, P. & Klein, P., BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS, London, Sweet & Maxwell, p. 290 (2001), where further reference can be found. For a somewhat more critical analysis, see Klabbers, J., AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW, Cambridge, Cambridge University Press, p. 208 (2002).

[66] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 826, para. 70, relying on the customary nature of certain norms so enunciated to come to this conclusion.

[67] Birnie, P. & Boyle, A., *supra* note 12, p. 630. See in this respect, see also the remarks made by Sands, P. & Bedecarre, A., *Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban*, 17 BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW p. 799, 814 note 113 (1990): "It is an interesting question, however, whether a resolution of the Conference of the Parties containing an authoritative interpretation of a provision of CITES can be applied to specimens acquired prior to its adoption", apparently accepting their legal validity. But in the following sentence they immediately add: "Determining the legal status of a Conference resolution lies beyond the scope of this Article."

[68] CITES, Art. XI (3)(e).

to amend the founding document itself, for that would run contrary to the provision specifically regulating the procedure for amending CITES.[69] This procedure is much more cumbersome, and guarantees the rights of the parties which cannot accept a proposed amendment, since the latter will only enter into force for the parties which have accepted it as evidenced by the deposit of their instrument of acceptance of the amendment.[70] Moreover, as stressed by Litwo, parties that do not wish to abide by the proposed amendments retain always the possibility to denounce CITES in its entirety.[71]

The conclusion seems therefore justified that recitals 7 and 8 of resolution Conf. 11.4, despite the way in which the resolution containing them was adopted,[72] seem nevertheless to provide a valid tool to interpret the term "introduction from the sea" today. The fact that the reference work to CITES, written by its Secretary-General, relies on these particular recitals in the section of the work on definitions in order to explain the exact content of the term "introduction from the sea", and this apparently uncontested by the states for which CITES has entered into force, further sustains this submission.[73]

IV Appraisal of the term "introduction from the sea" *de lege lata*

The literature is not very helpful in trying to clarify the meaning of the terminology "introduction from the sea" as used and defined in CITES. The sporadic references encountered to this notion, moreover, simply take over the conventional provisions without any attempt to

---

[69] CITES, Art. XVII.

[70] *Id.* An extraordinary meeting of the conference of the parties is needed, to be convened by the Secretariat at the request of at least one-third of the parties. Amendments are adopted by two-thirds majority. They moreover only enter into force for the parties having deposited an instrument of acceptance of the amendment after two-thirds of the total number of the parties at the date of their adoption have acted likewise. So far only one amendment has entered into force, and it took almost 10 years after its adoption to do so. It concerns the so-called Bonn amendment, adopted on 22 June 1979, which entered into force on 13 April 1987. This amendment added the words ", and adopt financial provisions" at the end of Art. XI (3)(a). A second amendment, trying to open up CITES to regional economic integrations organizations, was adopted already on 30 April 1983. But this so-called Gaborone amendment is at present, more than 20 years later, still awaiting its entry into force. This has partly to do with the success of CITES, especially when focusing on the important growth in membership since its inception. If only 34 states were needed for the Bonn amendment to enter into force, this number had already increased to 54 for the Gaborone amendment.

[71] Litwo, K, *The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora During the 1990's*, 15 SUFFOLK TRANSNATIONAL LAW JOURNAL p. 122, 135 (1991).

[72] See *supra* note 56 and accompanying text.

[73] See *supra* note 48 and accompanying text. Even though it must be admitted that a disclaimer on the cover page warns that "[t]he opinions expressed in the book do not necessarily represent the opinion of the CITES Secretariat", it seems hardly imaginable that states parties would not react to manifestly unacceptable propositions. This particular statement was already present in a previous version of this book.

further clarification, as if the meaning of the term was crystal clear.[74] Only very exceptionally one can find a rare author willing to give more substance to these provisions.[75]

In order to better understand this notion, it might be instructive first to briefly look back at the genesis of CITES, especially in view of the fact that the inclusion of this particular notion in the conventional text did not pass unnoticed. The working paper, which served as basis for the conference and had been prepared by the International Union for Conservation of Nature and Natural Resources,[76] already contained this notion and provided the following definition:

> "'Introduction from the sea' means the transportation into a State of a specimen taken in the marine environment beyond the territorial sea".[77]

This provision had been included at the suggestion of the government of the United States of America at a particular moment in time, but the preliminary comments on this working paper by IUCN already indicated that fundamental difficulties remained.[78] Already based on the opening statements of the different delegates it became clear that the issue whether or not to include marine species would become a hot topic of the conference.[79] This opposition of views made the

---

[74] The following references can be given by way of example: Alagappan, M., *The United States' Enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 10 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS p. 541, 547 note 36 (1990); Burns, W., *CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal*, 8 DICKINSON JOURNAL OF INTERNATIONAL LAW p. 203, 209 note 40 (1990); Gillespie, A., *Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans*, 33 OCEAN DEVELOPMENT AND INTERNATIONAL LAW JOURNAL p. 17, 30 (2002); Molenaar, E., *CCAMLR and Southern Ocean Fisheries*, 16 International Journal of Marine and Coastal Law p. 465, 473 note 43 (2001); Nichols, P., *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS p. 711, 748 note 124 (1996); and Vice, D., *Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution*, 29 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS pp. 577, 571 note 18, 582 note 20, and 609 note 181 (1997).

[75] See for instance Burns, W. & Mosedale, T., *European Implementation of CITES and the proposal for a Council Regulation (EC) on the Protection of Species of Wild Fauna and Flora*, 9 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW p. 389, 401 note 96 (1997), stating: "With the creation of 200 mile Exclusive Economic Zones as part of the negotiation of the United Nations Convention on the Law of the Sea, these areas do not appear to be beyond the jurisdiction of any state."

[76] Hereinafter IUCN. Three previous draft had already been circulated to governments in September 1967, August 1969 and March 1971.

[77] 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. 3. Hereinafter Working Paper.

[78] CITES, *travaux préparatoires*, *Memorandum Concerning the Working Paper for the Endangered Species Conference Containing the Text of Draft Convention on International Trade in Threatened Species of Wildlife (Submitted by the International Union for Conservation of Nature and Natural Resources)* (Doc. 4, 10 November 1972), p. 3.

[79] See for instance the opening statements of the United Kingdom (against), the United States (in favour), Canada (in favour) (CITES, *travaux préparatoires*, *Summary Record for the Second Plenary Session, Monday, February 12, 1973* (Doc. SR/2 (Final)), p. 3), and Japan (against) (CITES, *travaux préparatoires*, *Summary Record - Third Plenary Session, Tuesday, February 13, 1973* (Doc. SR/3 (Final), 24 February 1973), p. 3. See also the statements submitted Kenya (in favour) (CITES, *travaux préparatoires*, *Introduction from the Sea (Statement Submitted by the Delegation of Kenya)* (Doc. 12, 21 February 1973), p. 1) and Sweden (in favour) (CITES, *travaux préparatoires*, *Introduction from the Sea (Statement Submitted by the Delegation of Sweden)*

Chairman rule that the discussion in plenary should be delayed until more progress had been made on this point.[80] The discussion in plenary on this point was resumed a week later, but only to find out that the positions were still diametrically opposed.[81] This time the Chairman ruled that an *ad hoc* subcommittee would be established to try to solve the issue.[82] One had to wait another week before the Chairman could finally announce that an agreement had been reached, resulting, with minor later drafting changing, in the present Art. 1 (e).[83]

A The term "introduction"

The difficulties which have surfaced in the practice of states with respect to this term, mainly touch upon two different aspects. The first one relates to the question, put in simple terms, whether introduction occurs when a fishing vessels takes a specimen of a species of fish, included in Appendices I or II of CITES, on board, or whether that only occurs when the fish is landed in a port of one of the member states. A second one relates to the question whether, after "introduction from the sea", the shipping to another member state becomes export or rather re-export.

As to the first question, a literal reading of the convention conveys the impression, by means of the word "transportation into", that the founding fathers of CITES had the second alternative in mind when drafting the convention.[84] This point of view can also be found in the

---

(Doc. 14, 23 February 1973), p. 1) . In order to be crystal clear, Japan submitted one proposed amendment to the Working Paper and two more statements for the record: 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 (its content simply read: "Delete all the provisions relating to 'introduction from the sea' throughout the present draft); *General Statement by Mr. T. Yamazaki, Delegate of Japan, February 13, 1973* (Doc. PR/10, 21 February 1973), p. 2; and *Statement by Mr. T. Yamazaki, Delegate of Japan on "Introduction from the Sea"* (Doc. PR/11, 21 February 1973), 3 pp.

[80] CITES, *travaux préparatoires*, *Summary Record - Third Plenary Session, Tuesday, February 13, 1973* (Doc. SR/3 (Final), 24 February 1973), p. 3.

[81] CITES, *travaux préparatoires*, *Summary Record - Tenth Plenary Session, Tuesday, February 20, 1973* (Doc. SR/10 (Final), 5 March 1973), pp. 1-3. Two blocs had formed itself: One supporting the position of the United States, the initiator of this inclusion, consisting of Canada, the Federal Republic of Germany (see also CITES, *travaux préparatoires*, *Position Regarding the Inclusion of "Introduction from the Sea" into Convention (Submitted by the Delegation of the Federal Republic of Germany)* (Doc. PA/Gen/2, 20 February 1973), p. 1), Kenya and Sweden, and another one supporting the strongly negative attitude of Japan, consisting of France, South Africa, the United Kingdom, even though the latter started to shift position (see also CITES, *travaux préparatoires*, *Comments and Suggested Improvements to Doc. PA/I/11 - Introductions from the Sea (Submitted by the Delegation of the United Kingdom)* (Doc. PA/I/12, 19 February 1973), p. 1). Mexico stated that even though it first had supported Japan, it was now rather inclined to follow the United States approach. The former group basically argued that three-fourths of the world's surface would otherwise be excluded, the latter group rather emphasized that unnecessary duplication with other conventions would otherwise be the result.

[82] CITES, *travaux préparatoires*, *Summary Record - Tenth Plenary Session, Tuesday, February 20, 1973* (Doc. SR/10 (Final), 5 March 1973), p. 4.

[83] CITES, *travaux préparatoires*, *Summary Record - Eighteenth Plenary Session, Tuesday, February 27, 1973* (Doc. SR/18 (Final), 6 March 1973), p. 1.

[84] It can be noted in this respect that Council Regulation 338/97, *supra* note 14, changed the definition of "introduction from the sea" by not using the words "transportation into". See Art. 2 (e), which reads: "'[I]ntroduction from the sea' shall mean the introduction into the Community of any specimen which was taken in, and is being introduced directly from, the marine environment not under the jurisdiction of any State, including the air-space above the sea and the sea-bed and subsoil beneath the sea". Nevertheless, by splitting up the actions of

specialized legal literature.[85] It is also the one held by the Secretary-General of CITES.[86] This seems to fit logically in the overall set-up of CITES. Since implementation is left to the member states,[87] border controls constitute a quintessential element of the system.[88] Nevertheless, specifically with respect to commercially-exploited aquatic species the argument has been made that introduction from the sea certificates with respect to Appendix II specimen of species, could be issued by the Management Authority of the flag state in certain circumstances.[89] Since the flag state is often in a better position to ascertain whether the vessel in question was allowed to fish for the specimen harvested, under its national law as well as regional fisheries organizations to which the flag state may be a party, such a scheme would be better in line with contemporary international agreements, such as the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas[90] and the so-called 1995 UN Fish Stocks Agreement.[91]

Placed in a broader context, it seems to reflect the duality between flag and port state jurisdiction in the enforcement of fishery activities taking place beyond national jurisdiction. If the 1993 FAO Compliance Agreement indeed focuses on flag state implementation, the 1995 UN Fish Stocks Agreement on the other hand diversifies and also includes and creates the system of port-state jurisdiction in the area of fisheries.[92] Also the recent initiatives taken by

---

taking and introducing, a similar result is obtained. This impression is also left when this definition is read together with other definitions contained in the same article, such as "Member State of destination" (Art. 2 (h)) or "trade" (Art. 2 (u)).

[85] Favre, D., INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES, Dordrecht, Martinus Nijhoff, p. 89 (1989).

[86] Wijnstekers, W., *supra* note 12, p. 24, stating: "There has been some discussion about whether the boarding of specimens of a vessel is considered to be an introduction from the sea. I have always been of the opinion that this was not intended to be the case. 'Transportation into a state' is clearly something different from 'entering the territoiry of a state' and I therefore believe that a specimen is only introduced from the sea when it is landed". This personal opinion did not appear in the previous version of this book, which appeared in 2001.

[87] See *supra* note 7 and accompanying text.

[88] See Conf. 10.30 & 10.118 "Control and checking of shipments of CITES specimens", as available on Internet at <www.cites.org/eng/decis/valid12/10-30more.shtml> (last visited on 26 May 2004). This decision starts out by stating: "In order to improve enforcement, Parties should take the necessary measures to develop a comprehensive strategy for border controls, audits and investigations ...".

[89] CoP 13 Doc. 41, *Introduction from the Sea: Interpretation and Implementation of Article I, Article III, Paragraph 5, and Article IV, Paragraphs 6 and 7*, submitted by the United States 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/US01-E.pdf> (last visited on 26 May 2004), pp. 2-3, paras 9-13.

[90] 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.

[91] 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.

[92] For a succinct comparison of both agreements on the issue of implementation, see for instance Franckx, E., FISHERIES ENFORCEMENT: RELATED LEGAL AND INSTITUTIONAL ISSUES: NATIONAL, SUBREGIONAL OR REGIONAL PERSPECTIVES, FAO Legislative Study # 71, Rome, Food and Agriculture Organization, pp. 3-6 (2001), as available on Internet at <www.fao.org/Legal/legstud/list-e.htm>.

FAO in this particular direction, seem the confirm this novel trend.[93] It might therefore be concluded on this point that the founders of CITES might well have created an *avant-garde* system for the regulation of "introduction from the sea" which has simply remained dormant for a good number of years because most commercially-exploited aquatic species had remained outside of the system.

The second question concerns whether after "introduction from the sea" an export or re-export permit is required if the state of introduction intends to transship specimen of listed species to another contracting party. Indeed different criteria are provided for in both cases, the former always requiring a somewhat more stringent regulation than the latter.[94] Despite the fact that the CITES system is based on the export side of the medal as stressed above,[95] in case of introduction from the sea, the state of introduction will normally be the same as the state of export or re-export. Therefore, the practical consequences of this difference seem rather minimal, since the scientific authority of that state will already have been involved in advising that the introduction of Appendix I as well as II species will not be detrimental to the survival of the species involved prior to the introduction itself.[96]

B The term "from the sea"

When read together with the definition given by CITES itself, which limits this notion to the parts of the oceans beyond national jurisdiction,[97] the main issue to be addressed under this section relates to the fundamental problem of the appropriate time frame take into consideration when interpreting that definition. Is the situation *ex nunc* determining, or is it rather the situation *ex tunc*, meaning the time frame surrounding the conclusion of CITES. Given the fundamental changes which have occurred in the international law of the sea between 1973 and today, the practical importance of this question can hardly be overestimated. In international law the answer to this question is provided by the doctrine of intertemporal law.[98]

It seems therefore appropriate to analyse this doctrine first of all in a general manner, before trying to apply it to CITES more in particular. A further differentiation will be made with

---

[93] Lobach, T., PORT STATE CONTROL OF FOREIGN FISHING VESSELS, FAO Legislative Study #29, Rome, Food and Agriculture Organization, pp. 3-6 (2001), as available on Internet at <www.fao.org/Legal/legstud/list-e.htm>.

[94] Compare CITES, Arts III (2 & 4), IV (2 & 4), and V (2 & 4) relating to Appendix I, II or III specimen of species respectively. With respect to Appendix I and II specimen, for present purposes that most important ones, the most crucial difference is that the scientific authority of the state of re-export will not have to advise that such re-export will not be detrimental to the survival of that species, whereas that will be the case if the CITES rules relating to export are applicable to the same categories.

[95] See *supra* note 13 and accompanying text.

[96] CITES, Arts III (5)(a) and IV (6)(a) concerning Appendix I and II specimen of species respectively.

[97] See *supra* note 20 and accompanying text.

[98] This notion has been defined in the DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC (Salmon, J., ed.), Bruylant, Brussels, p. 388 (2001), as: "Ensemble de principes ou de règles qui, dans un ordre juridique, précisent les conditions d'application des normes dans le temps, tant pour déterminer à quel moment une norme donnée est applicable que pour déterminer l'époque à laquelle il faut se placer pour en déterminer le sens, lorsque ce dernier a évolué."

respect to CITES between the convention itself, and the later practice developed by the conference of the parties.

a In international law in general

The intertemporal law regulates the application in time of legal acts and rules in international law.[99] As of today, the proceedings of the *Institut de droit international* remain a basic point of reference in this domain. In August 1975 this scientific body adopted a resolution based on the reports of its rapporteur, Max Sørensen, concerning the issue of intertemporal law. The basic rule, to be found in paragraph 1, reads as follows:

> "A défaut d'une indication en sens contraire, le domaine d'application dans le temps d'une norme de droit international public est déterminé conformément au principe général de droit, d'après lequel tout fait, tout acte et toute situation doivent être appréciés à la lumière des règles de droit qui en sont contemporaines."[100]

As clearly indicated by the introductory words, states are free to depart from this rule in common agreement.[101]

A case to which reference is often made in this respect is the 1928 Islands of Palmas (Miangas) Case before the Permanent Court of Arbitration.[102] After having stated the above-mentioned rule,[103] the sole Arbiter in this case continued his reasoning in the following way:

> "However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be efficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has

---

[99] See for instance, Tavernier, P., RECHERCHES SUR L'APPLICATION DANS LE TEMPS DES ACTES ET DES RÈGLES EN DROIT INTERNATIONAL PUBLIC (PROBLÈMES DE DROIT INTERTEMPOREL OU DE DROIT TRANSITOIRE), Paris, Librairie Générale de Droit et de Jurisprudence, 351 pp. (1970).

[100] 56 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL pp. 536-541 (1975), the French text being authoritative. The English translation reads as follows: "Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it." Hereinafter 1975 IDI Resolution. For the preliminary as well as the final report of the rapporteur, containing a wealth of information, see 55 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL pp. 1-116 (1973).

[101] This rule, in other words, does not form part of *ius cogens*. A special paragraph was devoted to it in the just mentioned resolution of the *Institut de droit international*. See 1975 IDI Resolution, para. 4.

[102] 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS p. 829.

[103] *Id.*, p. 845. The case concerned conflicting sovereignty claims of the Netherlands and the United States over a particular island. The latter country thought to be able to rely on Spain's cession to the United States after the American-Spanish War in 1898. The Netherlands, on the other hand, relied on the peaceful display of authority during the period following this cession. The Arbiter first of all stated that the Spanish claim, based on discovery, and which the United States, as the successor to Spain, argued to have taken over by means of the cession, had to be judged on the basis of the international law as it existed in the 16th century when the discovery was made.

> continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical."[104]

Already at the time of the rendering of this arbitral award, severe warnings were uttered pointing at the dangerous implications such a reasoning might have,[105] and such critical readings of that second part of the award of 1928 still persist today. Or as warned by a present-day judge of the International Court of Justice:

> "Some have interpreted this second limb as providing that a right, even if lawfully obtained by reference to the law of the era, will be lost if a later rule of international law evolves by reference to which the basis of the 'right' would no longer be lawful. But to give such an understanding to the second limb of the Huber *dictum* would often wipe out the legal consequences of the first. Our understanding of it should flow from the realisation that it was a *dictum* offered in the context of establishing and maintaining territorial title… It has, however, been read in the most remarkable extensive fashion, as providing obligatory rules in circumstances that it never addressed, with consequences that it never intended."[106]

The better conclusion to be reached, therefore, appears that the basic rule formulated by the 1975 IDI Resolution still remains valid today.[107] Besides the derogations agreed upon by the parties,[108] there are certain types of agreements that have been held to form automatic exceptions to the rule. It concerns mostly human rights instruments and conventional provisions through which states subject themselves to the jurisdiction of an international court or tribunal.[109] Also concepts or generic terms embodied in treaties have been said to have a tendency to evolve with time.[110] But in its 1978 judgement on the jurisdiction in the case between Greece and Turkey relating to the Aegean Sea, the International Court of Justice clearly stated that the transferring

---

[104] *Id.*, pp. 839-845, where these ideas are further developed. It was in other words necessary according to the Arbiter to find out whether the United States still complied with the requirements of international law as they existed at the time of the cession, i.e. 1898.

[105] Jessup, P., *The Palmas Island Arbitration*, 22 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 735 (1928).

[106] Higgins, R., *Time and the Law: International Perspectives on an Old Problem*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY p. 501, 516 (1997).

[107] See for instance 1 OPPENHEIM'S INTERNATIONAL LAW (Jennings, R. & Watts, A., eds), London, Longman, pp. 1281-1282 (1996), where further references to the literature can be found in note 31. These authors formulate the rule of interpretation as follows: "[A] juridical fact must be appreciated in the light of the law contemporary with it. Similarly, a treaty's terms are normally to be interpreted on the basis of their meaning at the time that the treaty was concluded, and in the light of circumstances then prevailing."

[108] See *supra* note 101 and accompanying text.

[109] *Id.*, pp. 516-518. See also Elias, T., *The Doctrine of Intertemporal Law*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 285, 305-307 (1980), concluding that the second limb will always have to be applied with great care.

[110] *Id.*, p. 518. See also OPPENHEIM'S INTERNATIONAL LAW, *supra* note 107, p. 1282. Also the 1975 IDI Resolution, *supra* note 100, already provided this exception in its para. 4: "Lorsqu'une disposition conventionnelle se réfère à une notion juridique ou autre sans la définir, il convient de recourir aux méthodes habituelles d'interprétation pour déterminer si cette notion doit être comprise dans son acception au moment de l'établissement de la disposition ou dans son acception au moment de l'application. Toute interprétation d'un traité doit prendre en considération l'ensemble des règles pertinentes de droit international applicables entre les parties au moment de l'application."

of property rights was not covered by this exception relating to the use of generic terms.[111] The particular case, which formed the basis for the Court to make this assessment, even though unsuccessfully relied upon by the Greek government *in casu*, is nevertheless worth mentioning because of its particular relevance to the issues here at hand.

The *Petroleum Development Ltd v. Sheikh of Abu Dhabi* case concerned a concession agreement in which the latter had granted to the former the right to explore and exploit the oil in its territory.[112] Concluded at a time that the continental shelf notion had not yet crystallized in international law, the company later argued that the agreement automatically also covered the continental shelf once this notion had become part of international law. Lord Asquith, disagreeing with this line of reasoning, sustained his position by arguing that

> "it would seem a most artificial refinement to read back into a contract the implications of a doctrine not mooted till seven years later."[113]

b With respect to CITES in particular

i Analysis based on the founding document

The object and purpose of CITES do not seem to warrant an automatic exception as mentioned above.[114]

The question however needs to be addressed whether the parties, when drafting the convention, agreed between themselves to make a derogation to the rule that the law at the time of signature prevails. Indeed, in the CITES article on the effect on domestic legislation and international conventions the last paragraph reads as follows:

> "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."[115]

This paragraph has been argued by some to justify such a derogation from the normal rule discerned above, for it would:

---

[111] *Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgement, I.C.J. Reports 1978*, p. 33, para. 77.

[112] 18 INTERNATIONAL LAW REPORTS 144 (1951). Hereinafter cited as 1951 Abu Dhabi Case.

[113] *Id.*, p. 152, as mentioned by Higgins, R., supra note 106, p. 519.

[114] See *supra* notes 109-110 and accompanying text. The use of the concept jurisdiction in Art. I (e) of CITES seems to be fully covered by the "territory" argument as explained in the Abu Dhabi Case just mentioned. See *supra* notes 112-113 and accompanying text. Indeed both the concepts of territory and jurisdiction are intimately linked to state sovereignty. See for instance Shaw, M., INTERNATIONAL LAW, Cambridge, Cambridge University Press, pp. 409 and 572 (2003), respectively.

[115] CITES, Art. XIV (6).

> "anticipate the development of an agreement such as UNCLOS in the process of the codification and development of the international law of the sea."[116]

This would imply that the phrase "the marine environment not under the jurisdiction of any State"[117] must be interpreted in line with the 1982 United Nations Convention on the Law of the Sea,[118] i.e. excluding the exclusive economic zone[119] for instance.[120] In its comments to this draft resolution,[121] which the CITES Secretariat considered unnecessary since it doubted whether the problem that the draft resolution tried to solve did exist,[122] the latter body did not touch upon this particular issue.[123] Nevertheless, in his reference to CITES, the Secretary-General of this organization enigmatically states when commenting on Art. XIV (6):

> "This provision is of relevance to the introduction of specimens from the sea as defined in Article I (e)."[124]

The question therefore needs to be addressed whether indeed Art. XIV (6) holds the clue for the proper interpretation of the definition of the term "introduction from the sea" as found in Art. I (e).

A grammatical interpretation of this article, based on the ordinary meaning to be given to the terms,[125] seems to indicate that there is a definite one-way direction in the obligation not to prejudice, imposed on CITES to the advantage of the negotiations leading up to the 1982 Convention.[126] Nothing in CITES, in other words, could have an influence, neither positive or negative, on the development of the law of the sea, which at that time, 1973, was on the verge of being renegotiated at the third United Nations Conference of the Law of the Sea.[127] Indeed, the contracting parties to CITES were very much aware of the fact that the General Assembly of

---

116 Doc. 11.18, *Interpretation and Implementation of Article III, Paragraph 5, Article IV, Paragraphs 6 and 7 and Article XIV, Paragraphs 4, 5 and 6, Relating to Introduction from the Sea*, submitted by Australia to the eleventh conference of the parties held at Gigiri, Kenya, in 2000, as available on Internet at <www.cites.org/eng/cop/11/docs/18.pdf> (last visited on 26 May 2004), p. 2, para. 10. The relevant paragraph of the draft resolution proposed by this country reads: "RECOGNIZING that Article XIV, paragraph 6, of the Convention addresses the relationship between the Convention and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and that the provisions of UNCLOS concerning areas beyond national jurisdiction are relevant to the interpretation and implementation of the provisions of the Convention relating to introduction from the sea". *Id.*, p. 9.

117 CITES, Art. I (e), as already cited *supra* note 20 and accompanying text.

118 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 or LOSC in quotations).

119 Hereinafter EEZ.

120 Doc. 11.18, *supra* note 116, p. 2, para. 11, and p. 9.

121 This draft resolution was not adopted, but resulted in the setting up of a working group, chaired by Australia. *Summary Report of Committee II of the conference of the parties held at Gigiri, Kenya, in 2000*, as available on Internet at <www.cites.org/eng/cop/11/other/Com_II.pdf> (last visited on 26 May 2004), p. 7, para. 18. Hereinafter 2000 Summary Report of Committee II.

122 *Id.*, p. 4, para. A.

123 *Id.*, pp. 4-5.

124 Wijnstekers, W., *supra* note 12, p. 356.

125 1969 Vienna Convention, Art. 31 (1).

126 See *infra* note 138.

127 Hereinafter UNCLOS III. This conference lasted from 1973 until 1982 and finally resulted in the adoption of the 1982 Convention.

the United Nations had just requested the Secretary-General of that organization to convene the first and second sessions of UNCLOS III,[128] the former of which was going to be convened later that year.[129] By drafting CITES, in other words, the parties did not want to prejudice the outcome of these negotiations in any way nor did its conclusion tie the hands of the parties in the positions they would be taking during these negotiations. This provision does not provide any information on the influence the outcome of these negotiations, i.e. the 1982 Convention, might have on CITES. If it would, a similar reasoning should also be logically applied to the second part of sentence of Art. XIV (6) following the word "nor", which would imply that CITES should be influenced by the unilateral claims any state may wish to make in the future concerning the law of the sea and nature and extent of their jurisdiction. It is believed that very few states would be willing to subscribe to such a proposition.

This interpretation is further sustained when the terms of Art. XIV (6) are interpreted in a broader context. The latter, as just described in the previous paragraph, was not peculiar to CITES, but was in fact a problem encountered by many conventions, relating in one way or another to the law of the sea, drafted during this long period of UNCLOS III negotiations, the outcome of which, it should be remembered, remained highly unpredictable until the very end of the process. It should therefore not come as a surprise that the formula used in Art. XIV (6) is not unique to CITES. In fact, it represents a standard clause which was literally, or almost at least, reproduced in many other agreements that touch upon law of the sea issues and were concluded in this time period of high uncertainty with respect to the concrete content of this particular area of international law.[130] In this respect, reference can be made to the following examples:[131]

- The 1976 Convention on the Protection of the Mediterranean Sea against Pollution.[132] Art. 3 (2) contains an almost identical provision;[133]
- the 1977 Convention for the Safety of Fishing Vessels.[134] Art. 8 contains an almost identical provision;[135]

---

[128] GA Res. 3029 (XXVII), 18 December 1972.

[129] The first session of UNCLOS III was held from 3-14 December 1973.

[130] Standards works on the law of the sea published during this time period are for instance rather scarce, not to say almost nonexistent.

[131] When comparing provisions in the next paragraph, differences in punctuation are not taken into consideration.

[132] 1102 UNITED NATIONS TREATY SERIES pp. 44-137. This convention, signed on 16 February 1976, entered into force on 12 February 1978.

[133] The words "the present" are replaced by "this".

[134] As available on Internet at <www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/seldoc/1977/2521.html?query=%7e+torremolinos> (last visited on 26 May 2004). This convention, signed on 2 April 1977, never entered into force as such. It was superseded by a 1993 Protocol which, together with the Regulations Annexed to the Convention as modified by the Annex to the Protocol, then formed the conventional framework. As available on Internet at <www.oceanlaw.net/texts/torremolinos.htm> (last visited on 26 May 2004). Hereinafter 1993 Torremolinos Protocol.

[135] The words "the present" are replaced by "this".

- the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers.[136] Art. V (4) contains an almost identical provision;[137]
- the 1979 Convention on Maritime Search and Rescue.[138] Art. 2 (1) contains an almost identical provision;[139]
- the 1979 Convention on the Conservation of Migratory Species of Wild Animals.[140] Art. XII (1) contains an almost identical provision;[141]
- the 1981 Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region.[142] Art. 3 (3) contains an almost identical provision;[143] and
- the 1982 Protocol concerning Mediterranean Specially Protected Areas.[144] Art. 1 (2) contains an almost identical provision.[145]

Moreover it should be stressed that the copyright for this provision of Art. XIV (6) can not even be attributed to the drafters of CITES, for it had already been used before. Reference can be made here to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter.[146] It is clear that the founding fathers of CITES took Art. XIII of the 1972 London Dumping Convention as basis when drafting Art. XIV (6) a few months later, for both articles are almost identical.[147] But what is even more noteworthy, is that they as a

---

[136] 1361 UNITED NATIONS TREATY SERIES pp. 74-298. This convention, signed on 7 July 1978, entered into force on 28 April 1984.

[137] The word "present" in the beginning of the article is deleted.

[138] 1405 UNITED NATIONS TREATY SERIES pp. 118-256. This convention, signed on 27 April 1979, entered into force on 22 June 1985. See Kenney, F. & Vasilios, T., *The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 Pacific Rim Law and Policy Journal 143, 157 note 64 (2003), who have relied on this clause in order the ascertain whether the content of this agreement does not impinge upon the 1982 Convention, indicating the one-way direction this provision is intended to work, as already mentioned *supra* note 126 and accompanying text.

[139] The words "the present" are replaced by "this".

[140] 1651 UNITED NATIONS TREATY SERIES pp. 355-490. This convention, signed on 23 June 1979, entered into force on 1 November 1983.

[141] The words "the present" are replaced by "this".

[142] As available on Internet at <www.ecolex.org/ecolex/en/treaties/treaties_fulltext.php?docnr=2414 &language=en> (last visited on 26 May 2004). This convention, signed on 12 March 1981, entered into force on 5 August 1984.

[143] The words "State concerning the law of the sea and" are replaced by "Contracting Party concerning".

[144] 1425 UNITED NATIONS TREATY SERIES pp. 160-183. This convention, signed on 3 April 1982, entered into force on 23 March 1986.

[145] The words "the present Convention" are replaced by "this Protocol".

[146] 1046 UNITED NATIONS TREATY SERIES pp. 137-218. This convention, signed on 29 December 1972, entered into force on 30 August 1975. Hereinafter 1972 London Dumping Convention.

[147] The 1972 London Dumping Convention uses "this" instead of "the present". It also explain why most later agreements differed from CITES on this point. See *supra* notes 133, 135, 139, 141 and 145. This is confirmed when consulting the *travaux préparatoires* of CITES. The Working Paper, which served as basis for the negotiations, did not contain such a provision (see Working Paper, *supra* note 76, p. 18 (Art. XII)). When the United Kingdom, in support of a United States proposal to include present Art. XIV (6), also argued in favour of its inclusion, this country specifically referred in its explanation to the 1972 London Dumping Convention. See CITES, *travaux préparatoires*, *Comments and Suggested Improvements to Doc. PA/I/11 - Introductions from the Sea (Submitted by the Delegation of the United Kingdom)* (Doc. PA/I/12, 19 February 1973), p. 1, stating: "The suggested additional paragraph to Article XII (or new Article) is the same as that suggested by the U.S. Delegation in PA/I/11. It has the same source (the Ocean Dumping Convention, 1972) and the same object, of avoiding any

consequence must have knowingly deleted the second sentence which this 1972 London Dumping Convention appended to the formulation of this principle, and which reads as follows:

> "The Contracting Parties agree to consult at a meeting to be convened by the Organisation after the Law of the Sea Conference, and in any case not later than 1976, with a view to defining the nature and extent of the rights and the responsibilities of a coastal State to apply the Convention in a zone adjacent to its coast."[148]

It will be clear from the preceding paragraph, that the interpretation of Art. XIV (6) must not strictly be tied to CITES, but can be viewed in a larger context given the wide use that has been made by it in other agreements. Important to note is that all these agreements relate to a definite period of 10 years preceding the conclusion of the 1982 Convention, roughly corresponding to the UNCLOS III proceedings. It is clear therefore that this provision is much more linked to the process of UNCLOS III, than to the outcome of it. Once the 1982 Convention adopted, the use of such provision became redundant for its purpose had clearly been fulfilled. Even though the 1982 Convention only entered into force in 1994, the use of similar provisions no longer continued, even though the law of the sea had not yet totally settled during that period, and as a matter of fact took even some more time thereafter before all geographical regions in the world joined the move towards its general acceptance. This period, in other words, which is much longer than that covered by UNCLOS III, did not see a similar development, clearly indicating that this clause had a very concise purpose, and did not aim at making sure that the outcome of the law of the sea developments, triggered by this event, would find its way into the conventional framework.[149]

That the latter was indeed not the purpose of an Art. XIV (6) style clause, can best be illustrated by the fact that the conventions wanting to tackle that particular problem, did so by means of a specific provision different from, and in addition to the one today found in Art. XIV (6) of CITES. The 1972 London Dumping Convention tried to provide an answer by obliging the parties to reconvene later to try to decide on this issue once the law would have crystallized.[150] This example was however not followed by any of the later agreements listed above.[151]

---

prejudice to the work of the Law of the Sea Conference."

[148] 1972 London Duping Convention, Art. XIII.

[149] The only exception to this line of argumentation is the 1993 Torremolinos Protocol. Because UNCLOS III had concluded its work more than 10 years ago, the protocol adapted the provision in question by deleting its first part, but it did retain the following wording: "Nothing in the present Protocol shall prejudice 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." 1993 Torremolinos Protocol, Art. 8. The exact meaning of this provision is not immediately clear, especially not in a conventional framework which focuses on port state control and where the word jurisdiction, besides the article just mentioned, is not even used.

[150] 1972 London Dumping Convention, Art. XIII, as already cited *supra* note 148 and accompanying text.

[151] See *supra* notes 132-145 and accompanying text.

Another, and apparently more fruitful approach was the one followed by the 1973 Convention for the Prevention of Pollution from Ships.[152] This convention indeed, in a section entitled "Other Treaties and Interpretation" containing three paragraphs, provided the following after having stated that the 1954 International Convention for the Prevention of Pollution of the Sea by Oil would be superseded after its entry into force:

> "2. 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.
> 3. The term 'jurisdiction' in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention."[153]

Paragraph 3 is a perfect example in practice of the right states have in theory not to subject themselves to the basic rule of intertemporal law.[154] It also indicates how this can be done by means of a simple, concise and clear provision.[155] It can hardly be contested that paragraph 3 would have to be redundant if paragraph 2 had already the implication that national jurisdiction provided in the 1982 Convention determined the content of the MARPOL Convention.[156] Or as recently opined by I. Sinclair, Art. 9 (2) of the latter convention

> "does not appear, as such, to give priority to the future Law of the Sea Convention."[157]

---

[152] 1340 UNITED NATIONS TREATY SERIES pp. 184-193. This convention, signed on 2 November 1973, was later absorbed by a 1978 Protocol. Together with the latter, this conventional system entered into force on 2 October 1983. Hereinafter MARPOL Convention. *Id.*, pp. 62-265.

[153] *Id.*, Art. 9.

[154] See *supra* note 101 and accompanying text.

[155] It is striking that authors, when arguing that the exact content of the term jurisdiction found in Art. 4 (2) of the MARPOL Convention, do not base themselves on Art. 9 (2), but solely on Art. 9 (3). See for instance M'Gonigle M. & Zacher, M., POLLUTION, POLITICS AND INTERNATIONAL LAW: TANKERS AT SEA, Berkeley, University of California Press, p. 208 (1979), writing at a time that this provision merely contained a promise for coastal states; Boyle, A., *Marine Pollution under the Law of the Sea*, 79 AMERICAN JOURNAL OF INTERNATIONAL LAW p. 347, 361 note 79 (1985), writing that most probably this notion included the EEZ at that time; and Carlson, J., *Presidential Proclamation 7219: Extending the United States' Contiguous Zone: Didn't Someone Say This Had To Do With Pollution?*, 55 UNIVERSITY OF MIAMI LAW REVIEW p. 487, 504 (2001), concluding: "This foresight [i.e. Art. 9 (3)] allows MARPOL 73/78 to be seamlessly integrated into the 'umbrella' LOSC; note that LOSC Article 56(1)(b) uses the term 'jurisdiction' when referring to the scope of authority the coastal state may exercise within its EEZ".

[156] As contented with respect to CITES by those who are of the opinion that Art. XIV (6) implies that the provisions of the 1982 Convention concerning areas beyond national jurisdiction are relevant to the interpretation given by CITES to the term "introduction from the sea". See *supra* note 116 and accompanying text.

[157] Sinclair, I., *Preliminary Exposé*, 66 INSTITUTE OF INTERNATIONAL LAW YEARBOOK, Part I, Lisbon Session, p. 55 (1995). But see Sadat-Akhavi, S., METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES, Leiden, Martinus Nijhoff, pp. 116-117 note 62 (2003), who finds this view "hardly acceptable". In support of this submission, this author refers back to the 1972 London Dumping Convention, where an identical provision can indeed be found, and in respect of which the consultative meeting agreed that the 1982 Convention should have priority. This argument, however, loses sight of the fact that the 1972 London Dumping Convention contained a separate provision dealing specifically with this problem (see *supra* note 148 and accompanying text). Consequently, the priority of the 1982 Convention in this respect seems to result not from the convention itself, but rather from the later state practice of the parties, which is of course a totally different matter.

This last example relating to the MARPOL Convention also illustrates that specific conventional provisions could easily have been crafted had the founding fathers of CITES in 1973 really wanted to make sure that the term "introduction from the sea" evolved hand in hand with international law in force at the time of application. Once again, conventional provisions, as the one found in Art. 9 (3) of the MARPOL Convention, are not unique. In the 1970s, when states did not know what the international law of the sea would look like tomorrow, such a clause was indeed a very simple tool to make sure that conventional provisions would be able to evolve with the developing international legal framework.[158] It is moreover noteworthy that this kind of provision is encountered in the post UNCLOS III period as well. The convention which superseded the just-mentioned 1974 Helsinki Convention, namely the Convention on the Protection of the Marine Environment of the Baltic Sea Area concluded in 1992,[159] for instance, had no difficulty in retaining exactly the same provision.[160]

ii Analysis based on later state practice of the conference of the parties

Next the intertemporal aspects related to the relevant resolutions of the conference of the parties need briefly to be addressed in view of conclusion reached above that these resolutions remain today valid tools of interpretation.[161]

Even though resolution Conf. 2.8[162] has been repealed in the mean time, it is important to notice the time frame in which it was adopted. The late 1970s was a period where indeed UNCLOS III was still in full progress, and its outcome far from certain. The statement included in the resolution by the conference in the parties that the jurisdiction claimed by states in maritime areas adjacent to their coast was "not uniform in extent, varies in nature and has not yet been agreed internationally", as incorporated in the preamble of that resolution, fully reflected this reality.

The incorporation of these same words in resolution Conf. 11.4,[163] on the other hand, adopted in 2000, appears far less in touch with reality. In that year the Secretary-General of the United Nations, for instance, was able to state that:

> "a comprehensive 'constitution for the oceans' dealing with all aspects of man's interaction with the oceans and seas is in place."[164]

With more than three fourth of the total number of coastal states party, representing the different regions of the world, a sound argument could have been made at that time that coastal state

---

158 A similar clause was for instance used by the drafters of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1507 UNITED NATIONS TREATY SERIES pp. 167-217. This convention, signed on 22 March 1974, entered into force on 3 May 1980. Hereinafter 1974 Helsinki Convention. Annex IV on the Prevention of Pollution from Ships provided in Regulation 3 (5): "The term 'jurisdiction' shall be interpreted in accordance with international law in force at the time of application or interpretation of this Annex."

159 2099 UNITED NATIONS TREATY SERIES pp. 197-234. This convention, signed on 9 April 1992, entered into force on 17 January 2000. Hereinafter 1992 Helsinki Convention.

160 *Id.*, Annex IV, Regulation 3 (4).

161 See *supra* note 73 and accompanying text.

162 See *supra* note 46.

163 See *supra* note 44.

164 United Nations, *Oceans and the Law of the Sea: Report of the Secretary-General* (U.N. Doc. A/55/61), New York, United Nations, p. 4, para. 5 (20 March 2000).

jurisdiction had indeed been agreed upon internationally. Since this resolution was moreover revised in 2002, without any changes being made to this particular wording,[165] the contrast only becomes more accentuated as the Secretary-General was able to state at the occasion of the 20th anniversary of the 1982 Convention that the objective of universal participation was looming around the corner.[166]

The only plausible explanation one can advance to justify such apparent anomaly is that these recitals formed part of the preamble of a resolution which related specifically to the cetaceans and the relationship with the International Whaling Commission. An in depth study undertaken by the present author in 1995, entitled "The Limits of International Law Concerning the Laws and Regulations a Coastal State May Adopt for Its Exclusive Economic Zone in the Exercise of Its Sovereign Rights to Explore, Exploit, and Conserve and Manage the Living Resources, i.e. the Exploitation of Cetaceans", revealed that tensions do remain in this particular area, be it that a large majority of states opposes the views taken by a small minority of states.[167]

If this is the correct understanding of these recitals, however, their interpretative value in obtaining a correct understanding of the notion "introduction from the sea" becomes very limited in the eventuality that other commercially-exploited aquatic species would become listed.

iii Impact of the 1982 Convention

One cannot conclude this analysis of the intertemporal law without having a look at the 1982 Convention itself, for this treaty explicitly regulates its relationship with other international treaties. A quick reading of Art. 311 (2) could well lead to the conclusion that this so-called conflict clause of the 1982 Convention subordinates CITES provisions to those of the 1982 Convention if the former affect the enjoyment of rights or performance of obligations of states parties under the latter.

A more profound analysis of this particular topic undertaken by the present author elsewhere, however, leads to the conclusion that the situation is not that simple.[168] To raise but a few issues: Do CITES and the 1982 Convention cover the same subject-matter? *Quid* concerning the states that are a party to CITES but not to the 1982 Convention?[169] How are the terms of Art. 311 (2) to be interpreted in absence of any clear jurisprudence on the issue? Does CITES adversely affect the enjoyment of rights or the performance of obligations of the states parties to the 1982 Convention.

In this respect the object and purpose of CITES should be emphasized, namely international cooperation for the protection of certain species of wild fauna and flora against

---

[165] See supra note 44.

[166] United Nations, *Oceans and the Law of the Sea: Report of the Secretary-General* (U.N. Doc. A/57/57), New York, United Nations, p. 8, para. 3 (7 March 2002).

[167] Franckx, E., *Legal Opinion Commissioned by* Stichting Greenpeace Nederland, 15 January 1995. See also Andresen, S., *The International Whaling Regime: Order at the Turn of the Century?*, in Order for the Oceans at the Turn of the Century (Vidas, D. & Østreng, W., eds), The Hague, Kluwer Law International, pp. 215-228 (1999), answering the question in the negative sense.

[168] Franckx, E., *supra* note 2, *sub* II, B.

[169] This is an important issue, since a country like the United States, one of the main importers of fauna and flora listed by CITES, is as of present not a party to the 1982 Convention.

over-exploitation through international trade.[170] As argued by R. Churchill and V. Lowe with respect to the Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and its Protocol,[171] a reasoning *per analogiam* could be made with respect to CITES. These authors claim that even though it is clear that at the time of their conclusion, the term high seas did not have to take the EEZ concept into account, it would if an *ex nunc* interpretation were to be applied.[172] These authors continue:

> "Since the EEZ concept did not exist at the time the Intervention Convention and its Protocol were drafted, it would seem not unreasonable to consider that the phrase 'high seas' should be read to mean 'beyond the territorial sea'. This position is reflected in the legislation of a number of States."[173]

Since the inclusion of the EEZ would undermine the very object and purpose of the Intervention Convention and Protocol, one could argue that it also would undercut the effectiveness of CITES, since, as already stressed before, the latter is not competent for whatever happens within the boundaries of the member states.[174] Also with respect to CITES, in other words, an argument could be developed sustaining that "not under jurisdiction of any State" should be read to mean "beyond the territorial sea".[175] Recital 8 of resolution Conf. 11.4,[176] as based upon recital 3 of resolution Conf. 2.8,[177] may well be understood as pointing in that direction as well.

C Conclusions

The term introduction seems to indicate the state where the specimen of listed species caught beyond national jurisdiction are landed. This is in line with present-day developments in international fisheries law. Whether the flag state should become involved in the process rather seems to be a political issue, which could make future listing proposals of commercially-exploited aquatic species more palatable. The question whether once introduced from the sea, that country has to apply the rules of export or rather re-export, does not seem to have major practical implications.

---

170 CITES, recital 4.

171 970 UNITED NATIONS TREATY SERIES pp. 211-283. This convention, signed on 29 November 1969, entered into force on 6 May 1975. Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1313 UNITED NATIONS TREATY SERIES pp. 3-91. This protocol, signed on 2 November 1973, entered into force on 30 March 1983. Hereinafter Intervention Convention and Protocol.

172 1982 Convention, Art. 86, clearly stating that the provisions of Part VII of the convention (High Seas) "apply to all parts of the sea that are not included in the exclusive economic zone ...".

173 Churchill, R. & Lowe, V., THE LAW OF THE SEA, Manchester, Manchester University Press, p. 354 (1999).

174 See *supra* notes 14-15 and accompanying text.

175 The original working paper which served as basis for the CITES negotiations, it should be remembered, started out that way (see *supra* 77 note and accompanying text). An amendment proposed by the United Kingdom even wanted to replace territorial sea by the internal waters if states. CITES, *travaux préparatoires*, *Comments and Suggested Improvements to Doc. PA/I/11 - Introductions from the Sea (Submitted by the Delegation of the United Kingdom)* (Doc. PA/I/12, 19 February 1973), p. 1.

176 See *supra* note 45 and accompanying text.

177 See *supra* note 46 and accompanying text.

The issue of intertemporal law, on the other hand, appears to be more fundamental. From a strictly legal point of view, therefore, it appears that the meaning of the term "introduction from the sea", as defined in CITES to mean "marine environment not under the jurisdiction of any State", must be interpreted according to the rules of international law as they existed at the time of the conclusion of the treaty, and not as they exist today.[178]

The contracting parties, when drafting CITES, failed to include a provision discarding the normal application of the rules of intertemporal law in international law with respect to that convention. It has been argued that its Art. XIV (6) does not fulfil this function, for it was inserted for totally different purposes, namely to beware that neither the codification and development of the law of the sea nor the position of the parties would not be prejudiced by the terms of CITES during the upcoming UNCLOS III negotiations. It does not work the other way around, i.e. to ensure that the outcome of these negotiations in terms of changed jurisdiction of states in relation to maritime area, would find its way back into CITES. The latter is normally secured by other type of provisions in international treaty law, be they the convening of a follow-up conference after the crystallization of the law, or better still the expression of the idea that the convention will always have to be construed in light of the international law in force at the time of application or interpretation.

This having been said, the present study will not attempt to discern in concrete terms what the law in this respect was at the time of drafting of CITES. Other, much more competent persons were obliged to try to bring some order in the chaos reigning in that period on this issue and it might therefore suffice to refer to the judgement of the International Court of Justice in the case between Iceland and the United Kingdom spanning exactly this period of time 1972-1974.[179] What can be said with certainty is that an EEZ of 200 nautical miles and a continental shelf possibly reaching beyond that limit did not form part of international law at that time.

V Appraisal of the term "introduction from the sea" *de lege ferenda*

CITES, as it stands at present, and in view of the possible listing of commercially-exploited aquatic species, is somewhat out of touch with reality. If the latter would be listed at present, it would roughly mean that all species beyond 12 nautical miles would have to be considered as "introduction from the sea". This seems hardly to be in line with present-day international law. If one tendency characterized the period UNCLOS III up till present, it is certainly the so-called creeping jurisdiction of the coastal states. After having won a hard fought battle over the 200 nautical mile resource zone in the 1982 Convention, it did not take long

---

[178] But see Burns, W. & Mosedale, T., *supra* note 75, p. 401 note 96.

[179] *Fisheries Jurisdiction Case (United Kingdom v. Iceland), Judgement, I.C.J. Reports 1974*, p. 3. Having to render a decision based on old conventional law surpassed by unilateral state action at the eve of a global overhaul of the law of the sea, the Court was placed in a most delicate position. Its decision, accepting the notion of a fishing zone of 12 nautical miles between the parties, and preferential rights for the coastal state in the zone between 12 and 50 nautical miles, was very rapidly overtaken by events. As stressed by its former president G. Guillaume at the occasion of a conference talk he gave in Brussels on 27 January 2000, that was the only decision by the International Court of Justice that had not been complied with by the parties.

before this sacrosanct boundary was permeated by the 1995 UN Fish Stocks Agreement.[180] To oblige coastal states today to treat fish resources captured in their own EEZ as specimen not under their jurisdiction does seem to be at odds with the tendency just described.

It is therefore believed that the time is more than ripe for CITES to make use once again of the flexible procedure at its disposal consisting of adopting a new resolution by conference of the parties containing a new, more contemporary reading of the notion "introduction from the sea".

This can be done in several ways. One is the approach contained in two recent CITES initiatives trying to clarify this issue, and which consist of describing in a detailed manner the different maritime zones not under the jurisdiction of any state. In the Australian proposal of 2000 this has been described as:

> "All parts of the sea, seabed and subsoil that are not included in the exclusive economic zone, in the continental shelf, in the territorial sea, or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."[181]

Also the United States has, in preparation of the upcoming 13th conference of the parties, to be held in Bangkok, Thailand, from 2 to 14 October 2004, proposed its own interpretation of the notion "not under the jurisdiction of any state" as:

> "[N]ot within the territorial sea or the internal waters of a State or in the archipelagic waters of an archipelagic State, or Exclusive Economic Zone of a State"[182]

Both countries indicate to base their proposed interpretations on the 1982 Convention.[183]

Another approach, apparently not so far suggested within the CITES framework, is to rely on the examples set by the 1974 and 1992 Helsinki Conventions. If the first approach is characterized by its detailed nature, this one in contrast remains extremely general. It could easily be applied to CITES, and could thus read:

> "The term jurisdiction shall be construed in the light of international law in force at the time of application or interpretation of the present Convention."

Both approaches have of course their positive and negative sides. The first one is certainly easier to interpret since the zones are listed by name. On the other side of the medal, however, stands the fact that this approach once again forces the definition into a straightjacket

---

[180] Even though the agreement is said to implement the 1982 Convention, a plausible argumentation can be made that it breaks new ground. See for instance, Hayashi, M., *Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 9 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 1, 26 (1996).

[181] Doc. 11.18, *supra* note 116, p. 2, para. 11, and p. 9.

[182] CoP 13 Doc. 41, supra note 89, p. 6.

[183] Since the United States is not yet a party to the 1982 Convention, they put it a little bit more delicately: "consistent with customary international law of the sea as reflected in the 1982 United Nations Convention on the Law of the Sea". *Id.*, p. 3, para. 17.

reflecting the law at the time of the adoption of the resolution. Not that UNCLOS IV is expected to be convened in a foreseeable future, but it should nevertheless be realized that the so-called constitution of the oceans, as the 1982 Convention is sometimes called, turned out not to be a static constitution, but instead a rather flexible one.[184] Another negative aspect attached to such a specific enumeration is that it might, like resolution Conf. 11.4, well be drafted with a particular problem in mind, and unnecessarily leave out specific fauna or flora that, under normal circumstances, would in all probability have been included. Instead of cetaceans, that constituted the issue monopolizing resolution Conf. 11.4, the present American proposal might well be focused too much on commercially-exploited aquatic species, the problem now facing CITES. There seems for instance no reason why the continental shelf should be excluded, if not for fauna, then maybe tomorrow flora related to the sea-bed and subsoil could well be in need of protection against over-exploitation through international trade. But even the Australian proposition, which is more comprehensive, might have difficulty in accommodating the protection of birds flying over the high seas,[185] or maybe, albeit more farfetched, a possible new regime created for deep-sea hydro-thermic vents and the extremely vulnerable fauna and flora to be found there. It has moreover been criticized for not having included other areas of jurisdiction, not called EEZ, but in which coastal states exercise similar rights.[186] A formula, like the one used in the 1993 FAO Compliance Agreement might bring relief in this respect.[187]

The second one has the advantage of being extremely simple, comprehensible, and foremost flexible. It is moreover not directly tied to the 1982 Convention and, if necessary, able to adapt to possible new developments in international law of the sea not directly covered by that document and maybe expressed in other conventions. On the negative side, it must be acknowledged that the states parties will encounter greater difficulties when trying to apply the convention, for they first will always have to ascertain the exact content of the notion jurisdiction under the international law applicable at that particular moment in time.

It seems, therefore, that a careful balancing of the pros and cons will need to be undertaken in order to arrive at the most appropriate solution. Unless of course the conference of the parties is of the opinion that the object and the purpose of CITES could best be served by keeping the area beyond national jurisdiction as large as possible. As argued by the present paper, not much would have to be changed if that were to be the case, for the application of the rules of intertemporal law to CITES implies that all sea areas beyond the territorial sea fall under its scope of application. Nevertheless, in order to remove all lingering uncertainty, it would also

---

[184] Franckx, E., Pacta Tertiis *and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea*, 8 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW p. 49, 49 (2000). See also by the same author *PACTA TERTIIS* AND THE 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 & MANAGEMENT OF STRADDLING FISH STOCKS & HIGHLY MIGRATORY FISH STOCKS, FAO Legal Papers Online # 8, p. 2 (June 2000), as available on Internet at <www.fao.org/Legal/prs-ol/paper-e.htm> (last visited on 26 May 2004).

[185] It might be useful here to refer a last time to the definition of "introduction from the sea" used in Council Regulation 338/97, *supra* note 14, Art. 2 (e), which contains the words "including the air-space above the sea".

[186] 2000 Summary Report of Committee II, *supra* note 121, p. 7, para. 18.

[187] 1993 FAO Compliance Agreement, Art. II (3), where the expression used is "exclusive economic zones, or equivalent zones of national jurisdiction over fisheries".

in this case be advisable for the conference of the parties to adopt a new resolution confirming this position, or at least repeal or clarify recital 7 of Conf. 11.4.[188]

[188] See *supra* note 45 and accompanying text. Either that statement should be strictly tied to cetaceans or it should be repealed. Given the antecedents of this recital, i.e. its inclusion in a resolution entitled "Introduction from the sea" in general (see *supra* note 46 and accompanying text), this seems a necessary clarification to be made.

TABLE OF CONTENTS