



Trade Issues and Sustainability of Fisheries Resources

by IWMC World Conservation Trust

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2009 October

I. ABSTRACT

The document's main focus is trade and fisheries resources as exhaustible natural resources. It contains reviews of recent negotiations at the United Nations Food & Agriculture Organization (FAO), United Nations Convention on Biological Diversity (CBD), the World Trade Organization (WTO) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in which a divergence of views has emerged on the respective roles of the different bodies and the legal rights and obligations of the States with respect to various fisheries specific international agreements.

The paper also advocates supporting Developing Countries and Small Island nations with assistance on marine resources conservation before they implement free trade or no trade policies. This would also cover adverse impacts to rural communities in Developing Countries and Small Island nations from free trade (resource depletion) or no trade. It assesses how to avoid social impacts on such communities, which traditionally rely on natural resources of the surrounding areas.

With respect to CITES, the paper also includes some information on practical implementation and enforcement issues in the case of listing commercially-exploited marine species in Appendix II.

II. INTRODUCTION

General Definitions: For the intent of this paper FISHERIES must be interpreted as all commercially-exploited aquatic living resources, including but not limited to finfish and shellfish.

The paper intends to show the conflict between no-trade, free-trade and management of fish stocks and the inconsistent interpretation of the legal instruments available by international organizations, governments and environmentalist groups.

The paper will also demonstrate that a lack of understanding of fisheries-management and a political agenda are driving decision-makers to promote counterproductive policies that, if continued, will cause major environmental and social harm.

In some cases, as documented by the WTO, the application of government subsidies to fishermen prolongs the fishing effort upon a depleted species beyond "commercial extinction" pushing the stock into biological depletion.

The document will also show --through explicit examples-- how legal rights and obligations of States with respect to fisheries [regulated by various fisheries specific international agreements, beyond the United Nations Convention on the Law of the Sea (UNCLOS) CITES and several others] are sacrificed under unsound environmental and trade arguments.

The document will finally show - also through explicit examples-the practical difficulties of implementing and enforcing CITES regulations for controlling the trade in commercially-exploited marine resources.

III. FAO, CITES AND THE LAW OF THE SEA CONVENTION

In June 2004, an International Expert Consultation was convened in Rome, sponsored by FAO's Committee on Fisheries, to discuss the general relationship between CITES, the 1982 Law of the Sea Convention and other related international law covering fisheries and consider the more specific legal implications of the application of CITES in relation to commercially-exploited aquatic species⁴.

The Expert Consultation agreed that it was necessary to look for synergies between regimes with complementary mandates. As noted in the Report, FAO Member States recalled that CITES cannot replace traditional fisheries management, and noted the fundamental importance of national fisheries management agencies, regional fishery management organizations (RFMOs) and the FAO in this regard.

A number of working documents, inter alia two papers prepared by an FAO Legal Consultant, Prof. E. Franckx, served as primary sources of references for the work of the Expert Consultation Group.

While recognizing a divergence of views on the respective roles of the different bodies, the Consultation also considered it important to look at the general relationship between CITES, the 1982 Law of the Sea Convention and related international law covering fisheries before considering the more specific legal implications of the application of CITES in relation to commercially-exploited aquatic species:

“While dealing with the legal issues arising from the Criteria and CITES Listing Proposals, the experts acknowledged the potential flexibility of CITES and considered also the relationship between CITES and the 1982 [Law of the Sea] Convention, the relationship between CITES and illegal, unreported and unregulated (IUU) fishing, the legal aspects of the

Look-Alike and Split-Listing Provisions as well as the relationship between CITES and regional fisheries management organizations. The Expert Consultation agreed on the list of recommendations that draws attention to actions that it considered would lead to improvements in the legal interpretation and implementation of CITES in relation to commercially-exploited aquatic species. The recommendations emphasize close consultation between FAO and CITES to address the issues and possible actions discussed among the experts”.

The Consultation recognized that the application of successive treaties relating to the same subject-matter in general international law creates a conflict when trying to analyze the legal implications of CITES in relation to the 1982 Convention and other international instruments relating to fisheries management.

In general, treaties are interpreted and applied so as to be compatible with each other. Should questions of compatibility arise, international law provides a number of rules to try to resolve them, such as later treaties taking precedence over earlier treaties, and more specific treaties taking precedence over general ones. Since CITES (1973) predates most of these agreements, the application of a later treaty in relation to a previous one covering the same subject-matter is of special importance. States can always agree to derogate from these rules in resolving questions about the application of successive treaties relating to the same subject-matter.

FAO's Consultation also noted that the use of conflict (compatibility) clauses is of great importance when considering the relationship between international accords or treaties. General international law provides that Parties can use such clauses to determine the relationship between a treaty they create and other relevant international agreements.



The Law of the Sea Convention in article 311, provides a specific rule which regulates this relationship in general. It implies the priority of the 1982 Convention in relation to all other treaties in the event they are incompatible, but this is tempered by the fact that the 1982 Convention itself can, and does, derogate from this rule. Thus the 1982 Convention contains a simple set of provisions, which seem to apply to a very wide spectrum of different eventualities.

However, according to the experts, CITES shows much more deference to previously concluded agreements by a State party. In article XIV (2) the convention subordinates itself to any other treaty, already concluded or still to be concluded, by a State party to CITES in relation to "trade, taking, possession or transport of specimens". This article further regulates the relationship between CITES and other international treaties already concluded by State parties relating to marine species included in Appendix II [article XIV (4) and (5)].

Alarming, some of the species that have been subjected to discussion between FAO, CITES, RFMO and environmentalist groups are already monitored and regulated by other international organizations. Some of these include: The International Whaling Commission (IWC), the North Atlantic Fisheries Organization (NAFO), the Inter American Tropical Tuna & Billfish Commission (IATTC), the International Convention for the Protection of Atlantic Tuna & Billfish (ICCAT), and many other international or regional fisheries agreements. Most, if not all of them, have scientific regulatory and scientific boards that assess stocks' status.

Therefore, when, in October 1997, the International Union for Conservation of Nature and Natural Resources (IUCN) put four kinds of tuna on its "red list" of endangered species, Japan, the world's largest consumer of tuna, reacted in

disbelief. Although Bluefin Tuna was being (apparently) overfished, most scientists claimed that the problem was not serious enough to justify warnings of imminent extinction.

Some experts say IUCN's figures exaggerated the danger. A species makes the red list on the basis of absolute numbers, irrespective of fertility. The standards by which the Bluefin Tuna is said to be "on the brink of extinction" are the same as those applied to the Panda and the Bengal Tiger. These standards fail to take into account the tens of millions of Bluefin eggs laid in one spawning season. If existing stocks are managed properly, there is no possibility of the Tuna becoming extinct.

There are no reliable figures on precisely how many Tuna inhabit Pacific or Atlantic waters, but it is possible to estimate, however roughly, how well or badly stocks are faring. Modern fishery research laboratories collect data, such as the quantity and average age of the fish caught per boat (with allowance made for boat size) within a defined sea area. Computers are used to generate stock size estimates within a margin of error of around 20 percent.

In the case of Bluefin Tuna, the conclusion was inescapable: the numbers were falling sharply. By 1992 the Atlantic Bluefin population had declined to one-tenth of its 1975 strength. Obviously, these international agreements have the legality, the managers, the scientists and the data. ... The only thing most of them are missing are "teeth" to enforce their own regulations.

The lack of specific international sanctions has led countries to take the law into their own hands legislating unilaterally under the advice of poorly-informed or politically-motivated environmental or animal-rights groups.

Eugene Lapointe, former Secretary General of CITES, expressed clearly his point of view in regard to the Tuna debacle:

“As far as Tuna is concerned, the sad history of protectionist NGO involvement in the CITES process has demonstrated that conservation is impeded under political conditions that promote unscientific, unlawful, management and trade decisions. The emerging new ethic in the tuna trade is a prime example of responsible harvest. It has taken precedence industry-wide over unregulated, unreported, and unsustainable, tuna fishing. Major components of the international tuna industry are proving to the world that they are ethics-oriented, not just market driven, and that with the aid of FAO, tuna conservation can progress outside of the CITES system”.

As we will later show, the Tuna War was far from over.

The UN Fish Stocks Agreement includes a clause similar to the Law of the Sea Convention, which bestows that the provisions of this Agreement, in the event of incompatibility, will take precedence over all other agreements, existing or future, but gives deference to the Law of the Sea Convention.

As pointed out by the FAO's Expert Consultation, various rules exist in contemporary international law regulating the relationship between the different treaties concerned with the conservation and management of commercially-exploited aquatic species. Much will depend on the conflict clauses to be found in these different instruments.

Possible areas of conflict will have to be analyzed and evaluated on their own merits, taking into account all the relevant circumstances, in order to arrive at the highest possible common denominator acceptable to the States Parties to the agreements in question. Since all systems have their

strong and weak points, a closer cooperation could significantly enhance the global level of conservation of commercially-exploited aquatic species.

The negotiating history of CITES in the last 20 years reveals a politically-driven agenda. For example, the working paper which served as negotiating text incorporated the phrase “beyond the territorial sea” --ignoring the reality and legality of Exclusive Economic Zones-- rather than “not under the jurisdiction of any State”. Ultimately an agreement was reached that the marine environment would be included in the field of application of CITES, while at the same time agreements in existence at that time, such as the International Convention for the Regulation of Whaling and the International Convention for the Northwest Atlantic Fisheries, would not be interfered with.

“The [FAO's] Consultation considered that the main issue to be addressed relates to the interpretation of the phrase “not under the jurisdiction of any State”. As a starting point, the Consultation addressed the fundamental problem of the appropriate time frame to be taken into consideration when interpreting this definition. Should this time frame be the situation ex nunc, i.e. the time of application of this provision, or is it rather the situation ex tunc, meaning the time frame surrounding the conclusion of CITES. General international law on this topic adopts the ex tunc approach as a matter of principle as the default regime, from which the Parties can freely derogate if they so wish”.

The sentence “not under the jurisdiction of any State” was nevertheless not defined in the text of CITES. Although this did not affect the implementation of the treaty for many years, the efforts from certain countries and NGOs to involve CITES in commercial fisheries incited the same to consider this issue within the whole problematic of the treatment of the “introduction from the sea”, which is a form of international trade, as this term is

defined by CITES. The issue was also discussed by the FAO's Expert Consultation and then by a CITES working group, which met in December 2004. At CoP14 (The Hague, 2007), the Conference of the Parties agreed to the following definition of "not under the jurisdiction of any State": "The 'marine environment not under the jurisdiction of any State' means those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in the United Nations Convention on the Law of the Sea." However, neither the working group nor the Conference were able to determine which of the port State and the flag State should be considered as the State of introduction, responsible to issue certificates of introduction and to establish non-detriment findings. The working group met again in September 2009 but the divergences of views remained strong and a number of questions is still in need of answers.

Serious concerns have been expressed by governments and international fisheries organizations about CITES listing criteria. Moreover, with so many international fisheries bodies in the world, one might ask: Why would CITES --which traditionally has been involved in stopping trade of non-aquatic species threatened by extinction-- get involved in commercial fisheries? Maybe the answer lies between serious concern about certain fish stocks and environmentalist propaganda.

"The Consultation agreed that the listing of commercially-exploited aquatic species falls within the competence of CITES. Some participants noted that there are differences of opinion within FAO and CITES concerning whether the primary purpose for listing on Appendix II is to prevent a species from becoming endangered or to promote sustainable use thereof. Some participants suggested that may have legal consequences."

Historically, CITES criteria were established to list species that were deemed threatened or potentially threatened with imminent extinction. The criteria to include a species in CITES listings came from fundamental scientific research conducted by Governments or Intergovernmental Organizations. However, when CITES acts on its own accord -- without enough scientific data or international validation-- then we can assume that CITES is acting beyond its own legal limits or responsibilities. If we were to accept that CITES could list any species under the claim "To prevent a species from becoming endangered or to promote sustainable use thereof" it could unilaterally list all living things on the planet at its will.

In 1999 the IWMC World Conservation Trust released the following statement⁵:

"Among the trends identified at the Madagascar meetings is the growing interest among CITES delegates to bring issues that affect commercial fishery issues under CITES' auspices. Some believe this trend will reshape the complexion of CITES governmental delegations and NGOs alike given the important economic role fisheries play among the family of nations.

Evidence of such a trend could be seen among items discussed officially (sharks) and unofficially at the Animals Committee meetings as well in possible proposals for listing sharks, dolphins, giant clams, sawfishes, swordfish, bluefin tuna, sturgeon and Chilean sea bass. This was illustrated by the recommendation that the Animals Committee should continue to monitor shark issues after COP11, even if no shark species would be listed in CITES appendices at that meeting".

The increased significance of marine species within CITES was confirmed at the last meetings of the Parties. Nevertheless, this did not generate significant changes in the composition of delegations, in particular of the numerous small ones often limited to one or two delegates sponsored under the

Secretariat's delegate projects. Most delegations remain therefore composed of officers in charge of terrestrial species or environment oriented, and often without sufficient knowledge of fishery issues and interests.

Plenty of examples abound about CITES questionable criteria. For example, in 1997 the United States National Marine Fisheries Service (NMFS) proposed to include in CITES Appendix I two species of fish (Sawfish and Shark). The general perception among the scientific circles was that NMFS had been coerced by alarmist and disproportioned pressure by environmentalist groups that try to present a distorted vision of the actual situation.

The Latin American Fishing Development Organization (OLDEPESCA) --an inter-governmental regional body-- and the Latin American Fishing Business Association (ALEP) --a regional fisheries NGO-- responded by conducting their own consultations among governments, scientist and industry and they concluded that there was "*no convincing scientific evidence for such action*". In fact, both organizations denounced that the report on shark commerce had been undertaken by a subsidiary of IUCN --Traffic-- which was considered the legal arm of the Worldwide for Fund for Nature (WWF) and it was made without waiting for the conclusions of the ad hoc group created under FAO's sponsorship⁶.

OLDEPESCA and ALEP actions were validated later in 2004 when FAO's Expert Consultation expressed "*the need for improved consultation between CITES and FAO and relevant RFMOs and other relevant organizations. In respect of improving evaluations of CITES proposals to amend Appendices I and II under article XV of CITES, the Consultation emphasized that FAO and relevant RFMOs should respond by providing timely and relevant information and advice*"⁷.

By the same token, many outside observers have asked the question: Why are fisheries managers nervous of CITES involvement in commercially-exploited aquatic species?

The answer lays, in part, in the problems associated with down-listing and de-listing of species. Elephants and Whales are good examples to illustrate the concerns where healthy populations exist but problems persist in downlisting. In future application to commercially-exploited aquatic species, the problem may not be mainly going from Appendix I to Appendix II, but more likely going from Appendix II to de-listing.

This has already been identified as a major administrative burden, but it is also a legal problem where the language of the criteria to down-list or de-list is more restrictive than the language used to list species, due to the application of the "precautionary approach", which is used when not abused by protectionist groups and countries to oppose to any reduction of CITES controls.

IV. PRECAUTIONARY APPROACH

The term "Precautionary Approach" has been expressed by environmentalist groups as a way to bypass scientific methodology and present groundless unsupported assumptions with a technical aura.

For example, Langton & Auster⁸ wrote in a 1999 publication that "*The challenge for habitat researchers is to develop a quantitative predictive capability given a particular management protocol, but until this is accomplished, it is incumbent on managers and scientist alike to apply the precautionary approach to all management decisions by using current ecological theory to guide this process*".



The irony is that a scientific approach is, by definition, cautionary and, within a proper context, fish will always survive better when left to themselves than mankind can ever aspire to achieve through stock management. We should start by placing more emphasis on tracking more precisely spatial and temporal interventions on fish stocks, giving more opportunity to fishermen to provide information about what they see and learn, and giving them more responsibility for managing the fishery.

In arguing for value-based measurable objectives and biological-based constraints to fisheries decision-making, we are putting fisheries management in a problem solving context that provides long-term reference and short-term accountability - in the same way many thriving businesses operate.

The "Precautionary Approach" does not justify listing commercially-exploited species under CITES simply because of the aim "to prevent a species from becoming endangered or to promote sustainable use thereof". These arguments disregard scientific knowledge and methodology as well as fisheries economics and management.

The fisheries industry, from the smallest local fisheries manager all the way up to the largest international fisheries organization, has legal tools at its disposal to stop biological depletion of an aquatic resource. Some of these tools --which include regulating fishing gear, declaring species off-seasons, closing fishing areas, among dozens of regulations-- have proved effective when coupled with enforcement.

In cases where the manager is incapable of such enforcement other means should be sought to deal with the situation. However, CITES is not resourced to take on this enforcement role, any more than the World Health Organization (WHO) is resourced to resolve every import-duty controversy.

Trade regulations under CITES should be seen as the last resource in a long list of options available, and should be limited to specific cases where these regulations would be effective as agreed by all interested parties. This was expected to be the case for example when all sturgeons were listed in Appendix II at CoP10 (Harare, 1997). However, the results did not match expectations.

In late 2003, a sea cucumber species (*Isostichopus fuscus*) was listed on Appendix III by Ecuador. In this case, a commercially-exploited aquatic species was suffering from over-exploitation due to poaching. Appendix III provides more flexibility to Parties compared with Appendix I or II in that it allows for limited application to some subset of the species or derivative products, and a Party can include a species in Appendix III or remove it at its own initiative.

Though most fisheries instruments adopted since more than 20 years --including the UN Fish Stocks Agreement, the FAO Code of Conduct for Responsible Fisheries (the Code of Conduct) and its associated International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)-- include specific provisions for capacity building and other assistance to developing countries, that assistance, however, has not materialized in a way that would promote long-term change in many regions.

As IUU fishing problems in many instances come down to the ability of States to develop and enforce their laws, CITES and FAO need to cooperate to promote capacity building in developing countries. One area of capacity building where CITES could potentially provide assistance is in law development and enforcement and monitoring of trade in listed species. Concerning law enforcement capacity building, CITES as an organization also has strong links with Interpol and the World Customs Organization, which could prove helpful in fisheries law enforcement coordination.

It may be beneficial to create a directorate with a mandate to coordinate international enforcement between FAO, CITES and relevant RFMOs. For the time being, a Memorandum of Understanding only has been signed by CITES and FAO, after difficult negotiations between the two organizations. Pursuant to this MOU, “the signatories will cooperate as appropriate to facilitate capacity building in developing countries and countries with economies in transition on issues relating to commercially-exploited aquatic species listed on the CITES Appendices.” It does not appear that any such initiative has taken place so far.

V. COMMERCIAL EXTINCTION Vs. BIOLOGICAL EXTINCTION

Heavily fished stocks need rebuilding, and this will require sharp reductions in fishing effort over periods that, for longer-lived species, may approach or exceed a decade. If implemented, such ecologically responsible measures will have the side-effect of reducing world landings for a number of years and lead to increases in prices at dockside for the industry in the medium to long term.

As an example, let us revisit the “Dolphin-Tuna Wars” scenario:

By 1993, the international multilateral research that has been conducted in the Eastern Tropical Pacific reported incontrovertible results about the necessity for a Tuna Management Plan that contemplated dolphin rescue procedures. In this respect it is necessary to note the following:

- a) the sizes of tunas caught in association with dolphins corresponded exactly with the size that should be caught in order to guarantee an optimum yield from the fishery in the area year after year;
- b) concentrating fishing effort on alternatives other than tunas associated with dolphins (logs and schoolfish), meant adversely affecting juvenile tuna populations, most of which had not reached sexual maturity;
- c) if fishing effort were directed toward larger fish by using longlines, the yield from the fishery would not be maximized, which would thus lead to a highly significant level of natural mortality, which would in turn go against the fundamental principle of a sustainable yield from the resource year after year;
- d) the majority of the populations of dolphins were stable and growing to the levels at which they may have been prior to the mid-1960s;
- e) the number of incidental deaths of dolphins caused by the fishery of Yellowfin Tuna was insignificant; therefore, if some species of dolphins were not recovering, this was due to factors other than incidental captures, because levels of mortality were below 0.07% of the dolphin population;
- f) research showed that tuna fishing concentrated on logs and coastal schoolfish would have severe consequences for the Yellowfin Tuna stock, because it would affect juvenile populations and the overall yield from the fishery, which would probably immediately fall by more than 30%;
- g) this justified the adoption of catch quotas in order to protect the recruitment of tunas in the short term;
- h) the quantity of associated fauna that was captured with juvenile tunas and which was discarded was proportionally large, reaching --as it did-- some 40% of the catch, including threatened sea turtles and other species.

Dolphins, however, with a population estimated conservatively at over 9.5 million animals in the eastern Pacific, with an annual birth rate of 5% and an estimated incidental mortality of 4,000 in 1993 (0.07% of the population), could not be considered a “threatened” species, much less one in danger of extinction.

In contrast, although there was no evidence that tuna was a species “threatened with extinction”, diplomatic backstage moves were initiated to add Bluefin Tuna to the list of threatened species under CITES, due to overfishing. From this instance of bad management it was inferred that Yellowfin Tuna would follow the same course as Bluefin if the resource was not more carefully administered.

Upon observing that the fishery for Yellowfin Tuna in the eastern Pacific Ocean --which contributes almost 25% of the world production of the species-- was running the risk of being exploited at a level well below the optimum because legal and commercial decisions dictate that small fish was to be captured, in detriment of long-term management, many governments reacted negatively because the only possible alternative to sustain the fishery would had been to reduce the size of the Latin American fleet by 60%. This would have meant 60% less tuna, 60% fewer jobs, and 60% less tuna trade. Since this did not occur, a decade later the Inter American Tropical Tuna Commission (IATTC) was forced to impose --for the first time since the beginning of the fishery-- a three-month off-season for Yellowfin Tuna in the Pacific. At the same time, tuna landing showed a drastic reduction in yield and sizes, a trend that still continues.

Curiously enough, very few “experts” have done much research on the definition of “commercial extinction”. In most cases a stock will reach “commercial extinction” way before approaching biological exhaustion.

Commercial extinction in fisheries occurs when a particular species has been overfished or depleted to the point of becoming unmanageable due to economic reasons. Or simply put, it is not economically feasible to continue fishing. This economic concept sometimes eludes scientists and environmentalists. However, as we will later see, there are ways around it.

Let us consider a Cod-fishing fleet operating in the North Atlantic. If the fishing effort is maintained above the stock's maximum sustainable yield and the resource is being overfished, it eventually will become depleted. If a fishing-trip used to take, for example, 15 days and produce 100 tons of cod, that catch would cover all the boat's expenses (crew, insurance, diesel-gas, parts, maintenance, etc) and still leave a profit for the boat's owners. However, if the cod becomes depleted and gets harder to find, a single trip could stretch to 30 days or longer and produce a lower catch. The operation is now less attractive from an economic point of view. Boat-owners will eventually reach the point where they are be losing money and will pull out of that fishery, thus causing the “commercial extinction” of the stock.

Some could argue that, as the fish landings become scarce, the price of the fish, based on the laws of supply and demand, will go higher and therefore sustain the economic feasibility of the fishery. This may be true in the short term but as the fish's scarcity grows, its price will no longer be attractive to the consumer, who can switch to other, less costly, species. Eventually, as the fishing effort disappears, the stock will repopulate itself and return to healthier levels.

Now picture this in a larger scale, with factories and all the fishery's support services around it, and that is what happened in the North Atlantic and other fishing areas around the world.

However, what would happen if, despite the economic situation of a fleet, its government grants it enough subsidies to compensate not only its losses, but to make its operations profitable? The answer is obvious: the stock will continue to be harvested beyond commercial extinction, pushing it towards biological extermination. This issue is subject to heated debates at the World Trade Organization.

VI. THE WTO AND FISHERIES SUBSIDIES

The need for action to address subsidies in the fisheries sector which adversely affect trade and sustainable development has been recognized as an important objective by a range of developed and developing countries.

The WTO's Committee on Trade and Environment met in February 2000 to discuss subsidies in the fisheries sector. These are some of their findings:

Fish and fish products are the most international of all foodstuffs. Annually, more than 22 million tonnes, or roughly 40% of global fisheries production, is traded, with a value of about USD50 billion (figures include intra-EU trade). No less than 195 countries export part of their production and some 180 countries import fishery products. The level of trade has been growing at an accelerating pace in recent years, reflecting increased production, particularly of aquaculture and increased demand.

Fishery exports by value are almost entirely (95%) composed of food products, although in terms of volume, fishmeal and oil account for a much greater share. Thailand was the leading exporter between 1993 and 1996, with exports reaching USD3.2 billion in 1996 (around 6% of total exports), but was overtaken by Norway in 1997 with exports of USD3.4 billion. The US is also a significant exporter. Overall, developing countries account for approximately half the value of total exports, and would be considerably more (roughly 60%) if intra-EU trade was excluded.

For some economies, the export of fish products is particularly vital to the national economy. In particular, for Iceland, the Faeroe Islands, Greenland, Maldives and Seychelles, fish products represent more than 75% of total merchandise exports. In a further 20 countries, including Chile, Ecuador, Kiribati, Madagascar, Mauritania, Morocco, Mozambique, Namibia, Peru and Senegal, fisheries exports account for more than 10% of total merchandise exports.

While no one country dominates the export of fish products, three economies dominate the import scene. Including the value of intra-EU trade in the total statistics, the European Community is the largest importer of fish products at USD19.4 billion, followed by Japan, with USD15.5 billion worth of imports in 1997 (or 30% of total imports). These two economies, along with the United States, which absorbs 10% of world fish imports, import 75% of internationally traded fish products (approximately 70% if we make an estimation for intra-EU trade).

Against this background, the issue of reforms in the fish subsidies area has recently attracted much interest. Papers were submitted to CTE meetings during the course of last year prompting much discussion amongst Members⁹. In the preparations for the 1999 Ministerial Conference a number of Members expressed again their concern at the over-exploitation of fisheries resources caused by subsidies granted to the fishing sector¹⁰. At the 1 October informal WTO General Council session, Iceland submitted a proposal that Ministers agree to establish a working and negotiating group to identify and examine certain subsidies in the fishing area, with a view to developing and elaborating WTO commitments and disciplines for the reduction and elimination of such subsidies. A proposal that Ministers agree to establish such a programme of work was included in the draft Seattle Ministerial Declaration text and enjoyed wide support.



In spite of this declaration, the WTO has been unable to reach a consensus on the subject of fisheries subsidies. This has provoked reactions from many organizations who, taking into consideration the needs of developing countries and small island nations, demanded that WTO members should reaffirm their commitment to rules on fishing subsidies. The situation has not fundamentally changed in 2009.

Those demands included:

- Effectively prohibit the most harmful types of fishing subsidies, while permitting environmentally positive fishing subsidies and environmentally benign fishing subsidies that support economic and social development in developing countries.
- Ensure that any remaining subsidies do not contribute to over-fishing.
- Define fishing subsidies broadly to include all governmental financial contributions to or on behalf of fishing interests, for example payments for access to fisheries of other nations.
- Any WTO rules on fishing subsidies must include formal procedures for the participation of international organizations competent in fisheries management and marine protection

VII. POVERTY AND CIVIL SOCIETY

In terms of developing countries, a FAO study has observed *"that the number of subsidies in developing countries has been greatly reduced in recent years. The remaining subsidies are for off-shore fishing, artisanal fisheries and fisheries cooperatives as well as fishing operations in remote and underdeveloped areas. They were mainly available in the form of capital subsidies and reduced duty on fuel, and even these were in the process of being further reduced."*¹¹

In a brief summary of work done for the FAO COFI Sub-Committee on Fish Trade in 1998, the FAO Fisheries Department concluded that the evidence indicated *"very low subsidies in the developing world: not more than USD1,200 million/year, mainly in Asia. Subsidies in fisheries are practically unknown in Latin America and Africa."*¹² A more recent FAO technical paper concluded that *"in most developing countries in Asia, West Africa and Latin America, subsidies are no longer available."*¹³

Developing countries rely heavily on their growing production of fish and fishery products for export revenues and income generation but import tariffs on processed products are also hindering the industry's development. Non-tariff barriers, such as technical standards and sanitary issues of food safety, are a further obstacle to expanding fish exports from developing countries. There is still a need for internationally agreed guidelines on eco-labelling of fishery products and acceptance that developing countries have special requirements in adopting such a system, but that system must be put in place and enforced by governments, not by environmentalist groups (that charge an "endorsement fee") or private corporations. Otherwise each group will push its own standards and disrupt commerce and trade of fish products.

The World Bank, in this regard, recently concluded that *"in order to support a more balanced and inclusive development, the international community will need to find ways to remain engaged in the struggle against poverty in countries with the weakest of institutions and policies, where partnerships can be difficult to establish, and people in need are not heard"*.

VIII. ADDRESSING PROBLEMS OF METHOD

These issues are something that could have been addressed more than two decades ago.

It is crucial that all nations set an agenda to address issues like the sustainability of fisheries, the protection of endangered species, the socio-economic needs of developing countries and the enforcement of local, regional or international regulations, but while all these issues are being tackled separately in different fora, there is a need for greater involvement from the United Nations (UN) in order to expedite coordinated solutions.

The initial motivation for setting an agenda for a new direction is found in the FAO *Code of Conduct for Responsible Fisheries*. In its article 11.2.15, it requests States and other organizations to *"ensure that their policies and practices related to the promotion of international fish trade and export promotion do not result in environmental degradation or adversely impact the nutritional rights and needs of people for whom fish is critical to their health and well-being and for whom other comparable sources of food are not readily available or affordable."*

Nations have to stop pointing fingers and begin working constructively together. There are serious short and long-term problems that need to be faced directly and immediately, including high costs, poor product marketing, and sheer overcapacity --too many boats chasing depleted fish stocks.

Because this is not currently taking place and because the FAO has no real power to enforce the Code of Conduct or any similar rules, CITES is seen by a number of States and by many animal-rights and other protectionist NGOs as a vehicle to regulate and limit fishing without proper scientific justification. However, as noted above, trade regulations under CITES must be the last means of recourse in the long list of options available, and should be limited to specific cases where these regulations would be effective, as agreed by all interested parties. In addition to the proper use of the listing criteria, the issues associated with the implementation and enforcement of CITES provisions should be better taken into consideration, in particular by the Panel of Experts set up by FAO to assess and advise on the proposed amendments to CITES Appendices with respect to aquatic species. Indeed, although this does not appear to have been clearly understood by the fisheries community, the implementation and enforcement of CITES provisions would be extremely complicated in many cases, due not only to the look-alike and other issues noted by FAO but also to the ways fishery operations are conducted for commercially-exploited species. The virtual examples below, which include also fishing operations conducted in waters 'not under the jurisdiction of any State' and therefore, as seen above, subject to the still unresolved problematic of 'introductions from the sea', illustrate some of the difficulties that would have to be faced, in case of listing of commercially-exploited marine species in CITES Appendix II, to follow the provisions regarding the issuance of trade documentation.

Example 1

Country A exports specimens of a species listed in Appendix II, taken in waters under its jurisdiction, to country B. Country A shall issue an export permit. The permit shall be presented to country B before import.

If country B re-exports the same specimens, or some of them, or any processed specimens thereof, it shall issue a re-export certificate for each shipment. The certificate shall be presented to the country of import before import.

Difficulties: None other than increased bureaucracy. This is equivalent to any CITES trade in specimens of terrestrial species.

Example 2

Country A exports specimens of a species listed in Appendix II, taken in waters under its jurisdiction by a vessel from another country to which it has granted fishing rights, to countries B, C and D. Country A must issue an export permit for each country of import. The relevant permit must be presented to country B, C and D before import.

Difficulties: 1) Country A must know who is the importer in each country of import; and 2) it must also know the quantity of specimens for each country of import.

For re-export, see example 1.

Example 3

A vessel from country C takes specimens of a species listed in Appendix II in waters under the jurisdictions of countries A and B, from which it has been granted fishing rights, and transport them to countries C, D and E. Countries A and B must each issue an export permit for each country of import. The relevant permit must be presented to country C, D and E before import.

Difficulties: 1) Countries A and B must know who is the importer in each country of import; and 2) they must know the quantity of specimens taken in their own waters and exported to each country of import. This would be very difficult when the specimens taken simultaneously in both countries are mixed, as this would likely be the case, in particular if the harvested stock is shared between both countries.

For re-export, see example 1.

Difficulty: How would the re-exporting country know the origin of each re-exported specimen?

Example 4

Vessels from one or more countries take specimens of two or more species, one of which at least is listed in Appendix II, in the waters under the jurisdiction of two or more countries and bring them to a factory vessel of country A, on which fillets are taken and the scraps mixed to make fishmeal. Fillets are sent to two or more countries, including country A, and the fishmeal to one or more countries.

Each country in the waters of which the specimens have been taken should issue an export permit, covering one or more CITES species, for each country of import.

Difficulties : It is unlikely that the countries of export would know how the specimens were processed and where they would be sent and therefore to whom the export permits should be addressed and for which specimens. In such circumstances, and if this is considered as acceptable under the CITES provisions, the countries of export might consider that the country of import is the flag State of the factory vessel and the importer the owner of the vessel. Export permits would therefore have to be issued accordingly. If so, this flag country, unless all specimens are landed on its territory, will have to issue a re-export certificate for each shipment of fillets or fishmeal to other countries. For this example, the following has to be noted: 1) the name and address, including the country, of the owner of the factory vessel must be known; 2) for each re-exported shipment, the relevant Management Authority of the flag country of the factory vessel must know the quantity and type of specimens concerned and should know their origin, including the number and date of issue of the export permits; and 3) it shall be satisfied that all the specimens were 'imported' (on the factory vessel) in accordance with CITES.

Example 5

A vessel takes specimens in the water not under the jurisdiction of any State and lands them in country A. A certificate of introduction from the sea must be issued, unless the State of introduction is entitled to the exemption provided by CITES article XIV, paragraph 4, an infrequent possibility which is not taken into account below.

Difficulties : Which is the State of introduction? As indicated, this has not been agreed upon within CITES and discussions are going on within a working group of the CITES Standing Committee, which should submit its recommendations to the Parties for consideration at CoP15. It has to be noted however that the introduction from the sea is the only trade, as this term is defined by CITES, that involves one country only. Therefore, each CITES Party may decide which country is the country of introduction and this might generate conflicts in case of disagreement, and so create additional difficulties.

In any case, the certificate of introduction from the sea must be issued by the country of introduction, which may be either the port State or the flag State, although they may be the same. If it is agreed by both that the certificate has to be issued by the flag State, then this State must issue an export permit to be presented before import in the port State.

If the port State ships some or all of the specimens, processed or unprocessed, to another State, it shall issue either an *export permit*, if it was the State of introduction, or a re-export certificate if the State of introduction was the flag State.

Example 6

Vessels from one or more countries take specimens of two or more species, one of which at least is listed in Appendix II, in the waters under the jurisdiction of two or more countries, as well as in waters not under the jurisdiction of any State. They bring them to a factory vessel of country A, on which fillets are taken and the scraps mixed to make fishmeal. Fillets are sent to two or more countries, including country A, and the fishmeal to one or more other countries.

Difficulties : Regarding the specimens taken in the waters of specific countries, the situation is similar to that presented in example 4. Regarding the specimens taken in waters not under the jurisdiction of any State, the situation is as that presented in example 5.

How should shipments of mixed specimens from various origins and processed in various ways be dealt with in terms of CITES certification, including establishment of non-detriment findings? This question is left open in this document but many possible options could be considered.

In addition, it must be noted that these examples are based only on the CITES provisions, without taking into account the numerous stricter domestic measures adopted by many Parties, in particular a number of the main fish importing States. Furthermore, a number of problems may be generated with respect to aquaculture and other operations such as farming Bluefin Tuna in the Mediterranean Sea.

Finally, if commercially-exploited marine species are listed in Appendix II, or in Appendix I, opposition from a minority of Parties is likely to lead some to enter reservations. So, they would be considered as a non-Party concerning the trade in specimens of these species and the listing would lose most of its intended effect.

IX. CONCLUSION

It is obvious that fisheries, on a global basis, is faced with serious problems that need to be solved if marine resources are to be kept at levels sufficient to ensure their conservation and sustainable use for the sake of human food supply for this and future generations. Efforts must be made to set up systems to ensure the proper management of stocks and the implementation and enforcement of the necessary regulations, including possibly catch and trade certification and labelling. These efforts should be made first by the fisheries community if it wants to avoid interference by other forces, such as CITES. In certain circumstances, it may be found that CITES could be useful but this should be determined by all those concerned and not left simply to a decision by CITES Parties. However, keeping in mind that FAO, RFMOs, CITES and other conventions are composed in whole or in part of the same States, it is first at the national level that coordination should be realized to ensure that each of these States speaks with the same voice in the various relevant international institutions to which it belongs. In this way, it can protect its own interests and contribute to a better conservation of the marine resources of the world.

Notes

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- 2 Jaques Berney is an Engineer in Agronomy who obtained his diploma in 1957 from the Ecole polytechnique fédérale of Zurich (Switzerland). After eleven years in Benin (West Africa), as leader of a Swiss technical assistance project in the field of agriculture, he became Executive Secretary and then Deputy Secretary General of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). From early 1996 to September 1997 he worked as an adviser or a consultant for the CITES Secretariat. He started his function with IWMC in October 1997. Jaques Berney is also the Founder and President of IWMC-CH, the Swiss branch of IWMC World Conservation Trust.
- 3 Eugène Lapointe is the President of IWMC World Conservation Trust and Former Secretary-General of CITES (1982-1990). Mr. Lapointe holds a baccalaureate in Arts from the Laval University and a law degree from University of Ottawa, in Canada. He served as Secretary General of the Convention on International trade in Endangered Species of Wild Fauna and Flora (CITES) for nine years, from early 1982 to end of 1990. Before joining CITES, Eugène Lapointe worked 14 years with the Canadian Government in Ottawa. During eight of these years, he directed a Legislative Unit dealing with international agreements such as the International Coffee Agreement, the International Sugar Agreement, the International Cocoa Agreement, the CITES Convention and the United Nations Conference on the Law of the Sea. Mr. Lapointe sought to continue his work in global conservation and founded the IWMC World Conservation Trust (IWMC) in 1994. In 2003, he wrote a book entitled "Embracing the Earth's Wild Resources", now published in Chinese, English, French, Japanese and Spanish. He lectures in several fora devoted to marine and other conservation issues, on every continent of the world.
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- 5 World Conservation Trust, 1999 Newsletter # 7.
- 6 Latin American Fishing Business Association, Press Release, June 1997. México City.
- 7 Report of the Expert Consultation on Legal Issues Related to CITES and Commercially-Exploited Aquatic Species, Rome, 22-25 June 2004. FAO Fisheries Report No. 746 FIRM/R746 (En)
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- 11 *The State of the World Fisheries and Aquaculture*, 1998, FAO, Rome, page 50.
- 12 *Issues of International Trade, Environment and Sustainable Development: Fisheries Management, Subsidies and International Fish Trade*, Document No. COFI:FT/VI/98/4, Sub-Committee on Fish Trade, FAO, 1998, paragraph 8.
- 13 *Economic Viability of Marine Capture Fisheries*, FAO Technical Paper 377, FAO, page 23.