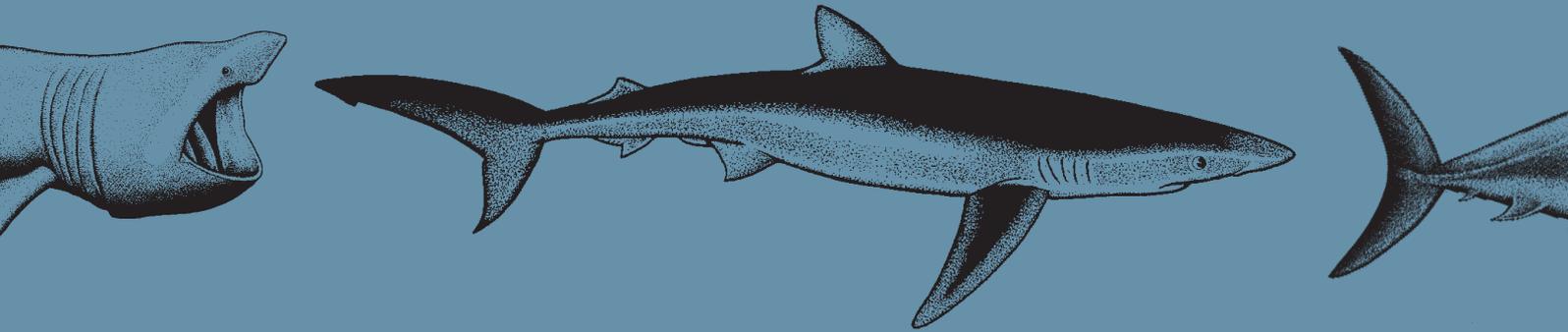


CITES “INTRODUCTION FROM THE SEA”



A PRACTICAL WAY FORWARD

**PROCEEDINGS OF A JOINT
TRAFFIC/ANCORS WORKSHOP**

*F. Meere, G. Geen, Q. Hanich, M. Lack,
G. Sant and M. Tsamenyi*



TRAFFIC
the wildlife trade monitoring network

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CITES INTRODUCTION FROM THE SEA— A PRACTICAL WAY FORWARD

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BACKGROUND

TRAFFIC, the wildlife trade monitoring network, works to ensure that trade in wild plants and animals is not a threat to the conservation of nature. TRAFFIC is a joint programme of WWF and IUCN–The World Conservation Union.

The Australian National Centre for Ocean Resources and Security (ANCORS) is a centre of excellence at the University of Wollongong in oceans governance and maritime security. ANCORS provides multi-disciplinary research, education and high level advice on national and international oceans governance and law, maritime security and co-operation and ocean resource management.

Jointly on 31 August 2007, TRAFFIC and ANCORS convened a small group of experts to examine operational issues relating to the application of who should have responsibility for issuing Introduction from the Sea (IFS) documentation under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for Appendix-II listed species and when this should occur. The workshop considered the practicalities of whether documentation should be issued by the flag or port State (or some combination) and ran through a series of real world examples to test the veracity of its findings.

The workshop participants were Mr Gerry Geen (commercial fisher and consultant), Mr Quentin Hanich (ANCORS), Ms Mary Lack (independent consultant), Mr Frank Meere (facilitator/independent consultant), Mr Glenn Sant (TRAFFIC Global Marine Programme Leader) and Professor Martin Tsamenyi (Director ANCORS).

INTRODUCTION

CITES provides for species listed in Appendix II to be traded commercially subject to certain requirements

being met and documentation accompanying the traded goods. The processes for monitoring and tracking such trade are well established for terrestrial fauna and flora and for marine species clearly within the control of a member country.

Under the text of the Convention ‘trade’ is defined to include “export, re-export, import and introduction from the sea”. “Introduction from the sea” is defined as “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State”. Until recently there has been ambiguity concerning the interpretation of both “transportation into a State” and “the marine environment not under the jurisdiction of any State”. This ambiguity has increased the complexity associated with the potential application of CITES to marine species caught in these areas.

The 14th meeting of the Conference of the Parties to CITES (CoP14) agreed that: “the marine environment not under the jurisdiction of any State” meant 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 (CITES *Resolution Conf. 14.6*).

This Resolution clarified one aspect of the IFS definition, however there remains uncertainty as to how “transportation into a State” should be interpreted and how the CITES processes of making a non detriment finding (NDF) and issuing an IFS certificate should be implemented. The workshop focused on the latter issue but recognized that this was influenced by how “transportation into a State” is defined.

CITES AND INTRODUCTION FROM THE SEA

Article III, paragraph 5, and Article IV, paragraphs 6 and 7, of CITES, provide a framework to regulate the

introduction from the sea of specimens of species included in Appendices I and II, respectively.

Article III, paragraph 5, is not included here as it deals specifically with introduction from the sea of specimens of species included in Appendix I which was not addressed by the Workshop.

Article IV—Regulation of Trade in Specimens of Species Included in Appendix II—paragraphs 6 and 7 state:

“6. 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.

7. 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.”

WORKSHOP PROCESS AND FINDINGS

In order to fully consider how IFS might best be interpreted under CITES we reviewed how trade in Appendix II listed species occurs. This is governed by Article IV of CITES. Key paragraphs include 2, 4 and 5:

“2. The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

- (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
- (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and
- (c) a Management Authority of the State of export is satisfied that any living specimen will be so

prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.”

“4. The import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.”

“5. The re-export of any specimen of a species included in Appendix II shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall only be granted when the following conditions have been met:

- (a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention; and
- (b) a Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.”

There are likely to be some differences in the processes used for trade in terrestrial species where the origin and time of capture will generally be known and those which might be used for marine species. Likewise, there may well need to be different approaches for target¹, by-product² and by-catch³ species specimens.

We first examined the legal and practical issues associated with interpretation of “transportation into a State”. The key issue in this regard is at what point is the specimen introduced from the sea. The participants agreed that for the purposes of CITES specimens can be considered as having been “transported into a State” when the species is either landed on the vessel as long as the vessel is flagged (and not Stateless) and it is therefore under the control of a State, or landed in a port (i.e., has cleared Customs). In coming to this conclusion we consider that for the purposes of commercial fishing, fish are taken when they are captured by the fishing gear and hence it can be argued that they are transported into a State when they land on the deck of the fishing vessel.

In further considering how IFS might work in practice we also discussed how to interpret “prior grant”. While we generally concluded that prior grant of an IFS certificate inferred that it would have to occur prior to a vessel taking a specimen, we acknowledged that the Convention is not explicit in this regard for either

¹Target species—the most highly sought component of the catch taken by fishers and usually the one which they are specifically authorized to fish for.

²By-product—any part of the catch which is kept or sold by the fisher but which is not the target species.

³By-catch—all living and non-living material which is caught while fishing (and not target or by-product) and includes discards and that part of the catch which doesn't reach the deck but is affected by interactions with the fishing gear.

terrestrial or marine species. The use of the term “will be so handled” (future tense) in paragraph 6 (b) of Article IV (see above) appears to support such a conclusion. We also discussed the need for flexibility in developing approaches for the issue of IFS certificates noting that this might be different for target, by-product and by-catch species and that providing such flexibility would not necessarily imply an IFS certificate or export permit would be issued in all cases.

Following these initial general conclusions we then sought to examine how a series of options would perform in seeking to maximise the effectiveness of a CITES listing and minimise the amount of product which had not complied with CITES arrangements and been traded into a market State.

In considering these options we examined the need for an IFS certificate and associated NDF to be issued prior to the product being taken and for the issuing State to also be able to certify the legality of the product should it be subsequently exported or re-exported.

In respect to this latter point, it was noted that a product which is caught in the marine environment not under the jurisdiction of any State and landed and not exported or re-exported does not require certification that the product was taken legally. It is also worth noting that certification that the product was taken legally (Article IV 2 (b)) would be assessed against the appropriate domestic legislation of the State issuing the IFS certificate and would only be as robust as that legislation and subsequent assessment⁴.

We also recognized that where a flag State has ratified the United Nations 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, (the UN Fish Stocks Agreement or UNFSA) they are required to issue permits to allow their vessels to fish on the high seas and having such arrangements in place would facilitate necessary IFS administrative arrangements.

To test our thinking we used the hypothetical example of a by-catch/by-product species being listed in Appendix II—Blue Shark in a tuna fishery.

⁴This includes the extent to which the domestic legislation adequately reflects commitments made in ratifying international conventions. Where this has not occurred there may be little or no domestic legislation upon which to base such an assessment. These circumstances would apply equally to both port and flag States.

⁵Flag State control requires that the State issuing the flag has primary control over the operations and laws with which the vessel must comply. While there are some arrangements in place which provide for the limited devolution of such powers (boarding and inspection under

Port State as the State issuing the IFS certificate

In analysing the possible operation of IFS arrangements by port States, where “Introduction” is interpreted as occurring when the product is landed in the port (ie crosses a Customs barrier), we looked at the following different scenarios.

1. Landing where the flag and port State are the same;
2. Landing by a vessel flagged to another State;
3. Transshipment in port where the flag and port State are the same (product does not enter the country—does not cross a Customs barrier);
4. Transshipment in port by a vessel flagged to another State (product does not enter the country—does not cross a Customs barrier).

Based on our assumption that an IFS certificate and NDF should be made prior to the take of the specimen our conclusions in relation to the above port State options were as follows:

1. Technically a port State (who is also the flag State) could issue an IFS certificate with a NDF to one of its vessels. If the product is to be exported the port State would also be required to determine that it had been taken legally – again this should be possible if fishing under a high seas permit, but would be more difficult if no permit has been issued.
2. Where a port State is required to issue an IFS and NDF for a vessel flagged to another State, we came to the conclusion that it would be very difficult if not impossible for this to occur. Based on our assumption that an IFS certificate should be issued prior to the take of the specimen, this would require the port State to be fully aware of the fishing operations of this and any other vessel which may seek to use its ports. Even if there were flexibility regarding the need for “prior grant of a certificate”, and an IFS certificate could be issued after the vessel has taken the specimen, such an approach would appear to be inconsistent with international law (a port State issuing a certificate or permit to flag State vessels⁵). A further potential issue for a port State would arise should penalties be subsequently imposed due to irregularities in CITES processes. This approach also appears inconsistent with the intent and operations of CITES⁶. A further compli-

the UNFSA, some elements of catch documentation schemes) they still require that the flag State maintain primary control of the vessel and take responsibility for its actions.

⁶The Convention wording and established processes for trade in Appendix II listed species appears to seek to set up and monitor arrangements ex ante rather than ex post which given the likelihood of some form of quantifiable trade limit is intuitively sensible. Arrangements which allow ex post approval and reporting would be likely to undermine the integrity of such a system.

cation would occur if the product is exported or re-exported as the port State would need to determine if the product was taken legally against its laws and not the laws of the flag State, something we believe would be difficult if not impossible.

3. Transshipment of product in port where the product & does not cross a Customs barrier (i.e remains in a
4. bond area) poses a further series of problems. As the product is not landed in the port, Introduction does not occur where the product is transhipped. In this scenario Introduction may not occur for some time and the product may be shipped through a number of different ports before Introduction occurs. The product may also be mixed with other similar product. Knowing who caught what where, whether a NDF can be made, and whether the product was taken legally will be difficult if not impossible for the port State to determine.

Overall, we concluded that while a port State could issue an IFS certificate and associated NDF in limited cases, it would be administratively complex and may raise questions about consistency with international law.

We concluded that having a port State undertake these functions may be more administratively cumbersome than the flag State. It was noted that efforts to secure certificates upon entering a port State could in many cases be extremely time consuming and complex and the process would be much easier through the flag State. In addition it was noted that the majority of vessels fishing that would be subject to the provisions of IFS have sophisticated communications systems which would enable the acquisition of official documentation while at sea from flag or port States.

Flag State as the State issuing the IFS certificate

We examined the possible options and outcomes involved in a flag State being responsible for issuing an IFS certificate and associated NDF where the product is considered to be Introduced when it is landed on the catching vessel. We looked at four possible scenarios, in a number of which the flag State would be required to make a determination that the product was taken legally.

1. Flag State vessel landing product in the flag State;
2. Flag State vessel landing product in a port State other than the flag State – this would require an export permit from the flag State;
3. Transshipment on the high seas to a vessel of the same flag;
4. Transshipment on the high seas to a vessel of a different flag – this would require an export permit from the flag State.

Our conclusions in respect of the above scenarios are as follows:

1. The flag State would issue an IFS certificate and & associated NDF prior to the product being taken in
3. accordance with CITES requirements. If the flag State has ratified the UNFSA this could be done in association with the issue to the vessel of a permit to fish on the high seas (a UNFSA requirement);
2. The flag State would issue an IFS certificate and & associated NDF prior to the product being taken in
4. accordance with CITES requirements. The flag State would also need to issue an export permit (prior to arriving in port or being transhipped) and be satisfied that the product was taken legally;

In these cases the basic rule would apply that an export permit would not be required until the product was to be moved to a vessel or port of a different flag from the flag State of the vessel that caught the product.

We concluded that in all cases where “Introduction” is considered to occur when the product is taken by the vessel and the responsibility lies with the flag State to issue an IFS certificate and associated NDF the administrative processes would be less complex than where “Introduction” is considered to occur when the product is landed in port. We acknowledged that under this approach the flag State of the catching vessel would be required to issue an export permit and therefore make a legal finding, prior to the product being landed in a port other than its own. It was considered that, given the modern communications facilities on these vessels this would not pose a significant administrative burden.

OVERALL CONCLUSIONS

The purpose of the workshop was to look at what constitutes “transportation into a State” and hence to determine where “Introduction” occurs and then to look at who should issue an IFS certificate and make a NDF and how and when this should be done. The overall objective is to start an informed dialogue on this matter so as to ensure arrangements are developed and implemented as quickly as possible. We acknowledge that whatever the finally agreed interpretation of “transportation into a State”, more thought will be needed as to how administrative processes will operate in support of this outcome.

The workshop participants were conscious that the initial thinking on these questions by some outside of this workshop seemed to favour “Introduction” occurring when the product first entered a port (crossed a Customs barrier) and hence the port State being responsible for issuing the IFS certificate and associated NDF. We understood this thinking to be in part based on the suggestion that flag States may not be as reliable or trustworthy as port States. This latter suggestion was not exclusively supported by workshop participants who agreed this was as much a shortcoming of port States as of flag States.

The workshop concluded that for the purposes of developing administrative arrangements which ensure that the least possible amount of product is able to circumvent CITES arrangements, it would be preferably to consider “Introduction” to have occurred when product is landed on a vessel and that the flag State should be the responsible entity for issuing IFS certificates (and NDF) as well as subsequent export or re-export permits (and determining that the product was taken legally) until the product is landed or transhipped to a State of a different flag to that of the vessel that first caught the product.

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Workshop participants—from left: F. Meere, G. Geen, M. Lack, M. Tsamenyi, G. Sant and, in front, Q. Hanich

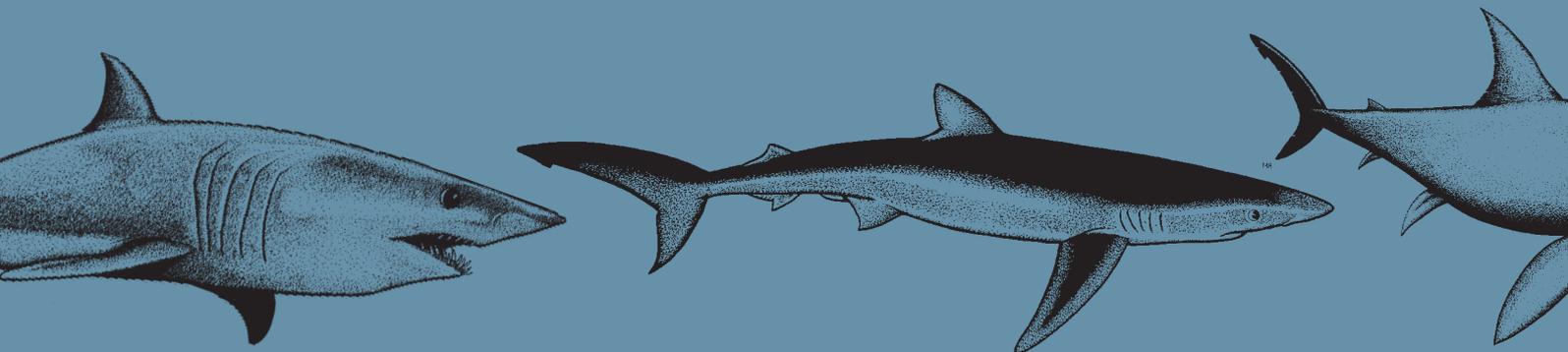
SUMMARY TABLES

Taken by	Tranship to vessel of:	Land in port of:	IFS certificate issued by:	Export certificate issued by (if relevant)	Re-export certificate issued by (if relevant)
Flag State A		State A	port State A (flag State A in this case)	port State	Subsequent exporting country
Flag State A		State B	port State B	port State	Subsequent exporting country
Flag State A	Flag State A	State A	port State A (flag State A in this case)	port State	Subsequent exporting country
Flag State A	Flag State A	State B	port State B	port State	Subsequent exporting country
Flag State A	Flag State B	State A	port State A (flag State A in this case)	port State	Subsequent exporting country
Flag State A	Flag State B	State B	port State B (flag State B in this case)	port State	Subsequent exporting country
Flag State A	Flag State B	State C	port State C	port State	Subsequent exporting country

Table 1. Port State responsible for issuing IFS certificate assuming introduction from the sea occurs when the specimen crosses the Customs barrier in that port.

Taken by	Tranship to vessel of:	Land in port of:	IFS certificate issued by:	Export certificate issued by (if relevant)	Re-export certificate issued by (if relevant)
Flag State A		State A	flag State A	port State A (flag State A in this case)	Subsequent exporting country
Flag State A		State B	flag State A	flag State A	State B
Flag State A	Flag State A	State A	flag State A	port State A (flag State A in this case)	Subsequent exporting country
Flag State A	Flag State A	State B	flag State A	flag State A	State B
Flag State A	Flag State B	State A	flag State A	flag State A	State B
Flag State A	Flag State B	State B	flag State A	flag State A	State B
Flag State A	Flag State B	State C	flag State A	flag State A	State B

Table 2. Flag State responsible for issuing IFS certificate assuming introduction from the sea occurs when the specimen is landed on the vessel.



COVER ILLUSTRATIONS BY BRUCE MAHALSKI FOR TRAFFIC

TRAFFIC, the wildlife trade monitoring network, works to ensure that trade in wild plants and animals is not a threat to the conservation of nature. It has offices covering most parts of the world and works in close co-operation with the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

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