

# CITES and the BBNJ Treaty: Some Reflections

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**Matter commented on:** Interaction between CITES and BBNJ Treaty

## 1. Introduction

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) nineteenth Conference of Parties (CoP19) was held in Panama between 10-24 November 2022. Under agenda item '[introduction from the sea](#),' CoP19 directed the CITES secretariat to monitor the then-ongoing discussions on the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). CoP19's decision to direct its secretariat to monitor the discussions at the ongoing BBNJ negotiations was the reiteration of its earlier [decision 17.181](#) taken at CoP17 at Johannesburg in 2016. Considering the interest CITES member States had shown toward the then-ongoing BBNJ negotiations, this blog post seeks to explore how the two regimes relate to each other, and if they overlap. As shown below, the two regimes do overlap, which might lead to a potential problem. This blog post begins by providing a brief overview of the CITES and the newly finalized BBNJ Treaty underscoring their scope of application. Section 3 examines the relevant provisions of the two instruments closely to highlight the overlap mentioned above. Section 4 delves into the regime interaction provision of both regimes to determine how this overlap may be resolved, followed by a discussion of the potential problem which may be caused due to the overlap, in section 5. Finally, section 6 concludes by asserting that cooperation between the two regimes may be the possible way out.

## 2. CITES and BBNJ Treaty: A brief snapshot

CITES deals with trade in endangered species of fauna and flora. The regime categorizes various species of fauna and flora into three appendices, as provided under Article II of CITES. Appendix I includes species that are threatened with extinction; therefore, trade in such species is permitted only in exceptional circumstances. Appendix II includes species that are not necessarily threatened with extinction, however, trade is controlled to avoid utilization incompatible with their survival. Appendix III includes species that are protected in at least one country, and that country has requested other CITES members to assist in controlling its trade. The most important aspect of the CITES regime is that it is a dynamic regime, species are added, removed, or transferred between appendices at each meeting of the CoP based on proposals made by the member states. For instance, COP-19 adopted [46 of the 52 proposals](#), which brought nearly 100 new species of sharks and rays, and 50 new species of turtles and tortoises within the ambit of CITES. The CITES regime regulates four types of trade: import, export, re-export, and introduction from the sea (IFS).

On the other hand, the general objective of the BBNJ Treaty ([agreed text of the BBNJ Treaty dated 04/03/2023](#)) "is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through

effective implementation of the relevant provisions of the [UNCLOS] and further international cooperation and coordination” (Article 2). The BBNJ Treaty regulates the use of marine biological diversity under four substantive elements: marine genetic resources, area-based management tools, environmental impact assessments, and capacity-building and transfer of technology. The first element, marine genetic resources, including the question of the sharing of benefits, focuses on the fair and equitable sharing of benefits arising from marine genetic resources, including capacity building, generation of knowledge, and development and transfer of marine technologies. The second element, the area-based management tools aim at the conservation and sustainable use of areas requiring protection. The third element, environmental impact assessments, aims to establish a robust framework for conducting and reporting assessments by parties. The last element, capacity-building, and transfer of technology, as the name suggests focuses on the capacity-building and transfers of technology aspects of the regime.

From the point of view of the BBNJ Treaty and CITES, the trade type of introduction from the sea is the most pertinent, as both operate in the area beyond national jurisdiction (ABNJ).

### **3. IFS in CITES and MGR in BBNJ – Overlap**

Two CITES definitions are important, to begin with. [Article I\(b\)](#) defines specimen as “(i) any animal or plant, whether alive or dead; (ii) in case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof...and (iii) in case of a plant: for ...Appendix I, any readily recognizable part or derivative...; and for species included in Appendix II and III, any readily recognizable part or derivative...” Thus, a CITES specimen would include marine animals, marine plants, and their parts or derivatives. In addition, [Article I\(e\)](#) defines IFS as “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State.” It is important to emphasize here that the IFS applies only to Appendix I and II species which have been caught in the ABNJ. As for the Appendix III species, since such species fall under the jurisdiction of States parties, their trade is not regulated by IFS. Therefore, IFS may be perceived as an important regulatory tool for the conservation of Appendix I and II species captured in the ABNJ.

On the other hand, Article 1(11) of the BBNJ Treaty defines marine genetic resources as “any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential values.”

From the above, we can make two main observations. First, the area of application for CITES IFS and the BBNJ Treaty is the same: ABNJ. Second, the provisions on marine genetic resources seem to be closely related to specimens captured under CITES’s IFS provisions as both may apply to the same marine biological resource. Since the two regimes overlap, we must ask how they interact with each other.

### **4. Regime interactions**

Starting with the CITES which came into effect in 1975, [Article XIV \(6\)](#) states that “[n]othing 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...” Considering the BBNJ Treaty was negotiated and finalized as an implementation agreement under UNCLOS, a general reading of Article XIV (6) would suggest that the CITES provisions shall not prejudice the codification and development of the BBNJ treaty. However, this provision does not seem to suggest that the CITES provisions may be overruled by provisions of the later-developed instrument under the auspices of the United Nations. The BBNJ Treaty also supports this interpretation, as [Article 4 \(2\)](#) states that the “[t]his Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies”. In other words, the provisions in the BBNJ Treaty dealing with MGRs shall not be interpreted in a way that would undermine CITES provisions. Such interpretation would be in line with Article 31 of the Vienna Convention of the Law of Treaties (VCLT). Considering the objectives of both regimes are different, as one seeks to regulate trade and the other focuses on the conservation and sustainable use of marine genetic resources, any interpretation which would suggest that the provisions of one regime may overrule the other seems unnecessary and unproductive. Therefore, the provision of both instruments must be read in a way that would allow both regimes to apply to the maximum number of marine fauna and flora, providing them with the respective protection of both regimes. Conservative interpretations which would lead to “mutual inaction out of fear to “undermine” each other” ([Langlet 2022](#)) shall also be avoided.

## **5. Potential problem**

The problem that this overlap may cause pertains to Appendix I species of CITES captured in the ABNJ. To understand the nature of this overlap, it is first necessary to differentiate between ‘introduction from the sea’ and other types of trade regulated by CITES. If the specimen of Appendix I and II species is captured in the ABNJ and the capturing vessel transports the specimen to the same State as the flag of the capturing vessel, then [IFS provisions](#) would apply ([here only one State is involved](#)). However, if the capturing vessel lands the specimen for export to another State, different from the flag of the capturing vessel, then the import/export provisions of CITES would apply and not the IFS provisions ([two or more States are involved](#)). This suggests that the IFS provisions seek to address the situation where the traditional understanding of trade between two States as import, and export becomes difficult to apply because in such situations only one State is involved. CITES prohibits the issuance of an import permit for Appendix I species for ‘primarily commercial purposes’ (Article III (3)(c)), and the IFS provisions extend the same protection to species captured in the ABNJ and transported back to the State which is the flag State of the capturing vessel. Therefore, CITES Article III (5) (c) prohibits the issuance of IFS certificates for Appendix I species that are to be used for ‘primarily commercial purposes.’ As per the CITES regime, an IFS certificate can be issued for the non-commercial trade of Appendix I species and both commercial and non-commercial trade in Appendix II species. As noted above, Appendix I includes species that are threatened with extinction, and trade is only allowed in exceptional circumstances. Therefore, the prohibition of issuance of an IFS certificate acts as a deterrence, which helps in the regulation of the existential threat to such species.

On the other hand, the BBNJ Treaty allows commercial use of marine biological resources as long as the requirements under the treaty are fulfilled, as per Article 10 (6) which states that “[w]here marine genetic resources of areas beyond national jurisdiction... are subjected to utilization, including commercialization” parties are required to notify the relevant information to the clear-house mechanisms. Moreover, the benefit-sharing provisions of the Treaty also provide for commercial use as Article 11(5) provides that the monetary benefit for the utilization of the marine genetic resource, including commercialization shall be shared fairly and equitably. And Article 11 (5bis) (b) states that the modalities (for sharing of monetary benefit) may include “[p]ayments or contributions related to the commercialization of products, including payment of a percentage of the revenue for sales of products.” Thus, suggesting that the BBNJ Treaty does not restrict the commercial use of marine biological resources even if the marine biological resources are threatened by extinction.

Considering the above, it seems that the BBNJ provisions and CITES’s IFS process are not mutually exclusive. This buttresses the problem of overlap between the two regimes, which may lead to a precarious situation for species listed in Appendix I of CITES as the same may be allowed to be taken or captured from the high seas for commercial purposes under the BBNJ treaty. This situation is created because both regimes may apply to the same marine biological resources in the ABNJ. The BBNJ Treaty has built-in mechanisms to address such issues, for instance, Article 10 (2) puts in place the requirement of notifying the clearing-house mechanism six months or as early as possible before the collection of the marine genetic resources in the ABNJ. This would give ample time to the respective authorities to resolve such issues. This also implies that coordination between the two regimes is very important as it would allow the respective authorities to exchange updated information with each other regularly. Such coordination would be in line with Article 9 of the BBNJ Treaty as well, which obligates parties to promote cooperation in all activities concerning marine genetic resources in the ABNJ. It is pertinent to emphasize here that this provision in addition to Article 6, lays down the requirement of promoting international cooperation more generally. Furthermore, the relevant authorities may take a more active role in each other’s institutional meetings or may devise a mechanism together that would help their respective authority to make a well-informed decision. For instance, even though the IFS certificate may not be issued for commercial use of Appendix I species, but still the CITES authorities may at least be informed of such an intent under the BBNJ Treaty. Considering the CITES secretariat was closely monitoring the BBNJ negotiations, they would have already identified such issues and problem areas. It is imperative to emphasize that over the years CITES has done remarkably well in furthering [cooperation](#) and partnership with other inter-governmental institutions and organizations. The BBNJ Treaty institutions may learn from the CITES experience and expertise.

## **6. Conclusion**

This blog briefly explored the connection between CITES and the newly finalized BBNJ treaty. Even though the scope of application of both regimes overlaps with each other, the objective that each seeks to achieve is different. This overlap may prove to be beneficial for the overall conservation of the marine biological resource, except for the limited case of Appendix I species captured for commercial use as pointed out above. Considering CITES was monitoring the

BBNJ negotiations such problems are bound to be in the knowledge of the secretariat already. It will be interesting to see the report that the CITES secretariat submits to the next meeting of the Standing Committee on the concluded BBNJ negotiations. Finally, the post suggests that such problems of overlap may be solved by active cooperation and partnership between the two regimes.

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