When Arguments Prevail Over Power: The CITES Procedure for the Listing of Endangered Species

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Introduction

The legitimacy and effectiveness of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) depends, not least of all, on reason-based listing decisions. Under the Convention, trade in about 32,000 species, and in products made thereof, is currently restricted. The Conference of the Parties (COP) decides every two years on proposals to list, or to de-list, species. Every listing decision implies a judgment as to whether a species is actually endangered or not. Failure to list species threatened with extinction would obviously reduce the effectiveness of CITES, while the listing of species that are not actually endangered would unnecessarily restrict activities of often poor countries, and would thereby jeopardize the legitimacy of the institution. Hence, listing decisions raise the notoriously difficult problem of how to effectively integrate scientific knowledge into regulatory decision-making.[1]

Listing decisions are frequently highly controversial, because they oblige CITES member states to enact trade restrictions. As demonstrated by the struggle over the status of the African elephant,[2] states pursue different, frequently competing, interests. They may be assumed to have a general interest in protecting biodiversity and in reducing the negative effects of trade-induced overexploitation of wild flora and fauna, or at least in upholding the multilateral CITES management system. Otherwise, the global membership of the institution, which currently comprises 169 member states, would be difficult to explain. However, states may advocate restricting trade in species that are not actually threatened with extinction,[3] or they may object to restrictions of trade in economically or culturally relevant species. Moreover, CITES raises a serious collective action problem. Whereas the benefits of the protection of an endangered species are widely distributed, costs are typically concentrated on only a few

1. Andresen 2000; and Haas 2004.
2. Glennon 1989; and Dansky 1999.
3. Epstein 2006.

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states. Hence, listing decisions are threatened by the influence of parochial interests and rejection by actors that are necessary to their successful implementation.

In this paper, we examine whether—and how—CITES' institutional apparatus empowers actors who can make reasoned arguments on the merits of a listing decision, while depriving those member states which seek to pursue parochial interests or wield their bargaining power. In spite of the voluminous literature on CITES, surprisingly little theoretically-guided analysis of the operation of the CITES listing procedure has been made so far.[4] We assume that the member states are not always intrinsically motivated to accept the most problem-adequate listing decisions. Reasoned arguments to list, or to de-list, a species will then not prevail over parochial interests, unless the CITES listing procedure ensures that attempts to influence COP decisions by way of bargaining remain unsuccessful. To prepare listing decisions, CITES has developed an impressive fact-finding apparatus which includes scientific committees and the Secretariat, as well as consultation of competent state agencies and non-state actors. However, the final decision is adopted by the member states during the regular COP meetings which do not per se exclude power-based bargaining and contentious voting.

The argument proceeds in three steps. First, we suggest that bargaining and reason-based argumentation are two diametrically opposed coordination mechanisms. We demonstrate theoretically that appropriately designed decision-making procedures can facilitate reason-based deliberation if they diminish stake-holders' opportunities for exploiting their bargaining power. For this reason, several decision-making functions must be systematically separated from each other. Second, we explore the incentives for member states and other stakeholders created by the CITES listing procedure. While the procedure cannot ensure that stakeholders will completely refrain from bargaining, it promises to dramatically reduce the prospect that the outcome is effectively influenced by power rather than reasoned arguments. Third, we examine three controversial listing decisions from COPs 12 (2002) and 13 (2004) as examples of the actual operation of the institutional arrangement in critical situations. These "hard cases" put the listing procedure to a test, because they address (initially) contentious issues and involve differing appraisals of the underlying facts. Moreover, they help elucidate the limits of procedural influence on powerful member states. We conclude that the functionally differentiated listing procedure will, in practice, succeed in diminishing the impact of power-based interventions and in promoting interventions that are based upon scientific reasons if information suffices to support convincing arguments.

4. See for example Sand 1997; Swanson 2000; Hemmings 2002; and Reeve 2002. In this article, we do not question the approach of CITES to protect single endangered species through trade restrictions instead of, for example, ecosystems. See Epstein 2006.

How Decision Procedures Can Help Arguments Prevail over Stakeholders' Interests

In the first step, we explore how the decision-making procedures of international institutions can help reasoned arguments prevail over stakeholders' interests. Coordination can reflect the ideal types of power-based bargaining or reason-based arguing. To help arguments prevail over parochial interests, procedures must systematically deprive stakeholders of their capacity to pursue parochial interests that are not supported by arguments and evidence, and/or cause them to accept collective decisions that reflect such arguments and evidence. Procedures consist of institutional rules that may systematically modify actors' opportunities for action. In order to explore this issue, we assume that the member states have ambiguous interests that are typical of international environmental cooperation. They support the multilateral CITES management system to facilitate protection of biodiversity and mitigate the negative effects of trade-induced over-exploitation of wild flora and fauna (otherwise CITES would not enjoy a virtually global membership), but they pursue specific interests on particularly salient species (otherwise we would not observe conflict). Hence, the member states, in order to make the management regime work, must reach decisions, despite their possibly contradicting interests, on every single species to be listed in one of the Convention's Appendices.

Bargaining is the most basic form of coordination within international institutions, but it does not ensure problem-adequate outcomes. It is directed at accommodating the interests of actors who are aware of their preferences and seek to maximize their individual gains, and it promises to identify opportunities for cooperation, even in the hostile environment of the anarchical international system. Bargaining processes are typically dyadic; criteria for decision-making that are accepted by the participants as a common point of reference do not exist. Therefore, no outcome agreed upon is in any sense "better" than any other one. To influence the outcome of the bargaining process, actors may use threats and promises, and they may mobilize their bargaining power.[5] Power in bargaining processes generally depends on the credibility to reject agreement (the "exit option") and on the nature of the best alternative to cooperation.[6] Accordingly, the outcome will reflect, by and large, the distribution of power among the actors participating in the negotiations.

The deliberative exchange of reasoned arguments ("arguing") constitutes a completely different coordination mechanism and promises more problem-adequate outcomes. The concept of arguing, adapted from Habermasian communicative action, has recently become more prominent.[7] In an arguing process, actors claim that a given proposition is empirically correct or normatively

5. Elster 1989, 50–96.
6. Fisher and Ury 1981, 101–111.
7. On the difference between bargaining and arguing, see Elster 1998; Gehring 1999; and Risse 2000.

right. To be convincing, a proposition must be accompanied by valid reasoning and evidence. Whereas bargaining is intended to accommodate interests, arguing is directed at collectively appraising and validating competing propositions and their accompanying reasons, with a view to identifying the most convincing ones. The collective appraisal and validation of a proposition requires abstract and mutually agreed-upon criteria. In contrast to bargaining, deliberation processes are therefore triadic and have a commonly accepted point of reference. Propositions that reflect the decision criteria better are more convincing than others. In a deliberation, actors engage in a collective learning process, and they produce commonly accepted and validated cognitive or normative knowledge. The actors participating in a deliberation may well *have* parochial interests, and they may *promote* them—as long as they do so only by submitting arguments that can be appraised during the process. Accordingly, arguing presupposes that the participants refrain from introducing power resources into the deliberation.

The effectiveness and the legitimacy of international regulation (of trade in endangered species, for example) will be supported if procedures help transform interaction among relevant actors from bargaining into arguing, or if they otherwise facilitate outcomes that meet the criteria of deliberative arguing. However, regulation in the mode of arguing is highly demanding. Outcomes of power-based bargaining processes can only coincidentally reflect an adequate solution of the underlying problem,[8] because the coordination mechanism excludes all options that are of a disadvantage to one of the negotiators, unless this actor is compensated for losses by side-payments or within larger package deals. In contrast, deliberative coordination in the form of arguing promises to identify problem-adequate outcomes that are chosen, because they are, in light of generally accepted criteria, based upon the most convincing propositions. They are not selected because of their distributive effects, nor are they distorted by the distribution of power among of the actors involved. Unfortunately, actors pursuing their own parochial interests will not easily accept decisions originating from a deliberation, because such decisions have immediate distributive consequences and their costs may outweigh benefits.

Procedures can, even among rational utility maximizers, systematically shift interaction from bargaining toward arguing if they deprive these actors of their ability to introduce bargaining power into the decision process. For this purpose, they must assign different decision-making functions to separate decision processes. If an institutional arrangement separates the two necessary functions of an arguing process, namely the elaboration of decision-making criteria and the appraisal of competing, or contradictory, propositions in light of these criteria, it will create a specific form of "institutional bargaining"[9] and fundamentally modify the calculation of the actors involved.

Actors whose decision-making competence is limited exclusively to the

8. Kratochwil 1993, 457.
9. Young 1994, 98–106.

elaboration of general criteria for subsequent decision-making are effectively deprived of pursuing their case-specific interests. If decision criteria, as well as a procedure for their application, are applicable to many case-specific decisions, the actors are forced to develop a consistent preference which applies to all future case-specific decisions.[10] If criteria are applied to yet unknown future cases, negotiators will even be hindered from assessing their case-specific preferences and will (partially) have to operate under a Rawlsian "veil of ignorance."[11] These actors gain an interest in advocating criteria that promise problem-adequate, and therefore generally acceptable, case-specific decisions, irrespective of their yet unknown distributive effects. In environmental affairs, such criteria will usually reflect scientific and technological knowledge,[12] which could possibly be supplemented by cost-benefit considerations, aspects of risk acceptance (or avoidance), and other matters.

Case-specific application decisions will also be largely protected from bargaining if decision-makers are sufficiently committed to generalized criteria and procedures. The commitment to the criteria must be credible. For this purpose, modern regulatory theory recommends delegation of decision-making competencies to independent agents.[13] This is, however, rare in international relations. A number of less intrusive mechanisms may also reinforce the credibility of the general commitment to mandatory criteria, especially by way of committee governance and the separation of scientific appraisal from decision-making.

Bargaining opportunities will diminish, and the influence of reason-based arguments will increase, through the typical patterns of committee governance. We know from democracy theory, that delegation of on-going and narrowly defined decisions to a committee will significantly change the decision-making rationale of the participating actors.[14] If a single decision is sufficiently small and sufficiently well separated from other decisions, so as to preclude their linkage within explicitly negotiated packages, its distributive effects will usually be asymmetrical and preclude a mutually acceptable bargaining outcome. Actors pursuing their case-specific interests under such conditions will inevitably jeopardize the entire cooperation project, to the effect that actors seeking to realize cooperation gains must compromise. While individual actors cannot expect to prevail on all decisions, they will not accept exclusively undesired decisions. The decision criteria provide a natural focal point that indicates in which decisions to compromise and in which to insist on one's original position. The effects of committee governance will tend to produce criteria-based decisions, if there are, beside the stakeholders, sufficient parties without stakes in the particular decision that have no inherent interest in violating the criteria. In the case of majority voting, remaining opponents do not even have to be convinced; they can

10. Brennan and Buchanan 1985, 28–31.
11. Rawls 1971, 136–142.
12. Haas 2004.
13. Majone 2001; and Gehring and Krapohl 2007.
14. Sartori 1987, 227–232.

simply be outvoted. Accordingly, arguments supporting the proper application of mandatory decision criteria become a powerful source of influence in the decision-process.

The credibility of the commitment to the sincere implementation of the decision criteria will be reinforced if risk assessment is separated from risk management. Typically, a regulatory decision consists of two components; namely the appraisal of relevant facts (in the case of CITES: scientific assessment of the status of a possibly endangered species), and the regulatory decision made on the basis of this appraisal (the listing decision). Although the former has implications for the latter, it is essentially concerned with matters of truth. Controversial propositions concerning empirical issues, which may be true or false, cannot be convincingly decided upon in bargaining processes. International institutions can reinforce the reasoned assessment of matters of truth if they assign these issues to specialized bodies. As a result, scientific and technological assessment panels establish a protected niche for the deliberative validation of relevant matters of truth based upon commonly shared standards for the appraisal of competing propositions. The findings of such panels set the agenda for the ensuing political decision process, and they provide standards for the appraisal of decisions.[15] This effect presupposes that the actors involved *can* agree on a common appraisal of competing propositions, and it is limited by prevailing uncertainty on relevant aspects.

Decision-making systems that separate these functions from each other and assign them to specialized decision processes facilitate deliberative coordination and problem-adequate outcomes because they systematically reduce the ability of stakeholders to pursue their parochial interests by way of power-based bargaining. If the stakeholders' ability to bargain diminishes, or if interventions in the bargaining mode do not significantly affect the outcome of a regulation, the most important obstacle to deliberative decision-making disappears. Accordingly, the incentive structure provided by the CITES listing procedure is assessed with special regard to the transformation of the calculus of those actors that are determined to pursue their parochial interests. It is important to note that the decision-making rationale of functionally differentiated decision-making systems is not reflected in the logic of any of the sub-systems involved, because each sub-system performs a specialized function within the overall decision process.

The Institutional Arrangement of the CITES Listing Procedure

In the second step, we explore the incentives of the CITES listing procedure to pursue preferences concerning the listing of a particular species by way of arguments rather than power-based bargaining. Regulation of international trade in endangered species of flora and fauna under CITES involves an enormous

15. Krapohl 2003.

amount of on-going decision-making. Listing decisions reflect a specific form of delegated law-making that has raised a great deal of concern among international lawyers.[16] Decisions are adopted by the COP of CITES with a two-thirds majority and become legally binding after 90 days without ratification, even for member states that voted against them. As a corollary, member states reserve the right to opt out of the commitment to an unwanted decision within 90 days of its adoption. The listing of a species in Appendix I bans all trade in wildlife for commercial purposes. Listing in Appendix II prohibits trade unless it is ensured that it does not jeopardize the survival of the species. Appendix III will not be discussed further in this article. It contains species protected in a particular country, and listed at the request of that country.

The CITES Listing Criteria

Listing criteria provide an indispensable common point of reference for all decision-makers involved in CITES negotiating processes, and they help transform regulatory decision-making from bargaining to arguing. They may limit, or completely diminish, bargaining opportunities. For this reason, they have to be sufficiently specific in order to significantly reduce the margin of discretionary choice and to preclude arbitrarily different treatment of comparable species. The criteria must also be accepted, that is considered as well-reasoned and legitimate, by all groups of member states.[17] Otherwise, one could expect bargaining and coalition-building, namely the "politicization" of decision-making.

The early listing criteria did not appropriately fulfill their function. The Convention merely provides that Appendix I "shall include all species threatened with extinction which are or may be affected by trade. Appendix II shall include . . . all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival."[18] The "Bern Criteria" of 1976,[19] as a first set of more detailed guidelines, also did not provide reliable standards as to whether a species was to be listed or not. They mainly indicated points that had to be considered during the assessment process, and thus allowed extensive interpretation by decision-makers. Species to be listed in Appendix I had to be threatened with extinction *and* had to be affected by international trade. Proposals had to be accompanied by scientific reports, addressing, amongst other things surveys of population size and geographic range and/or development of the respective species. Listing criteria for Appendix II were spelled out similarly.

16. Gehring 2007.
17. Payne 2001.
18. CITES-Convention 1973, Art. II.
19. CITES Document Resolution 1.1, 1976. Criteria for the Addition of Species and other Taxa to the Appendices I and II and Resolution 1.2., Criteria for the Deletion of Species and other Taxa to the Appendices I and II. See also Sand 1997; and Wijnsteckers 2003.

The lack of reliable listing criteria supported politicization of listing decisions and created a veritable crisis of CITES. Generally, there was an impression that "charismatic" species, that are attractive to human beings, were over-represented on CITES-Appendices, while politically less salient species such as invertebrates were under-represented.[20] Moreover, many decisions seemed to reflect political expediency rather than scientific data.[21] Accordingly, aggrieved states explored opportunities for leaving CITES and founding an alternative institution.[22] The conflict culminated in the hotly disputed decision to list the African elephant in Appendix I. When the quota system for trade in ivory failed, COP 7 (1989) adopted a ban of ivory trade at the proposal of the United States and some other, mostly Western, states, supported by environmental NGOs. Several Southern African countries had claimed that elephants were not threatened with extinction in their territories and that revenues from ivory trade were needed to finance habitat management and ranging.[23] At COP 8 (1992), Zimbabwe, as the most politically active Southern African country on the subject, proposed a new set of listing criteria and demanded that range states were granted the power to veto a listing decision. This proposal was rejected.

To overcome this crisis, the COP agreed that a revised set of criteria should be drafted.[24] The decision was adopted in spite of the initial resistance of the United States and other economically powerful states believing that classification of species might become more difficult.[25] The complex revision procedure included extensive consultation of the member states, advice by the International Union for the Conservation of Nature and Natural Resources (IUCN) and other competent organizations and individuals, as well as discussion of drafts within the two competent expert committees on plants and animals. The Fort Lauderdale criteria were adopted by consensus at COP 9 (1994)[26] and were slightly amended by COP 13 (2004).[27]

The new set of criteria is much more stringent and was intended to limit discretion during the listing process more strictly.[28] They focus exclusively on the biological status of a species,[29] and apply to all further listing-decisions. They clearly define the terms on which a species shall be considered as "threatened with extinction" and listed in Appendix I. Criteria for the listing of species

20. Martin 2000; and Webb 2000.
21. Epstein 2006, 49–50.
22. Mofson 2000.
23. Goho 2001, 1777; and Glennon 1989, 23.
24. CITES Document Resolution 8.20, 1992. Development of New Criteria for Amendment of the Appendices, and Mofson 2000.
25. See CITES Document SC 28, 1992. Summary Report of the Twenty-eighth Meeting of the Standing Committee.
26. CITES Document Plen. 9.8, 1994. Eighth Session of the Plenary.
27. CITES Document Resolution 9.24 , 1994. Criteria for Amendment of Appendices I and II, 87; and CITES Document Resolution 9.24 (Rev.CoP13), 2004. Criteria for Amendment of Appendices I and II.
28. Blundell and Rodan 2001.
29. Goho 2001, in particular 1779–1782.

in Appendix II refer to those relating to Appendix I. A species shall be included in Appendix II, if "it is known, or can be inferred or projected, that the regulation of trade in the species is necessary to avoid it becoming eligible for inclusion in Appendix I in the near future." A species shall also be included if "it is known, or can be inferred or projected, that regulation of trade in the species is required to ensure that the harvest of specimens from the wild is not reducing the wild population to a level at which its survival may be threatened by continued harvesting or other influences."[30] The listing criteria are not only quite detailed (Table 1), they are also accompanied by a number of definitions and guidelines, including quantifiable terms, to ensure that they are applied as objectively as possible.[31] Accordingly, they restrict the discretion during the making of listing decisions more significantly than their predecessors. Moreover, they are too abstract and applicable to too many different species to be significantly influenced by case-specific parochial interests. It is difficult to see how member states could have accommodated their interests related to particular species with the general criteria, unless they were applicable to species protection as a whole.

Still, these criteria do not remove all discretion from case-specific decision-making. This is illustrated by the problem of "marked decline." According to a CITES resolution "a general guideline for a marked historical extent of decline is a percentage decline to 5%–30% of the baseline, depending on the biology and productivity of the species." Moreover, "a general guideline for a marked recent rate of decline is a percentage decline of 50% or more in the last 10 years or three generations, whichever is the longer. If the population is small, a percentage decline of 20% or more in the last 5 years or 2 generations (whichever is the longer) may be more appropriate."[32] However, the resolution adds that these quantitative guidelines are not equally applicable to all species. Figures merely constitute examples and require interpretation during the listing process.

The elaboration of the currently existing CITES listing criteria reflects a division of labor between the two functions of molding meaningful and legitimate decision-criteria on the one hand, and their application on the other hand. The criteria define the commonly accepted standards which are to be met by problem-adequate listing decisions. Henceforth, they provide a common point of reference for all actors involved in preparing, assessing, or deciding upon a listing proposal.

The Commitment of Decision-Makers to the Listing Criteria

For listing to be deliberative and scientifically-based, the various decision-makers involved must be committed to honoring the listing criteria and, in addi-

30. Quotations from CITES Document Resolution 9.24, 1994. Annex 2, *supra* note 27.
31. Dansky 1999, 966.
32. Quotations from CITES Document Resolution 9.24, 1994. Annex 5, *supra* note 27.

Table 1
Criteria for the Listing of Species in Appendix I

The wild population is small and characterized by at least one of the following: • an observed, inferred or projected decline in the number of individuals or the area and quality of habitats; or • each sub-population being very small; or • a majority of individuals, during one or more life-history phases, being concentrated in one sub-population; or • large short-term fluctuations in population-size; or • a high vulnerability to either extrinsic or intrinsic factors	The wild population has a restricted area of distribution and is characterized by at least one of the following: • fragmentation or occurrence at very few locations; or • large fluctuations in the area of distribution or the number of sub-populations; or • a high vulnerability to either extrinsic or intrinsic factors; or • an observed, inferred or projected decrease in any one of the following: • the area of distribution; or • the area of habitat; or • the number of sub-populations; or • the number of individuals; or • the quality of habitat; or • the recruitment.	A marked decline in the population size in the wild, which has been either: • observed as ongoing or as having occurred in the past (but with a potential to resume); or • inferred or projected on the basis of any one of the following: • a decrease in area of habitat; or • a decrease in quality of habitat; or • levels or patterns of exploitation; or • a high vulnerability to either extrinsic or intrinsic factors • A decreasing recruitment

tion, to filling remaining gaps by sincere interpretation, rather than by bargaining. In contrast to the negotiation of general criteria, member states and nonstate stakeholders are generally aware of their case-specific interests and are not inherently forced to be consistent. The listing procedure must ensure that only decisions in conformity with the listing criteria are adopted.

The case-specific listing procedure consists of two important collective decision stages, followed by an individual stage. It systematically separates the two functions of assessing the merits of, and of deciding upon, a listing proposal. In a nutshell: (1) a listing proposal is evaluated in the scientific assessment stage, which culminates in a recommendation of the Secretariat as to the appropriate decision. (2) Subsequently, the proposal is decided upon by the Conference of the Parties by at least a two-thirds majority of the members present and voting. (3) Eventually, aggrieved parties may opt out of the commitment to an unwanted decision. The decision-process may fail, or be distorted, at any of these stages. This procedure is based upon art. XV of the Convention and has been elaborated continuously in a number of resolutions adopted by the COP.[33]

The Scientific Assessment Stage

The first stage of the procedure is designed to overcome the severe information problem related to every listing proposal and to organize an exchange of arguments as to the appropriate application of the listing criteria. In order to be acceptable and in conformity with the listing criteria, a decision must be based upon sufficient and reliable scientific information on the biological status of the relevant species. The importance of such information is evident: listing decisions presuppose knowledge of whether a species is threatened with extinction, or could become threatened with extinction if trade measures were not applied. However, relevant information is not always fully available. Even more importantly, information submitted by the parties may be biased because it can influence the ensuing regulatory decision, or it may be open to interpretation. Hence, information must be gathered and evaluated in light of the decision criteria—a task for which the deliberative exchange of arguments has been identified as the most appropriate form of coordination.

Elaboration of a decision proposal occurs in an open and transparent multi-step procedure. It starts with the submission of a listing proposal by one or more member states. This has to be accompanied by all available scientific data. The information should allow the participants in the procedure to judge the proposal against the listing criteria.[34] The proponents shall consult range states of the concerned species and include their statements in the submission. To make sure that all participants have the chance to review the proposal and

33. CITES Document Resolution 9.24, Annex VI, 1994. l.c., and CITES Document Conf. 5.20, 1985. Guidelines for the Secretariat when making recommendations in accordance of Art. XV. See generally Wijnstekers 2003, 29.
34. CITES Document Resolution 9.24 (1994), *supra* note 27.

(possibly) to collect their own information, the proposal shall be sent to the Secretariat at least 150 days before the next COP. Next, the Secretariat distributes the information and consults the member states concerning the proposal.[35] It shall also collect information from the two most important scientific committees of CITES, namely the Animals Committee and the Plants Committee, as well as from competent NGOs, which traditionally play an important role in CITES, as well as from relevant international institutions. For marine species, the UN Food and Agricultural Organization (FAO) must be consulted.[36] Finally, the Secretariat elaborates its listing recommendation for the ensuing decision stage on the basis of all available scientific information and data.[37]

This procedure assigns an extraordinarily strong role to the Secretariat,[38] which acts as an impartial third party on behalf of the member states as a group. The Secretariat not only controls and organizes the information assessment stage by consulting states and non-state actors, and by collecting the incoming information, it also enjoys the de facto right to evaluate the incoming information and to elaborate the recommendation for the COP decision. Its recommendation sets the agenda for the ensuing COP-decision process. Assignment of such powers to the bureaucracy of an international institution is rare in international environmental relations. More frequently, international environmental institutions establish scientific committees attended by governmental experts, or by experts nominated by governments. Indeed, proposals to establish such a committee were discussed at COP 6 (Ottawa 1987), but were rejected. Member states feared that direct deliberation among states and non-state actors, including stakeholders, might undermine, rather than support, the scientific assessment of a listing proposal.[39] The CITES Committees on Plants and on Animals, attended by experts from all regions, and elected by the member states, do not play the key role in these matters, but they may submit information on listing proposals.

The Secretariat has a strong incentive to submit convincing recommendations to the COP. Final decisions are made by the COP, and the Secretariat cannot impose its position on the member states. In the decision stage, it merely occupies an advisory role. Accordingly, the decision stage includes the implicit threat of sanctions, if only in the form of reduced influence. The quality of the recommendations can easily be assessed against the criteria to which both the Secretariat and the COP are committed. Secretariat activity is closely observed by so many states and non-state actors that unconvincing conclusions will almost certainly be discovered. Altogether, the strong role of the Secretariat within

35. CITES, Art. XV.
36. CITES, Art. XV 2 b), and CITES Document SC 53 Doc. 10.1 (2005), Cooperation with the Food and Agriculture Organization of the United Nations.
37. CITES Document Conf. 5.20 (1985), *supra* note 33.
38. Sandford 1996, 8.
39. Sand 1997; and Favre 1989, 276–280. On the relevance of strong secretariats for preparing scientific knowledge, see generally Haas and Haas 1995.

the listing process depends on its ability, and preparedness, to elaborate recommendations which are as convincing as possible, and its reputation of delivering sound advice on listing proposals.

States and non-state actors seeking to affect the decision-process can attempt to influence Secretariat decisions by submitting convincing arguments during consultation. Except for the simple (non-controversial) cases, there are always some states and non-state actors favoring the proposal under consideration to list, or to de-list, a species, while others advocate its rejection. However, none of the stakeholders can *impose* its own position on the Secretariat or on other stakeholders. As purely interest-based statements cannot be expected to influence this stage of decision-making, actors will seek to influence relevant decisions by producing convincing arguments in support of their positions. Arguments that relate available information to the listing criteria will be most convincing, because they will be difficult for the Secretariat to ignore or reject. If convincing arguments, rather than power, constitute the main resource during this stage, competent non-state actors, such as the IUCN, can occupy the status of full participants in the process. This does not however mean that actors seeking to influence the Secretariat will submit exclusively unbiased information and are necessarily open to conviction by the better argument. On the contrary, we may expect actors to submit information and arguments predominantly supporting their own positions. The assessment process may well start, like any sincere deliberation, with contradicting propositions.[40] It is directed at identifying the most convincing of these propositions on the basis of mutually accepted criteria. Deliberation—in the form of written statements—can occur, because the outcome of the process is not negotiated among the stakeholders, but delegated to a non-partisan third party.

The scientific assessment stage establishes a veritable discourse on the merits of a listing proposal. Its triadic structure and its integration into the larger listing procedure deprive the member states, and other stakeholders, of their bargaining power and commit them to the commonly accepted listing criteria. As a result, a protected niche for the exchange of arguments emerges. Both the Secretariat and the actors seeking to influence decisions have strong incentives for justifying their claims and propositions with arguments that are as convincing as possible. While interested states and non-state actors cannot get influence unless they convince the Secretariat of the reasoned nature of their statements, the Secretariat has to convince the member states of its recommendation in order to gain influence over the final decision.

40. Experts from states and NGOs involved in listing decisions may be seen as coming close to an epistemic community. While this group is in control of valid arguments, it may still lack some characteristics of such communities, especially shared values and principled beliefs providing a value-based rationale for social action. See Haas 2001, 11579–11580. This does not exclude the possibility that empowerment of experts by the listing procedure might gradually produce an epistemic community because experts from different origin have to base their interventions on a single set of criteria.

The Commitment of the COP to the Criteria

The crucial question is whether, and how, the member states are committed to their own criteria when transforming Secretariat recommendations into regulatory decisions that commit themselves to trade restrictions. Like other international institutions, CITES lacks powerful mechanisms, such as a court or other competent body, to oversee COP activities. Moreover, listing decisions always have distributive effects. They allocate specific costs to those members which previously traded in a newly listed species, and benefits to parties capable of trading in a de-listed species. Such decisions lend themselves to bargaining and coalition-building, i.e. to the mobilization of power resources. Actors pursuing their parochial interests will tend to base their own positions on the cost-benefit ratios of proposals, rather than on their desirability according to the mutually agreed listing criteria. After discussion in Committee I, listing proposals are decided upon by the plenary with a two-thirds majority of the parties present and voting.[41]

The Secretariat recommendation on a proposal provides a powerful focal point and significantly changes the role of the COP. By way of the listing procedure, the CITES Secretariat acquires the role of an exclusive agenda-setter comparable to that of the European Commission.[42] Whereas international conferences normally are negotiating forums in which agreement is reached in a give-and-take manner, the member states are now forced to make decisions in light of a clear proposal with formal status. In practice, their activity is limited to evaluating whether the recommendation fits the listing criteria, and to making a choice about its acceptance or rejection. In contrast to bargaining processes, in which, because such processes lack external points of reference, any solution agreed upon is equally good, COP decisions can easily be appraised against the formal recommendation. Every decision that ignores a well-reasoned Secretariat recommendation inevitably undermines the legitimacy of the overall management system, because it openly challenges the collective commitment to the listing criteria. While this concern may not persuade those states with immediate stakes in the particular case, it will be highly relevant for all those states that are indifferent vis-à-vis the particular case, but support the management regime. Accordingly, the Secretariat recommendation transforms the COP, in the area of listing decisions, from a negotiation forum into a body controlling the Secretariat's assessment activities.

The nature of the listing decisions helps activate the typical patterns of committee governance.[43] The decision to protect a single endangered species will almost never allow for a mutually acceptable balancing of interests, because of its asymmetrical distribution of costs and benefits. Even the roughly 30–50 listing decisions adopted at an average COP session only rarely make up a mu-

41. Sand 1997.
42. On the importance of this role, see Pollack 1997, 121–128.
43. Sartori 1987, 227–232.

tually acceptable package.[44] Listing decisions are made, relative to specific Secretariat proposals, and there are no reports of successful attempts to put together reliable packages. One can therefore expect that listing decisions are dealt with on an individual basis. The asymmetrical distribution of costs and benefits in a single listing decision implies that a member state cannot expect to enjoy the benefits of cooperation and at the same time effectively reject all undesired decisions. Accordingly, states faced with a scientifically sound, but undesired listing proposal can pursue their case-specific preferences and seek to block the decision, or behave cooperatively and expect similar behavior by other states. The former strategy risks bringing the regulatory process to a stop, while the latter creates a sort of decision-making cooperation which relies on reciprocity and a strong Axelrodian "shadow of the future."[45]

The possibility of adopting listing decisions by a two-thirds majority of the parties present and voting has a twofold effect. On the one hand, it relaxes the pressure on any single party, because a negative vote does not immediately block the decision process and may not, therefore, trigger the aforementioned sanctions mechanism. A range state may vote against an undesired proposal without preventing the majority from adopting the resultant decision. On the other hand, voting on a controversial proposal inevitably introduces power-based interaction into the decision process, rather than reason-based argument. A vote is not necessarily supported by arguments and evidence, and it is not intended to convince opponents. Accordingly, one might expect that both stakeholders favoring and opposing a proposal will attempt to gather support for their respective positions. Between these two camps there will always be many parties with no partisan interests in the particular case, but with an interest in the management regime as a whole. These parties will tend to favor the option that is most justifiable in light of the listing criteria, rather than simply joining one of the two camps. Accordingly, both the proponents and the opponents will endeavor to *convince* the undetermined parties of their positions, but the situation supports the coalition advocating the most problem-adequate option.

As a result, the listing procedure provides strong incentives for the COP, as a collective decision-making body, to honor its commitment to the sincere application of the listing criteria, but it does not necessarily lead to express deliberation. Because the COP is not accountable to any other body of the institution, the member states themselves may hinder stakeholders from bringing about decisions that deviate from well-reasoned Secretariat recommendations. The commitment of the COP to adhere to Secretariat recommendations relies on the joint effect of a number of different components, namely the existence of the listing criteria as a commonly accepted external point of reference, the externalized scientific assessment of listing proposals, the agenda-setting function

44. COP 12 and 13 in 2002 and 2004 adopted 44 and 33 listing decisions respectively. See Amendments to the Appendices I and II adopted at COP 12, and CITES Document 2004/073, 2004. Notification to the Parties, Amendments to Appendices I and II.
45. Axelrod 1984.

of the Secretariat, the nature of the single listing decisions which tend to preclude "deals," and the presence of member states without partisan interests in a single case. However, we do not expect exclusively deliberative interaction within the COP. Parties may refrain altogether from discussing proposals, because of bureaucratic inertia or because Secretariat recommendations are simply considered well-reasoned. Occasionally, parties may also engage in voting and coalition-building and thus introduce power-based interaction into the decision process. But this strategy does not necessarily hinder the institution from adopting decisions that are based on deliberation. There are however limits to the institutional capacity to produce problem-adequate decisions. If the opponents of a listing decision manage to gather one third of the member states present and voting, they can block even a well-reasoned proposal. Or a two-thirds majority might list a species without convincing reasons. Such decisions would indicate a major crisis of the entire regulatory system, as occurred in the late 1980s, related to the listing of the African elephant. Fortunately, it is not very probable that such coalitions emerge, because many countries not directly affected by trade restrictions on a particular species would have to be prepared to openly ignore their commitment to the listing criteria.

Commitment of Aggrieved Parties to Criteria-Based Decisions

Finally, a listing decision must be accepted by the member states, which have the formal right to opt out of the resulting commitment within 90 days of its adoption. It could be tempting for states interested in trade in a listed species to use this right, especially if they have been outvoted by the majority in the COP. However, opting out of decisions that are convincing according to mutually agreed criteria raises the reciprocity concerns which already occurred during committee decision-making. A country choosing this option will inevitably contribute to undermining the effectiveness of the institution at large, because it automatically invites other countries to do the same in other cases. A specific feature of CITES regulation supports the acceptance of even undesired listing decisions. Trade restrictions following from a listing decision apply both to the exporting and the importing party of a trade relationship. Accordingly, unhampered trade in listed species requires collective opting out by exporters and importers. Indeed, such cases have occasionally happened in the past (e.g. by whaling countries, and in respect to the saltwater crocodile), but generally, even powerful states tend to accept listing decisions, even after being outvoted.[46]

CITES Listing Decisions in Practice

In the third step of our argument, we examine whether the CITES listing procedure actually sorts out parochial interests and ensures criteria-based decisions in practice. In order to do this, we analyze three of the comparatively few contro-

46. Sand 1997.

versial listing decisions of two past COPs (2002 in Santiago and 2004 in Bangkok) that reflect different problems. Proposals that raise significant opposition are considered controversial. Our case selection is thus deliberately biased toward the contentious cases, because we assume that such cases can tell us more than the many non-controversial ones about the ability of the procedure to produce convincing decisions.[47] The brief case studies have the dual purpose of exploring whether the reasons accompanying the Secretariat recommendations are challenged within the COP, and of assessing member states' responses toward them. We rely mainly on CITES documents which reflect the main arguments voiced during the listing process and indicate the parties which raised concern, as well as the votes cast. Parties that do not duly raise their concern cannot expect to influence the decision process.

The Humphead Wrasse: Arguments Prevail

The decision to list the Humphead Wrasse illustrates how the procedure operates in comparatively simple cases with reliable information. While countries may oppose a Secretariat recommendation, the procedure is capable of generating consensus. A number of members, namely the EU, the US, Fiji, and Ireland, submitted the proposal to list the Humphead Wrasse, a reef fish, in the run-up to COP 13 (2004).[48] The fish suffers from increasing demand as a luxury food, primarily in China and Southeast Asia. As in all luxury export markets, value tends to increase with rarity. The listing proposal therefore generated remarkable interest. The proponents argued that the fish satisfies the listing criteria because "it is known, or can be inferred or projected, that regulation of trade in the species is required to ensure that the harvest of specimens from the wild is not reducing the wild population to a level at which its survival might be threatened by continued harvesting or other influences."[49]

Knowledge about the status of the Humphead Wrasse proved to be extraordinarily good. The proponents provided detailed information about the status of the species in seven range states. Fishing quotas had decreased and indicated a drop in populations. And visual underwater censuses in twenty-four independent studies had shown a rapid decline in Humphead Wrasse populations in the West-Pacific. Even better data for the Indo-Pacific oceans also indicated serious threats to the fish. The proponents consulted, according to the listing criteria, all other range states before submitting the proposal to the Secretariat. Statements of six responding range states, as reflected in Table 2, were included in the final version of the proposal.[50]

After consulting member states and competent non-state actors, the Secre-

47. For example, 23 of the 33 listing-decisions of COP 13 were made by consensus, see Checklist on Amendment Proposals COP 13.
48. CITES Document COP 13 Prop. 33, 2004. Consideration of Proposals for Amendment of Appendices I and II (cheilinus undulatus).
49. CITES Document Resolution 9.24, 1994. Annex 2a, Paragraph, *supra* note 27.
50. CITES Document COP 13 Prop. 33, 2004. *supra* note 48.

Table 2
Comments by Range States on Humphead Wrasse

	Support	*Opposition*	*Comments*
Fiji	X		
Guam	X		
Hong Kong		X	". . . range countries are in the best position to cooperatively manage their natural resources, including the establishment of catch and export quota systems for each exporting country."
Indonesia		X	Species is not endangered in Indonesia
Japan		X	Species is not endangered in Japan. Proposed a FAO-expert meeting to develop sustainable management measures.
Singapore		X	FAO and regional fishery management authorities are the competent authorities to manage fish stocks, not CITES.

tariat recommended to list the Humphead Wrasse in Appendix II because current levels of harvest for international trade had a detrimental impact on the species and were not sustainable. Consultation had produced further evidence in support of the proposal. The FAO communicated that its Ad Hoc Expert Advisory Panel had concluded "that the available evidence supports the inclusion of Humphead Wrasse in CITES Appendix II. . . This conclusion is based on its high vulnerability, low productivity and evidence of widespread and serious impacts of exploitation throughout most of the range of the species."[51] Moreover, the IUCN informed that it had listed the Humphead Wrasse 2004 as "endangered," indicating that the species was seriously threatened with extinction.[52]

In spite of the remarkable economic interest in the species, discussion of the proposal at the COP focused almost entirely on whether Humphead Wrasse met the listing criteria, and resulted in a consensual decision to list the species. During the discussion, delegations from Palau, Iceland, Kenya, Norway and Indonesia explicitly supported the proposal.[53] This is noteworthy because Indonesia had opposed the listing at the outset of the listing process, bringing forward the argument that the species was not endangered in that country. Being con-

51. CITES Document COP 13 Doc. 60, 2004. Proposals to Amend Appendices I and II, 58.
52. IUCN Species Information "cheilinus undulatus," at www.iucnredlist.org, viewed 28 January 2008.
53. Documented in CITES Document COP 13 Com. I. Rep. 16, 2004. Summary Report of Committee I, sixteenth Session.

fronted with new information collected during the consultation-procedure, it changed its position and, apparently, became truly convinced of the endangered status of the fish. The Seychelles opposed the proposal on the grounds that no data had been provided for this region and that the competence for the management of reef fish was with the FAO, not with CITES; moreover, listing of the Humphead Wrasse might lead to listing of other species of reef fish. The FAO representative pointed out that the FAO Expert Advisory Committee had recommended the listing in Appendix II of CITES, so that the second argument was rejected and dropped by the Seychelles. In the end, neither this country nor any of the four range states which initially opposed the proposal voted against it. The decision was adopted by consensus according to the recommendation of the Secretariat, and no party entered a reservation.[54]

Despite the extraordinarily reliable informational basis, some interested countries had initially opposed listing. During the procedure, the level of knowledge on the status of the species was enhanced and resistance gradually diminished. One country explicitly changed sides, and others did so implicitly, or at least considered it inappropriate to vote against the proposal. Consensus was therefore able to emerge. Moreover, arguments referred throughout to the listing criteria, and these criteria were accepted as standard for problem-adequate decisions.

Big-leaf Mahogany: Arguments Are Enforced by the Majority

The case of Big-leaf Mahogany illustrates the difficulty of parties to rally sufficient support for positions that are, according to the listing criteria, unconvincing. It exemplifies a type of case in which the informational basis is sound, but economic interests are overwhelming and stakeholders are prepared to disregard the fact that a species clearly meets the listing criteria. In the run-up to COP 12 (2002), Guatemala and Nicaragua submitted the proposal to list Big-leaf Mahogany in Appendix II. Whereas Guatemala was only a minor Mahogany producer, Nicaragua was the fourth-largest exporter of this timber. Mahogany is the most valuable of all timber species. Before the species was listed, a cubic meter cost about US$1.700.[55] The species was listed under Appendix III at the demand of individual range states, but Nicaragua and Guatemala considered this status to be inadequate, especially because it had not been requested by all range states.

The informational basis in the case of Big-leaf Mahogany was quite sound.[56] According to an FAO study, the average rate of deforestation in Big-leaf Mahogany populations was more than one percent per year since the 1980s. Some 28 percent of the forest cover had been lost within the total area of its dis-

54. CITES Specific Reservations Entered by Parties.
55. Blundell 2004, 86, citing ITTO 2003.
56. For an overview of Big-leaf Mahogany studies, see Blundell and Gullison 2003.

tribution. Thus, the proponents inferred that the species would be threatened with extinction in the near future, and that it therefore met the criterion for inclusion in Appendix II. They provided good data for most of the range states, but the proposal did not contain consultation statements.

The Secretariat recommended the inclusion of Big-leaf Mahogany in Appendix II. In the consultation procedure, states neither brought forward arguments in favor or against the listing, nor presented new information. Arguments had been exchanged in the Mahogany Working Group which was attended by nearly all range states and the major importer states, and had been established at COP 11 (2000). The positions were rather controversial and the final report of the working group stated that mahogany forest cover was reduced in some, but not all, countries for various reasons; among others, due to illegal trade.[57]

The proposal remained contentious during the COP and was adopted in a secret ballot. In the discussion, Costa Rica, Ecuador and Mexico favored the proposal to ensure sustainable exploitation of the species. Bolivia opposed a listing because the species was not threatened in that country, although it had stated in the Mahogany Working Group one month before that "Mahogany populations underwent a rapid and drastic decrease as a consequence of illicit logging."[58] Peru and Ghana also opposed the listing in Appendix II.[59] Eventually, Brazil requested a secret ballot. 68 parties voted in favor, 30 against the proposal and 14 abstained from voting. The United States, one of the two major importers, stated after the vote that it had voted in favor of the listing. No country entered a reservation.

In spite of the high level of conflict, the final decision fully reflected the deliberative outcome of the scientific assessment stage, but interaction within the COP amounted to bargaining and coalition-building rather than deliberation. The three major producing countries (Brazil, Peru and Bolivia) fought the listing proposal despite reliable information concerning the species' threatened extinction, and as many as 30 parties voted against the listing. The necessary two-thirds majority of the parties present and voting (not counting abstentions) was barely reached. However, the species was eventually listed according to the Secretariat recommendation. The listing entered into effect because the range states refrained from submitting a reservation.

The Great White Shark: Weak Arguments do not Prevail Over Interests

The Great White Shark case demonstrates the limits of criteria-based rationality in the CITES listing procedure. If information is limited and unreliable, the recommendation of the Secretariat cannot be very well-reasoned. Therefore, it can

57. CITES Document COP 12 Doc. 47, 2002. Final Report of the Mahogany Working Group.
58. CITES Document Prop. 12.50, 2002. Considerations of Proposals for Amendment of Appendices I and II, refers to Mahogany Working Group 1 Document 8.8.
59. The discussion is documented in CITES Document COP 12 Com. I Rep. 13, 2002. Summary Report of Committee I, thirteenth session.

easily be challenged. In preparation for COP 13 (2004), Madagascar and Australia submitted the proposal to list the Great White Shark in Appendix II. Shark fins are eaten primarily in Asia as delicacies, and sets of shark teeth are sold for as much as US$50,000.[60] Shark conservation has been a topic of CITES conferences since 1994. Sharks were subject to discussion in the Animals Committee, and a shark working group was established to assess which of the shark species were especially endangered.

The information relating to this species was extraordinarily limited. The assessment of the status of a species like the Great White Shark, which is highly migratory and lives in deep waters, is costly and difficult. The proponents had only poor population trend data at their disposal. They argued that it is hardly possible to get data about a species that is nearly extinct.[61] Therefore, they relied on indicators such as declining catch rates, less by-catch and fewer sharks in bather protection nets. The small amount of data available showed, according to the proponents, a 60 percent decline in great white shark populations. The consultation of the range states hardly improved available knowledge about the shark. Algeria, Brazil and Mexico supported the proposal, but they also had little information about population trends. Japan opposed the listing, because, in its view, the available information was insufficient and the species seemed not to be endangered. Some other countries were indifferent. A workshop on Great White Shark conservation research with twenty international shark experts, organized by the Animals Committee early in 2004, also resulted in no clear assessment of the shark populations. It concluded that "the natural rarity of White Sharks means that catch records are scarce. This makes it more difficult to identify statistically significant trends from most data sets than is the case for other more commonly recorded large shark species, which are certainly declining in some regions."[62] Although most members of the Animals Committee Working Group were satisfied that the species met the criteria for an Appendix II listing,[63] the Committee did not reach agreement on a listing recommendation. During the consultation, Japan strongly opposed the listing, claiming that information was not sufficient to show that the species is endangered and that trade is a serious threat to it. It argued that, although the data of some countries showed a decline, an assessment of the global status of the species was impossible. Japan advocated protection of sharks in the framework of the FAO International Plan of Action for the Conservation and Management of Sharks launched in 1999. Assessment by the FAO Ad Hoc Expert Advisory Panel was also inconclusive. The available evidence could support a range of hypotheses, and it was not possible

60. CITES Document COP 13 Prop. 32, 2004. Considerations of Proposals for Amendment of Appendices I and II.
61. Ibid.
62. CITES Document AC 20 Inf.1, 2004. White Shark Cacharodon cacharias: Status and management challenges, 3.
63. CITES Document AC 20 Doc. 19, 2004. Biological and Trade Status of Sharks, Report of the Working Group, 1.

to confirm or exclude the possibility that the species, as a whole, met the criteria for a listing in Appendix II.[64]

Against this backdrop, the Secretariat recommended an inclusion of the species in Appendix II without any export quota, but the recommendation was extraordinarily cautiously worded. It stated that "the available information and the analysis of IUCN/TRAFFIC[65] and FAO suggest that overall, *C. carcharias* may meet the criteria for inclusion in Appendix II."[66]

The proposal to list the Great White Shark was hotly discussed at the Conference of the Parties, and eventually adopted by a secret ballot, but important countries entered reservations. In the center of discussions was the question of whether the species met the criteria,[67] although this issue was immediately related to distributive interests. Several states (i.e. the Netherlands on behalf of the member states of the European Community, Brazil, Ecuador, Kenya, Uruguay and Thailand) held the view that the species met the criteria. Japan, Santa Lucia, Guinea and Qatar opposed the proposal. They argued that there was not sufficient information to assess whether the species met the criteria and that shark-management should be conducted within the framework of the FAO. The FAO repeated that data did not allow for the opposition or the support of the proposal, whereas the IUCN stated that the data indicated a decline in shark populations, which could be attributed to fishing and trade. A secret ballot was eventually held at the request of Japan. The proposal was accepted with 87 votes in favor, 34 against and 9 abstentions. Japan, Iceland, Norway and Palau entered reservations.[68]

If information is limited and unreliable, stakeholders can pursue their preferences and challenge the recommendation of the Secretariat without openly violating the listing criteria. While parties favoring the listing proposal may advocate their position based upon the precautionary principle, opponents do not need to advocate unconvincing positions, as they did in the Mahogany case. It suffices to point to lacking information which renders problem-adequate decisions difficult to make, or to advance a different interpretation of the data. Moreover, this opportunity reduces the threshold for reservations, because opting out does not reflect an outright denial of the CITES regulatory approach.

Conclusion

Functionally differentiated decision procedures can fundamentally transform the logic of coordination in international institutions and support problem-

64. Consultation is documented in CITES Document COP 13 Doc. 60, 2004. *supra* note 51, 53–60.
65. The Great White Shark was listed as "vulnerable" on the Red List of Threatened Species of IUCN, at www.iucnredlist.org, viewed 28 January 2008.
66. CITES Document COP 13 Doc. 60, 2004. *supra* note 51, 57.
67. The discussion is documented in CITES Document COP 13 Com.I Rep. 15, 2004. Summary Report of Committee I, fifteenth session.
68. CITES Specific Reservations Entered by Parties.

adequate regulation based on reason instead of power. Whereas stakeholders will normally tend toward a balance of interests through bargaining in intergovernmental negotiations, the separation of different functions within a decision process may deprive them of their bargaining power and thereby favor the exchange of arguments and deliberative agreement. Institutions can systematically separate the molding of general criteria from the decision of specific cases in light of these criteria. In addition, they can systematically separate regulatory decision-making, which immediately entails distributive consequences from the assessment of facts that are inherently open to the deliberative appraisal of arguments (like scientific information). These two forms of functional differentiation provide niches for the meaningful exchange of arguments, and confront decision-makers with commonly accepted criteria and information. Moreover, they tend to provide incentives for decision-makers not to ignore the deliberatively-reached insights, and thereby diminish their capacity for power-based bargaining.

The CITES listing procedure mobilizes both forms of functional differentiation. On the one hand, the COP has committed itself and all other actors involved in the listing process, to a broad set of detailed listing criteria, against which recommendations submitted by the Secretariat, as well as its own decisions can be appraised. On the other hand, the procedure includes a strong scientific assessment stage, which is dominated by the Secretariat. Information and relevant opinions are collected from a wide range of governmental and nongovernmental sources and sufficient incentives are provided to induce all relevant actors, especially the member states, to rely on arguments when attempting to influence the assessment process. Of utmost importance is the triadic structure of the process, because it precludes negotiations among stakeholders. The Secretariat alone decides upon its recommendation to the COP, but it does so in light of information and comments received from all competent sides. The Secretariat, in turn, has a strong incentive to submit scientifically convincing recommendations, because it merely occupies an advisory role in the subsequent decision-making stage. The decision stage remains the Achilles' heel of the procedure, because it cannot entirely be excluded that states rally around political compromises instead of problem-adequate solutions. However, the joint effect of a number of factors, including the commitment to the listing criteria, the opportunity to appraise decisions against the Secretariat recommendation, the limited scope of the single listing decisions, and the presence of many member states that do not have stakes in any given listing proposal, usually hinder even a coalition of decisive stakeholders from imposing decisions not in conformity with the listing criteria on the institution. It is thus highly probable that well-reasoned Secretariat recommendations are accepted by the COP.

The analysis of several contentious listing decisions discloses how the regulatory system sorts out parochial interests and where its limits lie. It reveals that states do have, and seek to promote, strong parochial interests on listing issues, so that outcomes cannot simply be explained by their intrinsic motivation

to protect endangered species. In some cases, the regulatory system collects convincing information sufficient to induce states to change their preferences on a listing proposal. In the Humphead Wrasse case, Indonesia openly changed its preferences after it had received new information during the consultation procedure, while other states, like the Seychelles, terminated their open rejection and acquiesced in light of existing information. In this case, parochial interests running counter to the Secretariat proposal were successfully dismantled through convincing arguments. In the Mahogany case, overwhelming economic interests were at stake, although it was difficult to deny that the species fulfilled the listing criteria. The listing proposal was adopted against the votes of no fewer than thirty states. Hence, it was not convincing arguments, but the power of a sufficiently broad majority that effectively sorted out the parochial interests of the Mahogany traders. However, the majority position reflected the convincingly reasoned Secretariat proposal, and all opponents resisted the temptation to enter a reservation. The last case demonstrates the limits of the persuasion system. If it cannot be decided whether a species like the Great White Shark really meets the listing criteria and stakeholders can easily interpret the information according to their parochial interests, states tend to follow their preferences and enter reservations. Hence, the listing procedure is capable of depriving stakeholders of their bargaining power—even in difficult cases like Mahogany—if it manages to generate sufficient convincing information, but it reaches its limits where such information is lacking.

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