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Enforcing CITES: The Rise and Fall of Trade Sanctions

Peter H. Sand

Among the most innovative – albeit least well known – features of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regime is the use of trade sanctions for noncompliance with the treaty. Though not foreseen at all in the original text of the Convention, a unique system of 'collective retorsion' was gradually developed through a series of resolutions by the Conference of the Parties, by way of trade embargoes – that is, multilateral recommendations to suspend trade in CITES-listed specimens with the country concerned. Since 1985, this scheme – now codified in the 2007 Guidelines on Compliance with the Convention – has been enforced against at least 43 recalcitrant States (parties and non-parties). This article reviews the historical evolution of the CITES sanction scheme in practice over the past three decades, and its effectiveness in achieving compliance. The legality and legitimacy of the scheme is assessed in light of the Convention, other relevant international instruments and general rules of international law.

INTRODUCTION: ENFORCEMENT OF COMPLIANCE ON THE CITES AGENDA

The mandate of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) placed the treaty in disputed territory – namely the borderland of environmental conservation and trade regulation.[1] This article reviews the practical experience of the CITES regime in applying one of its most potent regulatory and enforcement instruments: the use of trade embargoes, in the form of recommendations to suspend trade in CITES-listed species.

Enforcement issues have long been a 'constant concern' for the Conference of the Parties (CoP) to CITES.[2] In 1981, it had mandated a 'Technical Expert Committee' (established in 1979; renamed 'Technical Committee' in 1983) to 'identify problems with enforcement of the Convention and provide guidance to the secretariat and the parties on measures that may be undertaken to remedy these problems'.[3] After the abolition of the Committee in the course of a re-organization in 1987,[4] enforcement matters were left to the CITES Standing Committee and the Secretariat, with advisory input from ad hoc meetings (2004 and 2009) of an 'Enforcement Expert Group' reporting to the Standing Committee.[5] Over the past few years, however, the problem of illegal wildlife trafficking – and its connection with organized crime and political security threats – has come to the forefront. Following a series of Memoranda of Understanding with other international institutions (including INTERPOL) and regional networks active in this field,[6] and through participation in the International Consortium on Combating Wildlife Crime created in 2010,[7] the CITES Secretariat also intensified its cooperation with the United Nations Commission on Crime Prevention and Criminal Justice,[8] at whose

[1] 'International cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.' Convention on International Trade in Endangered Species (Washington, DC, 3 March 1973; in force 1 July 1975) ('CITES'), preamble. See P.H. Sand, 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment', 8:1 *European Journal of International Law* (1997), 29; and W. Wijnstekers, *The Evolution of CITES: A Reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 9th edn (International Council for Game and Wildlife Conservation, 2011).

[2] CITES Resolution Conf. 11.3 (Rev. CoP16), Compliance and Enforcement (2000/2013).

[3] CITES Resolution Conf. 3.5 (Rev. CoP4), Technical Expert Committee (1981/1983).

[4] See R. Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (Earthscan, 2002), at 49–50.

[5] See Report of the CITES Enforcement Expert Group (SC58 Doc.23/ Add, 2009). On the promotion and coordination of enforcement at the national level, see D. Kaniaru and E. Mrema (eds.), *Enforcement of and Compliance with MEAs: The Experience of CITES, Montreal Protocol and Basel Convention*, Vol. 1 (United Nations Environment Programme (UNEP), 1999), 1, at 93–149; and the proceedings of the International Network for Environmental Compliance and Enforcement (1990–2011), found at: <http://www.inece.org>.

[6] For a list of MoUs concluded, see P.H. Sand, 'Endangered Species, International Protection', in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 3 (Oxford University Press, 2012), 423, at 427.

[7] Co-financed by the World Bank Development Grant Facility. See International Consortium on Combating Wildlife (CoP16 Doc.15 (Rev.1), 2013).

[8] The commission services the UN Convention Against Transnational Organized Crime (New York, 15 November 2000; in force 29 September 2003) and the UN Convention Against Corruption (New York, 31 October 2003; in force 14 December 2005). See M.E. Zimmermann, 'The Black Market for Wildlife: Combating Transnational Organized Crime in the Illegal Wildlife Trade', 36:5 *Vanderbilt*

request the UN Economic and Social Council on 25 July 2013 adopted a resolution on 'crime prevention and criminal justice responses to trafficking in protected species of wild fauna and flora'.[9] Illustrating the dimension of the problem, a recent report of the UN Office on Drugs and Crime estimates illegal trade in wildlife and wood-based products in/from East Asia and the Pacific alone as approaching a value of US$20 billion annually.[10]

Surprisingly perhaps, enforcement (defined as 'the act or process of compelling compliance with a law . . . or agreement'[11]) is still approached with considerable hesitation in most multilateral environmental regimes. Notwithstanding the advent of a whole range of innovative compliance procedures and institutions over the past few decades,[12] treaty drafters as well as commentators seem to bend over backwards to avoid 'coercive' language – or the very word 'sanctions', for that matter.[13] In essence, many international lawyers today 'do not so much shy away from addressing the topic of coercion as simply deny its importance'.[14]

Yet, as pointed out by Jean Combacau, the concept of sanctions lies at the centre of the debate on the effectiveness or even the existence of international law.[15] And contrary to the widespread assumption that 'sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used',[16] CITES offers perhaps the most striking illustration of a workable system of collective treaty sanctions, gradually developed in practice, and credited by some observers with 'an almost 100 percent success rate'.[17] Not surprisingly therefore, an independent external evaluation of the system commissioned by the Standing Committee in 2004 concluded that unlike other multilateral environmental agreements, CITES did not need a special compliance control body as postulated by some parties.[18]

TRADE EMBARGOES UNDER CITES ARTICLE XIV.1

The formal legal basis for CITES sanctions is Article XIV.1(a) of the Convention, which expressly reserves the right of States to take 'stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in

Journal of Transnational Law (2003), 1657, at 1686; M. Yeater, 'Corruption and Illegal Wildlife Trafficking', in: *Corruption, Environment and the United Nations Convention Against Corruption* (UNODC, 2012), 17; and R. Torpy, 'If Criminal Offenses Were Added to CITES, Would Nations Be Better Able to Restrict International Trade in Endangered Species and Protect Biodiversity?', 9:3 *Revista de Direito Internacional/Brazilian Journal of International Law* (2012), 57.

[9] Text in: Report of the Commission on Crime Prevention and Criminal Justice on its Twenty-second Session (UN Doc. E/2013/30, 2013), at 36. See also United States President Obama's Executive Order 13648 of 1 July 2013 ('Combating Wildlife Trafficking'), 78 Federal Register 40619 (5 July 2013); and J.E. Scanlon, 'CITES at Its Best: CoP16 as a "Watershed Moment" for the World's Wildlife', 22:3 *Review of European, Comparative and International Environmental Law* (2013), 222.

[10] UN Office on Drugs and Crime, *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment* (UNODC, 2013), at 75–86 (based on 2008 FAO and TRAFFIC data). The largest black market in wildlife products concerns marine wildlife: even when disregarding illegal offshore fishing, that sector alone is estimated to net an annual income of US$850 million for the criminal enterprises involved (ibid., at 86). On the illegal ivory trade, see C. Nellemann *et al*. (eds.), *Elephants in the Dust: The African Elephant Crisis* (UNEP/CITES/IUCN/TRAFFIC, 2013). The overall value of wildlife, fisheries and timber products in global trade was estimated at US$332.5 billion in 2005. See M. Engler, 'The Value of International Wildlife Trade', 22:1 *TRAFFIC Bulletin* (2008), 4.

[11] B.A. Garner (ed.), *Black's Law Dictionary*, 9th edn (Thomson/West, 2009), at 608.

[12] See T. Treves *et al*. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (T.M.C. Asser Press, 2009).

[13] See J. Brunnée, 'Enforcement Mechanisms in International Law and International Environmental Law', in: U. Beyerlin *et al*. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (Martinus Nijhoff, 2006), 1, at 3. Both the UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements (UN Doc. UNEP/GCSS.VII/4/Add.2, 17 February 2002) and the UN Economic Commission for Europe (UNECE) Guidelines on Compliance and Enforcement/Implementation of Multilateral Environmental Agreements (UN Doc. ECE/CEP/107, 23 May 2003) refrain from using the term 'sanctions' and instead refer to 'potential measures' only.

[14] A. D'Amato, 'The Coerciveness of International Law', 52 *German Yearbook of International Law* (2009), 437, at 437. See also M.E. O'Connell, 'Enforcement and the Success of International Environmental Law', 3:1 *Indiana Journal of Global Legal Studies* (1995), 47, at 53.

[15] J. Combacau, 'Sanctions', in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4 (Elsevier, 2000), at 311, equating sanctions with the (preferred) term 'countermeasures'. See also A. Pellet and A. Miron, 'Sanctions', in: R. Wolfrum, n. 6 above, Vol. 9, 1, at 1; G. Abi-Saab, 'The Concept of Sanction in International Law', in: V. Gowland-Debbas (ed.), *United Nations Sanctions and International Law* (Kluwer Law International, 2001), 29; N. White and A. Abbas, 'Countermeasures and Sanctions', in: M.D. Evans (ed.), *International Law*, 3rd edn (Oxford University Press, 2010), 531; and D. Alland, 'The Definition of Countermeasures', in: J. Crawford *et al*. (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 1127.

[16] A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1998), at 32–33.

[17] D. Brack, 'Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System', in: G.P. Sampson and W.B. Chambers (eds.), *Trade, Environment and the Millennium*, 2nd edn (United Nations University Press, 2002), 321, at 334. For a more nuanced assessment of the system's effectiveness, see R. Reeve, 'Wildlife Trade, Sanctions and Compliance', 82:5 *International Affairs* (2006), 881, at 892–895.

[18] V. Koester, *Compliance Committees within MEAs and the Desirability and Feasibility of Establishing Special Compliance Bodies under CITES* (SC54 Doc.Inf.3, 2004); and see the proposal by Germany (on behalf of the EU Member States), summarized in: Guidelines on Compliance with the Convention (SC50 Doc.27, 2004), Annex 1, at paragraph 12.

Appendices I, II and III, or the complete prohibition thereof'.[19] Implicitly therefore, the Article also authorizes the use of unilateral economic sanctions by way of trade restrictions or trade bans (embargoes) against other States,[20] provided these are compatible with applicable general rules of international law.[21]

The most prominent examples of unilateral state practice in this field are the trade embargoes imposed by the United States under the Lacey Act of 1900 as amended in 1935,[22] the so-called 'Pelly Amendment' of 1971 to the 1954 Fishermen's Protective Act,[23] and the 1976 Fishery Conservation and Management Act as amended.[24] Those laws empower the American President to sanction other States infringing international environmental agreements such as CITES or the International Convention for the Regulation of Whaling by way of foreign-trade restrictions or denial of fishing rights in American coastal waters, upon prior 'certification' of such infringements through the United States Secretary of Commerce.[25]

By implication, such findings of infringement are based on treaty interpretation – that is, the alleged noncompliance by other States with multilateral agreements. While the interpretation so invoked is unilateral, it may be motivated or supported by pronouncements of competent intergovernmental treaty bodies, such as the CITES CoP or Standing Committee authorizing/recommending 'stricter domestic measures' under Article XIV.1. Unilateral American trade measures have thus repeatedly been applied in response to CITES infringements, including an import ban under the Lacey Act against Singapore in 1986,[26] certifications under the Pelly Amendment against Japan in 1991,[27] and against Taiwan in 1993.[28] Along the same lines, EU Member States enforced a strict import ban against Indonesia for all species listed on CITES Appendix II in 1991–1995.[29] Significantly, though, the United States Supreme Court made it clear in 1986 that the imposition of trade sanctions lies within the exclusive foreign policy discretion of the American government and therefore cannot be mandated on the basis of community concerns.[30] That would in essence condition the enforcement of international environmental law on whether or not it is currently opportune for any one government – hardly a robust basis for the long-term conservation of common natural resources.[31]

[19] CITES, n. 1 above, Article XIV.1(a). See P.H. Sand, n. 1 above, at 38.

[20] See H.G. Kausch, 'Embargo', in: R. Bernhardt, n. 15 above, Vol. 2, 38; and H.K. Ress, *Das Handelsembargo: Völker-, europa- und aussenwirtschaftsrechtliche Rahmenbedingungen, Praxis und Entschädigung* (Springer, 2000), at 7.

[21] For a caveat against excessive unilateral use of Article XIV.1 of CITES, see J. Hutton, 'CITES: The Issue of Endangered Species', in: P. Könz (ed.), *Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America* (International Centre for Trade and Sustainable Development, 2000), 143, at 145.

[22] Lacey Act of 25 May 1900, as amended by the Act of 15 June 1935, 49 Stat. 378. See R.S. Anderson, 'The Lacey Act: America's Premier Weapon in the Fight against Unlawful Wildlife Trafficking', 16:1 *Public Land Law Review* (1995), 27.

[23] Fishermen's Protective Act of 27 August 1954, as amended by the Act of 23 December 1971, 85 Stat. 786. See S. Charnovitz, 'Encouraging Environmental Cooperation through the Pelly Amendment', 3:1 *Journal of Environment and Development* (1994), 3–28.

[24] Starting with the 1979 Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 13 April 1976, 93 Stat. 407. See E. Zoller, *Enforcing International Law Through US Legislation* (Transnational, 1985), at 84; and the import restrictions under Sections 205 and 608 of the 2006 Magnuson-Stevens Fishery Conservation and Management (Reauthorization) Act, Public Law 109-479.

[25] See A.F. Upton, 'The Big Green Stick: Reducing International Environmental Degradation through US Trade Sanctions', 22:3 *Boston College Environmental Affairs Law Review* (1995), 671; and S.D. Murphy, 'US Sanctions against Japan for Whaling', 95:1 *American Journal of International Law* (2001), 149, at 150.

[26] Following an American embargo on 25 September 1986 for all wildlife imports from Singapore (which at the time was not a CITES member), Singapore acceded to CITES on 30 November 1986, and the embargo was lifted on 30 December 1986. See P.H. Sand, n. 1 above, at 39; and R. Reeve, n. 4 above, at 129–130.

[27] Following Japan's Pelly Amendment certification in March 1991 for trade in endangered marine turtles (even though it had entered valid reservations under CITES Article XXIII), the Japanese government in April 1991 withdrew its reservation on olive ridley turtles (*Lepidochelys olivacea*), and in 1994 its reservation on hawksbill turtles (*Eretmochelys imbricata*). See C.D. Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* (Princeton University Press, 1993), at 45; S. Murase, 'National Report: Japan', 5 *Yearbook of International Environmental Law* (1994), 425, at 426; P. Mofson, 'Protecting Wildlife from Trade: Japan's Involvement in the Convention on International Trade in Endangered Species', 3:1 *Journal of Environment and Development* (1994), 91, at 100; and M. Dupree, 'Passing through Enemy Waters: Marine Turtles in Japan', 14:1 *University of California at Los Angeles Pacific Basin Law Journal* (1995), 75. See also S. Charnovitz, 'Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices', 9:3 *American University Journal of International Law and Policy* (1994), 751.

[28] See S. Patel, 'The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn', 18:2 *Houston Journal of International Law* (1995), 157, at 197–199; and E. De Sombre, *Domestic Sources of International Environmental Policy: Industry, Environmentalists, and US Power* (MIT Press, 2000), at 175–178.

[29] The embargo was eventually lifted after an EU-sponsored field inspection by an IUCN expert. See R. Reeve, n. 4 above, at 125–126. See also L. Krämer, 'Environmental Protection and Trade: The Contribution of the European Union', in: R. Wolfrum (ed.), *Enforcing Environmental Standards: Economic Measures as Viable Means?* (Springer, 1996), 413, at 437.

[30] *Japan Whaling Association v. American Cetacean Society* (30 June 1986), 478 US 221. See J.K. Setear, 'Can Legalization Last? Whaling and the Durability of National (Executive) Discretion', 44:3 *Virginia Journal of International Law* (2004), 711, at 753.

[31] P.H. Sand, 'Japan's "Research Whaling" in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)', 17:1 *Review of European Community and International Environmental Law* (2008), 56, at 68. See also U. Beyerlin and T. Marauhn, *Rechtsetzung und Rechtsdurchsetzung im Umweltvölkerrecht nach der Rio-Konferenz 1992* (Erich Schmidt Verlag, 1997), at 79; and L. Boisson de Chazournes, 'The Use of Unilateral Trade Measures to Protect the Environment', in: A. Kiss *et al.* (eds.), *Economic Globalization and Compliance with International Law* (Kluwer Law International, 2003), 181.

THE EVOLUTION OF COLLECTIVE RETORSION PROCEDURES

Meanwhile, the CoP to CITES gradually developed a procedure of its own for *collective* measures against noncompliance with the Convention, based on Article XIII ('international measures'), consolidated and codified in Resolution 14.3 (2007).[32] The practice of the CITES compliance regime, which amounts to a system of 'multilateral retorsion'[33] (starting with the first trade embargo against Bolivia in 1985),[34] may be summarized as follows:[35]

Whenever 'specific compliance matters' (a euphemism for disputes over noncompliance) are not resolved by direct communication between the party concerned and the CITES Secretariat (pursuant to Article XIII) or the Standing Committee (pursuant to its functions as delegated by the CoP), the Conference or the Standing Committee may, as a last resort ('where a party's compliance matter is unresolved and persistent and the party is showing no intention to achieve compliance'), recommend an embargo – that is, the 'suspension of commercial or all trade in specimens of one or more CITES-listed species'.[36] While a suspension may thus focus on trade in particular species only (*species-specific*;[37] e.g., the embargo on imports of Nile crocodile specimens and products from Madagascar imposed in 2010),[38] the most effective sanctions of course are general embargoes (*country-specific*) – that is, denying recognition to all CITES export permits issued by the targeted country as valid documentation for entry anywhere else in the world. As a result, the country is excluded from access to the lucrative legal export markets for some 35,000 species of commercially tradable wildlife and wildlife products listed in Appendix II of the Convention. In view of the economic stakes involved, therefore, the mere threat of denial of market access often tends to produce near-instant compliance.[39]

Embargoes were not only imposed on parties to the Convention, but also on non-party States failing to comply with 'comparable' documentation standards under Article X ('trade with states not party to the Convention').[40] During the early years of CITES, countries unwilling to comply with the treaty's standards still had the option to preserve their 'free-rider' status by refusing to join, in the hope of finding substitute markets or alternative suppliers outside the regime. Consequently, sanctions during those years also focused on the goal of bringing recalcitrant outsiders under the rules of the Convention (free-riders turned 'forced-riders').[41] With progressive expansion of the membership to its current near-universal total of 178 States, external trade options have virtually disappeared, and the new free-riders are those parties that fail to implement basic treaty rules and in the process exploit the resulting inequality of trading standards to their own competitive advantage.[42]

To cope with these changes, the CoP also expanded the catalogue of offences triggering trade sanctions. While

[32] CITES Resolution Conf. 14.3, CITES Compliance Procedures (2007), Annex: Guide to CITES Compliance Procedures ('CITES Compliance Procedures'). See C. Payne, 'Introductory Note', 46 *International Legal Materials* (2007), 1174. As explained in the introductory paragraph of the guidelines, the codification is a description of existing Convention practice; the authentic legal basis thus remains CITES, n. 1 above, Article XIII (empowering the Conference to review alleged infractions, and to make 'whatever recommendations it deems appropriate'), and the five earlier Conference resolutions and decisions listed in footnote 1 of the Guide.

[33] See P.H. Sand, n. 6 above, at 427.

[34] CITES Resolution Conf. 5.2, Implementation of the Convention in Bolivia (1985). See R. Reeve, n. 4 above, at 96–99.

[35] For a detailed account of the dynamic growth of the scheme, see the valuable research work of Rosalind Reeve: R. Reeve, n. 4 above; R. Reeve, n. 17 above, and R. Reeve, 'Enhancing the International Regime for Protecting Endangered Species: The Example of CITES', 63:2 *Heidelberg Journal of International Law* (2003), 333. See also M. Fitzmaurice, 'Environmental Compliance Control', in: R. Wolfrum, n. 6 above, Vol. 3, 541, at 554–555.

[36] CITES Compliance Procedures, n. 32 above, at paragraph 30. See W. Wijnstekers, n. 1 above, at 254.

[37] Mainly for 'significantly-traded' Appendix II species and 'high-profile' Appendix I species, in implementation of CITES Resolution Conf. 12.8 (Rev. CoP13), Review of Significant Trade in Specimens of Appendix-II Species (2002/2004). See R. Reeve, n. 4 above, at 159–205; R. Reeve, n. 17 above, at 889; W. Wijnstekers, n. 1 above, at 137 and 142; and CITES Notification to the Parties No. 2013/013, Review of Significant Trade in Specimens of Appendix-II Species (2 May 2013).

[38] CITES Notification to the Parties No. 2010/015, Madagascar (17 June 2010). For follow-up, see Overview of Trade in *Crocodylus Niloticus* from Madagascar during the Period 2006–2011 (SC63/Inf.1, 2012).

[39] See P.H. Sand, 'Sanctions in Case of Non-compliance and State Responsibility: *Pacta Sunt Servanda* – Or Else?', in: D. Zaelke *et al*. (eds.), *Making Law Work: Environmental Compliance and Sustainable Development*, Vol. 1 (Cameroon, May 2005), 259; reprinted in: U. Beyerlin *et al*., n. 13 above, 259.

[40] See CITES Resolution Conf. 9.5 (Rev. CoP15), Trade with States not Party to the Convention (1994/2010); and W. Wijnstekers, n. 1 above, at 339–342. Given that third-party States are not bound by CITES rules, conduct giving rise to sanctions in these cases (persistent refusal to furnish documentation required pursuant to Article X) cannot be characterized as a breach of the Convention, but as a simple 'unfriendly act'. On the compatibility with GATT/WTO law, see A. Goyal, *The WTO and International Environmental Law: Towards Conciliation* (Oxford University Press, 2006), at 84–85; but see M. Fitzmaurice, n. 35 above, at 549 ('controversial').

[41] P.H. Sand, 'Commodity or Taboo? International Regulation of Trade in Endangered Species', 6 *Green Globe Yearbook of International Cooperation on Environment and Development* (1997), 19, at 22. See, e.g., the case of Singapore in 1986, n. 26 above, which at the time was notorious for attracting international wildlife trade in CITES-listed species, thereby diverting trade flows from other countries for the benefit of its local commerce. Three other non-parties eventually acceded to CITES after being targeted by trade embargoes (El Salvador in 1987, Equatorial Guinea in 1992 and Grenada in 1999). The United Arab Emirates withdrew from the Convention following an embargo in 1988, but re-joined in 1990, and were targeted again in 2001–2002.

[42] See A. D'Amato, n. 14 above, at 439, on the need for coercion to prevent this very kind of free-riding.

the initial focus was on infractions of specific substantive treaty obligations, inadequate domestic implementing legislation has since 1999 become the most frequently cited reason (on the basis of systematic country-by-country reviews of national laws and administration),[43] followed since 2002 by cases of persistent noncompliance with annual reporting requirements,[44] and since 2008 by noncompliance with specific requirements of the Action Plan for the Control of Trade in African Elephant Ivory.[45] Table 1 shows the country-specific CITES embargoes imposed since 1985 against a total of 43 States, in chronological order.[46]

The extraordinary effectiveness of the scheme is demonstrated by the fact that in more than 80% of the cases, trade suspensions could be lifted within less than a year, on the basis of evidence that the targeted country had returned to compliance (by enacting or amending the necessary legislation, submitting overdue reports, or complying with action plan requirements).[47] Even in cases where recommended trade bans were not implemented by all member States,[48] denial of market access in a few key countries usually proved sufficient to induce compliance.

[43] Under the 'National Legislation Project' initiated by CITES Resolution Conf. 8.4, National Laws for Implementation of the Convention (1992, repeatedly revised up to CoP16/2013), domestic implementing legislation is rated according to whether it meets 'all', 'some' or 'none' of four basic criteria: (i) designation of national CITES management and scientific authorities; (ii) prohibition of trade in violation of the Convention; (iii) penalization of such trade; and (iv) confiscation of illegally traded or illegally possessed specimens. See R. Reeve, n. 4 above, at 134–147; and R. Wolfrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law', 272 *Hague Academy of International Law: Collected Courses* (1998), 9, at 50 (footnote 99).

[44] Under CITES Resolution Conf. 11.17 (Rev. CoP14), National Reports (2000/2007), providing for sanctions after a party's failure to submit reports for three consecutive years. See R. Reeve, n. 4 above, at 147–152.

[45] Action Plan for the Control of Trade in African Elephant Ivory, adopted in 2005, found in: Trade in Elephant Specimens (CoP14 Doc.53/1, 2007), Annex 1 ('African Elephant Action Plan'); and W. Wijnstekers, n. 1 above, at 626–628. At the 64th meeting of the Standing Committee (Bangkok, 14 March 2013), eight countries identified as 'source countries' (Kenya, Uganda, Tanzania), 'transit countries' (Malaysia, Philippines, Vietnam) or 'destination countries' (China, Thailand) were officially requested to submit national action plans to combat illegal ivory trade, for review and possible compliance action by the Committee at its 65th meeting (Geneva, 7–11 July 2013). See National Ivory Action Plans (SC64 Doc.2, 2013); but see also the critical comments by S. Suresh, 'CITES: Rhetoric and Tiptoeing around Elephant Poaching', *Environmental Investigation Agency Blog* (15 March 2013), found at: <http://www.eia-international.org/cites-polite-rhetoric-and-tiptoeing-around-elephant-poaching>.

[46] In cases of suspensions for multiple reasons, States are grouped between first-listed and last-lifted embargo.

[47] For case-by-case assessments, see R. Reeve, n. 4 above, at 91–188; and R. Reeve, n. 17 above, at 892–895.

[48] For example, Austria, Switzerland and the United States did not implement the 1992 embargo against Italy; and the United States implemented the 1993 embargo against Taiwan, though not against China. See n. 28 above and n. 57 below.

TESTING THE LEGALITY OF THE CITES SANCTION SCHEME

Legal evaluation of the current CITES scheme of sanctions (in the form of country-specific trade embargoes penalizing persistent noncompliance) must address three basic questions: (i) the authority of the CoP or its Standing Committee to initiate collective retorsion measures; (ii) the compatibility of the scheme with other relevant treaty regimes; and (iii) its conformity to applicable general rules of international law.

DELEGATED LAW-MAKING IN PRACTICE

Decision-making by CoPs to environmental agreements has been described as 'de facto law-making'.[49] Whether or not these conferences are considered autonomous intergovernmental organizations or quasi-organizations,[50] they unquestionably perform normative functions.[51] In many respects, CITES is a prototype of this growing 'institutionalization of normative diplomacy'.[52] What has evolved from the accumulated practice of the regime as codified in the Compliance

[49] J. Brunnée, 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements', in: R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty-making* (Springer, 2005), 101, at 115.

[50] See J. Sommer, 'Environmental Law-making by International Organizations', 56:3 *Heidelberg Journal of International Law* (1996), 628, at 632; R.R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law', 94:4 *American Journal of International Law* (2000), 623, at 658; and G. Ulfstein, 'Treaty Bodies', in: D. Bodansky *et al*. (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), 877, at 886.

[51] See M. Chemillier-Gendreau, 'La Création de "Normes" par les Institutions des Conventions', in: J.M. Lavieille (ed.), *Conventions de Protection de l'Environnement: Secrétariats, Conférences des Parties, Comités d'Experts* (Presses Universitaires de Limoges, 1999), 361; J. Brunnée, 'COPing with Consent: Law-making Under Multilateral Environmental Agreements', 15:1 *Leiden Journal of International Law* (2002), 1; E. Hey, 'Sustainable Development, Normative Development and the Legitimacy of Decision-making', 34 *Netherlands Yearbook of International Law* (2003), 3; T. Gehring, 'Treaty-making and Treaty Evolution', in: D. Bodansky *et al*., n. 50 above, 467, at 491; L.K. Camenzuli, *The Development of International Law at the Multilateral Environmental Agreements' Conference of the Parties and Its Validity* (IUCN World Commission on Environmental Law, 2007); A. Wiersema, 'The New International Law-makers? Conferences of the Parties to Multilateral Environmental Agreements', 31:1 *Michigan Journal of International Law* (2009), 231; O. Kraft, *La Réception des Conférences des Parties dans l'Ordre Juridique International* (Master thesis, University of Paris I, 2010); and P.H. Sand, 'Le Role des "Conférences des Parties" aux Conventions Environnementales', in: Y. Kerbrat *et al*. (eds.), *Le Droit International face aux Enjeux Environnementaux* (Pedone, 2010), 101.

[52] P.M. Dupuy, *Droit International Public*, 9th edn (Dalloz, 2008), at 387. See also V. Röben, 'The Enforcement Authority of International Institutions', in: A. von Bogdandy *et al*. (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2010), 819, at 829.

TABLE 1 SUSPENSION(S) OF ALL COMMERCIAL TRADE IN CITES-LISTED SPECIES (1985–2013)[53]

COUNTRIES TARGETED	*REASONS FOR TRADE SUSPENSIONS*			
	GENERAL PROBLEMS OF IMPLEMENTATION	*INADEQUATE LEGISLATION*[54]	*INADEQUATE REPORTING*[55]	*INADEQUATE CONTROLS OF IVORY TRADE*[56]
Bolivia	1985–1987			
United Arab Emirates	1985–1990, 2001–2002			
El Salvador	1986–1987			
Equatorial Guinea	1988–1992	2004		
Grenada	1991–1992			
Thailand	1991–1992			
Italy	1992–1995			
China and Taiwan[57]	1993			
Greece	1998–1999			
Guyana		1999		
Senegal		1999–2000		
Democratic Republic of Congo	2000–2001			2008
Vietnam		2002		
Yemen		2002		
Fiji		2002–2003		
Bangladesh[58]			2002–2003	
Dominica			2002–2003	
Vanuatu			2002–2003	
Afghanistan			2002–2003, 2013–date	
Liberia		2004–2008	2002–2005	
Rwanda		2004–2010	2002–2003	2008
Somalia		2004–date	2002–2003	2008–2012
Djibouti		2004–date	2002–2003, 2013–date	
Mauritania		2004–date	2003–2010	
Central African Republic			2004	
Gambia		2004–2005		
India		2004–2005		
Algeria			2004–2005	
Guinea-Bissau		2004–2008	2004–2006	
Mozambique		2004		
Panama		2004		
Sierra Leone		2004		
Nigeria	2005–2008			2008
Chad				2008
Ethiopia				2008
Nepal				2008
Sri Lanka				2008
Sudan				2008
Swaziland				2008
Gabon				2008–2012
Libya			2011–2012	
Guinea[59]	2013–present			2008
Lesotho			2013–present	

[53] Revised/updated from Table 1 in R. Reeve, n. 17 above, at 890–891; and Table 1 in P.H. Sand, n. 39 above, 261–262. Current CITES trade suspensions can be found at: <http://www.cites.org/eng/resources//ref/suspend.php> (updated 17 May 2013).
[54] In light of the criteria listed in CITES Resolution Conf. 8.4, n. 43 above.
[55] Suspensions for persistent inadequate reporting (over three consecutive years) are for *all* CITES trade.
[56] Pursuant to the African Elephant Action Plan, n. 45 above.
[57] Standing Committee Decision No. 6, 30th Mtg. See CITES Notification to the Parties No. 1993/774, Decisions of the Standing Committee on Trade in Rhinoceros Horn and Tiger Specimens (15 October 1993).
[58] Bangladesh was targeted by mistake. See CITES Notification to the Parties No. 2003/006, Bangladesh (7 February 2003).
[59] Standing Committee, 63rd Mtg. See CITES Notification to the Parties No. 2013/017, Guinea (16 May 2013).

Procedures[60] thus is a kind of 'derivative law-making'[61] delegated to the Conference and its Standing Committee (which was not even foreseen in the original treaty)[62] that verges on quasi-legislation.[63]

The imposition of trade sanctions in this unorthodox fashion did not go unchallenged. In the 'Bolivian Furskins case' before the European Court of Justice between 1986 and 1990[64] – involving imports of ocelot furs from Bolivia to France after the trade embargo imposed by CITES Resolution 5.2 (1985),[65] and its implementation by the EU under Regulation 3626/82[66] – France contended that the resolution 'was only a recommendation without any legal effect'.[67] However, the Court held that by authorizing the imports, France had failed to fulfil its obligations under the regulation implementing CITES by not following the 'stricter domestic measures' adopted by the EU in light of the 1985 resolution.[68]

It has been contended that the practice of delegated law-making by CITES resolutions 'undermines' the rigid legality principle of international criminal law (*nulla poena sine lege*).[69] The reason given is that, under Article VIII, parties are obliged to 'penalize' trade in violation of the Convention and hence have to amend their national criminal laws each time the CoP amends the list of species on CITES Appendices I or II,[70] without any participation by the national legislatures solely competent to enact penal norms.[71] That academic criticism underrates the corrective potential of the saving-clause in Article XV.3: Parties are indeed free to 'opt out' by entering reservations against any amendments to Appendices I or II adopted by the Conference.[72] In practice, at least one party (Austria) has made actual use of that provision for the declared purpose of giving its legislature an opportunity to review all amendments made by a CoP meeting, pending their transformation into national law.[73] While it is true that no such option exists for EU Member States once a CITES resolution (such as a recommendation to suspend trade with targeted States)[74] has been transformed into directly applicable EU law,[75] that is a general constitutional matter for relations between the EU and its members,[76] rather than a legality problem for CITES.

CITES AND THE WORLD TRADE REGIME

There has also been considerable debate on the legality of CITES embargoes under the free trade rules of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO).[77] While the

[60] CITES Compliance Procedures, n. 32 above.
[61] G. Bastid-Burdeau, 'Quelques Remarques sur la Notion de Droit Dérivé en Droit International', in: N. Angelet *et al*. (eds.), *Droit du Pouvoir, Pouvoir du Droit: Mélanges Offerts à Jean Salmon* (Bruylant, 2007), 161.
[62] The Standing Committee was established by CITES Resolution Conf. 2.2, Establishment of the Standing Committee of the Conference of the Parties (1979, with terms of reference repeatedly restated/amended up to Rev. CoP15/2010). See W. Wijnstekers, n. 1 above, at 389–391.
[63] See J. Brunnée, n. 49 above, at 125.
[64] ECJ 29 November 1990, Case C-182/89, *European Commission v. French Republic*, ECR [1991] I-4337.
[65] CITES Resolution Conf. 5.2, n. 34 above.
[66] Regulation 3626/82/EEC of 3 December 1982 on the Implementation in the Community of the Convention in International Trade in Endangered Species of Wild Fauna and Flora, OJ [1982] L384/1, Article 10.1(b). This Regulation was superseded by Regulation 338/97/EC of 9 December 1996 on the Protection of Wild Species of Fauna and Flora by Regulating Trade Therein, OJ [1997] L61/1, and is currently implemented by Regulation 792/2012/EU of 23 August 2012 Laying Down Rules for the Design of Permits, Certificates and Other Documents Provided for in Council Regulation (EC) No 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein and Amending Commission Regulation (EC) No 865/2006, OJ [2012] L242/13. Even though the Union (then the European Economic Community) is not a party to CITES (the 'Gaborone amendment' of Article XII adopted for this purpose in 1983 still not having received the required number of ratifications), it adopted regulations implementing the Convention since 1982. See R. Parry-Jones and A. Knapp (eds.), *Enforcement of Wildlife Trade Controls in EU Member States: Country Profiles* (UK Department for Environment, Food and Rural Affairs, 2006); T. Garstecki, *Implementation of Article 16, Council Regulation (EC) No. 338/97, in the 25 Member States of the European Union* (TRAFFIC Europe, 2006), at 7; J.H. Jans and H.H.B. Vedder, *European Environmental Law*, 4th edn (Europa, 2012), at 518.
[67] Judge-Rapporteur P.J.G. Kapteyn, *European Commission v. French Republic*, n. 64 above, Report for the Hearing, at 4344 and 4346.
[68] *European Commission v. French Republic*, n. 64 above, at 4356. See the comments by L. Krämer, *European Environmental Law Casebook* (Sweet & Maxwell, 1993), at 207–215.
[69] C. Fuchs, 'Convention on International Trade in Endangered Species: Conservation Efforts Undermine the Legality Principle', in: A. von Bogdandy *et al*., n. 52 above, 475.
[70] For example, pursuant to CITES Notification to the Parties No. 2013/022, New CITES Appendices in Effect after the 16th meeting of the Conference of the Parties (29 May 2013). See A. Nollkaemper, 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order', 13 *Yearbook of International Environmental Law* (2002), 165, at 170.
[71] See C. Fuchs, n. 69 above, at 503–507.
[72] On the CITES reservations system, see generally P.H. Sand, n. 1 above, at 40–41; W. Wijnstekers, n. 1 above, at 469; and G.G. Steward, 'Enforcement Problems in the Endangered Species Convention: Reservations Regarding the Reservations Clause', 14:3 *Cornell International Law Journal* (1981), 424.
[73] Report of the Secretariat, Proceedings of the Sixth Meeting of the Conference of the Parties, Ottawa (Canada), 12 to 24 July 1987 (Doc. 6.6, 1987), at 380, paragraph 4.
[74] See, e.g., Regulation 578/2013/EU of 17 June 2013 Suspending the Introduction into the Union of Specimens of Certain Species of Wild Fauna and Flora, OJ [2013] L169/1, pursuant to CITES Notification No. 2013/013, n. 37 above.
[75] Under the Consolidated Version of the Treaty on the Functioning of the European Union, OJ [2012] C326/47, Article 288. See; J.H. Jans and H.H.B. Vedder, n. 66 above, at 159.
[76] See also Directive 2008/99/EC of 19 November 2008 on the Protection of the Environment through Criminal Law, OJ [2008] L328/28.
[77] See, e.g., J. Cameron and J. Robinson, 'The Uses of Trade Provisions in International Environmental Agreements and Their Compatibility with the GATT', 2 *Yearbook of International Environmental Law* (1991), 3, at 8–12; T.M. Swanson, 'The Evolving Trade

general compatibility of unilateral environmental trade restrictions with the GATT/WTO regime is beyond the scope of this article,[78] it is worth recalling that during the preparatory negotiations for CITES in 1971, the IUCN Secretariat did indeed consult the GATT Secretariat and obtained confirmation that the proposed treaty seemed 'consistent with the Preamble of Article XX' of GATT.[79] The actual practice of country-specific trade embargoes (mentioned nowhere in the treaty, and 'intentionally discriminatory' in GATT terms)[80] only emerged during the 1980s and could hardly have been foreseen at the time CITES was drafted. Interpretation of the world trade rules by GATT/WTO panel jurisprudence likewise evolved in the meantime, with the two treaty regimes virtually 'leap-frogging' each other as *lex posterior* and *lex specialis*, respectively.[81] Singapore had raised the matter when it was first targeted (as a 'free-riding' non-party at the time) by a unilateral American trade embargo expressly based on CITES in 1986;[82] and other CITES parties occasionally invoked free-trade objections against Standing Committee recommendations of trade suspensions.[83] Yet, none of the parties affected ever brought a complaint under the WTO's dispute settlement mechanism, and in view of the near-universal and closely matching current memberships of both regimes the issue is purely hypothetical for the time being.[84]

RETORSION AND STATE RESPONSIBILITY

More importantly, however, the CITES sanction scheme must be evaluated in light of the applicable general rules on the legality of counter-action, in response either to persistent breaches of the Convention by a party, or to persistent refusal by other States to provide trade documentation. The issue here is not the binding force of recommendations by the CITES Conference or Standing Committee,[85] but the right of the parties to impose foreign trade embargoes – individually or collectively – on the basis of Article XIV.1.[86] In essence, then, the scheme may be described as decentralized concerted action, rather than centrally organized international decision making. Unlike a treaty suspension under Article 60 of the 1969 Vienna Convention on the Law of Treaties,[87] a recommendation by the CITES Conference or Standing Committee to suspend trade does not have the effect of suspending – let alone terminating – the treaty in whole or in part *vis-à-vis* the State targeted, but merely authorizes other States temporarily to derogate from their subsisting obligations.[88]

The most authoritative reference source in this regard is the 2001 draft of Articles on the Responsibility of States for Internationally Wrongful Acts, prepared by the

Mechanism in CITES', 1:1 *Review of European Community and International Environmental Law* (1992), 57; C. Crawford, 'Conflicts between the Convention on International Trade in Endangered Species and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade', 7:2 *Georgetown International Environmental Law Review* (1995), 555; and R. Wolfrum, n. 43 above, at 60.

[78] See, e.g., E.U. Petersmann, *International and European Trade and Environmental Law after the Uruguay Round* (Kluwer Academic, 1995); G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction: The Relationship between the WTO Agreement and MEAs and Other Treaties', 35:6 *Journal of World Trade* (2001), 1081; D. Brack and K. Gray, *Multilateral Environmental Agreements and the WTO* (Royal Institute of International Affairs, 2003); and A. Goyal, n. 40 above.

[79] On the Patterson-Nicholls correspondence of 24 February 1971, see C. Wold, 'The Convention on International Trade in Endangered Species of Wild Fauna and Flora', in: R. Housman *et al.* (eds.), *The Use of Trade Measures in Select Multilateral Environmental Agreements* (UNEP, 1995), at 165; and R. Tarasofsky, 'Ensuring Compatibility between Multilateral Environmental Agreements and GATT/WTO', 7 *Yearbook of International Environmental Law* (1996), 52, at 52.

[80] See R. Reeve, n. 4 above, at 312.

[81] On the relationship of CITES and WTO under Article 30 of the 1969 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; in force 27 January 1980) ('VCLT'), see: U. Beyerlin and T. Marauhn, *International Environmental Law* (Hart, 2011), at 434; and A. Goyal, n. 40 above, at 365–370.

[82] See nn. 26 and 41 above.

[83] R. Reeve, 'The Convention on International Trade in Endangered Species (CITES)', in: G. Ulfstein *et al.* (eds.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, 2007), 134, at 160.

[84] M. Yeater and J. Vasquez, 'Demystifying the Relationship between CITES and the WTO', 10:3 *Review of European Community and International Environmental Law* (2001), 271. See also U. Beyerlin and T. Marauhn, n. 81 above, at 434 ('there seems to be tacit approval of the WTO compatibility of CITES measures'); and C. Wold *et al.* (eds.), *Trade and the Environment: Law and Policy*, 2nd edn (Carolina Academic Press, 2011), at 646–647. In an address to the WTO Committee on Trade and Environment, CITES Secretary-General John Scanlon emphasized that 'CITES and the WTO have harmoniously coexisted for the past 40 years'. CITES Press Release, 'CITES Addresses WTO Committee on Trade and Environment' (6 June 2013), found at: <http://www.cites.org/eng/news/sundry/2013/20130606_wto_cte.php>.

[85] Clearly labelled 'non-legally binding' in Resolution Conf. 14.3. See CITES Compliance Procedures, n. 32 above, Annex, Article 1. See, however, on the potential role of CoP resolutions as subsequent agreements on the interpretation or application of the treaty under Articles 31 or 32 of the VCLT, n. 81 above: G. Nolte, 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings: Third Report for the ILC Study Group on Treaties Over Time', in: *Treaties and Subsequent Practice* (Oxford University Press, 2013), 307, at 378.

[86] CITES, n. 1 above, Article XIV.1. See also n. 19 above.

[87] VCLT, n. 81 above. See I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester University Press, 1984), at 188–190. On the irrelevance of Article 60 in this context, see J. Klabbers, 'Compliance Procedures', in: D. Bodansky *et al.*, n. 50 above, 995, at 1002 ('rather useless'); and S. Rosenne, *Breach of Treaty* (Grotius, 1985), at 35–44 (doubting the adequacy of the article to enforce environmental treaties). See also B. Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law', 20:1 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1970), 5; and R. Wolfrum, n. 43 above, at 57.

[88] Analogous to the effect of countermeasures. See the introductory commentary by Special Rapporteur J. Crawford on Part III/Chapter II of the Draft Articles on State Responsibility adopted by the International Law Commission ('ILC Draft Articles'), Report of the International Law Commission on its 53rd Session (UN Doc. A/56/10, 2001) ('ILC Report'), 29, at 326.

UN International Law Commission (ILC).[89] Part III/ Chapter II of the Draft Articles deals with the conditions and limitations on the taking of countermeasures by States 'injured' by the wrongful conduct of another State.[90] The Draft Articles do not, however, cover measures traditionally defined as 'retorsion' in customary international law – that is, 'unfriendly' conduct that is not inconsistent with any international obligation of the State engaging in it.[91] In fact, the ILC expressly excluded acts of retorsion (such as 'embargoes of various kinds') from the scope of its Draft Articles.[92] Moreover, while recognizing the legal interest of all parties (as distinct from States individually 'injured') to respond to breaches of 'collective obligations' owed *erga omnes* or *erga omnes partes* (such as environmental treaty obligations in particular),[93] the ILC commentary goes on to note that 'such cases are controversial and the practice is embryonic',[94] and therefore 'leaves the resolution of the matter to the further development of international law'.[95]

Yet, even though retorsion measures thus are 'not circumscribed by the international legal order',[96] it does not follow that they 'do not require the establishment of a legal regime'.[97] On the contrary, even 'solidarity measures' (to use a term coined by Martti Koskenniemi[98]) that are considered lawful responses to treaty breaches or otherwise unfriendly acts must respect certain limits set by international law, lest they cease to be lawful and in turn become internationally wrongful acts.[99] It may be useful, therefore, to compare current enforcement practice under the CITES sanction scheme to the corresponding conditions specified by the ILC for the lawful exercise of countermeasures (Table 2), including their temporary or reversible character, proportionality to the injury[100] and procedural conditions such as prior notification and negotiation.[101]

In addition, Article 50 of the ILC Draft Articles stipulates that countermeasures may not infringe certain 'sacrosanct' rules of general international law,[102] such as the prohibition of the use of force, the protection of human and humanitarian rights, other peremptory norms, or diplomatic and consular immunities – an overarching requirement that may be considered as *eo ipso* applicable in the CITES context. For its part, paragraph 32(d) of the CITES procedures adds a further specific element not found in the ILC Draft Articles, which could well qualify as a new 'sacrosanct' concern of international environmental law – namely 'the possible impact on conservation and sustainable use with a view to avoiding negative results'.[103]

In light of all these elements, the CITES sanction scheme, as codified in Resolution 14.3 (2007) after 25 years of continuous practice (rather an

[89] Ibid. See also J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).
[90] See ILC Report, n. 88 above, at 324.
[91] Ibid., at 325. See generally O. Schachter, 'International Law in Theory and Practice' (Martinus Nijhoff, 1985), at 185–186; L. Damrosch, 'Enforcing International Law through Non-forcible Measures', 269 *Hague Academy of International Law: Collected Courses* (1997), 9, at 54; and T. Giegerich, 'Retorsion', in: R. Wolfrum, n. 6 above, Vol. 8, 976, at 976.
[92] See ILC Report, n. 88 above, at 325. But see M. Fitzmaurice, n. 35 above, at 542, who treats trade sanctions as countermeasures, which would bring them directly within the ambit of State responsibility and hence subject them to the ILC conditions of legality listed in Table 2.
[93] See, generally, K. Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and Its Legal Status', 35:3 *Netherlands International Law Review* (1988), 273, at 282–285; and A.E. Boyle, 'State Responsibility for Breach of Obligations to Protect the Global Environment', in: W.E. Butler (ed.), *Control Over Compliance with International Law* (Nijhoff, 1991), 69, at 73. During the negotiations for the CITES Compliance Procedures, n. 32 above, the Japanese delegation unsuccessfully tried to restrict the right to initiate CITES compliance procedures to States 'directly affected'.
[94] See ILC Report, n. 88 above, at 327 and 351; but see A. Pellet and A. Miron, n. 15 above, at 11 ('hardly convincing').
[95] See ILC Report, n. 88 above, at 355. On the somewhat sibylline suggestion (ibid., at 183 and 328) that it is 'without prejudice to the right of any state identified in Article 48(1) to take lawful measures against a responsible state to ensure cessation of the breach', see J. Klabbers, *International Law* (Cambridge University Press, 2013), at 170.
[96] E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational, 1984), at 5.
[97] E. Klein, 'Gegenmassnahmen' in: W. Fiedler *et al*. (eds.), *Gegenmassnahmen/Counter Measures* (C.F. Müller, 1998), 39, at 44 and 69.
[98] M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *British Yearbook of International Law* (2001), 337, at 339. See also the reference to 'purely solidary obligations' under multilateral environmental agreements in an earlier ILC report: Third Report on State Responsibility (UN Doc. A/CN/4/507, 15 March 2000), at paragraph 108; D.N. Hutchinson, 'Solidarity and Breaches of Multilateral Treaties', 59 *British Yearbook of International Law* (1988), 151, at 164 ('solidarity *lato sensu*'); and A. Nissel, 'The ILC Articles on State Responsibility: Between Self-help and Solidarity', 38:1–2 *New York University Journal of International Law and Politics* (2006), 355.
[99] T. Oppermann, 'Discussion', in: W. Fiedler *et al*., n. 97 above, at 120 (*contra* E. Klein, n. 97 above); N. White and A. Abbas, n. 15 above, at 538; and T. Giegerich, n. 91 above, at 978–980.
[100] See E. Cannizaro, 'The Role of Proportionality in the Law of International Countermeasures', 12:5 *European Journal of International Law* (2001), 890.
[101] See the commentary by J. Crawford in ILC Report, n. 88 above, at 182 and 327; Y. Iwasawa and N. Iwatsuki, 'Procedural Conditions', in: J. Crawford *et al*., n. 15 above, 1149, at 1151–1152.
[102] See ILC Report, n. 88 above, at 333; and L. Boisson de Chazournes, 'Other Non-derogable Obligations', in: J. Crawford *et al*., n. 15 above, 1205.
[103] Reflecting the *sic utere tuo* maxim in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration, 'now part of the corpus of international law relating to the environment'; ICJ 8 July 1996, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep. 226, at paragraph 29. See also L. Boisson de Chazournes, n. 103 above, at 1211 (naming international environmental protection as an additional limiting factor for countermeasures).

TABLE 2 CRITERIA FOR THE LEGALITY OF SOLIDARITY MEASURES AGAINST NONCOMPLIANCE

ILC DRAFT ARTICLES (2001)	*CITES GUIDELINES (2007)*
Temporary/revisable measures	
49.3 'As far as possible, taken in such a way as to permit resumption of performance of the obligations in question.'	30 'Recommend suspension' of trade in specimens of CITES-listed species 'until further notice'.
52.3 'May not be taken, and if already taken must be suspended without undue delay, if the internationally wrongful act has ceased.'	33–34 'Monitoring and review of progress in implementation.'
53 'Terminated as soon as the responsible State has complied with its obligations.'[104]	34 'Withdrawn as soon as the compliance matter has been resolved or sufficient progress has been made.'
Proportionality	
51 'Commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.'	32.2 'Commensurate with the gravity of the compliance matter.'
Prior notification and opportunity to negotiate	
52.1 '(a) Call on the responsible State, in accordance with article 43 [notice of claim], to fulfil its obligations; (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.'	20 'Parties are given every opportunity to correct [compliance matters] within reasonable time limits.'
	25 'The Party concerned is given the opportunity to provide comments within a reasonable time limit.'
	27 'The Party concerned has the right to participate in discussions with respect to its own compliance.'
	29(c) 'Written caution, requesting a response and offering assistance.'
	29(g) 'Warning to the Party concerned that it is in noncompliance.'
	29(h) 'Request for compliance action plan identifying appropriate steps, timetable and means to assess satisfactory completion.'

advanced age for an 'embryo'),[105] would appear to satisfy the general requirements for lawful response ('collective retorsion') to persistent noncompliance by parties to the Convention, as well as to unfriendly acts (persistent refusal to comply with documentation requirements) by non-parties.[106] Even if CITES trade embargoes are not considered 'countermeasures' in the sense of the 2001 ILC Draft Articles, the essential standards precluding wrongfulness of solidarity measures, as codified by the ILC, are indeed matched by the 2007 Compliance Procedures, which surely constitute a notable contribution to 'the further development of international law' in this field.[107]

EPILOGUE: LEGITIMACY IN THE BALANCE?

The question remains as to whether the unique CITES scheme of collective retorsion against noncompliance also meets other criteria which an international regulatory regime must take into account if it expects to continue to be viable and effective. In the words of Laurence Boisson de Chazournes, 'the viability of the "regulatory phenomenon" is linked to a major challenge: that of its legitimacy'.[108] Legitimacy in this

[104] Furthermore, according to ILC Draft Article 52.3(b), n. 88 above, at 345, countermeasures cannot be taken or continued when formal procedures for third-party dispute settlement are pending – a requirement *not* matched in the CITES Guide, which merely states that 'the procedures described in this Guide are without prejudice to any rights and obligations and to any dispute settlement procedure under the Convention'. See CITES Compliance Procedures, n. 32 above, paragraph 3.

[105] See n. 94 above.

[106] See n. 40 above.

[107] See the commentary by J. Crawford in ILC Report, n. 88 above; and the introductory note by C. Payne, n. 32 above.

[108] L. Boisson de Chazournes, 'Gouvernance et Régulation au 21ème Siècle: Quelques Propos Iconoclastes', in: L. Boisson de Chazournes and R. Mehdi (eds.), *Une Société Internationale en Mutation: Quels*

context is more than normative legality of a decision-making process. It includes elements of democracy, equity, transparency and 'safeguards that take account of minority viewpoints';[109] above all, however, it involves trust – 'trust that an institution will make decisions appropriately'.[110]

Looking at the decision outcomes of the CITES sanction scheme over the past thirty years (as summarized in Table 1), the time may have come for a critical review not only from an effectiveness perspective, but also from what has been defined as the empirical/sociological or 'popular' dimension of legitimacy.[111] The first, most striking finding is that more than 95% of the States targeted by all-out trade embargoes were Third World countries. Even accounting for the fact that world trade flows in wildlife and wildlife products run predominantly South-to-North (from 'suppliers' in developing countries to 'consumers' in industrialized countries), one would expect the global CITES system to represent a balance of export, transit and import controls – with corresponding compliance failures and loopholes likely to show up at both ends. While inadequate implementation of the Convention is undoubtedly often attributable to shortcomings in administrative and financial capacity,[112] to find sanctionable compliance deficits almost exclusively in the South comes as something of an empirical surprise. (The CITES Secretariat's infraction reports from 1979 to 1997, which regrettably were discontinued after objections from some of the parties 'shamed', had shown a fairly constant involvement of North and South alike.[113]) The good news is that most of the developing countries targeted rapidly returned to compliance with the help of external technical assistance; and there clearly is a continuing need for reliably funded multilateral and bilateral foreign aid in this field.[114]

Under the circumstances, however, a less charitable alternative explanation for the skewed geographical distribution of CITES trade embargoes could also be that there is an inherent hidden bias in the system as currently practised. It is now more than 15 years since the Standing Committee recommended trade suspensions against the only 'Northern' countries ever targeted (Italy 1992–1995 and Greece 1998–1999),[115] but it seems unlikely that there were no further cases since involving serious and persistent noncompliance with the Convention in the industrialized part of the world. The point is perhaps best illustrated by the well-documented example of Japan.

- In terms of the criteria for domestic implementing legislation, as specified in Resolution 8.4 (1992), the CITES Secretariat invariably ranks Japan in category 1 ('legislation that is believed generally to meet the requirements for implementation of CITES').[116] Yet, Japan still does not meet the first

Acteurs pour une Nouvelle Gouvernance? (Bruylant, 2005), 19, at 40; and see E. Hey, n. 51 above, at 13.

[109] G. Handl, 'International "Lawmaking" by Conferences of the Parties and Other Politically Mandated Bodies', in: R. Wolfrum and V. Röben, n. 49 above, 127, at 140. See generally T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990), who relates legitimacy to concepts of fairness. See also T.M. Franck, *Fairness in International Law and Institutions* (Clarendon, 1999), at 7 and 22–26.

[110] D. Bodansky, 'Legitimacy', in: D. Bodansky *et al.*, n. 50 above, 704, at 721.

[111] Ibid., at 709; and D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93:3 *American Journal of International Law* (1999), 596, at 600–603.

[112] P.H. Sand, 'Institution-building to Assist Compliance with International Environmental Law: Perspectives', 56:3 *Heidelberg Journal of International Law* (1996), 774, at 775; and J. Brunnée, 'Enforcement Mechanisms in International Law and International Environmental Law', 5:1 *Environmental Law Network International Review* (2005), 3, at 11 ('non-complying parties are most likely to be states with genuine capacity limitations').

[113] See CoP Proceedings, Docs. 2.6/Annex1 (1979); 3.6/Annex3 (1981); 6.19/Rev. (1987); 7.20 (1989); 8.19/Rev. (1992); 9.22 (1994); and 10.28/Rev. (1997). On diplomatic protests by Germany (repeatedly identified for infractions of the treaty in the 1980s), see: P.H. Sand, n. 1 above, at 49 (footnote 120); and P.H. Sand, *Transnational Environmental Law: Lessons in Global Change* (Kluwer Law International, 1999), at 239. After CITES Decision 10.122, Regarding Reports on Alleged Infractions and Other Implementation Problems (1997), the Secretariat changed the format of the reports from a detailed country-specific list of infringements to an unspecific overview of 'trends in non-compliance'. See W. Wijnstekers, n. 1 above, at 258. For criticism of this severe 'loss of public access to information', see R. Reeve, n. 4 above, at 72–75.

[114] See W. Wijnstekers, n. 1 above, at 771–775; L. Gündling and D. Navid, 'Compliance Assistance in International Environmental Law: Capacity-building through Financial and Technology Transfer', 56:3 *Heidelberg Journal of International Law* (1996), 796. Significantly, the very first CITES sanctions case (Bolivia in 1985–1987) was resolved at the time through a capacity-building and training programme jointly financed from bilateral and EU foreign aid sources. See E. Fouéré, 'Emerging Trends in International Environmental Agreements', in: J.E. Carroll (ed.), *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems* (Cambridge University Press, 1988), 29, at 38.

[115] Case histories in R. Reeve, n. 4 above, at 120–125. See also P. Birnie, 'The Case of the Convention on Trade in Endangered Species', in: R. Wolfrum, n. 29 above, 233, at 258–259.

[116] The initial ranking was based on an analysis of Japanese implementing legislation undertaken on behalf of the CITES Secretariat in December 1996 under the National Legislation Project, n. 43 above, for which Japan is one of the principal financial donors. See Implementation of the Costed Programme of Work for 2012 (CoP16 Doc.8.2 (Rev.1), 2013), Annex 2. But see, on major legislative and administrative deficits, K. Ishibashi, 'The Effectiveness of Mechanisms for the Monitoring or Compliance Control of Multilateral Environmental Agreements: A Critical Analysis of CITES Implementation' [in Japanese], 15:2 *Kagawa Hōgaku* (1995), 53; M. Taguchi, *International Regimes and Cooperation: An Analysis of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and Japan* (Masters thesis, University of Oregon, 1996); J.V. Feinerman and K. Fujikura, 'Japan: Consensus-based Compliance', in: E. Brown Weiss and H.K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 2000), 253, at 269–273 (concluding that 'Japan's performance in complying with the CITES obligations has not been satisfactory').

of those criteria ('designation of national CITES management and scientific authorities' under Article IX), as specified by Resolution 10.3 of 1997, which requires scientific authorities to be 'independent of management authorities'.[117] In actual practice, the national scientific authority for marine species in Japan (the Resources and Environment Research Division of the Japan Fisheries Agency, JFA) is directly subordinate to the JFA Director-General, who as head of the designated management authority for CITES-listed marine species issues all 'certificates of vessel research' – for example, for whale specimens introduced from the sea. This dual function of the JFA squarely contravenes the mandatory criteria for designation of scientific authorities.[118] Yet, while in 1999–2002 Afghanistan and Rwanda were targeted by CITES trade embargoes for persistent failure to designate appropriate scientific authorities,[119] Japan never was.

- In terms of the mandatory requirements for submission of annual reports by national management authorities under Article VIII.7, as specified in Conference Resolution 11.17 of 2000,[120] the JFA abruptly ceased to submit any reports on permits issued for CITES-listed marine species introduced from the sea after the adoption of Resolution 11.4 of 2000,[121] and only resumed its annual reporting *nine years later* in 2009. Yet, while between 2002 and 2013 a total of 14 other CITES member countries were targeted (with Japanese consent) by trade embargoes for persistent inadequate reporting over *three* consecutive years,[122] Japan never was.
- Moreover, the Japanese Institute of Cetacean Research (ICR), under contract and permit from the JFA, has from 2001 to 2012 taken and introduced from high sea areas outside Japanese territorial jurisdiction a total of 887 North Pacific sei whales (*Balaenoptera borealis*),[123] which are listed on CITES Appendix I and for which Japan does not have a valid reservation under Article XXIII.2 or XV.3 of the Convention.[124] Most of the whale meat from these catches was commercially sold in Japan,[125] some of it (identified by DNA analysis) illegally exported to the United States and the Republic of Korea.[126] The permits issued by the JFA for sei whales thus contravene Article III.5 of the Convention, which requires that the specimens so introduced are 'not to be used for primarily commercial purposes'.[127]

The matter was first drawn to the attention of the CITES Secretariat in 2007 by a nongovernmental-organization-sponsored legal expert panel in London,[128] and by the United Kingdom CITES

[117] See W. Wijnstekers, n. 1 above, 336–338.

[118] P.H. Sand, ' "Scientific Whaling": Whither Sanctions for Non-compliance with International Law?', 19 *Finnish Yearbook of International Law* (2008), 93, at 112–113. According to the official text of the JFA permits, they are also to serve as 'certificate under Articles III(5) and IV(6) of the CITES, as appropriate, when samples and the parts thereof obtained are subject to the provisions of these articles'. It is clear from Article XIV.4 of the Convention, however, that only specimens listed on Appendix II (and *not* species listed on Appendix I) may so be certified, subject to confirmation by an (independent) scientific authority that the introduction will not be detrimental to the survival of the species involved.

[119] See R. Reeve, n. 4 above, at 153.

[120] See W. Wijnstekers, n. 1 above, at 304.

[121] Resolution Conf. 11.4 (Rev. CoP12), Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission (2000/2002) was apparently viewed by the JFA as 'anti-whaling' and hence hostile. On the other hand, the Japanese Ministry of Economy, Trade and Industry, as the designated management authority for CITES-listed *non-marine* species, continued to submit reports in accordance with Article VIII.7.

[122] See Table 1 and n. 44 above.

[123] See the International Whaling Commission's statistics of 'special permit catches since 1985' (2013), found at: <http://iwc.int/table_permit>. The JFA has issued permits for the taking and introduction from the sea of another 100 sei whales during the current pelagic whaling season in the Northwest Pacific (July–October 2013), for research purposes including new 'abundance estimates'. See ICR Media Release, '2013 IWC/Japan Joint Cetacean Sighting Survey Cruise in the North Pacific' (12 July 2013), found at: <http://www.icrwhale.org/pdf/130712ReleaseENG.pdf>; and ICR Media Release, '2013 JARPN-II Offshore Cruise Research Vessels Depart' (25 July 2013), found at: <http://www.icrwhale.org/130725ReleaseENG.html>.

[124] According to the official CITES reservations list, found at: <http://www.cites.org/eng/app/reserve.php> (updated 12 June 2013), the reservation entered by Japan on 6 June 1981 against the listing of *Balaenoptera borealis* on Appendix I is *not* applicable to sei whale populations in the North Pacific. See M. Koyano, 'Whaling Issues: International Law and Japan', 63:5 *Hokkaido Law Review* (2013) 201, at 239.

[125] See T. Kasuya, 'Japanese Whaling and Other Cetacean Fisheries', 14:1 *Environmental Science and Pollution Research* (2007), 39, at 46; and generally A. Ishihara and J. Yoshi, *A Survey of the Commercial Trade in Whale Meat Products in Japan* (TRAFFIC Japan, 2000), at 9.

[126] See C.S. Baker *et al*., 'Genetic Evidence of Illegal Trade in Protected Whales Links Japan with the US and South Korea', 6:5 *Royal Society: Biology Letters* (2010), 647. On 31 January 2013, the Los Angeles District Court returned a grand jury indictment against the importers. See *NOAA v. Typhoon Restaurant, Yamamoto and Ueda*, Press Release No. 13-018, US Attorney's Office, Central District of California (1 February 2013). The trial is scheduled for 3 December 2013.

[127] Specified by CITES Resolution Conf. 5.10 (Rev. CoP15), Definition of 'Primarily Commercial Purposes', (1985/2010) to mean 'that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature, with the result that the importation of specimens of Appendix-I species should not be permitted'. See W. Wijnstekers, n. 1 above, at 128–129; P.H. Sand, n. 31 above, at 64; and P.H. Sand, n. 118 above, at 108–111.

[128] K. Cook *et al*. (eds.), *The Taking of Sei and Humpback Whales by Japan: Legal Issues Arising Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (International Fund for Animal Welfare, 2007).

management authority.[129] In response, the Secretariat opined that the JFA permitting practice appeared to be in conformity with Article III.5 of the Convention,[130] and subsequently declined to take further action under Article XIII and the compliance procedures of Resolution 14.3.[131] It so happens that Japan is the second-largest financial contributor (after the United States) to the CITES budget,[132] and an influential member of the Standing Committee (chaired by a key whaling country, Norway).[133] Under these circumstances, even a perfectly legal and effective sanction system could well risk losing its credibility and certitude once it begins to operate selectively, 'Sicilian' fashion: '*Law is applied to enemies – but interpreted for friends*.'[134]

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[129] E-mail dated 7 November 2007 from T. Salmon (UK Department for Environment, Food and Rural Affairs, DEFRA) to W. Wijnstekers (CITES Secretary-General), *re* 'commercial sale of whale meat' (on file with author).

[130] E-mail dated 7 November 2007 from W. Wijnstekers to T. Salmon. The correspondence was leaked to the Japanese Institute of Cetacean Research (ICR), whose legal counsellor then quoted it triumphantly in: D. Goodman, 'Japan's Research Whaling Is Not Unlawful and Does Not Violate CITES Trade Rules', 13:2 *Journal of International Wildlife Law and Policy* (2010), 176, at 181–182. As pointed out in a comment by V. Papastavrou and P. Ramage, 'Commercial Whaling by Another Name? The Illegality of Japan's Scientific Whaling: Response to Dan Goodman', 13:2 *Journal of International Wildlife Law and Policy* (2010), 183, at 185 (footnote 9), the CITES Secretariat of course has *no* mandate for authentic treaty interpretation, which is the sole prerogative of the CoP.

[131] E-mails dated 3 and 5 September 2012 from M. Yeater (CITES Chief of Legal Affairs) to the author, in response to evidence of illegal trade in sei whale meat from Japan, n. 126 above (on file with author).

[132] See the status of contributions in Implementation of the Costed Programme of Work for 2012, n. 116 above. Japan has also been a principal donor of voluntary funding in 2010–2012 (including the National Legislation Project, see nn. 43 and 116 above), and is expected to make further donations to the second phase of the CITES Secretariat's joint Timber Programme with the Yokohama-based International Tropical Timber Organization.

[133] In the entire history of the CITES sanctions scheme since 1985, trade suspensions were never targeted against a current member of the Standing Committee, and in only two instances against alternate members (Vanuatu in 2002 and India in 2004). The embargoes against China, the Democratic Republic of Congo, Dominica, Ethiopia, Fiji, Italy, Nepal, Senegal, Sudan and Thailand (see Table 1) were recommended at a time when the countries targeted did not serve on the Committee.

[134] '*La legge si applica ai nemici – ma si interpreta per gli amici*'; aphorism attributed to Giovanni Giolitti (1842–1928), former Italian Prime Minister.

ADDENDUM: UPDATE

1. On 15 October 2013, the Japanese Fisheries Agency (JFA, CITES Management Authority and Scientific Authority for marine species) announced the results of the 2013 North Pacific pelagic whale hunt (July-October 2013): Of the total catch of 162 whales, 100 were sei whales, 28 Bryde's whales, 3 minke whales, and 1 sperm whale. Consequently, the Northwest Pacific population of sei whales (*Balaenoptera borealis*, CITES Appendix I) has now become the principal target species of this annual hunt, reflecting a major shift of consumer demand from the lower-quality minke whale meat to the high-priced sei whale meat on the Japanese *sushi* market.
2. US District Judge Audrey B. Collins, Central District of California in Los Angeles, has set 3 December 2013 as the trial date for all three defendants in the criminal case of *NOAA v. Typhoon Restaurant, Yamamoto and Ueda* (grand jury indictment for the sale of North Pacific sei whale meat illegally imported from Japan, with potential fines up to US$ 1.2 million and 77 years in prison).
3. The next North Pacific pelagic whale hunt, as part of the 'Japanese Whale Research Program under Special Permit in the North Pacific' (JARPN-II), is scheduled to begin in June 2014, with a catch target of another 100 specimens of sei whales expected to be permitted by the JFA for scientific research purposes.