Enforcing CITES: The Rise and Fall of Trade Sanctions

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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

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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’. 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

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).
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.
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, the so-called ‘Pelly Amendment’ of 1971 to the 1954 Fishermen’s Protective Act, and the 1976 Fishery Conservation and Management Act as amended. 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.

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, certifications under the Pelly Amendment against Japan in 1991, and against Taiwan in 1993. 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. 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. 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.
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). The practice of the CITES compliance regime, which amounts to a system of ‘mutual retorsion’ (starting with the first trade embargo against Bolivia in 1985), may be summarized as follows: 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 tradeable 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.

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’). 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’). 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.

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

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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), followed since 2002 by cases of persistent noncompliance with annual reporting requirements, and since 2008 by noncompliance with specific requirements of the Action Plan for the Control of Trade in African Elephant Ivory. Table 1 shows the country-specific CITES embargoes imposed since 1985 against a total of 43 States, in chronological order.

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). Even in cases where recommended trade bans were not implemented by all member States, denial of market access in a few key countries usually proved sufficient to induce compliance.

45 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), 5, at 50 (footnote 99).

46 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.

47 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. Wijnssteekers, 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 Tip-toeing around Elephant Poaching’, Environmental Investigation Agency Blog (15 March 2013), found at: <http://www.eiainternational.org/cites-polite-rhetoric-and-tip-toeing-around-elephant-poaching/).

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

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

50 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’. Whether or not these conferences are considered autonomous intergovernmental organizations or quasi-organizations, they unquestionably perform normative functions. In many respects, CITES is a prototype of this growing ‘institutionalization of normative diplomacy’. What has evolved from the accumulated practice of the regime as codified in the Compliance


<table>
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<tr>
<th>COUNTRIES TARGETED</th>
<th>REASONS FOR TRADE SUSPENSIONS</th>
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<td>GENERAL PROBLEMS OF</td>
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<td>Thailand</td>
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<td>Italy</td>
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<td>China and Taiwan</td>
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<td>Greece</td>
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<td>Guyana</td>
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<td>Vietnam</td>
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<td>Yemen</td>
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<td>Fiji</td>
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<td>Bangladesh</td>
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<td>Dominica</td>
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<td>Vanuatu</td>
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<td>Liberia</td>
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<td>Rwanda</td>
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<td>Somalia</td>
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<td>Djibouti</td>
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<td>Mauritania</td>
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<td>Central African Republic</td>
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<td>Gambia</td>
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<td>India</td>
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<td>Algeria</td>
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<td>Guinea-Bissau</td>
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<td>Mozambique</td>
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<td>Panama</td>
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<td>Sierra Leone</td>
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<td>Nigeria</td>
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<td>Nepal</td>
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<td>Sri Lanka</td>
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<td>Sudan</td>
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<td>Swaziland</td>
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<td>Gabon</td>
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<td>Libya</td>
<td>2011–2012</td>
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<td>Guinea</td>
<td>2013–present</td>
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<td>Lesotho</td>
<td>2013–present</td>
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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.


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 thus is a kind of ‘derivative law-making’ delegated to the Conference and its Standing Committee (which was not even foreseen in the original treaty) that verges on quasi-legislation.

The imposition of trade sanctions in this unorthodox fashion did not go unchallenged. In the ‘Bolivian Fur skins case’ before the European Court of Justice between 1986 and 1990 – involving imports of ocelot furs from Bolivia to France after the trade embargo imposed by CITES Resolution 5.2 (1985), and its implementation by the EU under Regulation 3626/82 – France contended that the resolution was only a recommendation without any legal effect. 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.

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). 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, without any participation by the national legislatures solely competent to enact penal norms. 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. 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. 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) has been transformed into directly applicable EU law, that is a general constitutional matter for relations between the EU and its members, 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). While the
general compatibility of unilateral environmental trade restrictions with the GATT/WTO regime is beyond the scope of this article, 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. The actual practice of country-specific trade embargoes (mentioned nowhere in the treaty, and ‘intentionally discriminatory’ in GATT terms) 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. 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, and other CITES parties occasionally invoked free-trade objections against Standing Committee recommendations of trade suspensions. 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.


See R. Reeve, n. 4 above, at 312.


See nn. 26 and 41 above.


CITES, n. 1 above, Article XIV.1. See also n. 19 above.


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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, but the right of the parties to impose foreign trade embargoes – individually or collectively – on the basis of Article XIV.1. 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, 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.

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
UN International Law Commission (ILC).96 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’.95 On the contrary, even ‘solidarity measures’ (to use a term coined by Martti Koskenniemi99) 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 injury100 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

90 See ILC Report, n. 88 above, at 324.
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.
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.
100 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.
TABLE 2 CRITERIA FOR THE LEGALITY OF SOLIDARITY MEASURES AGAINST NONCOMPLIANCE

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

Advanced age for an ‘embryo’),

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. 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.

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’. 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.

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.11 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 (of course, world ‘top countries’), see: P.H. Sand, ‘Institution-building to Assist Compliance with International Environmental Law’, 5:1 RECIEL 22 (3) 2013 ENFORCING CITES

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? (Bruxlant, 2005), 19, at 40; and see E. Hey, n. 51 above, at 13.
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’. 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. Yet, while in 1999–2002 Afghanistan and Rwanda were targeted by CITES trade embargoes for persistent failure to designate appropriate scientific authorities, 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, 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 2009, 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, 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), 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. Most of the whale meat from these catches was commercially sold in Japan, some of it (identified by DNA analysis) illegally exported to the United States and the Republic of Korea. 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’.

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

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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.
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.
management authority.\textsuperscript{132} In response, the Secretariat opined that the JFA permitting practice appeared to be in conformity with Article III.5 of the Convention,\textsuperscript{133} and subsequently declined to take further action under Article XIII and the compliance procedures of Resolution 14.3.\textsuperscript{134} It so happens that Japan is the second-largest financial contributor (after the United States) to the CITES budget,\textsuperscript{135} and an influential member of the Standing Committee (chaired by a key whaling country, Norway).\textsuperscript{136} 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.’\textsuperscript{137}

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\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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’ (JARPNI-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.