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Thematic Studies

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – Conservation Efforts Undermine The Legality Principle

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A. Introduction

CITES is acknowledged as one of the most successful international environmental treaties in the world.[1] CITES is not just a conservation treaty, it is also a trade instrument that attempts to strike a balance between these often competing values.[2]

The purpose of CITES, as stated in the first paragraph of its preamble, is to protect wild fauna and flora for current and future generations. Wild fauna and flora are described as an irreplaceable part of the natural systems of the earth and as being valuable from aesthetic, scientific, cultural, recreational and economic points of view.[3] CITES establishes international co-operation for the protection of certain species from over-exploitation through international trade.[4] The purpose of adopting the convention was not only to avoid aggravation of an ecological problem, but also to prevent a penalization of countries, in particular the US, with stricter ecological legislation.[5]

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[1] Elisabeth M. McOmber, *Problems in Enforcement of the Convention on International Trade in Endangered Species*, 2 BROOK. J. INT'L L. 673, 674 (2002).

[2] ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES. THE CITES TREATY AND COMPLIANCE 28 (2002).

[3] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, Preamble (1), (2), available at: http://www.cites.org/eng/disc/text.shtml.

[4] CITES, Preamble (4).

[5] Peter H. Sand, *Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment*, 1 EUROPEAN J. INT'L L. 29, 31 (1997).

The trade in species that the convention is intending to regulate is mainly a South-to-North phenomenon that is driven by consumer demand for fashion and food products, as well as rare animals and plants for medical/pharmaceutical research, exhibition or collection purposes.[6] The market is worth between $5 billion and $17 billion every year.

In order to ascertain reasons for the success of CITES, this paper examines how public authority is exercised under the convention. At the same time it raises the question of how efforts to establish and reinforce an effective mechanism for the protection of species has made CITES lose sight of an aspect of the rule of law: the legality principle. The obligation on member states to penalize trade in protected species provokes the question whether the intention to safeguard our wealth in species contemporaneously encroaches upon this fundamental principle of justice.

This paper tackles these questions in three steps. Part A analyses the two main interests CITES aims to balance, namely species preservation and economic development (I.). This is followed by a brief introduction to CITES' activities (II.).

To render an analysis possible as to whether or not CITES' methods threaten or infringe the legality principle, Part B provides an insight into CITES' institutional structure and mode of work. It first explores CITES' institutional characteristics as a treaty regime (I. 1.), the functions and the composition of CITES' organs (I. 2.), and CITES' cooperation with other organizations (I. 3.).

The subsequent paragraph focuses on CITES' substantive activities which comprise, most significantly, the listing of species on its three appendices (II. 1.) and the development of concrete rules for this listing procedure (II. 2.). The amendment procedure is described (III) as well as the result of CITES' listing activities: the three appendices (IV.). Furthermore, the obligations for member states that are linked to the appendices (IV. 1.) as well as the implementation of these obligations (IV. 2.) are set forth in detail. Finally, the way in which CITES reviews its own effectiveness (V. 1.), the monitoring procedures (V. 2.) and the enforcement mechanisms of CITES (V. 3.) are considered in turn.

The article concludes with Part C which deals with CITES' legitimacy, whereby particular attention is given to the aforementioned questions regarding the legality principle (II. 2.).

[6] *Id*. at 30.

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I. Two Contrasting Interests: Preservation and Sustainable Development

CITES' members and involved NGOs represent various attitudes towards wildlife which reflect their political, ethical, religious and cultural differences that range from the view that wildlife should be economically exploited, to the belief that individual animals have the right to continued life and freedom from pain.[7] NGOs usually represent the more extreme views of the spectrum while Government positions tend to be in the middle.[8]

CITES' primary concern is the conservation of species. Its preamble lists the economic value among species' values, and the convention does not generally prohibit but merely strives to coordinate trade in species that may become endangered. This underlines the fact that the convention does not one-sidedly favor an unlimited conservation approach, nor does it neglect trade interests outright. The Convention text does not however refer to the need to balance environmental and development interests in the way envisaged by the sustainability principle. The Brundtland Report and Agenda 21 both stress the concept of "sustainable development," that is the need to strike a balance between development and environmental protection.[9]

CITES' member states that seek to resume trade in species (the so called "consumptive use block"), in particular the African elephant, are of the opinion that the use of species provides both incentives to local people to conserve, as well as funds to improve enforcement and customs services.[10] The economic value of species is even considered to be the only value that will help conserve wildlife. It is argued that a preservationist approach, that is an approach which opposes any commercialization of endangered species, places a disproportionate share of the costs on poorer range states while sustainable use provides a source of revenue for conservation measures.[11] Furthermore, social and economic issues,

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[7] DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 878 (1989); Saskia Young, *Contemporary Issues of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use*, 1 COLO. J. INT'L ENVTL. L.& POL'Y 167, 173 (2003).

[8] Favre (note 7), at 882.

[9] Brundtland Report of the World Commission on Environment and Development: Our Common Future; United Nations Conference on Environment & Development, Agenda 21, UN doc. A/42/427.

[10] Patricia Birnie, *The Case of the Convention on Trade in Endangered Species*, *in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS? 233, 241, (Rüdiger Wolfrum ed., 1996).

[11] Young (note 7), at 183; Catharine L Krieps, *Sustainable Use of Endangered Species under CITES: Is it a Sustainable Alternative?*, 17 U. PA. J. INT'L ECON. L. 476, 477 (1996).

such as the destruction inflicted on the humans living alongside protected wildlife, must also be taken into account.[12]

These arguments are rejected by preservationists as being unproven. Proponents of trade resumption are accused of placing relatively too little importance on the survival of species compared to the importance placed on the exploiters. Any trading in a threatened species is said to encourage poachers because it establishes a market where income is generated from the killing of the species, thereby thwarting the convention's objectives.[13] Global trade is seen as the second most crucial reason for the decline of species after habitat loss.[14] Preservationists emphasize the need to base decisions on whether or not to permit trade in a species exclusively on scientific advice rather than on the needs of the exploiters who, in any event, frequently exceeded quotas. In cases of scientific uncertainty, preservationists insist that the burden of proving that trade is not detrimental lies on the traders, independent of economic and social pressures.[15] Placing an emphasis on economic value leaves species without any apparent use unprotected.[16]

While the text of the Convention does not elaborate on the linkages between trade and sustainable development, the 13th Conference of the Parties (CoP) meeting urged the parties to utilize the Principles and Guidelines for the Sustainable Use of Biodiversity.[17]

The CITES' Strategic Vision adopted by CoP-14 confirms that sustainable trade in wild fauna and flora can make a major contribution to achieving the broader objectives of sustainable development and biodiversity conservation.[18] The Strategic Vision provides a framework for the future development of Resolutions and Decisions. It takes into account issues such as:

1. Meeting the UN Millennium Development Goals;
2. Significantly reducing the rate of biodiversity loss by 2010;

[12] Young (note 7), at 184.

[13] Birnie (note 10), at 241.

[14] McOmber (note 1), at 674.

[15] Birnie (note 10), at 241.

[16] Young (note 7), at 185.

[17] Conf. 13.2(a).

[18] Conf. 14.2 Annex Goal 3; Objective 3.4; SC54 Doc. 6.1, Annex 2.

3. Achieving deeper understanding of the cultural, social, and economic issues at play in producer and consumer countries; and
4. Promoting wider involvement of civil society in the development of conservation policies and practices.

These developments indicate a shifting of CITES towards a more comprehensive approach, increasingly taking into account the various interests and actors concerned. Yet, while the draft of the Strategic Plan 2008-2013 stated as one of its four goals to adopt balanced wildlife trade policies compatible with human well-being, livelihoods, and cultural integrity, the final version of the Strategic Vision omitted this goal.[19]

II. Introduction to CITES' Activities

CITES uses a three-tiered system of appendices to classify species that are already threatened with extinction, those that may become threatened unless trade in them is regulated, as well as those protected within any member state which needs the cooperation of other states to ensure the effectiveness of the protection.[20] There are approximately 5,000 fauna species and 28,000 flora species listed on the three CITES appendices. In certain cases they include entire groups, such as primates, cetaceans (whales, dolphins and porpoises), sea turtles, parrots, corals, cacti and orchids. While some creatures, such as bears, elephants, tigers and whales, are the most widely known species listed by CITES, the majority of species included are less popularized species, such as aloes, corals, mussels and frogs.[21]

CITES' main activities include the amendment of its appendices, the monitoring of implementation of the Convention by member states, and enforcement measures. The implementation itself is a task entrusted to the member states. CITES' activities in this latter context are limited to supporting and assisting its members.

[19] SC54 doc. 6.1.

[20] Art. II.

[21] *See* http://www.cites.org/eng/disc/species.shtml, last visited: April 2007.

B. The Exercise of Public Authority by CITES: A Legal Analysis

I. The Institutional Framework

1. CITES' Characteristics as Treaty Regime

CITES is a treaty regime. It has not been established as an international organization, yet its structure and functioning, in many respects, resembles those of international organizations. CITES satisfies the conditions required of international organizations. It is an association of states established by and based upon a treaty that pursues common aims, and which has organs that fulfill functions.[22] Typically, international organizations are founded with a generally and vaguely termed framework treaty which is then dynamically concretized by treaty bodies. Executive tasks are carried out by a Secretariat.[23] Both aspects are also true of CITES.

2. Function and Composition of CITES' Organs

At the international level, CITES operates through CoPs which take place every two and a half years, a Secretariat, the executive Standing Committee[24] and two functional, subsidiary or technical committees: the Animals and the Plants Committee.[25] While the CoP and the Secretariat are provided for by the Convention, the other committees have been established by resolution of the CoP.[26]

The essential actors at the national level are Management Authorities, designated to issue export and import permits as well as certificates for species, and Scientific Authorities which advise on all scientific matters.[27]

The convention thus relies on national as well as international bodies to perform its central tasks. The examination of the composition and the functions of CITES' institutions will further underline this composite administrative dimension of the treaty.

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[22] Rudolf L. Bindschedler, *International Organisations, General Aspects, in* EPIL, vol. 2, 1289 (Rudolph Bernhardt ed.,1995)

[23] EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE 321 (2006).

[24] Conf. 11.1 (Rev. CoP14) (a).

[25] Conf. 11.1 (Rev. CoP14) (b).

[26] Conf. 11.1 (Rev. CoP14).

[27] Art. IX(1), (2).

a) Conference of the Parties (CoP)

CITES' main decision-making body, the CoP, is composed of government representatives. Fourteen CoPs have been held to date.[28]

The role of CoPs is viewed quite divergently. Sometimes they are described as issue-specific global legislatures. At the other end of the spectrum they are envisaged as nothing more than a forum in which lawmaking is undertaken by states. They are compared to a diplomatic conference, with the additional advantage that they permit continuous processes and cooperative engagements of technical experts, policy-makers, and lawyers. The truth may well lie between those two extremes.[29]

b) Secretariat

CITES' Secretariat is entrusted with executive functions in a way typical for international organizations and treaty regimes.[30] The Secretariat is provided by the Executive Director of UNEP with the assistance of intergovernmental and non-governmental agencies and bodies and located in Geneva.[31] CITES was one of the first multilateral environmental agreements (MEAs) with a professional full-time Secretariat.[32]

c) Standing Committee

In 1979, following a recommendation of the Secretariat, the then existing advisory Steering Committee was re-established by resolution as a permanent executive Standing Committee. The Standing Committee's functions are "general policy and general operational direction"[33] and overseeing the operation of the Convention

[28] *See* http://www.cites.org/eng/CoP/index.shtml.

[29] Jutta Brunnée, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements, in* 177 DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 101, 106 (Rüdiger Wolfrum &Volker Röben eds., 2005).

[30] Rüdiger Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 RECUEIL DES COURS. COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 48 (1998).

[31] Art. XII(1); Birnie (note 10), at 238.

[32] REEVE (note 2), at 43.

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between meetings of the CoP.[33] This includes providing guidance and advice to the Secretariat,[34] overseeing the Secretariat's budget and all financial activities,[35] providing coordination and advice to other committees and working groups,[36] drafting potential CoP resolutions,[37] and performing any other functions that are entrusted to it by the CoP.[38]

Members of the Standing Committee are elected by the CoP.[39] The Committee comprises 14 regional party representatives, plus Switzerland, the depositary government,[40] and the previous and the next host country.[41] Between one and four members represent each of the six geographic regions.[42] Africa, the region with the most parties, has four representatives. Each regional representative has an alternate member authorized to act in case of his absence.[43]

Elected members serve an approximate five-year term that ends with the second CoP meeting following their election.[44] Only the regional members or alternate regional members have the right to vote, with the Depositary Government voting only to break a tie.[45] Decisions are, in practice, made by consensus.

d) The Technical Committees

The Animals and Plants Committees are the technical committees. Their members are chosen by the regions. North America and Oceania each elect one person,

[33] Conf. 11.1, (Rev. CoP14) Annex 1, (a).

[34] Conf. 11.1, (Rev. CoP14) Annex 1, (b).

[35] Conf. 11.1, (Rev. CoP14) Annex 1, (c).

[36] Conf. 11.1, (Rev. CoP14) Annex 1, (d).

[37] Conf. 11.1, (Rev. CoP14) Annex 1, (f).

[38] Conf. 11.1, (Rev. CoP14) Annex 1, (i).

[39] Conf. 11.1, (Rev. CoP14) Annex 1, (a)(III).

[40] Conf. 11.1, (Rev. CoP14) Annex 1, (a)(i)(B).

[41] Conf. 11.1, (Rev. CoP14) Annex 1, (a)(i)(C).

[42] Conf. 11.1, (Rev. CoP14) Annex 1, (a)(i)(A).

[43] REEVE (note 2), at 47; Conf. 11.1, (Rev. CoP14) Annex 1, (a)(ii).

[44] REEVE (note 2), at 48; Conf. 11.1, (Rev. CoP13) Annex 1, (a)(iii).

[45] Conf. 11.1, (Rev. CoP14)Annex 1, (b)(i).

while the other four regions elect two. Additionally, there is a specialist on zoological nomenclature (Animals Committee) and a specialist on botanical nomenclature (Plants Committee) who are appointed by the CoP, bringing the total number of members to twelve.[46] Even though not expressly required, members tend to be from Scientific Authorities. Their terms in office last about five years, ending with the second CoP after their election.[47]

The Committees' main functions are to provide advice and guidance to all other bodies, including proposals to amend the appendices;[48] cooperate with the Secretariat to assist Scientific Authorities;[49] review and assess species that are significantly affected by trade;[50] review species included in the appendices;[51] advise range states on management techniques and procedures if requested;[52] draft potential CoP resolutions;[53] and perform any other functions assigned to them by the CoP or the Standing Committee.[54]

3. CITES Co-Operation with Other Organizations

A characteristic feature of CITES lies in its cooperation with other organizations. The Secretariat contracts several organizations to carry out specific tasks, such as the specialist groups of the IUCN (World Conservation Union) Species Survival Commission, which is a "knowledge network" of roughly 7,000 volunteers, the IUCN Environmental Law Centre, the UNEP World Conservation Monitoring Centre and TRAFFIC (Trade Records Analysis of Fauna and Flora in Commerce). TRAFFIC has 22 offices which monitor wildlife trade and provide data to the Secretariat and national authorities. Occasionally, other NGOs are contracted by the Secretariat for specific tasks.[55]

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[46] Conf. 11.1, (Rev. CoP14) Annex 2, (a).

[47] REEVE (note 2), at 51; Conf. 11.1, (Rev. CoP14) Annex 2, (c).

[48] Conf. 11.1, (Rev. CoP14) Annex 2, (a).

[49] Conf. 11.1, (Rev. CoP14) Annex 2, (d).

[50] Conf. 11.1, (Rev. CoP14) Annex 2, (f), (g).

[51] Conf. 11.1, (Rev. CoP14) Annex 2, (h).

[52] Conf. 11.1, (Rev. CoP13) Annex 2, (i).

[53] Conf. 11.1, (Rev. CoP13) Annex 2, (j).

[54] Conf. 11.1, (Rev. CoP13) Annex 2, (k).

[55] REEVE (note 2), at 46.

On the whole, the composition of CITES' organs and its cooperation with other organizations indicate that CITES follows the typical form of a composite administration, notably in international organizations and treaty regimes. CITES' work is based on linkages between different international bodies as well as those at the national and international level.

II. CITES' Substantive Programming

The following paragraphs will serve to draw a more distinctive picture of CITES' foremost function: the listing of species on its appendices as well as the development of the regulatory framework for listing decisions.

1. The Mandate of CITES to Amend its Appendices

CITES is mandated to list species in one of three appendices.[56] Appendix I includes all species that are threatened with extinction, and that are or may be affected by trade. Trade in specimens of these species underlies the most stringent provisions and is only authorized in exceptional circumstances.[57]

Appendix II includes species which may become threatened with extinction unless trade in them is strictly regulated, as well as species which are not at risk themselves but resemble threatened species (so-called "look alike" species)[58] that are included in order to protect their threatened counterparts.[59]

Appendix III includes all species which are protected within any member states that need the co-operation of other parties in trade control.[60]

2. Concretization of the Mandate Through CoP Resolutions

The mandate of CITES to conserve wild fauna and flora through the listing of species in its three appendices is rather vague and abstract. This made further concreti-

[56] Art. II.

[57] Art. II(1).

[58] Birnie (note 10), at 235.

[59] Art. II(2).

[60] Art. II(3).

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zation through resolutions of CoPs necessary. These resolutions have brought about a considerable reform of the Convention's mode of work.[61]

For treaty regimes it is a common phenomenon that decision making power gradually shifts from the states parties to the CoP.[62] Typically, environmental problems need to be addressed in a flexible manner, which keeps pace with evolving knowledge, or readiness to act. Thus, initial agreements only comprise general commitments of the parties, while the success of the treaty regime largely depends on its adaptation capacities. This shifting of the decision-making power to the CoP thus helps to strike a balance between the interests of state sovereignty, which is safeguarded by consent requirements, and efficiency, that is, the capacity to respond to new circumstances.[63]

a) Form of and Procedure for CoP Resolutions

The Convention provides the CoP with the opportunity to make recommendations but does not specify the form of those recommendations.[64] Since 1994 they have taken the form of "resolutions," "revised resolutions," and "decisions." Resolutions are designed to take long-term effect, while decisions are generally only valid from one meeting of the CoP to the next.[65] In practice, however, decisions with long-term effect are being increasingly approved.[66] In 1994 the CoP decided to compile all its decisions not recorded in resolutions into a document that was to be updated after each meeting of the CoP.[67] Recommendations have grown into a body of rules which, although not considered legally binding, transformed the regime in an unforeseeable way.[68]

CoP resolutions contain language that is typical for legally binding provisions ("shall") and, arguably, they affect the rights and obligations of the parties under the agreement. Non-compliance with them triggers reactions under the compliance

[61] Birnie (note 10), at 237.

[62] Brunnée (note 29), at 102.

[63] *Id*. at 104.

[64] Art. XI(3)(e).

[65] REEVE (note 2), at 40.

[66] *Id*. at 41.

[67] REEVE (note 2), at 40.

[68] Sand (note 5), at 35.

regime. This entails their classification as *de facto* lawmaking, that is, they have a *de facto* effect on parties as if they were binding.[69]

Until 1985, resolutions were adopted by a simple majority of the parties present and voting. The argument that wider support would improve implementation, led to the introduction of the requirement of a two-thirds majority of votes cast. In practice, parties try to achieve a consensus.

The recommendations become effective on the date when they are notified to the parties, unless otherwise provided.

The recommendations have made the CITES regime more dynamic and flexible than it would be if changes in its procedures were only brought about by treaty amendments. Amendments have to be adopted by a two-thirds majority of the votes cast.[70] They enter into force for the parties which were in favor of them 60 days after two-thirds of the parties have deposited an instrument of acceptance.[71] The Gaborone amendment which is intended to permit the accession to the EU shows the delay treaty amendments may cause. It was approved at CoP-4 in 1983, and still has not entered into force.[72]

Until 1994, voting at CoP meetings on proposals to amend the appendices and on CoP resolutions was public. At CoP-9 an option for a secret ballot was introduced, in spite of expressed concerns about a loss of transparency. A vote can be by secret ballot if so requested by ten parties.[73] Although this is meant to be only an exception, in practice the secret ballot is being used more and more often for strongly contested proposals.[74]

b) Content of Concretizing Resolutions

CoP resolutions significantly revised the grounds upon which decisions concerning the categorization of species are based. At the First Meeting of the CoP, the "Berne criteria" were adopted which specified the method used to list species and to transfer them

[69] Brunnée (note 29), at 111, 115.

[70] Art. XVII(1).

[71] Art. XVII(3).

[72] REEVE (note 2), at 41.

[73] *Id*. at 42.

[74] *Id*. at 43.

from one Appendix to the other. [75] Decisions were to be based on data on population, habitat, trade and similar factors. This method was preferred to a strict application of precise biological data because it helped to ensure the protection of species whose survival status was unknown due to scientific or financial reasons. These criteria were rejected, mostly by African states, as being too vague and unscientific.[76]

In 1981, CoP-3 adopted a resolution which permitted the ranching of Appendix I species that were no longer considered endangered, if the ranching was "primarily beneficial to the conservation of the local population."[77]

In 1992, the CoP-8 decided to revise the criteria and the 1994 Conference finally agreed on more specific criteria for amendments.[78]

Dissatisfaction about the listing criteria was wide-spread. Industrialized states' efforts to assign charismatic mega fauna such as elephants, rhinoceroses, and tigers to Appendix I were considered as a form of cultural imperialism.[79] At the same time environmentalists argued that the failure to list species such as the Atlantic Bluefin tuna and the Brazilian mahogany resulted from powerful economic interests overruling sound science. The Berne Criteria were also criticized for making it virtually impossible for certain species to be down listed from Appendix I to Appendix II. The members regarded science as a means to both serve procedural "rule of law" values, and help to achieve a substantively correct listing result.

The Ford Lauderdale Criteria changed in particular four aspects. First, they introduced quantitative guidelines for the assignment of species to an appendix. Second, the criteria gave biology a priority over trade status. Third, the criteria recommended parties to down-list Appendix I species which failed to meet the new quantitative criteria. Finally, the criteria authorized "split-listing."

This much contested question, whether or not to permit the split-listing of a species (that is the listing of different populations of a species in different appendices), had

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[75] Willem Wijnstekers, *The Evolution of CITES,* 51 (Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 2003).

[76] McOmber (note 1) at 683; Johan L. Garrison, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use*, 12 PACE ENVTL. L. REV. 301, 312 (1994).

[77] McOmber (note 1), at 683; Sand (note 5), at 45.

[78] McOmber (note 1), at 684; Sand (note 5), at 46.

[79] FAVRE (note 7), at 876.

particular relevance with respect to elephants. South African countries rejected the 1989 listing of all elephant populations in Appendix I. In 1997, the parties reached a compromise and agreed to leave the highly threatened East African populations on Appendix I, while downgrading the Southern African elephants to Appendix II.[80]

Further changes included the request for input from intergovernmental organizations for all species.[81] A precautionary principle was established for cases of uncertainty about status of a species or impact of trade on a species, as well as a proportionality principle.[82]

After the adoption of the criteria, listing decisions have continued to be political decisions since the parties are not under an obligation to vote for the listing of a species even when it meets the quantitative guidelines. Instead they act in accordance with their own conservation priorities given the unfeasibility of a comprehensive protection of all species.

III. Procedure to Amend Appendices

1. General Amendment Procedure

CITES' appendices are amended in several steps. Amendments to Appendix I or II can be proposed for consideration at the next CoP meeting by any party.[83] Additionally, there is a postal procedure for urgent cases.[84] The proposal is communicated to the Secretariat. The Secretariat consults the other parties and interested bodies and communicates the response to all parties.[85]

Amendments are adopted by a two-thirds majority of parties present and voting. Abstaining parties are not counted.[86] Amendments enter into force 90 days after the meeting for all parties except those which make a reservation.[87] Any party may, by

[80] McOmber (note 1), at 695.

[81] *Id*. at 685.

[82] *Id*. at 686; Conf. 9.24 (Rev. CoP13).

[83] Art. XV(1)(a).

[84] Art. XV(2).

[85] Art. XV(1)(a).

[86] Art. XV (1)(b).

[87] Art. XV(1)(c).

notification in writing to the Depositary Government, make a reservation with respect to the amendment.[88] Parties who enter reservations with respect to Appendix I species are recommended to treat the species as if it were listed in Appendix II, and to report trade in their annual reports.[89] Current editions of appendices are published periodically and distributed to the parties by the Secretariat.[90]

Hence, the convention does not provide for formal state consent to the modification of appendices. Pursuant to Article 11 of the Vienna Convention of the Law of Treaties, states can express their consent by "any other means if so agreed." Typically, when dealing with the amendment of annexes, formal consent requirements are discarded. Those tend to be adopted at sessions of the CoP and do not require the deposit of instruments of acceptance by parties to become effective. Rather, it is common to presume acceptance unless a party explicitly opts out.

Those annexes usually contain only technical detail rather than substantive commitments. Yet, in the case of CITES the decisions about amendments to appendices are among the most controversial issues in the ambit of the convention and impact directly on obligations of parties and individuals.[91] In this aspect CITES differs from most other treaty regimes. This fact underlines the high level of power CITES exerts on its members.

2. Co-operation With Other Actors in the Preparation of Amendments

It is not exclusively CITES which works to amend Appendices. The IUCN Species Survival Commission and TRAFFIC International are authorized to review the proposals for amendments.[92]
IUCN's Species Survival Commission collects information on the status and biology of species from its Specialist Group network and the scientific community as a whole, while TRAFFIC collects data on the trade and use of species from its own sources as well as the CITES trade database. They both publish their analyses of proposals to amend the appendices online. A summary booklet is produced and widely distributed before and during the CoPs, with a view to enabling participants to base their decisions on accurate and up-to-date scientific data.

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[88] Art. XV(3).

[89] REEVE (note 2), at 36.

[90] Art. XII(2)(f).

[91] Brunnée (note 29), at 108.

[92] REEVE (note 2), at 32.

Before CoP-14 in 2007 they engaged in intensive consultations involving hundreds of experts around the world for three months. Thirty-six proposals have been analyzed covering a wide range of species from mammals, such as the African elephant and leopard, to commercially important timber species, including three species of Central American rosewood, and commercially valuable marine species of sharks, eels and coral. One third of the animal species proposed this time were marine species.[93]

The indicated NGOs thus play a significant role with regard to amendment proposals.

3. Observers at CoP Meetings

One aspect of particular significance during the procedure leading to an amendment of the appendices is the participation of observers at CoP meetings. Governmental or non-governmental bodies or agencies qualified within the field of action of CITES may attend CoP meetings without a right to vote unless at least one-third of the parties present object.[94] The United Nations, its specialized agencies, and the International Atomic Energy Agency, as well as any state that is not a party to the Convention, may be represented at meetings of the Conference by observers who do not vote.[95]

At its thirteenth meeting the CoP specified requirements under Article XI (7)(a) such that a registration by the Secretariat would require a prior demonstration that the organization is qualified in protection, conservation or management of wild fauna and flora; and is an organization in its own right, with a legal persona and an international character, remit and program of activities.[96] Rule 3, paragraph 5, of the Rules of the Procedure for CoP meetings established a one-month deadline to inform about observers.

The CoP further recommended that the parties make every effort to ensure that chosen venues for meetings have space for observers and that the Secretariat and the host country make every effort to ensure that each approved observer is provided with at least one seat in the meeting rooms, unless one-third of the party

[93] Available at: http://www.iucn.org/themes/ssc/news/2007_articles/cities.htm.

[94] Art. XI(7).

[95] Art. XI(6).

[96] Conf. 13.8.

representatives object. Finally, it instructed the Presiding Officers to make every effort to allow observers to make interventions.

The Secretariat is further asked to ensure that informative documents prepared by observers are distributed to the participants in the meeting, and not to provide sponsorship through the Sponsored Delegates Project to any representative who is also an observer for an NGO.[97]

In practice, NGOs participate actively in CoP meetings. They make verbal interventions, suggest amendments to CoP recommendations, and participate in working groups at the discretion of the chairs of the sessional committees.[98]

IV. The Central Instruments

1. Obligations for its Members Set Forth by CITES

The central regulatory impact of CITES is intended to derive from the appendices in connection with the obligation of member states to coordinate international trade in accordance with the Convention and to prohibit and penalize trade in contravention of it.[99]

The export of Appendix I species requires an export permit, which is only granted when authorities of the state of export have advised that the export will not be detrimental to the survival of that species. Further conditions of a permit are that the authorities are satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora, that any living specimen will be so prepared and shipped as to minimize risks of injury, damage to health or cruel treatment, and that an import permit has been issued for the specimen.[100]

The import requires an import permit and either an export permit or a re-export certificate. An import permit requires that the authorities of the state of import have advised that the import will be for purposes which are not detrimental to the survival of the species concerned, are satisfied that the recipient of a living specimen will care for it adequately, and that the specimen is not to be used for primarily

[97] Conf. 13.8.

[98] REEVE (note 2), at 38.

[99] Art. II(4) 8(1)(a).

[100] Art. III(2).

commercial purposes.[101] This limits trade to specimens used primarily for scientific and educational purposes, and, in some instances, to hunting trophies.[102]

The re-export or introduction from the sea of any specimen underlies similarly strict regulations.[103]
The export of Appendix II species requires an export permit which is granted under the same conditions applicable to Appendix I species.[104] A Scientific Authority in each party monitors exports and advises to limit the granting of permits if necessary.[105]

The import merely requires the prior presentation of either an export permit or a re-export certificate. Other requirements necessary with respect to Appendix I species need not to be fulfilled here.[106]

The export of specimens of species listed in Appendix III from any state where it is listed in Appendix III requires an export permit.[107] The import requires the prior presentation of a certificate of origin and, where the import is from a state which has included that species in Appendix III, an export permit.[108]

There are exemptions from the requirements of Articles III, IV, and V. For example, for the benefit of scientists[109] and, at the discretion of the states' authorities, traveling exhibitions.[110]
CITES thus obliges its members to make concrete actions concerning the control of international trade through the issuing of export and import permits. Groups of individuals actually affected by the prescriptions are exporters and importers of wildlife and wildlife products.

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[101] Art. III(3).

[102] Birnie (note 10), at 237.

[103] Art. III(4), (5).

[104] Art. IV(2).

[105] Art. IV(3).

[106] Art. IV(4).

[107] Art. V(2).

[108] Art. V(3).

[109] Art. VII(6).

[110] Art. VII(7).

2. Implementation of CITES

The implementation of the convention is a responsibility of the member States. States have a duty to prohibit trade in contravention of CITES.[111] They are under an obligation to take appropriate measures to enforce the provisions of CITES, including penalties for trade in, or possession of, such specimens and the confiscation or return to the state of export of such specimens.[112] Even Articles III, IV, and V are formulated in broad general terms and require national legislation to make them effective.[113]

a) CITES' Support for Implementation

CITES assists its members in the implementation of their obligations under the convention in several different ways. CoPs helped to interpret some of the vague treaty provisions, for example the phrase "any readily recognizable part or derivative"[114] of specimens to lead to more conformity and effective implementation.

Where the non-detriment finding is concerned, in many cases CITES does not support its members. The parameters for non-detriment findings are not specified in the Convention or in any resolutions.[115]

The setting of export quotas has evolved into a standard practice to fulfill the non-detriment condition. Quotas establish the maximum number of specimens of a species that may be exported over the course of a year without causing a detrimental impact on its survival. The CoP usually sets quotas only for species of special concern while most quotas are set voluntarily by parties.[116]

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[111] Art. II(4).

[112] Art. VIII(1).

[113] Birnie (note 10), at 243.

[114] Art. 1(b)(II), (III).

[115] Conf. 10.3 (h); James B. Murphy , *Alternative Approaches to the CITES "Non-detriment" Finding for Appendix II Species*, 2 ENVTL L. 531, 540 (2006).

[116] Conf. 10.14 (Rev. CoP13); Conf. 10.15 (Rev. CoP12); Conf. 12.3 (Rev. CoP13); available at: http://www.cites.org/eng/resources/quotas/index.shtml.

To support the implementation, the Secretariat also undertakes scientific and technical studies in accordance with programs authorized by the CoP.[117] Another important strategy to facilitate implementation is the organization of capacity-building training seminars for officials from CITES Management Authorities and enforcement services, since institutional and financial constraints, especially in developing countries, are often the cause for failure of implementation.[118]

b) Implementation by the EU

The European Community enacted binding regulations to implement CITES in 1982. These were subsequently amended and enforced by a landmark judgment of the European Court of Justice in 1990 which held an unsubstantiated French CITES import permit to infringe Community law.[119]

At present, CITES is implemented by the EU through regulation No. 338/97 9th December, 1996. The regulation includes four annexes, which contain, *inter alia*, all the species from CITES appendices.[120]

c) Implementation by Non-Members

Non-members may also be required to comply with treaty provisions when they intend to trade with member states. Trade with non-member states is regulated in Article X and elaborated through resolutions of the CoP. Parties can only accept permits and certificates from non-party states whose competent authorities and scientific institutions are included in the most recent list compiled by the Secretariat, or after consulting with the Secretariat. Parties importing Appendix I and II species must also require certificates stating that the competent scientific institution in the non-party state has made a non-detriment finding, and that the specimens were not illegally obtained. Before allowing trade in Appendix I species with non-party states, parties are further required to consult with the Secretariat, and to only allow the trade of wild specimens in special cases for conservation or welfare purposes.

[117] Art. XII(2)(c).

[118] Sand (note 5), at 51.

[119] Sand (note 5), at 55.

[120] Art. 3.

V. Review, Monitoring and Compliance Enforcement

1. Review of CITES

CITES' organs themselves review CITES' effectiveness. The CoP, as well as the Secretariat, may make recommendations to improve CITES' effectiveness.[121]

Member states also have a certain degree of control over CITES' activities. Parties can object if they feel that the Secretariat is being too intrusive in its reports on infractions.[122]

2. Monitoring

To make the monitoring of the implementation possible, parties are required to transmit an annual report to the Secretariat listing the number and type of permits granted, exporters and importers and the states with whom they are trading and the numbers or quantities and types of specimens.[123] Furthermore, they have to furnish a biennial report on legislative, regulatory, and administrative measures taken to enforce the provisions of the Convention.[124] These reports are made public if the law of the party so permits.[125]

The collection, analysis, and dissemination of information on compliance is essential for a compliance system. These tasks are undertaken by the Secretariat. CITES relies mainly on party reports, but also on information from NGOs and International Organizations, from organizations such as Interpol and the World Customs Organization (WCO). CITES disperses one of the best information sources available to any environmental treaty, with independent case studies and reports on seizures and prosecutions being publicized in the TRAFFIC Bulletins.[126] NGOs, such as IUCN, WWF (World Wide Fund for Nature), and TRAFFIC, provide data on the status of species, the threat to them posed by trade, and the strictness of

[121] Arts. XI(3)(d), (e); XIII(3); Art. XII(2)(h).

[122] Sand (note 5), at 49.

[123] Art. VIII(6), (7).

[124] Art. VIII(7).

[125] Art. VIII(8).

[126] Sand (note 5), at 50.

observance of the Convention which enables the Secretariat to identify problems and to engage in counter measures.[127]

The Secretariat may also be asked to make an ad hoc visit to any party to verify information, or in cases of serious non-compliance.[128]

When the Secretariat is convinced that any species included in Appendix I or II is adversely affected by trade or that the Convention is not implemented effectively, it communicates such information to the Management Authority of the parties concerned.[129] The concerned states inform the Secretariat of any relevant facts and, propose remedial action.[130]

The Secretariat draws the attention of the parties to any matter which pertains to the aims of CITES[131] and it prepares annual reports on the implementation of the Convention.[132] Within the monitoring mechanism the Secretariat has thus further reaching competences than secretariats under the majority of treaty regimes.[133]

3. Compliance Enforcement

Compliance with CITES is promoted through two mechanisms, trade suspension and Significant Trade Review. In addition to those measures certified, non-compliance leads to negative publicity and politically harmful media coverage.[134] Thus, public pressure can help to improve compliance.
Countries that continue to violate CITES can face a recommendation of trade sanctions issued by the Standing Committee or the parties.[135] Trade sanctions were not explicitly provided for in CoP Resolution 11.3 (Rev. CoP14) which deals with non-compliance response. They are however used in practice.[136]

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[127] Birnie (note 10), at 239; Sand (note 5), at 49.

[128] REEVE (note 2), at 62.

[129] Art. XIII(1).

[130] Art. XIII(2).

[131] Art. XII(2)(e).

[132] Art. XII(2)(g).

[133] Wolfrum (note 30), at 49.

[134] Sand (note 5), at 49.

[135] Murphy (note 115), at 537.

[136] REEVE (note 2), at 91.

The Standing Committee initiates collective action against non-compliance from member states as well as third states. It recommends parties to take stricter domestic measures than those provided by the treaty, including suspension of trade, as envisaged in article XIV(1).[137] In the case of non-member states, these measures are used when the state concerned persistently refuses to provide comparable documents pursuant to article X.[138]

At the time of writing, 31 countries are subject to a recommendation to suspend trade. In the case of Djibouti, Guinea-Bissau, Liberia, Mauritania, Rwanda, and Somalia, a suspension of all trade has been recommended due to a lack of adequate national legislation. Mauritania and Somalia are additionally subject to a recommendation of a comprehensive trade suspension due to a failure to provide annual reports. Niger is subject to a recommendation to suspend all trade because of enforcement matters.[139]

The procedure for Significant Trade Review for Appendix II species may lead, as a last resort, to a suspension of trade in the affected species with the state concerned issued by the Standing Committee.[140]

CITES thus disposes of two rather sophisticated and complex enforcement mechanisms.

C. Legitimacy

I. Input Legitimacy

This final section of the paper will address the question of whether or not CITES represents a legitimate regime. To shed light on this problem, the in-put legitimacy will first be considered.

Government members form the main decision-making body of CITES and have, therefore, a quite central position. On the other hand, the Secretariat and the Committees' strong position, founded upon expertise procured from external experts, is notable. CITES is comparatively open to NGO participation which

[137] Sand (note 5), at 38.

[138] *Id*. at 39.

[139] *See* http://www.cites.org/eng/news/sundry/trade_suspension.shtml.

[140] Conf. 12.8 (Rev. CoP13) (s).

means that it leaves room for influence by affected individuals. The central position of states, the reliance on science, and the involvement of NGOs indicate existing efforts to ensure CITES' in-put legitimacy.

II. Out-Put Legitimacy

1. Effectiveness

CITES' output-legitimacy is hotly debated where CITES' effectiveness is concerned**.** The status of a species depends on a multitude of factors, such as the state of their habitat and impacts by alien invasive species, that the Convention has no influence on. The effectiveness of the Convention can therefore not be correlated directly with the conservation status of a species.[141]

CITES' effectiveness in regulating global trade seems doubtful considering that the global illegal trade in wildlife is estimated to be worth $5 to $10 billion every year. Only drugs and arms generate more illegal income.[142]

The Species Survival Network's review of international trade in birds found nine species of birds and thirteen countries for which quotas established under the significant trade process had been exceeded between 1994 and 1999.[143] The study further detected an omission of range states in fifteen reviews of significantly traded birds, quota-setting without biological data, lack of peer review of field studies, lack of uniform standards for non-detriment findings, lack of follow-up recommendations, and a failure of importing states to comply with trade suspensions. A further problem is that reviews consider only a limited number of species while the majority of species remains unheeded.[144]

The quota system is criticized for being uncontrolled, unscientific, and open to abuse. Parties often exceed quotas. In 1999, sixty-seven quotas for fauna and two for flora were reportedly exceeded. Half of these were exceeded by at least 150% and two were exceeded by over 1000%.[145]

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[141] Sand (note 5), at 54.

[142] McOmber (note 1), at 674.

[143] Murphy (note 115), at 541.

[144] *Id*. at 542.

[145] *Id*. at 540.

The significant trade review process is also criticized by some as being complex, difficult to understand, and ineffective.[146] The Significant Trade Review process was however successful in some cases. The committees reviewed more than 200 animal taxa, succeeded in limiting trade to a sustainable level and in increasing cooperation among range states, for example, with Caspian Sea range states regarding sturgeon and paddlefish. High cost of scientific studies and lack of a scientific consensus to determine when a species is endangered pose additional problems.

There is a notably sharp decline of some Appendix I species, such as the Kenyan rhinoceros population which dropped from 18,000 rhinos in 1968 to only 400 rhinos in 1992. A similar decline is notable with respect to tigers.[147] When affluent states such as the United States lack adequately trained personnel, it is not surprising that poorer range states' record of controls is not any better.[148]

The implementation of provisions relating to Appendix II species are hampered by the lack of accurate information on the health of a species and levels of trade which prevents parties from assessing whether trade will be detrimental to the survival of the species. The overwhelming percentage of all CITES species are listed in Appendix II which makes the significance of precise non-detriment findings all the more obvious.[149] Decisions taken in the absence of reliable scientific data need to be avoided.

And still, some positive outcomes of CITES are undeniable. In spite of its limited budget of approximately US $5 million annually, the Secretariat of CITES has a strong position.[150] Its Infraction Reports are now perceived as reliable and impartial documents that help to reinforce national implementation and accountability.[151]

Some changes in consumer demands are attributed to CITES. The food and fashion industries shifted away from products from Appendix I listed species, such as turtle soup, or leopard fur coats. Medical/pharmaceutical research, and partly the pet trade, substituted captive-bred for wild-caught animals. Crocodile leather is

[146] *Id*. at 534, 541.

[147] Krieps (note 11), at 462.

[148] *Id*. at 473.

[149] Murphy (note 115), at 533.

[150] REEVE (note 2), at 45.

[151] Sand (note 5), at 50.

increasingly obtained from CITES controlled ranching operations and plants such as orchids and cacti are artificially propagated. In many cases CITES listed species have been replaced by other species.[152]

2. The Legality Principle

One further legitimacy question is commonly neglected by CITES' organs as well as researchers. The obligation of member states to penalize the trade in and possession of protected species[153] entails the question of whether the criminal norms that are consequently adopted at the national level are legitimate. The decision about form and content of criminal provisions remains exclusively within the purview of each member state. And yet the references to CITES contained in the legislation may present a legitimacy problem shared by criminal norms that are adopted in order to implement the convention. The EC regulation for the protection of species,[154] for example, automatically incorporates all species on CITES' appendices. The regulation is then implemented through national criminal norms containing dynamic cross-references to the EC regulation. The Austrian,[155] German,[156] Hungarian,[157] and Dutch[158] criminal legislation refer to the lists of protected species contained within EC Regulation No. 338/97.[159] Denmark,[160] France,[161] Italy,[162]

[152] *Id*. at 54.

[153] Art. VIII(1)(a).

[154] EC Regulation No 338/97 of 9 December 1996, OJ L 61, 3.3.1997.

[155] Bundesgesetz über die Überwachung des Handels mit Exemplaren wildlebender Tier- und Pflanzenarten Artenhandelsgesetz – ArtHG) – Trade in Species Act from 30 January 1998, BGBl. I Nr. 33/1998, last changed by BGBl. I Nr. 29/2006.

[156] Section 66, Federal Nature Conservation Act from 3 April 2002, BGBl. I Nr. 22/2002; Section 330 (1)(3), Criminal Code from13 November 1998, BGBl. I p.3322, last changed by BGBl I p.1690.

[157] Government Decree No.271/2002 (XII.20) on the Implementation and Enforcements of CITES (2002), amended by Government Decree 283/2004.

[158] Flora and Fauna Act from 1 April 2002, Stb. 1998, 402, last changed by Stb. 2002, 236; Act on Economic Offences from 22 June 1950, Stb. 1950, K258, last changed by Stb. 2002, 542.

[159] Tobias Garstecki, *Implementation of Article 16, Council Regulation (EC) No. 338/97, in the 25 Member States of the European Union*. A TRAFFIC Europe Report for the European Commission,.7 (2006), *available at* http://www.traffic.org/general-topics/.

[160] Ministry of Environment and Energy Statutory Order No. 84 of 23 January 2002.

[161] Art. 215 and Art. 414, Customs Code of 8 July 1963, Décret Nr. 63-673, Journal Officiel from 12 July 1963.

[162] Law 150/92, Gazz. Uff. Nr. 44 from 22 February 1992.

Luxembourg,[163] Poland,[164] Slovenia[165], and Belgium[166] criminalize violations of this EC Regulation. Portuguese law,[167] on the other hand, does not provide for any criminal but only administrative sanctions in order to implement CITES.[168]

It is not merely the commercial conduct which is criminalized. Small-scale wildlife trade offences are also criminalized.[169] In Denmark, for instance, the importation in good faith for non-commercial use (for example tourist souvenirs) of specimens in Appendix II, usually result in confiscation[170] whereas such importation of Appendix I specimens usually results in fines.[171]

Hence, a modification to the appendices of CITES automatically alters domestic criminal law without any control by the legislature. Moreover, the criminal proscriptions do not specify the trade in which species is criminalized. To ascertain the species concerned, it is necessary to peruse a current edition of CITES' appendices. Consequently the involvement of CITES' appendices causes a loss of power of the national legislature which goes hand in hand with a loss of clarity for addressees of the statutes.

Primarily, the question arises whether such criminal proscriptions conform with the legality principle - provided that this principle is a relevant concept for measuring legitimacy. What status does the legality principle enjoy in existing national legal systems? What elements are encompassed by it? And what is its status and content within international law?

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[163] Art. 12 Law of 21 April 1989, Journal Officiel Nr.33 from 26 May 1989.

[164] Arts. 127-131 Nature Conservation Act of 16 April 2004, Journal of Laws 04.92.88.

[165] Art. 40 Decree on the course of conduct and protection measures in the trade in animal and plant species, OG of the RS 52/04.

[166] Art. 127 Loi-Programme of 27 December 2004, Service Public Federal Chancellerie du Premier Ministre from 31 December 2004, available at http://www.ejustice.just.fgov.be/doc/rech_f.htm.

[167] Art. 32/1 Decreto-Lei Nr.114/90, from 5 April 1990, Diário da República I Nr.80, p.1669.

[168] *Rob Parry Jones and Amelie Knapp*, *Enforcement of Wildlife Trade Controls in EU Member States: Country Profiles*, 108 *(2006),* available at *http://www.traffic.org/enforcement.*

[169] Garstecki (note 159), at 7.

[170] Monika Anton, *A Preliminary Overview of Court Cases and Challenges in the Prosecution of Crime related to Wildlife Trade in the EU, in* PROCEEDING OF THE INTERNATIONAL EXPERT WORKSHOP OF THE ENFORCEMENT OF WILDLIFE TRADE CONTROLS IN THE EU, 43 (Monika Anton, Nicholas Dragffy, Stephanie Pendry & Tomme Rozanne Young eds., 2001), *available at* www.traffic.org/enforcement.

[171] *Parry-Jones and Knapp (note 168), at* 29.

Since the French Revolution, this principle has been hailed as a fundamental guaranty. That being said, not all national legal systems base their criminal law on the principle of legality. Rather, there are examples for legal orders founded on the doctrine of substantive justice. Under the latter doctrine, any conduct that is harmful or threatening to society is punished independently of any legal criminalization at the time of action.[172] Society is thus favored over the individual. The Soviet Union and the Nazi criminal law are examples for the application of the doctrine.[173]

Nowadays, most democratic civil law states recognize the principle of strict legality as fundamental. The principle sets out four conditions for proscriptions that criminalize and penalize certain actions: (i) they are enacted by parliament, rather than by customary rules or secondary legislation enacted by the ministers; (ii) they may not be retroactive; (iii) they may not be applied analogously; and (iv) they must be as specific and clear as possible.[174] The requirement of a written law passed by a central authority which has the sole responsibility for the adoption of criminal law is seen as a logical condition for the effectiveness of legal certainty.[175] These principles prevent the risk of judicial abuse and arbitrary application of the law and are considered a part of fundamental justice.

By contrast, common law countries have both common law offences, resulting from judgments, as well as statutory offences. Hence, proscriptions are not necessarily enacted by parliament, nor do they fulfill the principle of non-retroactivity in the way it is applied under civil law systems. It follows that the principle has a different content within common law systems.[176]

One aspect of the legality principle as it is recognized in civil law countries, which makes the influence of CITES on criminal law problematic, is its requirement of solely legislative responsibility for criminal proscriptions as the CoP changes the content of the statute with its decision to add species to the appendices. States do not even have to declare their willingness to be bound by those changes. Rather they have to actively opt-out. The second aspect which poses problems with respect

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[172] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 139 (2003).

[173] *Id*. at 140.

[174] *Id*. at 141.

[175] Mauro Catenacci, *Nullum Crimen Sine Lege, in* The INTERNATIONAL CRIMINAL COURT, COMMENTS ON THE DRAFT STATUTE, 159, 162 (Flavia Lattanzi ed., 1998).

[176] CASSESE, *supra* note 172at 142.

to CITES' influence is the condition for statutes to be as specific and clear as possible. This too is problematic since norms with dynamic references do not contain all relevant information.

Does international law contain similar requirements for criminal provisions which make CITES' effect on criminal statues problematic also from an international law perspective?

Historically, international law has applied the doctrine of substantive justice, since states used to be unwilling to enter into treaties establishing criminal liabilities. Additionally, customary rules had only evolved in a rudimentary manner and only with respect to prohibiting and punishing war crimes. The international community thus had no choice but to rely upon the doctrine of substantive justice when crimes against peace and crimes against humanity had to be addressed by the Nuremberg Tribunal.[177]

After World War II, international law witnessed a gradual shift towards the principle of legality. Various newly adopted human rights treaties laid down the principle for national courts.[178] Additionally, the Universal Declaration of Human Rights[179] and the Third and Fourth Geneva Conventions of 1949 contributed to the principle being accepted as a fundamental human right.[180]

Today, international criminal proscriptions, irrespective of whether they flow from conventions, custom, or general principles of law, must satisfy the principle of legality. The statutes of the ICTY, ICTR, and the ICC[181] formulate a legality requirement.[182] The principles of legality are a general principle of international

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[177] *Id*. at 143.

[178] Art. 15 UN Covenant on Civil and Political Rights; Art. 7 European Convention on Human Rights; Art. 9 American Convention on Human Rights; Art. 7(2) African Charter on Human and People's Rights; Susan Lamb, *Nullum Crimen, Nulla Poena sine Lege in International Criminal Law*, *in* I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. A COMMENTARY 733 (Antonio Cassesse ed., 2002).

[179] Art. 11(2) Universal Declaration Of Human Rights.

[180] CASSESE (note 172), at 144; Art. 99(1) Third Convention; Art. 67 Fourth Convention; Additional Protocol I, Art. 2(c); Additional Protocol II, Art.6(c).

[181] Arts. 22-24 ICC-Statute; Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE - ISSUES, NEGOTIATIONS, RESULTS 189, 190 (Roy S. Lee ed., 1992).

[182] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 219 (2003).

law and have become part of customary law.[183] Hence, this principle is not merely a concept in domestic legal systems, it is also recognized at the international level.

At the international level this principle requires that: (i) there be no crime without a law (*nullum crimen sine lege*), nor a punishment without a law (*nulla poena sine lege*); (ii) no retroactive application of laws; (iii) no analogies as bases for punishment, and (iv) crimes have to be defined in a clear and unambiguous way to ensure that people are aware which acts constitute a crime.[184] The level of specificity required remains debated since existing criminal justice systems do not agree on the issue. Arguably, the crime must be defined as clearly as possible, which is interpreted less strictly than in continental European law.[185]

The second significant difference between the international and national continental European level concerning the scope of the legality principle, relates to the requirement of a law enacted by parliament. In contrast to civil law systems, international law permits customary law as a source of criminal provisions where international as well as national crimes are concerned. However, the legality question is particularly controversial where customary international criminal proscriptions are concerned.[186] In some instances, customary international law fails to comply with the requirement of legality, and codification is thus advocated to address this weakness. General principles of law may also be a source of criminal law as stated in Article 15 (2) ICCPR. They are however the source of criminal law that is most likely to fall short of the principle of legality.[187] The decisive question remains, whether a proscription is known or could have been known to any ordinary reasonable person anywhere in the world.[188]

Legislation containing dynamic references to CITES is less transparent than legislation containing all relevant details. References to appendices are also less transparent than those of conventions, since the former can be changed more easily and become binding upon states unless they enter reservations. The mandate of the

[183] GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 32 (2005); BASSIOUNI (note 182), at 221.

[184] BASSIOUNI (note 182), at 218; WERLE (note 183), at 33; Lamb (note 178), at 733; WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 223 (2006).

[185] WERLE (note 183), at 33.

[186] BASSIOUNI (note 182), at 221.

[187] *Id*. at 224.

[188] *Id*. at 225.

CoP to decide on the inclusion of species, which is hailed as an important step towards safeguarding endangered species causes, at the same time, a loss of clarity of criminal provisions. Moreover, the utilization of tacit consent makes the problem even more acute, since there is no need for parliamentary consent.

On the other hand, customary law and general principles of law are recognized as source of criminal law yet these sources are even more likely to be unknown to reasonable persons and they lack parliamentary control. Are CITES' appendices, as a consequence, unproblematic with respect to the legality principle in international law?

The existence of un-codified international crimes is opposed. The fact that customary law and general principles of law are even less transparent does not absolve the international community from accomplishing CITES' mandate in a way that takes account of international and national legality principle standards. Efforts to make species protection more effective may not detract from the fundamental value of the legality principle. CITES should not leave this principle unheeded. Instead it should work to ensure that references to its appendices are as transparent as possible. It should promote participation of legislatures to legitimate them.

There are those who argue that the principle makes the criminal system inflexible and unable to comply immediately with the constant changes of public opinion[189]. Indeed, the mandate of the CoP to change CITES' appendices arguably makes CITES better able to quickly respond to conservation needs. Nevertheless, it must be noted that criminal sanctions can only be effective if they are clear enough. The appendices are difficult enough for customs officers. So how accessible are they for importers and exporters?

The convention does not include concrete guidelines for the listing of species. These have instead been drafted by the CoP. Modifications are adopted with a two-thirds majority of votes cast and by secret ballot. Decisions depend on conservation priorities of the states. All this makes the listing procedure even less amenable to parliamentary control and less clear for addressees.

States that fail to abide by the obligation to penalize contraventions may face enforcement measures under the compliance regime which makes it essential that CITES itself respects and safeguards the principle of legality in its work. It does not suffice to place all responsibility on member states to safeguard this principle.

[189] Catenacci (note 175), at 160.

D. Conclusion

CITES represents a fascinating example of the exercise of public authority by an international institution. Since its inception in 1973 it evolved into one of the most effective multilateral environmental agreements, balancing conservation and economic interests. Its institutional features, including its strong Secretariat and close cooperation with expert NGOs, as well as its main activities, the listing of species, compliance monitoring and decisions on enforcement measures, are factors which render this success possible. At the same time, the influence of CITES on national criminal provisions poses several problems to the legality principle as it exists at the international level, as well as within national legal systems. This problem has not yet been discussed. CITES and its members should take account of it to ensure that responsive strategies can be developed.