

Chapter Six

The Convention on International Trade in Endangered Species of Wild Flora and Fauna and the Illegal Wildlife Trade: A Critical Perspective

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This chapter critically evaluates the successes and limitations of the *Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)* in regulating the international wildlife trade and contributing to international responses against wildlife trafficking. This chapter demonstrates that despite valid criticisms of the Convention's practical implementation and compliance mechanisms, *CITES* remains the primary international instrument to combat the pervasive threat of the illegal wildlife trade. This chapter argues that it is necessary to strengthen the *CITES* regime through enhanced transnational cooperation between *CITES* and other international agreements, organisations and coalitions, but also underscores the increasing pressure for the development of a specific convention against international wildlife crime.

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I. Introduction

Over the past decade, there has been growing momentum within the international community to combat the widespread and devastating consequences of the illegal wildlife trade.¹ The available sources discussing the scale of the illegal wildlife trade reveal major inconsistencies in quantified assessments, and considerable disagreement as to the changing levels and characteristics of trafficking in wild flora and fauna.² But although the precise scope or worth of the illegal wildlife trade is uncertain,³ the serious consequences of such trade are widely acknowledged.⁴ The illegal international trade in endangered species has critical ramifications for animal welfare, global biodiversity, environmental

1 Angad Keith, 'Hunting for Efficacy: A Critical Evaluation of International Responses to Wildlife Trafficking in the African Great Lakes Region' (2018) 35 *Environmental and Planning Law Journal* 542, 542–543; CITES Secretariat, 'The International Consortium on Combating Wildlife Crime', *Wildlife Crime* (Web page, undated); Jafari R Kideghesho, 'Reversing the Trend of Wildlife Crime in Tanzania: Challenges and Opportunities' (2016) 25(3) *Biodiversity and Conservation* 427, 427–428; John Martin Chamberlin, 'Wildlife Crime' in Margaret E Beare (ed), *Encyclopedia of Transnational Crime & Justice* (2012) 467–468.

2 Daniel WS Challender, Stuart R Harrop and Douglas C MacMillan, 'Understanding Markets to Conserve Trade-Threatened Species in CITES' (2015) 187 *Biological Conservation* 249, 251–252; William S Symes et al, 'The Gravity of Wildlife Trade' (2017) 218 *Biological Conservation* 268, 268; UNEP, *Analysis of the Environmental Impacts of Illegal Trade in Wildlife*, UNEP/EA.2/INF/28 (2016) 6–7.

3 INTERPOL, *Global Wildlife Enforcement: Strengthening Law Enforcement Cooperation Against Wildlife Crime* (March 2019) 1; OECD, *Illegal Trade in Environmentally Sensitive Goods* (2012) 13–14.

4 See, for example, Symes et al (n 2) 268.

and natural resource protection, sustainable development, and, where connected to organised crime and armed conflict, human security.⁵

This chapter refers to the illegal wildlife trade as the transnational movement of species, specimens and their derivatives in contravention of the provisions and controls established in international law.⁶ There is no universal definition of ‘illegal wildlife trade’, a term used interchangeably in other sources with ‘wildlife smuggling, trafficking or exploitation’.⁷ Despite the increasing global efforts targeted at preventing and suppressing the illegal trade in wildlife, there is still no firm consensus on its precise scope or magnitude as a form of transnational ‘environmental’ or ‘wildlife crime’.⁸

There is resounding agreement among international environmental scholars, professionals, and activists that international cooperation is fundamental in any serious efforts for preventing and suppressing the illegal wildlife trade.⁹ The need for coordinated global responses to combat the ecological, economic, and security consequences of wildlife trafficking is exemplified in the vast majority of policies and campaigns pertaining to the protection

5 See, for example, Keith (n 1) 543; Kideghesho (n 1) 428; Hennie Strydom, ‘Transnational Organised Crime and the Illegal Trade in Endangered Species of Wild Fauna and Flora’ in Pierre Hauck & Sven Peterke (eds), *International Law and Transnational Organised Crime* (2016) 264, 266; Kideghesho (n 1) 428; UNEP (n 2) 2; William H Schaedla, ‘Local Socio-cultural, Economic and Political Factors of Transnational Wildlife Crime’ in Lorraine Elliott and William H Schaedla (eds), *Handbook of Transnational Environmental Crime* (2016) 45, 59; Vincent Niiman, ‘An Overview of International Wildlife Trade from Southeast Asia’ (2010) 19(4) *Biodiversity and Conservation* 1101, 1103.

6 OECD (n 3) 15–17.

7 See, for example, Greg L Warchol, ‘The Transnational Illegal Wildlife Trade’ (2004) 17(1) *Criminal Justice Studies* 57, 58–59; Rebecca N Johnson, ‘The Use of DNA Identification in Prosecuting Wildlife-Traffickers in Australia: Do the Penalties Fit the Crime?’ (2010) 6(3) *Forensic Science, Medicine, and Pathology* 211, 211–216; Samuel K Wasser et al, ‘Combating the Illegal Trade in African Elephant Ivory with DNA Forensics’ (2008) 22(4) *Conservation Biology* 1065, 1065–1071.

8 See, for example, Carole Gibbs et al, ‘Introducing Conservation Criminology: Towards Interdisciplinary Scholarship on Environmental Crimes and Risks’ (2010) 50(1) *British Journal of Criminology* 124, 124–126; Challender, Harrop and MacMillan (n 2) 249; Strydom (n 5) 264.

9 Keith (n 1) 542–599; Kimberley Graham, ‘International Intent and Domestic Application of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES): The Case of the Ocelot (*Leopardus paradisi*)’ (2017) 20(3–4) *Journal of International Wildlife Law & Policy* 253, 254.

of vulnerable and endangered species.¹⁰ Evidently, the illegal wildlife trade is an environmental threat that transcends national borders and demands regional responses and global action.¹¹ However, existing international frameworks are fragmented and limited in application. There is no specific international agreement directly targeted to the eradication of environmental or wildlife crimes, including illegal wildlife trade.¹²

The principal international instrument for the regulation and restriction of trade in wildlife is the *Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)*.¹³ The overarching objective of *CITES* is to protect vulnerable and endangered species of wild flora and fauna from over-exploitation caused or exacerbated by international trade.¹⁴ Effectively, *CITES* aims to regulate and monitor the international trade of endangered species, whether alive or dead, and their derivatives, in a manner that balances the conservation of wildlife with the economic interests of states in utilising their natural resources.¹⁵

CITES entered into force in 1975, and is often cited as the most successful multilateral environmental agreement concerned with biological conservation and wildlife protection.¹⁶ *CITES* regulates international trade through a permit system which is based upon whether the wild plant or animal species is listed in either of three Appendices to the treaty. The

¹⁰ Strydom (n 8) 272–273; INTERPOL (n 3) 1–2; UN, *The Future We Want*, Outcome Document of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil 20–22 June 2012 (2012) 53–54; UNEP (n 2) 2; UNODC, *World Wildlife Crime Report: Trafficking in Protected Species* (2016) 23.

¹¹ Christian Nellemann et al (eds), *The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources* (2014) 48–49; Michael Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (2010) 493, 494–495; UNEP (n 2) 2.

¹² Bowman (n 11) 494–495.

¹³ Opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

¹⁴ Strydom (n 8) 270.

¹⁵ Geoffrey Wandesforde-Smith, 'Looking for Law in All the Wrong Places? Dying Elephants, Evolving Treaties, and Empty Threats' (2016) 19(4) *Journal of International Wildlife Law & Policy* 365, 367; Strydom (n 8) 264.

¹⁶ David M Ong, 'International Environmental Law Governing Threats to Biological Diversity' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (2010) 519, 521; Strydom (n 8) 264.

main requirements of the permit system consist of the provision of relevant documentation between importing and exporting States Parties, which is administered and monitored by established national institutions. In effect, the ‘protective measures’ or trade restrictions imposed on States Parties depend on the listing of the particular species.¹⁷ *CITES* currently regulates the international trade of more than 35,000 species and subspecies of flora and fauna.¹⁸

Although *CITES* is the primary international mechanism for controlling trade in vulnerable and endangered species of flora and fauna, its achievements and limitations continue to be the subject of significant debate.¹⁹ A considerable number of scholars from legal, scientific, and conservationist backgrounds have discussed the shortcomings of *CITES* in preventing and suppressing illegal trade in wildlife, but also the Convention’s limitations as a ‘conservation’ agreement more broadly. Some assessments view the Convention as an indispensable instrument in the ‘conservation toolbox’, while others assert that the *CITES* regime is simply a ‘toothless paper tiger’ and ‘waste of resources’.²⁰ Political and ideological differences between Parties to the Convention have raised other challenges related to *CITES*’ approach of ‘strict protection’ versus ‘sustainable use’ of endangered species.²¹ Similarly, many scholars underscore the limitations of *CITES* as an international environmental regime for combating wildlife crime are inextricably tied to the Convention’s purpose in regulating the international trade in wildlife.²² It is often stressed that the contributions of *CITES* to biological conservation and the fight against environmental crime are constrained due to the Convention’s role in legitimising

17 Ong (n 16) 524 – 525.

18 CITES Secretariat, ‘The CITES Species’ (Web page, 2 January 2017).

19 Wandesforde-Smith (n 15) 366.

20 Arie Trouwborst et al, ‘International Wildlife Law: Understanding and Enhancing Its Role in Conservation’ (2017) 67(9) *BioScience* 784, 789.

21 Andrew Taylor et al, ‘Sustainable Rhino Horn Production at the Pointy End of the Rhino Horn Trade Debate’ (2017) 216 *Biological Conservation* 60 – 61; Trouwborst et al (n 20) 785; Catherine L Krieps, ‘Sustainable Use of Endangered Species under CITES: Is It a Sustainable Alternative?’ (1996) 17(1) *University of Pennsylvania Journal of International Law* 461, 481; Wandesforde-Smith (n 15) 366.

22 Ong (n 16) 524 – 525.

international trade in endangered species, albeit within the controls imposed by the legal regime.²³

This chapter provides a critical review of the operation and administration of *CITES* in regulating the international wildlife trade and further analyses the role and relevance of the Convention in combating the global illegal trade in endangered species. Specifically, this chapter identifies and evaluates three core criticisms of *CITES* as a global biodiversity measure and instrument in the international response to wildlife crime. This chapter maintains that while these critiques demonstrate valid and pertinent problems in current experiences of practice and compliance, *CITES* remains the primary legal mechanism to facilitate international action against the threat of unsustainable and illicit international trade to endangered species. Despite its constraints, *CITES* has evolved from the early 1970s to contribute some force in the implementation and enforcement of Party obligations.²⁴ For this reason, the position of this analysis is that serious consideration must be given to strengthening the long-term and legally binding commitments imposed by the *CITES* regime on a transboundary scale, and enhancing cooperation between the Convention and other international environmental agreements and institutions.

The range of academic literature, institutional reports and commentary on the implementation, successes and limitations of *CITES* of the past five decades is very extensive.²⁵ Existing scholarship typically focuses on the role of *CITES* in relation to conservation of particular species,²⁶ regional

23 Ibid.

24 Trouwborst et al (n 20) 787.

25 See generally Kriepps (n 21) 481; John L Garrison, 'The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use' (1994) 12(1) *Pace International Law Review* 301, 303; Trouwborst et al (n 20) 784 – 786; Wandesforde-Smith (n 15) 365; Laura H Kosloff and Mark C Trexler, 'The Convention on International Trade in Endangered Species: No Carrot, but Where's the Stick?' (1987) 17 *Environmental Law Reporter* 10222, 10222 – 10223.

26 See, for example, Bram Janssens and Arie Trouwborst, 'Rhinoceros Conservation and International Law: The Role of Wildlife Treaties in Averting Megaherbivore Extinction' (2018) 21(2 – 3) *Journal of International Wildlife Law & Policy* 146; Linlin Li and Zhigang Jiang, 'International Trade of CITES Listed Bird Species in China' (2014) 9(2) *PLoS ONE* [s.p.]; Julie Cheung, 'Implementation and Enforcement of CITES: An Assessment of Tiger and Rhinoceros Conservation Policy in Asia' (1995) 5(1) *Pacific Rim Law & Policy Journal* 125; Vincent Nijman and Chris R Shepherd, 'The Role of Thailand in the International Trade in CITES-Listed Live Reptiles and Amphibians' (2011) 6(3) *PLoS ONE* [s.p.].

trends in compliance,²⁷ and broad connections with transnational organised crime and corruption.²⁸ This chapter does not intend to provide a definitive discussion of the various assessments of the Convention, but rather aims to provide a critical perspective on the main critiques raised by prominent authors and organisations in the prior literature on *CITES* and the illegal wildlife trade.

Part II of this chapter discusses the background, development, and purpose of *CITES*. Part III provides a detailed review of the operation of *CITES*, including the substantive provisions for the regulation of 'legal' international trade in wildlife, and the articles relevant to the criminalisation of the illegal international trade. Part IV outlines the administration of *CITES* at the international and domestic levels and highlights the main administrative bodies and implementation mechanisms. Part V comprises the main critical and analytical contribution of this chapter and evaluates the the prominent arguments directed to the Convention's narrow scope and coverage, contested approach to ecological conservation, and finally, lack of effective and consistent enforcement mechanisms. Part IV considers the way ahead for *CITES*, and presents conclusions on the recommendations for the future of international wildlife law.

II. History and development

1. Background to multilateral environmental and wildlife agreements

The development of *CITES* can be traced to several foundational international agreements for the preservation of fauna and flora.²⁹ Early

²⁷ See, for example, Lynn P Marshall, 'Canada's Implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Cites): The Effect of the Biodiversity Focus of International Environmental Law' (1999) 9 *Journal of Environmental Law and Practice* 31; Sherryn Ciavaglia et al, 'Current Issues with the Investigation of Wildlife Crime in Australia: Problems and Opportunities for Improvement' (2015) 18(3) *Journal of International Wildlife Law & Policy* 244.

²⁸ See, especially, Strydom (n 8) 264.

²⁹ John Lanchbery, 'Long-Term Trends in Systems for Implementation Review in International Agreements on Fauna and Flora' in David G Victor, Kal Raustiala and Eugene B

international treaties on flora concentrated on preventing the spread of disease and maintaining healthy cultivation stocks, while early international agreements for the protection of wild fauna were primarily concerned with resource productivity and management.³⁰ These initial species-specific agreements were largely motivated by narrow utilitarian objectives,³¹ and directly targeted at ensuring the production of resources derived from species threatened with endangerment and extinction.³²

A prominent example includes the conservation instruments adopted to resolve disputes concerning the preservation of fur seals in the North Pacific Ocean.³³ Following unresolved disputes surrounding a bilateral treaty between the United States and the United Kingdom,³⁴ a multilateral convention was adopted to secure the 'protection' of North Pacific Ocean fur seals in 1911.³⁵ The preamble to the Convention explicitly refers to the need to ensure the 'maximum sustainable productivity of the fur seal resources of the North Pacific Ocean'.³⁶ The 1911 agreement expired prior to the outbreak of the Second World War,³⁷ and was succeeded by the 1957 *Interim Convention on Conservation of North Pacific Fur Seals*.³⁸ The core motivation underlying the 'North Pacific Fur Seal Treaties' was not in fact the conservation of the species, but rather ensuring continued production of seal fur for commercial purposes.³⁹

In response to the narrow aims of species-specific treaties, multilateral agreements were drafted to provide special protection for wild flora and

Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998) 57, 57–58.

30 Ibid 58–59.

31 Michael Bowman, Peter Davies, and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd ed, 2010) 4–5.

32 Strydom (n 8) 268.

33 Bowman (n 11) 495–496; Chandler P Anderson et al, 'The North Pacific Sealing Convention' (1911) 5(4) *American Journal of International Law* 1025, 1026.

34 Strydom (n 8) 268.

35 *Convention Between the United States, Great Britain, Japan and Russia Providing for the Preservation and Protection of the Fur Seals* signed 7 February 1911, 37 Stat. 1542 (entered into force 12 December 1911).

36 Strydom (n 8) 268.

37 Michael Bhargava, 'Of Otters and Orcas: Marine Mammals and Legal Regimes in the North Pacific' (2005) 32(4) *Ecology Law Quarterly* 939, 944.

38 Signed on 9 February 1957, 314 UNTS 105 (entered into force 14 October 1957).

39 Bhargava (n 37) 942.

fauna, with an increased focus on conservation as opposed to sustainable resource production.⁴⁰ The *Convention Relative to the Preservation of Fauna and Flora in their Natural State*,⁴¹ commonly referred to as the 'London Convention', is widely regarded as the first multilateral 'special protective regime' for wild flora and fauna.⁴² The *London Convention* was adopted by nine states (and former colonial powers) in 1933, and closely modelled on the previous 1900 *Convention for the Preservation of Wild Animals, Birds and Fish in Africa* (never entered into force).⁴³ The *London Convention* not only included provisions imposing an obligation on States Parties to establish wildlife parks and conservation reserves,⁴⁴ but notably implemented a 'schedule system' which categorised species according to levels of protection. This schedule structure directly informed the Appendices and listing system of *CITES*.⁴⁵ The conceptual and structural approach implemented in the *London Convention* has been utilised in almost all following multilateral treaties on flora and fauna.⁴⁶ A prominent example is the 1940 *Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere*,⁴⁷ which targeted habitat preservation as a key measure in the protection of endangered species, and included a specific provision for the regulation of export, import, and transit of protected species.⁴⁸ These early multilateral environmental agreements were ultimately unsuccessful for various reasons, most significantly being the impact of geopolitical events including the Second World War and decolonisation, absence of effective institutional

40 Barry Walden Walsh, 'Convention on International Trade in Endangered Species of Wild Flora and Fauna: A CITES Timeline' (2005) 26(1–2) *Selbyana* 92, 93–94; Lanchbery (n 29) 58–59.

41 Signed 8 November 1933, 172 LNTS 241 (entered into force 14 January 1936).

42 Strydom (n 8) 269.

43 Signed 19 May 1900.

44 Strydom (n 8) 269.

45 Peter H Sand, 'Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment' (1997) 1 *EJIL* 31–32.

46 Walden Walsh (n 40) 92; Lanchbery (n 29) 59.

47 Signed on 12 October 1940, 161 UNTS 229 (entered into force 30 April 1942).

48 Strydom (n 8) 268–269.

mechanisms for ensuring compliance and enforcement, and other operational weaknesses.⁴⁹

2. New responses to the international wildlife trade

As early as the 1950s, traction was growing within the international community for a multilateral convention which imposed global and concrete restrictions on the commercial and non-commercial exploitation of endangered wildlife.⁵⁰ During the 1960s, there was growing public awareness of the threats to the survival of vulnerable species of flora and fauna, as well as increasing pressure from global civil society to respond to the dramatic increase in international wildlife trade, particularly in the form of illicit smuggling and trafficking.⁵¹ It was against this background of international momentum to address the practical and political problems associated with the illegal wildlife trade that the General Assembly of the International Union for Conservation of Nature and Natural Resources (IUCN) called for 'an international convention on the regulation of export, transit, and import of rare or threatened wildlife species or their skins and trophies'.⁵² The IUCN was critical in the drafting and negotiation process of the structure and text of *CITES*,⁵³ which involved the preparation and revision of multiple successive drafts between 1963 and 1972.⁵⁴ The IUCN built upon several features of earlier flora and fauna agreements, the most important being the use of lists to categorise threatened species according to the level of protection or trade restriction necessary to ensure continued survival.⁵⁵ *CITES* was concluded in Washington, DC on 3 March

49 Michael Bowman, 'The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law' in Michael Bowman and Catherine Redgwell (eds), *International Law and the Conservation of Biological Diversity* (1996) 5, 15–17.

50 Lanchbery (n 29) 57, 65; William C Burns, 'CITES and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal' (1990) 8(2) *Penn State International Law Review* 202, 203–204.

51 Bowman, Davies, and Redgwell (n 31) 483–484.

52 IUCN, *Proceedings of the 8th Session of the General Assembly* (1963) 130.

53 Burns (n 50) 204.

54 Strydom (n 8) 270.

55 *Ibid.*

1973, and entered into force just over two years later on 1 July 1975.⁵⁶ As on 1 January 2020, there are 183 Parties to the Convention.⁵⁷

III. Purpose and objectives

1. Preamble

From its inception, *CITES* has been regarded as the most important instrument for the protection of threatened and endangered species of flora and fauna against exploitative international trade.⁵⁸ The Convention was drafted on the basis that cooperation in the international community ‘is essential for the protection of wild flora and fauna against over-exploitation through international trade’.⁵⁹ Its Preamble acknowledges the role of ‘individual peoples and nations in cooperation with the international community’ in protecting endangered species from over-exploitation.⁶⁰ Furthermore, *CITES* refers to the need to protect wild flora and fauna ‘in their many beautiful and varied forms’ for present and future generations, and recognises their diverse ‘aesthetic, scientific, cultural, recreational and economic’ values.⁶¹

2. Tension between trade and conservation objectives

Although *CITES* is widely recognised as an international conservation instrument for the preservation and protection of wildlife, it remains that there is a strong divergence in opinion as to ‘how *CITES* should be

56 Bowman, Davies, and Redgwell (n 31) 484.

57 CITES Secretariat, ‘List of Contracting Parties’ (Web page, 14 January 2020).

58 Garrison (n 25) 303–304.

59 *CITES*, preamble.

60 Jay E Carey, ‘Improving the Efficacy of CITES by Providing the Proper Incentives to Protect Endangered Species’ (1999) 77(4) *Washington University Law Review* 1291, 1294–1295.

61 *CITES*, preamble.

interpreted and what its primary purpose should be'.⁶² Several commentators underscore the fact that *CITES* is by definition an international trade agreement: the Convention operates to regulate and legalise certain levels of trade in wildlife.⁶³ David Ong, for instance, stresses that *CITES* was not designed for the direct protection or conservation of endangered species, and only plays an indirect role through the controls it places on commercial trade.⁶⁴ John Garrison emphasises the inclusion of the term 'over-exploitation' in the Preamble to the Convention as indicative of the core purpose of the Convention.⁶⁵ He contends that the reference to protecting vulnerable species from 'over-exploitation' recognises that while unregulated trade can threaten the survival of wild species, 'some exploitation' is permissible.⁶⁶

This demonstrates the inherent conflict between the trade and conservation objectives of *CITES*,⁶⁷ particularly in terms of whether endangered species should be subject to strict protection or in accordance with principles of sustainable use.⁶⁸ Many scholars stress that complete prohibitions on all forms of trade in species and their derivatives would be an infringement on state sovereignty, and the right of sovereign states to 'derive some benefit' from species located within their territories.⁶⁹ This argument is frequently raised by governments of 'producer' states which view sustainable use trade as an effective compromise between ecological and economic interests.⁷⁰ From this perspective, the Convention is a vehicle for regulating the international wildlife trade, not 'stopping trade and use of species altogether'.⁷¹

62 See Garrison (n 25) 305; Michael Bowman, 'Conflict or Combability? The Trade, Conservation and Animal Welfare Dimensions of CITES' (1998) 1(1) *Journal of International Law & Policy* 9, 9–11.

63 Ong (n 16) 524; Erica Thorson and Chris Wold, *Back to Basics: An Analysis of the Purpose of CITES and a Blueprint for Implementation* (2010) 7–10; Bowman, Davies, and Redgwel (n 31) 484.

64 Ong (n 16) 524.

65 Garrison (n 25) 304–305.

66 Ibid 305.

67 Keith (n 1) 545; Bowman (n 62) 58.

68 Garrison (n 25) 309.

69 See, for example, Ong (n 16) 524–525; Garrison (n 25) 305.

70 Krieps (n 21) 481; Wandesforde-Smith (n 15) 372; Carey (n 60) 1292.

71 Garrison (n 25) 315.

CITES attempts to balance needs for environmental and wildlife conservation with the interests of States Parties in trading species for commercial purposes.⁷² Simon Lyster provides a balanced analysis in identifying *CITES* as a ‘protectionist’ and ‘trading’ treaty in the sense that it both prohibits international commercial trade in species threatened with extinction and permits controlled trade in species whose survival status is ‘not yet threatened but may become so’.⁷³ Other scholarship has also emerged in relation to the Convention’s underlying animal welfare objectives, exemplified in the various provisions ‘intended to ensure the welfare of species introduced into international trade’.⁷⁴ Michael Bowman, for instance, stresses that the animal welfare dimension to *CITES* is frequently ‘neglected and overlooked’,⁷⁵ despite the explicit references to welfare protection throughout the text of the Convention. It is asserted that Lyster and Bowman, among others, accurately identify that while there is a ‘degree of tension’, there is no ‘fundamental incompatibility’ between the trade, conservation, and animal welfare objectives of *CITES*.⁷⁶

3. Emerging focus on the illegal wildlife trade

The Convention does not explicitly include any purpose or commitment related to combating the illegal trade in wildlife or suppressing other forms of wildlife crime related to exploitation or cruelty. It is only in recent years that scholars have focused on the dimensions of *CITES* relevant to combating the illicit trade in wildlife, and specifically the effect of its requirement of penalisation and prohibition of trade in contravention of its provisions.⁷⁷ While it is clear that *CITES* is by no means an international criminal law instrument, and was not developed or drafted for the international enforcement or prosecution of wildlife crime, *CITES* was nevertheless developed from a surge of international concern for the impacts of unregulated trade and trafficking in wildlife.⁷⁸ It

72 Ong (n 16) 524 – 525; Bowman (n 62) 10.

73 Simon Lyster, *International Wildlife Law* (1985), discussed in Ong (n 16) 525.

74 Bowman (n 62) 10 – 11.

75 *Ibid.*

76 *Ibid.* 58 – 59; Lyster (n 73) discussed in Ong (n 16) 525.

77 Wandesforde-Smith (n 15) 367.

78 UNODC, *Wildlife and Forest Crime Analytic Toolkit* (rev ed, 2012) 15.

is on this basis that significant attention has been placed on the potential and present role of *CITES* in responding to the illegal trade in wildlife.⁷⁹ Apart from *CITES*, there is no other international environmental, wildlife, or criminal law that can be invoked to counteract the threat to endangered species from wildlife crime.⁸⁰

IV. Operation

1. Regulation of international wildlife trade

1.1. Appendices and permit system

CITES regulates the international trade in vulnerable and endangered species of flora and fauna listed in the three Appendices to the Convention.⁸¹ The Convention operates through a permit or licensing system, which is based on whether the species concerned is listed in either of the three appendices.⁸² The main requirement of the permit system is the provision of permit documentation between importing and exporting States in a 'descending order of strictness depending on whether the species involved are listed in Appendix I, II or III'.⁸³ In essence, the permit restrictions imposed on trade in species varies between the three appendices.⁸⁴

(a) Scope of international trade

The concept of international trade is defined under Article I(c) of the Convention as 'export, re-export, import and introduction from the sea'. An important feature of the meaning of trade under *CITES* is that is considerably broader than other definitions of trade as 'commerce for profit'.⁸⁵ The purpose or nature of the exportation or importation is

79 Wandesforde-Smith (n 15) 367.

80 UNODC (n 78) 15.

81 Bowman, Davies, and Redgwell (n 31) 484.

82 Ong (n 16) 524.

83 *Ibid.*

84 David S Favre, *International Trade in Endangered Species: A Guide to CITES* (1989) 30.

85 *Ibid.* 25.

irrelevant: Any time that a specimen of the species protected under the Convention crosses a national border, the action is considered to be trade and will have satisfied the provisions of the treaty.⁸⁶ Furthermore, it is not an issue if the exporting country is not also the species' country of origin, as this is explicitly included as 're-exporting' in the definition of trade.⁸⁷ It is critical to stress that the operation of *CITES* is limited to the regulation of international trade only, and does not extend to domestic trade within national borders. There are no permit or certificate requirements for the 'transit or transshipment of specimens through the territory of a State Party'.⁸⁸

(b) Protected specimens

CITES specifically regulates international trade in 'specimens of species'(art II(4)). Species means 'any species, subspecies, or geographically separate population thereof, and 'specimen' is defined as 'any animal or plant, whether or alive or dead' (art I(a)), as well as 'any readily recognisable parts or derivatives' (art I(b)). The definitions of 'species' and 'species' under Article I allows for the 'split-listing' of different populations of the same species,⁸⁹ and extends trade restrictions to particular parts and physical items of protected specimens (art I(b)). The term 'readily recognisable' is not defined in the Convention text, which provides that certain parts and derivatives are thus regulated by 'some Parties but not by others'.⁹⁰ Further clarification has been provided by the Conference of the Parties (CoP) which noted that

the term 'readily recognizable part or derivative', as used in the Convention, shall be interpreted to include any specimen which appears from an accompanying document, the packaging or a mark or label, or from other circumstances, to be a part or derivative of an animal or plant of a species included in the Appendices, unless such part or derivative is specifically exempted from the provisions of the Convention.⁹¹

86 Ibid.

87 Ibid.

88 Ong (n 16) 526.

89 Bowman, Davies, and Redgwell (n 31) 492.

90 Ibid 491.

91 *CITES* Conference of the Parties, 'Trade in readily recognizable parts and derivatives', Resolution Conf. 9.6 (Rev. CoP16).

Species and subspecies of wildlife are classified under either Appendix I, II or III of the Convention depending on the level of threat from exploitation through international trade.⁹² Species listed in Appendix I are subject to the most stringent restrictions, followed by Appendix II and then III.⁹³

1.2. Appendix listing criteria and permit requirements

Article II establishes the listing criteria of the three Appendices and incorporates the ‘three very most basic components’ of *CITES*: the species listed in the three Appendices, the act of trade in those species, and the conditions and limitations of subsequent provisions.⁹⁴ Article II(4) requires that States Parties do not engage in trade in specimens of species included under Appendices I, II or III except in accordance with the provisions of the Convention (art I(b)). David Favre describes Article II as the ‘functional or operative heart’ of the *CITES*, which imposes the fundamental obligations of the treaty on State signatories.⁹⁵ Article II is also critical as it exemplifies that the primary focus of the Convention is international trade, not the range of other major threats to the protection and conservation of wild flora and fauna. The listing criteria established in the first three paragraphs of Article II, and the permit requirements for specimens of species included in each Appendix are examined below.

Note that while the text of *CITES* establishes ‘the basic conditions for the inclusion of a species in Appendix I, II or III’,⁹⁶ more detailed guidelines for the listing or de-listing of species are provided by the so-called ‘Fort Lauderdale Criteria’, which are not further discussed in detail here.⁹⁷ In relation to Appendix I and II, each State Party has the right to propose an amendment for consideration either by postal vote, or by submission to the *CITES* Secretariat prior to the next CoP meeting.⁹⁸ Proposals are adopted ‘if approved by a two-thirds majority of parties present and voting’.⁹⁹

92 Radha Ivory, ‘Corruption Gone Wild: Transnational Criminal Law and the International Trade in Endangered Species’ (2017) 111 *AJIL Unbound* 413, 413.

93 *Ibid.*

94 Favre (n 84) 29 – 30.

95 *Ibid.* 31.

96 Bowman, Davies, and Redgwell (n 31) 492.

97 *Ibid.*

98 *Ibid.* 496.

(a) Appendix I

(i) *Listing criteria*

Appendix I lists species threatened with extinction which are or may be affected by international trade. Species listed on Appendix I are subject to the highest degree of protection in order not to 'further endanger their survival' and trade is only permitted in extremely limited circumstances (art II(1)). Prominent Appendix I species include all African and Asian pangolin species, the blue humpback whale (*Megaptera novaeangliae*), hawksbill sea turtle (*Eretmochelys imbricata*), as well as certain populations of African elephants (*Loxodonta africana*), which are split-listed between Appendix I and Appendix II. Article II(1) establishes two criteria which must be satisfied for the listing of a species on Appendix I. The species must be: threatened with extinction, and be or potentially be affected by international trade.¹⁰⁰ Annex 1 of the *Fort Lauderdale Criteria* expands on these two requirements, particularly as to how a species may satisfy the 'biological criteria' required by the words 'threatened with extinction'.¹⁰¹

(ii) *Permit requirements: export and import*

Article III of CITES imposes the strict regulatory requirements for trade in Appendix I species. International trade in Appendix I species requires the prior grant and presentation of export and import permits (art III(1)). The grant of an export permit requires four different 'preconditions' to be satisfied in the form of approvals from the Scientific and Management authorities of the State of export (art III(2)). The satisfaction of one of the preconditions must be determined by the exporting State's Scientific Authority, and three by the Management Authority. The final precondition requires the State of import to have granted an import permit prior to the export of the specimen (art III(2)(d)).¹⁰² An import permit can only be granted where the Scientific Authority of the State of import is satisfied that the import of the species will be for purposes which are not detrimental to the survival of the species involved (art III(3)(a)), and that the proposed recipient of any living specimen is suitably equipped to

99 Ibid.

100 Favre (n 84) 31–32.

101 Bowman, Davies, and Redgwell (n 31) 494.

102 Ibid 500.

house and care for it (art III(3)(b)). In addition, the Management Authority of the State of import must be satisfied that the specimen is not to be used for ‘primarily commercial purposes’ (art III(3)(c)). The import of an Appendix I specimen requires the prior grant and presentation of an import permit and either an export permit or re-export certificate.¹⁰³

(iii) Certificate requirements: re-export and introduction from the sea

The re-export of any specimen of a species included in Appendix I, meaning the export of any specimen previously imported,¹⁰⁴ requires the prior grant and presentation of a re-export certificate (art III(4)). A re-export certificate can only be granted when three conditions are held to be satisfied by the Management Authority of the State of re-export (art III(4)). Article III(5) prohibits the introduction from the sea of any specimen of a species included in Appendix I without the prior grant of a certificate from a Management Authority of the State of introduction (art III(5)). A specimen is deemed to have been introduced from the sea if it has been ‘taken in the marine environment not under the jurisdiction of any State’ and is imported into that State (art I(e)). A certificate for introduction from the sea can only be granted if a Scientific Authority of the State of introduction advises that it will not be detrimental to the survival of the involved species (art III(5)(a)). The Management Authority of the State of introduction must also be satisfied that the other conditions required for the import of Appendix I species have been met.¹⁰⁵

The strength of the trade restrictions imposed by Article III lies in the requirement for the prior grant and presentation of two different permits or certificates. The ‘double permit approach’ also operates as a countermeasure to illegal activity or wildlife trafficking,¹⁰⁶ as it effectively requires the forgery of documents from two different State governments in order to attempt to utilise legal export and import routes. Moreover, the requirement for the Management Authority of the State of import or State of introduction to be satisfied that the specimen in question will not be used for ‘primarily commercial purposes’ effectively ‘prohibits international commercial trade’ and limits legal trade among States Parties to specimens

¹⁰³ Favre (n 84) 56–57.

¹⁰⁴ Bowman, Davies, and Redgwell (n 31) 500.

¹⁰⁵ *Ibid* 501.

¹⁰⁶ Favre (n 84) 58.

required for scientific and educational purposes, and in limited circumstances, to hunting trophies'.¹⁰⁷

(b) Appendix II

(i) *Listing criteria*

There are two grounds for the listing of a species on Appendix II. Article II(2) (a) includes 'all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation' in order to avoid over-exploitation. An Appendix II listing under Article II(2)(a) seeks to avoid a level of utilisation that is incompatible with the survival of the species. Essentially, Appendix II-listed species are under a potential threat of serious population decline, but should be able to sustain limited commercial trade with regular monitoring. The difficulty with the listing criteria under Article II(a) is that a future determination is required concerning trade and biological status (by reference to the Fort Lauderdale Criteria) of the species in question.¹⁰⁸ In addition, Appendix II to the Convention extends protection to 'look-alike species' (art II(2)(b)), which could potentially be confused by customs officers and other enforcement agencies, or even by the traders or traffickers themselves, as the specimen of a threatened species. Notably, there is no equivalent provision in the Convention text for Appendix I lookalike species.¹⁰⁹ This omission was recognised and rectified in the first CoP, when the Parties clarified that Appendix I lookalike species should also be included in Appendix II.¹¹⁰

Appendix II includes 'heavily traded species with relatively secure populations' as well as species 'which are not yet in trade but could be vulnerable if...traders suddenly switch from one target species to another'.¹¹¹ At present, Appendix II contains over 30,000 wild species, including well known species such as the American black bear (*Ursus americanus*), southern fur seal (*Arctocephalus forsteri*), great white shark

¹⁰⁷ Bowman, Davies, and Redgwell (n 31) 500 – 501.

¹⁰⁸ Favre (n 84) 38.

¹⁰⁹ Bowman, Davies, and Redgwell (n 31) 494.

¹¹⁰ CITES Conference of the Parties, Resolution Conf. 1.1

¹¹¹ Bowman, Davies, and Redgwell (n 31) 495.

(*Carcharodon carcharias*), green iguana (*Iguana iguana*) and queen conch (*Strombus gigas*).

(ii) *Permit and certificate requirements*

Article IV delineates the permit and certificate requirements for legal trade in Appendix II. Similar controls are imposed on the export and re-export of Appendix II species to those which apply to Appendix I species.¹¹² The rules for the import of Appendix II specimens are, however, significantly less stringent. The import of any specimen of a species included in Appendix II only requires ‘the prior grant and presentation of either an export permit or re-export certificate’.¹¹³ The grant of an Appendix II export permit under Article IV(2) requires the Scientific Authority and Management Authority of the State of export to make identical determinations to the first three preconditions for the export of Appendix I species. Additionally, re-export certificates are required for the re-export of Appendix II specimens (art IV(5)), and introduction from the sea of any specimen of a species requires a certificate from a Management Authority of the State of introduction (art IV(6)).

(iii) *Permit monitoring and reporting*

As import permits are not required for Appendix II species, there is ‘no prerequisite to the issuing of an Appendix II export permit under Article IV’, which allows for trade in Appendix II specimens for commercial purposes (art IV(3)). Article IV(3) also requires the Scientific Authority in each Party to monitor both the export permits granted by that State for specimens of species included in Appendix II, as well as the actual exports of such specimens. Article IV(3) imposes an obligation on the Scientific Authorities of States Parties to ‘advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits’ where it is determined that the population status of the species may be threatened.¹¹⁴

¹¹² Ibid 502.

¹¹³ Ibid.

¹¹⁴ Favre (n 84) 111 – 112.

(c) Appendix III

Appendix III contains species that are subject to regulation within the jurisdiction of a Party to the Convention ‘for the purpose of preventing or restricting exploitation’,¹¹⁵ and for which cooperation by other Parties is needed to control the trade (art II(3)). Appendix III provides a mechanism whereby any Party with domestic legislation for ‘regulating the export of species not listed in Appendix I or II can seek international help in enforcing its legislation’ (art XVI(1)).¹¹⁶ An important distinction between Appendix III and Appendices I and II is that no vote of the Parties is required to list the species on this Appendix – it is possible for ‘any Party to unilaterally amend Appendix III at any time simply by notifying the Secretariat’.¹¹⁷ The restrictions imposed on trade in Appendix III species are limited to specimens originating from the listing State,¹¹⁸ and considerably less stringent than the regulatory requirements for Appendices I and II.

1.3. Other provisions: reservations, exemptions and trade with Non-Party States

While it is beyond the scope of this chapter to provide a complete analysis of all of *CITES*’ provisions, certain articles are particularly relevant to the scope and strength of Party obligations.¹¹⁹ Article XIV(1), for instance, expressly provides that *CITES*’ provisions do not affect the right of each party to introduce stricter trading measures than are required by the Convention. This right has been exercised by several State Parties, especially Member States of the European Union.¹²⁰ In contrast, *CITES* also permits States Parties to enter specific reservations with regard to any of the species listed in the Appendices, which must be submitted ‘at the time of depositing an instrument of ratification, acceptance, approval, or accession by a State Party’ (art XXIII(2)). Until the reserving Party withdraws its reservation, it is treated as a Non-Party State to the Convention ‘with

¹¹⁵ Ibid 42.

¹¹⁶ Bowman, Davies, and Redgwell (n 31) 499.

¹¹⁷ Ibid.

¹¹⁸ Ibid 507.

¹¹⁹ Paul Matthews, ‘Problems related to the Convention on International Trade in Endangered Species’ (1996) 45(2) *International & Comparative Law Quarterly* 421, 424.

¹²⁰ Bowman, Davies, and Redgwell (n 31) 533.

respect to trade in a species, or parts, or derivatives specified in the reservation' (art XXIII(3)). States Parties are also treated as Non-Party States in relation to reservations to amendments adopted to Appendices I and II (art XV(3)), and in respect of changes to species listing under Appendix III (art XVI(2)). While States Parties are not required to provide any reasons or justification for taking reservations, they are typically made by Parties objecting to increased protection and thus enhanced trade controls of certain species.¹²¹ Article X concerns the regulation of trade between States Parties and Non-Party States, and provides that 'comparable documentation' which substantially conforms with the Convention's requirements for trade permits and certificates may be accepted from the Non- Party State engaged in such trade.

There are a number of other 'exemptions' where the permit and licensing requirements for the trade in species protected under the Convention are 'modified or excluded',¹²² including 'transit or transshipment' through or in the territory of a State Party while under customs control (art VII(1)), 'pre-Convention specimens' (art VII(2)), 'personal or household effects' (art VII(3)), as well as specimens exchanged for 'captive breeding and artificial propagation' (art VII(4), (5)) or other 'scientific and exhibition purposes' (art VII(6)). While some exemptions have been largely recognised as necessary to facilitate national wildlife management and conservation, others have been forcefully challenged as creating opportunities for abuse and exploitation.¹²³

2. Criminalisation of illegal wildlife trade

The significance of *CITES*' operation for combating the illegal wildlife trade is primarily related to the obligations imposed on States Parties for the enforcement of *CITES*, and the prohibition of trade in contravention of its provisions delineated above.¹²⁴ While *CITES* was not drafted and does not operate to criminalise or prosecute illegal wildlife trade as a form of 'wildlife crime' at the international level, Article VIII(1) of the Convention does require States Parties to take 'appropriate measures' to 'enforce the

¹²¹ Ibid 516.

¹²² Ibid 509.

¹²³ Ibid 513 – 515.

¹²⁴ Strydom (n 8) 271.

provisions of the Convention and to prohibit trade in specimens in violation thereof. Article VIII(1) specifically determines that such measures shall include the penalisation of trade or possession of CITES-listed specimens, and confiscation or return of specimens to the State of export. In addition to requiring the implementation of treaty obligations, Article VIII also obligates States Parties to maintain implementation records and provide periodic reports to the CITES Secretariat (art VIII(7)). This responsibility of States Parties is fundamental to enabling insight into the effectiveness of controls and compliance mechanisms.¹²⁵

Article VIII effectively requires each State Party to implement treaty obligations through domestic legislation.¹²⁶ This provision functions to create the transition between international obligations and the criminal law and regulations of States Parties.¹²⁷ Many scholars emphasise the incredibly general nature of the language used in Article VIII(1).¹²⁸ As highlighted by Favre, there are no ‘uniform provisions’ or ‘legislation models’ suggested for adoption by States Parties.¹²⁹ The inconsistencies and lack of uniformity between the different ‘measures’ adopted by States Parties to implement and enforce their obligations under *CITES* has been the subject of extensive criticism.¹³⁰ The essential argument raised by the majority of commentators is that reliance on States Parties to implement general ‘appropriate measures’ to enforce and ensure compliance with

125 James B Murphy, ‘Alternative Approaches to the Cites Non-Detriment Finding for Appendix II Species’ (2006) 36 *Environmental Law* 531, 537.

126 John B Heppes and Eric J McFadden, ‘The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Improving the Prospects for Preserving Our Biological Heritage’ (1987) 5 *Boston University International Law Journal* 229, 237–238.

127 *Ibid.*

128 *Ibid* 237; Favre (n 84) 215; Carey (n 60) 1298.

129 Favre (n 84) 215.

130 See, for example, Aurelie Flore Koumba Pambo et al, ‘International Trade in Endangered Species: The Challenges and Successes of the 17th Conference of Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)’ (2016) 54(4) *African Journal of Ecology* 399, 402; Joel T Heinen and Diwakar P Chappain, ‘On the Expansion of Species Protection in Nepal: Advances and Pitfalls of New Efforts to Implement and Comply with CITES’ (2002) 5(3) *Journal of International Wildlife Law and Policy* 235, 236–237; Kimberley Graham, ‘International Intent and Domestic Application of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES): The Case of the Ocelot (*Leopardus paradisi*)’ (2017) 20(3–4) *Journal of International Wildlife Law & Policy* 253, 279; Wandesforde-Smith (n 15) 376.

CITES has resulted in the ‘pervasive inadequacy of national legislation’, which is explored in greater detail below.¹³¹

V. Administration

Administration of *CITES* refers to the implementation of the Convention’s provisions in relation to the regulation of international wildlife trade and criminalisation of illegal trade. The ‘elaborate nature of the administrative machinery’ established by the *CITES* regime has been emphasised by several commentators,¹³² including the effective cooperation and collaboration between the different administrative bodies.

1. International administration

The Conference of the Parties, or CoP for short, established under Article XI of the Convention, is the principal administrative and decision-making body for the implementation of *CITES*.¹³³ The Conference provides guidance and recommendations on the Convention’s operation and compliance mechanisms.¹³⁴ The recommendations of the CoP are issued as either Resolutions or Decisions.¹³⁵ Resolutions are intended to provide long-standing clarification on the implementation of certain provisions of *CITES*, while decisions are typically of a less permanent nature. Although these resolutions and decisions are only regarded as ‘soft law’,¹³⁶ the recommendations of the CoP have been integral in improving understanding of, and compliance with, Parties’ obligations under the

¹³¹ Carey (n 60) 1294 – 1295.

¹³² Bowman (n 62) 10.

¹³³ *CITES* Conference of the Parties, ‘*CITES* Strategic Vision: 2003 – 2013’, Resolution Conf. 14.2, discussed in Strydom (n 8) 272.

¹³⁴ Annecoos Wiersema, ‘*CITES* and the Whole Chain Approach to Combating Illegal Wildlife Trade’ (2017) 20(3 – 4) *Journal of International Wildlife Law & Policy* 207, 212 – 213; Rosalind Reeve, ‘Wildlife Trade, Sanctions and Compliance: Lessons from the *CITES* Regime (Convention on International Trade in Endangered Species of Wild Flora and Fauna)’ (2006) 82(5) *International Affairs* 881, 882.

¹³⁵ Bowman, Davies, and Redgwell (n 31) 488.

¹³⁶ *Ibid.*

Convention.¹³⁷ CoP Resolutions in particular effectively provide ‘concrete content to the broadly stated obligations’ in the text of the Convention.¹³⁸ Arguably one of the most significant roles of the CoP has been in guiding the progress and consistency of national implementation measures, which in turn has supported the capacity of States Parties to combat the illegal trade in wildlife.¹³⁹ This includes in particular the clarification the CoP has provided on issues such as transit/custom controls and document verification procedures, training and equipment guidelines for wildlife law enforcement professionals, as well as methods for improving cooperation between the government authorities and agencies responsible for *CITES* enforcement.¹⁴⁰

The roles and functions of the CoP are executed in conjunction with the *CITES* Secretariat,¹⁴¹ established under Article XII (art XVII). The *CITES* Secretariat performs various functions including the arrangement of Party meetings and preparation of numerous reports and draft resolutions.¹⁴² Key responsibilities of the *CITES* Secretariat include the collection and review of compliance data, as well as the publication of CoP recommendations and ‘Notifications to the Parties’. The third dimension to the international administration of *CITES* is the permanent committees established by the CoP to support the *CITES* Secretariat.¹⁴³ The Standing Committee is particularly significant,¹⁴⁴ as it provides policy and operational guidance to the Secretariat and CoP, but also has developed the function to respond to non-compliance through special reports, written cautions and warnings, compliance action plan requests, and finally, recommendations for the suspension of commercial or all trade with the non-compliance State Party.¹⁴⁵ The ability of the Standing Committee to effectively ‘penalise’ States Parties is cited by some authors as a powerful mechanism for

137 Wiersema (n 134) 212 – 213.

138 Bowman (n 62) 59.

139 Strydom (n 8) 272.

140 *Ibid.*

141 *Ibid.*

142 Wiersema (n 134) 212 – 213.

143 *CITES* Secretariat (n 18).

144 Sand (n 45) 38.

145 *CITES* Conference of the Parties, ‘*CITES* compliance procedures’, Resolution Conf. 14.3 [30].

enforcing Article VIII compliance obligations,¹⁴⁶ while others assert that the ‘threat of trade sanction against states for departures from treaty norms are more likely to be negotiated, extended, and forgiven on promise of more help, more money, and better behaviour in the future’.¹⁴⁷

2. Domestic administration

At the domestic level, the listing and permit requirements of the Convention are administered by the Management and Scientific Authorities of each State Party. The Management and Scientific Authorities of States Parties not only create a ‘global network of institutions’ dedicated to administering the Convention, but also provide the foundation for the implementation and enforcement of *CITES*’ provisions which regulate, restrict and eliminate forms of international trade in wildlife.¹⁴⁸ As highlighted in the earlier examination of the operation of *CITES*, the State authorities are responsible for considering the available scientific and trade data on a particular species when making a determination on whether or not the trade in question is a current or potential threat to the survival of the species.¹⁴⁹

VI. Experiences and critique

1. Contested approach to ecological conservation

CITES is widely regarded as the benchmark international agreement for the global conservation of endangered species of flora and fauna. Although the Convention was fundamentally drafted and implemented as a trade

¹⁴⁶ Karen N Scott, ‘Non-Compliance Procedures and the Implementation of Commitments under Wildlife Treaties’ in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (2016) 414, 419 – 420.

¹⁴⁷ Wandesforde-Smith (n 15) 369, citing Reeve (n 134) 881.

¹⁴⁸ Bowman, Davies, and Redgwell (n 31) 488, 489 – 490; Pervaze A Sheikh and M Lynne Corn, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, Research Report (2016) 5 [emphasis added].

¹⁴⁹ Bowman, Davies, and Redgwell (n 31) 488, 489 – 490.

agreement for the regulation of the international wildlife trade, many authors underscore that an inherent dimension to the *CITES* regime is to secure the conservation of vulnerable wildlife.¹⁵⁰

A strong challenge to this perspective has been raised by scholars who contend that recognition of even an indirect role of *CITES* in wildlife conservation is misplaced.¹⁵¹ A range of environmental justice and animal welfare activists underscore that while *CITES* may ‘protect’ endangered wildlife to the extent that it restricts and eliminates trade in certain species, the Convention nonetheless operates to legalise commercial trade in multiple thousands of species listed on Appendix II.¹⁵² Bowman, for example, stresses that while the text of the Convention imposes stringent welfare obligations on States Parties, these

The anthropocentric values underlying international ‘conservation’ treaties and the commodification of wildlife are contested by legal and conservation scholars on the basis of ethical and animal welfare grounds,¹⁵³ but also due to the consequences for environmental and wildlife crime.¹⁵⁴ One of the most serious ramifications of the sustainable use principle and the legalisation of trade in wildlife and their derivatives is the creation of parallel ‘black markets’ for the illegal trafficking and trade in endangered species.¹⁵⁵ Several commentators have addressed the

150 Trouwborst et al (n 20) 784; Lindsay Stringer, ‘Moving Towards Sustainability? An Analysis of *CITES*’ Conservation Policies’ (2011) 21(4) *Environmental Policy and Governance* 240, 242; Timothy Hodgetts, ‘Improving the Role of Global Conservation Treaties in Addressing Contemporary Threats to Lions’ (2018) 27(1) *Biodiversity and Conservation* 2747, 2748 – 2749.

151 Jon Hutton and Barnabas Dickson (eds), *Endangered Species Threatened Convention: The Past, Present and Future of CITES* (2000) xv.

152 Helen Kopnina, ‘Wild Animals and Justice: The Case of the Dead Elephant in the Room’ (2016) 19 *Journal of International Wildlife Law and Policy* 219, 222 – 223; Nancy Lee Peluso, ‘Coercing Conservation?: The Politics of State Resource Control’ (1993) 3(2) *Global Environmental Change* 199, 201; Sian Sullivan, ‘Elephant in the Room? Problematising ‘New’ (Neoliberal) Biodiveristy Conservation’ (2011) 33(1) *Forum for Development Studies* 105, 105.

153 See, for example, Alexander Gillespie, *International Environmental Law, Policy, and Ethics* (2nd ed, 2014) 13; and Rachelle Adams, ‘Delegitimising Ivory: The Case for an Ivory Trade Ban Treaty’ (2014) 108 *American Journal of International Law Unbound* 166, 166 – 167.

154 Keith (n 1) 545; Wiersema (n 134) 217 – 218; Kristen Conrad, ‘Trade Bans: A Perfect Storm for Poaching?’ (2012) 5(3) *Tropical Conservation Science* 245, 245 – 254.

155 Keith (n 1) 545; Wiersema (n 134) 217 – 218; Conrad (n 154) 245.

relationship between trends and characteristics of the illegal wildlife trade and the various exemptions and reservations allowed by *CITES*, as well as the substantial links between legalised markets, trade restrictions and the increased demand for wildlife parts and products.¹⁵⁶ The critiques aimed at the Convention's approach to ecological and biodiversity conservation nevertheless provide strong arguments as to how certain aspects of the *CITES* regime actually exacerbate wildlife trafficking and the demand for illegal trade.¹⁵⁷ However, the author determines that it would be incorrect and dismissive to conclude that *CITES* has had no positive contributions to the preservation of wildlife populations.¹⁵⁸ While of course it would be inaccurate to conclude that the permit system operates 'perfectly', the elaborate administrative structure of the Convention has proven effective in facilitating regular oversight and review of species' trade and conservation status.

2. Narrow scope and coverage

Perhaps the most common argument raised against the role of *CITES* in relation to international responses against the illegal wildlife trade is the fact that *CITES* is restricted to the regulation and enforcement of international trade. The Convention does not address or extend to the diverse range of other threats to wildlife preservation, such as habitat loss, climate change, pollution/hazardous waste, or animal cruelty.¹⁵⁹ Critically, the Convention does not explicitly refer or include any express provisions relevant to the illegal wildlife trade, or wildlife crime, beyond the extent to which it requires States Parties to implement 'appropriate measures' at the domestic level.

This critique of *CITES'* role in international responses against wildlife crime is often countered by arguments regarding the flexibility of the Convention's administrative bodies and institutional mechanisms to extend its focus to

¹⁵⁶ Adams (n 156) 166–167; Keith (n 1) 545; Joseph Vandegrift, 'Elephant Poaching: CITES Failure to Combat the Growth in Chinese Demand for Ivory' (2013) 31 *Virginia Environmental Law Journal* 102, 102–103.

¹⁵⁷ Keith (n 1) 545.

¹⁵⁸ See, for example, Carey (n 60) 1294–1295; Graham (n 130) 279.

¹⁵⁹ Ong (n 16) 520.

the phenomenon of global wildlife crime.¹⁶⁰ A number of authors stress that the responses of *CITES* to the illegal wildlife trade cannot simply be determined by reference to the text of the Convention,¹⁶¹ and highlight the increasing prominence of the *CITES* Secretariat and CoP in providing guidance and recommendations specific to wildlife crime.¹⁶² Numerous resolutions have been issued by the CoP in relation to wildlife crime, including Resolution Conf. 17.4 on *Demand reduction strategies to combat illegal trade in CITES-listed species*, Resolution Conf. 16.6 (Rev CoP17) on *Prohibiting, preventing, detecting and countering corruption, which facilitates activities conducted in violation of the Convention*, and Resolution Conf. 11.3 (Rev CoP17) on *Compliance and enforcement*. The relevance and importance of *CITES* as part of international action for preventing and suppressing wildlife crime has also been underscored in two UN General Assembly Resolutions,¹⁶³ which recognised the role of *CITES* as the primary international legal framework to counteract wildlife crime, and its contributions in other UN and non-governmental responses.

3. Challenges to enforcement and compliance

In discussing the provisions of *CITES* pertaining to the prohibition and penalisation of international trade in contravention of its provisions, it has already been highlighted that the enforcement of the Convention is constrained to the domestic level. Geoffrey Wandesforde-Smith determines that the inability of *CITES* to effectively respond to the illegal international wildlife trade is as simple as the fact the Convention requires implementation and enforcement through domestic legislation.¹⁶⁴ He stresses that the only ‘real power’ to combat the threat and consequences of the illegal wildlife trade lies with ‘domestic law, domestic police and

160 Keith (n 1) 548.

161 Wiersema (n 134) 212 – 214.

162 Lorraine Elliott, ‘Fighting Transnational Environmental Crime’ (2012) 66(1) *Journal of International Affairs* 87, 97.

163 UN General Assembly, *Tackling Illicit Trafficking in Wildlife*, UN Doc A/RES/69/314 (19 August 2015); UN General Assembly, *Tackling Illicit Trafficking in Wildlife*, UN Doc A/RES/71/326 (28 September 2017).

164 Wandesforde-Smith (n 15) 369; Michael Glennon, ‘Has International Law Failed the Elephant?’ (1990) 84 *American Journal of International Law* 1, 30 – 31.

rangers, domestic prosecutors, domestic courts, and domestic conservation bureaucracies'.¹⁶⁵ Despite the progress of the CITES Secretariat and CoP in facilitating guidance and mechanisms to support consistent national implementation of *CITES* obligations, it remains the case that approximately half of the State Parties to the Convention 'have not implemented appropriate measures at the national level for the enforcement of the Convention's provisions'.¹⁶⁶ It is important to clarify that the vast majority of multilateral environmental agreements and other environmental or wildlife treaties are not self-executing, and also do not provide for enforcement mechanisms at the international level.¹⁶⁷ Thus, *CITES* is not in any sense exceptional in requiring States Parties to implement domestic enforcement provisions.

However, there is significant concern within the literature that the gravity of the wildlife trafficking problem has moved beyond 'mere attempts' to achieve consistent and operational compliance with *CITES*' provisions.¹⁶⁸ On the issue of enforcement, Wandesforde-Smith as well as John Heppes and Eric McFadden emphasise that there is an even more serious problem with enforcing the legislative provisions adopted by States Parties.¹⁶⁹ Lack of human capacity and economic resources across all States Parties is a chronic weakness, especially so in developing countries where even in the 'rare instances when prosecutions are brought and cases tried',¹⁷⁰ underlying problems associated with forensic and judicial processes results in dismissals, waived fines, and reduced or suspended sentences.¹⁷¹ Overall, there are very weak prospects for the implementation of 'international legal standards for the protection of endangered species' in the legal and judicial systems of States Parties, notwithstanding the substantial focus and efforts of the *CITES* administration.¹⁷² Despite the pervasive global threat of wildlife trafficking, it is clear that the limited political will and

165 Wandesforde-Smith (n 15) 369.

166 Strydom (n 8) 272; Bowman (n 62) 59 – 60.

167 Schaedla (n 5) 59.

168 Strydom (n 8) 275 – 276; Wandesforde-Smith (n 15) 377 – 378.

169 Wandesforde-Smith (n 15) 378; Heppes and McFadden (n 126) 237 – 238.

170 Wandesforde-Smith (n 15) 378.

171 See, for example, Heinen and Chapagain (n 130) 235; Niiman (n 5) 1101.

172 Wandesforde-Smith (n 15) 380 – 381; Heinen and Chapagain (n 130) 238 – 239.

commitment of States Parties undermines the effectiveness of *CITES* as a regulatory mechanism.¹⁷³

VII. The way ahead, conclusion

The prominent recommendations for the future role of *CITES* are often presented in the context of the critiques of the Convention's operation and relevance to combating the illegal wildlife trade raised above. It is clearly apparent that leading scholars, experts and professionals highlight valid criticisms and obstacles associated with the role of *CITES* in combating the illegal trade in endangered species of wild flora and fauna. It is 'widely known and repeatedly emphasised', notes Hennie Strydom, that the Convention is constrained in any contributions to preventing and suppressing wildlife crime as a result of its limited scope and application to the regulation of international trade, and reliance on national legislation and enforcement mechanisms to ensure compliance.¹⁷⁴ Thus, the majority of authors determine that any future or enhanced role for *CITES* in responding to the complex scale and threat of the illegal wildlife trade requires improving strategic cooperation with other critical environmental and criminal frameworks relevant to combating wildlife crime. To this end, there is an increasing focus on opportunities to enhance collaboration with existing multilateral instruments including the 1992 *Convention on Biological Diversity*, the 1972 *Convention Concerning the Protection of World Cultural and Natural Heritage*, the 2000 *UN Convention against Transnational Organised Crime*, and the 2003 *UN Convention against Corruption*.¹⁷⁵

There has been extensive academic debate about how national laws and criminal law responses of States Parties could be harmonised. However, in recent years there is growing recognition that consistent and powerful

¹⁷³ Duncan Brack, 'The Growth and Control of International Environmental Crime' (2004) 112(2) *Environmental Health Perspectives* A80, A80–81.

¹⁷⁴ Strydom (n 8) 285.

¹⁷⁵ *Ibid* 276; Elliott (n 162) 97; Hutton and Dickson (n 151) 125; Richard Caddell, 'Inter-Treaty Cooperation, Biological Diversity and the Trade in Endangered Species' (2013) 22 *Review of European Community and International Environmental Law* 264, 264–280; Hodgetts (n 150) 2747.

international enforcement responses to wildlife crime may ultimately require the adoption and implementation of a multilateral convention that is specific to preventing and suppressing wildlife crime.¹⁷⁶ While a specific convention with effective monitoring and enforcement mechanisms would require significant political will and agreement, it is very clear that the illegal wildlife trade, and other associated forms of wildlife crime, present too significant of a threat to ignore.

In conclusion, the author stresses that despite the limitations of *CITES*' role in the fight against wildlife crime, it does remain the only international legal instrument to facilitate any action against the unsustainable and illicit international trade in endangered species. *CITES* imposes rigorous and substantive obligations on States Parties, and has also established intricate administrative machinery in order to monitor both trade levels and the implementation of necessary enforcement measures through national legislation.¹⁷⁷ Thus, in the absence of any other long-term and binding commitments to counteract the illegal wildlife trade, the author urges continued scholarship and analysis as to how the international frameworks for combating wildlife crime can be strengthened at all levels of governance and enforcement.

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¹⁷⁶ John E Scanlon, 'Do We Need a Wildlife Crime Convention?', *WildAID* (Web page, 20 February 2019); Wandesforde-Smith (n 15) 380–381.

¹⁷⁷ Bowman (n 62) 10.

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