It Takes Two: CITES, Illegal Wildlife Trade, and Importing Country Accountability

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IT TAKES TWO: CITES, ILLEGAL WILDLIFE TRADE, AND IMPORTING COUNTRY ACCOUNTABILITY

ERICA LYMAN*

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One of the fundamental principles of CITES is the existence of a double control at the exportation and importation stages. While shortcomings may occur at one of these points, they can be compensated for at the other point. Enforcement of CITES and therefore the decrease in the number of infractions, depend on international collaboration.

–CITES Secretariat, 1989

INTRODUCTION

The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") is rooted in international relationships. Standing alone, this is unremarkable—international trade in wildlife entails, by definition, market activity across two or more States, and regulation by treaty is inherently international in character. In fact, multiple facets of CITES—from the listing criteria, to the permit regime, to Article VIII implementation measures—reflect the Parties' recognition that both the problem and solution, with respect to wildlife trade, are relational in nature. As the Preamble puts it, the treaty’s raison d’être flows from the understanding that "international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade."

Yet, while the treaty relies on Parties working together to address an issue of international significance, the Parties appear to implement one aspect of the treaty without cognizance of the relational nature of the issue: non-compliance, particularly in the context of illegal trade in parts of derivatives of CITES-listed species. When the CITES Parties identify an illegal flow of wildlife specimens from one country to another, the treaty community’s tendency is to focus on the source country’s failure to stem the tide of that trade, to prevent the wildlife specimens from leaving the exporting country in the first place. The role of the consumer...
country—the demand-side magnet that draws the wildlife from the exporting country—takes a backseat in contemporary compliance discussions. Not only does this tendency overlook the economic reality of illegal trade, where both supply and demand drive trade, but it flies in the face of the treaty’s otherwise relational orientation. Why should CITES recognize that wildlife trade and its regulation entail a shared responsibility in all aspects of the treaty except compliance?

The reality is that it should not. In fact, reasserting shared responsibility in compliance matters could be the key to making headway on tackling the magnitude and scale of illegal wildlife trade. The illegal wildlife trade involves the global movement of specimens for various purposes, ranging from medicinal to ornamental, and is lucrative, generating anywhere from $10 billion to $20 billion annually. Charismatic megafauna such as elephants, rhinoceroses, and tigers are often the first species that come to mind when imagining the illegal wildlife trade; however, non-living corals, Tridacna species (giant clams), and flowering plants, such as Pterocarpus spp. and Dalbergia spp., loom just as large or even larger in wildlife trafficking. Although the value of the legal global wildlife market far exceeds that of the illegal market, averaging...
approximately $220 billion annually, illegal wildlife trade is often said to be amongst the top three or four grossing black market activities, typically listed as behind only human trafficking, the arms trade, and the global drug trade.

Remarkably, despite these alarming statistics, CITES’ compliance regime is often touted as one of the more, if not the most, effective international environmental compliance mechanisms. The CITES compliance regime is built to have a meaningful, positive impact on implementation and enforcement of the treaty. It is designed to incorporate “carrots,” such as capacity-building, but it does not stop there like so many other compliance regimes. Instead, it also relies on “sticks”—namely, the option of the Parties to recommend trade suspensions with recalcitrant States. The intent of the trade suspensions is to prod a Party into compliance by leveraging a potentially powerful economic sanction. But illegal wildlife trade is a thriving, and even growing, black market. The incongruity between the design of the mechanism and the use of trade suspensions and the scale of illegal wildlife trade suggests that root causes remain unaddressed, despite the good reputation of CITES’ compliance mechanism.
This Article does not propose to challenge others’ assessments of the CITES compliance regime, but it does examine critically the ways in which the compliance regime has evolved and how it is currently applied in the face of the staggering scale of illegal wildlife trade in order to understand whether it could be more effective. \(^{20}\) CITES Parties’ approach to the “carrots and sticks” tools of the compliance regime is fundamental to the treaty’s effectiveness, particularly its effectiveness relative to other multilateral environmental agreements; however, bias in application of such tools may hinder how effective CITES could be in tackling the illegal wildlife trade crisis.

As such, this Article approaches its review of the CITES compliance mechanism through a justice-oriented lens. By examining the evolution and contemporary application of the CITES compliance mechanism through such a lens, and against the backdrop of the enormous scale of illegal wildlife trade, the effectiveness of the regime is questionable but not a lost cause. Importantly, the design of the compliance regime reflects the basic parameters of a procedurally just system. \(^{21}\) But its application has, over time, taken a turn away from being applied in a distributionally just manner: Outcomes do not appear to be equitable and fair across relevant cohorts. \(^{22}\)

Viewed in this way, the contemporary CITES compliance regime stands as a fair target for critiques of international law that highlight imbalances of power and structural inequities and how these factors drive design and application of international instruments. \(^{23}\) At CITES, the power imbalances and the structural inequities of international

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\(^{20}\) To be clear, the measure of illegal wildlife trade encompasses much more than CITES regulates, as described in Part I of this Article, but the figures nonetheless give a sense of the backdrop and context in which the effectiveness and application of the CITES compliance regime sits.

\(^{21}\) See discussion infra Part IV.

\(^{22}\) REEVE, supra note 14, at 2–6.

environmental negotiations hinder the regime’s legitimacy and effectiveness because they engender a myopic focus on source countries, leaving little space for examination of the role of consumer countries in illegal wildlife trade. Importantly, though, moving toward greater effectiveness may require only reimagining the scope of the regime and the ways in which it can be applied to illegal wildlife trade. In other words, CITES Parties can correct the biases that play out as the Parties navigate the convention’s compliance mechanism.

This Article proposes that the CITES compliance mechanism is fit-for-purpose in its design but its application is biased against source countries and ignores consumer countries both as drivers of illegal wildlife trade and as noncompliant actors. Bringing a justice-based sensibility to the application of the CITES compliance process requires a whole-of-supply-chain analysis and, drawing on the core relational foundations of the treaty, an international perspective, to identify the root causes of non-compliance that allow illegal trade to fester. Ultimately, the compliance mechanism must gel with the machinery and spirit of the treaty by reflecting the relational dynamics of illegal wildlife trade. Of course, illegal international wildlife trade takes at least two Parties, a source country and a consumer country.

Part I of this Article provides an overview of the CITES permit regime, and Part II overviews the compliance and enforcement framework of the treaty. Part III examines past compliance actions and the evolution of the compliance mechanism, revealing that in its original form, the compliance mechanism took a relational approach that waned over time, giving way to the biases inherent in the geopolitics of international law. Part IV reflects on this evolution and posits that a distributionally just compliance mechanism could drastically draw down illegal wildlife trade. The Conclusion states that application of the compliance mechanism with a whole-of-supply-chain perspective reflects an approach that is both rooted in justice and ultimately more effective in tackling the global illegal wildlife trade.

I. DEFINING ILLEGAL WILDLIFE TRADE: THE CITES PERMIT REGIME

The CITES permit regime is the foundation of the regulatory framework of the treaty.24 It forms the basis for understanding whether

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trade in wildlife is legal or illegal, at least with respect to CITES-listed species.\textsuperscript{25} The tenets of the permit regime fundamentally reflect the relational nature of CITES implementation. It also supports the notion that CITES employs two primary tools for managing international trade: science and market control.\textsuperscript{26} The importance of market control is particularly significant; the drafters placed great emphasis on addressing demand-side drivers of unsustainable wildlife trade.\textsuperscript{27} Over time, however, the Parties, owing largely to power dynamics between source and consumer countries, have diminished the significance of demand-side drivers in addressing non-compliance.\textsuperscript{28}

The application of the permit regime is based on whether a species is listed in one of the three CITES Appendices. Appendix I species are those presently “threatened with extinction and which are or may be affected by trade.”\textsuperscript{29} Trade in Appendix I species is “subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.”\textsuperscript{30} Appendix II species are those “not necessarily now threatened with extinction,” but which “may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.”\textsuperscript{31} Appendix II also includes so-called “look-alike species,” those species that so closely resemble Appendix I or Appendix II species that they must also be listed “in order that trade in specimens . . . may be brought under effective control.”\textsuperscript{32} CITES also allows a Party to list species unilaterally in Appendix III when a Party requires “the co-operation of other Parties in the control of trade.”\textsuperscript{33}

\begin{flushleft}
\textsuperscript{25} See id.
\textsuperscript{26} ERICA THORSON & CHRIS WOLD, BACK TO BASICS: AN ANALYSIS OF THE OBJECT AND PURPOSE OF CITES AND A BLUEPRINT FOR IMPLEMENTATION 12 (2010).
\textsuperscript{28} See infra Part III.
\textsuperscript{29} CITES, supra note 2, art. II(1).
\textsuperscript{30} Id.
\textsuperscript{31} Id. art. II(2)(a).
\textsuperscript{32} Id. art. II(2)(b). The treaty provides for Appendix II listings when the species looks like a species already listed on Appendix II. Resolution Conference 9.24 allows “look-alike” listings for species that look like Appendix I species. CITES, Criteria for Amendment of Appendices I and II, ¶ 3(j), Res. Conf. 9.24 (Rev. CoP17) (1994).
\textsuperscript{33} CITES, supra note 2, art. II(3); see also Chris Wold, Multilateral Environmental Agreements and the GATT: Conflict and Resolution?, 26 ENV’T L. 841, 872 n.229 (1996) (“Species are listed in Appendix III solely on the basis of a decision by the country of origin.”).
\end{flushleft}
The structure of the permit regime makes clear that the drafters intended that science would be a fundamental management tool for preventing over-exploitation. Before a Party’s Management Authority may issue a permit for the export of specimens of an Appendix I or II species, the Party’s Scientific Authority must determine that such export will “not be detrimental to the survival of that species.” This determination is known as a non-detriment finding (“NDF”). A former Secretary-General has called the issuance of adequate NDFs “obviously essential for achieving the aims of the Convention,” and stated that such issuance “requires sufficient knowledge of the conservation status of the species and that a positive advice should not be given in the absence thereof.”

These statements confirm the link between the scientific basis of the permitting scheme and the object and purpose of CITES: Before any specimen of an Appendix I or Appendix II listed species may be exported, the exporting country must ensure that the export will not be detrimental to the species.

While the Convention clearly sets a baseline of non-detriment to the species, it also makes clear that regulatory control of commercial markets is necessary for species threatened with a higher degree of risk—that is, those species listed in Appendix I. Before issuing an import permit, the State of import must determine that the import under review will be for purposes that are not detrimental to the survival of the species involved. This provision requires an analysis of whether the purpose will increase demand for and trade in specimens of the species.

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34 This language appears in Article III(2)(a), which pertains to Appendix I exports, and Article IV(2)(a), which pertains to Appendix II exports. CITES, supra note 2, arts. III(2)(a), IV(2)(a). Article III(3)(a), which pertains to Appendix I imports, uses slightly different language, as non-detriment finding requirements for Appendix I imports are different from those of Appendix I and II exports. Id. art. III(3)(a).
37 Id.
38 Beyond the initial NDF, a Scientific Authority from each Party must monitor both the export permits granted and the actual number of exports to ensure that trade in the species remains non-detrimental. CITES, supra note 2, art. IV(3). In addition to monitoring, each Party must maintain records of its trade in listed species and submit annual reports to the Secretariat. Id. arts. VIII(6), (7)(a).
40 CITES, supra note 2, art. III(3)(a).
at issue. The State of import also must be “satisfied that the specimen is not to be used for primarily commercial purposes.”

These provisions clearly support the Convention’s intention to regulate commercial markets for Appendix I specimens. An Appendix I listing amounts effectively to a commercial trade ban. The Convention clearly contemplates that commercial demand for Appendix I species in the international marketplace is such an inherent risk to the survival of the species that such trade is presumed to be detrimental to the survival of the species.

In fact, at the Washington Conference, the delegate from Tanzania noted that “[t]he treaty should be flexible enough to deal with the whole range of commercial threats.”

Implementation of the permit regime is key to CITES’ goals, and the drafters understood that cooperation across all Parties is key to the permit regime’s success. Specifically, they understood that both exporting and importing countries had obligations across supply chains not to undermine the permit regime. Article II(4) puts this plainly: “The Parties shall not allow trade in specimens of species included in [the Appendices] except in accordance with the . . . Convention.”

II. COMPLIANCE AND ENFORCEMENT UNDER CITES

From the beginning, the drafters of CITES appeared to understand the importance of strong compliance and enforcement to achieve the treaty’s central goal of avoiding over-exploitation of species due to international trade. The understanding reflects an awareness of the
market dynamics at play, even then, that had already driven species to extinction and that threatened many thousands more. Article VIII of the treaty sets out enforcement obligations that were not necessarily innovative at the time of CITES’ drafting but were distinct in that they include obligations to adopt specific requirements into domestic legislation. The general requirement to enforce the treaty coupled with the specific requirement to adopt legislative measures to prohibit trade in violation thereof are cornerstone features of the Convention. As framed, enforcement is an obligation and thus a matter of compliance.

Article XIII establishes the basic structure of the compliance mechanism. Notably, it moves beyond a call for the future development of a mechanism and instead highlights specific types of concerns and calls for response actions by the Parties. Moreover, despite a lack of reference to specific consequences for non-compliance, the Parties have relied on the ability to take “stricter domestic measures” to justify recommendations to suspend trade with recalcitrant Parties. These elements form the basis of CITES Parties’ authority to enforce the provisions of the treaty.

While compliance and enforcement are terms often used in tandem and often conflated, they are distinct terms with specific meanings. In the context of thinking about illegal wildlife trade and the roles of various actors across an illegal wildlife supply chain, carefully construing the distinction between “compliance” on one hand and “enforcement” on

LAW 409 (4th ed. 2018); Susan Biniaz, Remarks About the Cites Compliance Regime, in 2 ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS 89, 89 (Ulrich Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum eds., 2006).

49 For comparison, the International Convention on the Regulation of Whaling (“ICRW”), signed in 1946, contains a provision that requires Parties to ensure that the Convention’s strictures are enforceable in domestic law. International Convention for the Regulation of Whaling, art. IX(1), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74. (“Each Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction.”); see also Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention), art. VII(2), 1046 U.N.T.S. 138 (adopted Dec. 29, 1972).

50 CITES, supra note 2, art. VIII(7).

51 For a general review of CITES’ compliance and enforcement provisions, see Juan Carlos Vasquez, Compliance and Enforcement Mechanisms of CITES, in THE TRADE IN WILDLIFE (Sara Oldfield ed., 2002).

52 See infra Section II.B.

53 CITES, supra note 2, art. XIV(1); see Sand, supra note 19, at 252–53 (explaining that Article XIV(1)(a) of CITES gives States the right to take “stricter domestic measures,” implicitly “authoriz[ing] the use of unilateral economic sanctions by way of trade restrictions or trade bans . . . against other States”).
the other is important, as is understanding how these terms differ from a Party's obligation to “implement” the treaty.54

“Implementation” refers to the extent to which a Party has taken steps to translate the provisions of a treaty into its legal systems such that a treaty’s obligations may be given effect by the State actor.55 “Compliance” is a term used to describe a Party’s state of implementation. Compliance exists when the “legal requirements of international agreements are met by the state parties to them.”56 In other words, compliance exists when a Party has fully implemented its treaty obligations.57 Non-compliance, in contrast, is the state of not having fully implemented one’s treaty obligations.58 Importantly, the actor here is the State, the sovereign that has ratified a particular treaty and thus that holds the obligation to implement its provisions in good faith.59

54 The three broad categories of actors involved in the illegal wildlife trade include suppliers, intermediaries, and consumers. Phelps et al., supra note 9, at 480; Michael 't Sas-Rolfs, Daniel W.S. Challender, Amy Hinsley, Diogo Verissimo & E.J. Milner-Gulland, Illegal Wildlife Trade: Scale, Processes, and Governance, 44 ANN. REV. ENV'T RES. 201, 206 (2019). Suppliers may gather wildlife for subsistence, recreation, or commercial reasons. Phelps et al., supra note 9, at 481. Intermediaries supply wildlife by ordering, transporting, and/or selling wildlife products to consumers. Id. at 481–82. Consumers, the endpoint of wildlife trade and the main driving force of the illegal wildlife trade network, use wildlife products for a variety of reasons including but not limited to medicinal, ornamental, cultural, food, construction, and recreation. Id. at 481.


57 See id.

58 See id.

59 Vienna Convention, supra note 55, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).
Enforcement is distinct: It refers to the actions taken by a competent authority tasked with ensuring that all necessary rules and regulations comprising a particular treaty’s obligations are complied with by relevant actors. Enforcement, then, can take place at two levels. It can mean the actions taken by a treaty-based competent authority, such as a compliance body, or it can mean actions taken by the Party itself to ensure that its nationals comply with the laws adopted to implement a particular treaty’s obligations.

As this section sets out and as the history of compliance work under CITES shows, CITES’ compliance mechanism has the capacity to enforce both formal and actual compliance. In this case, formal compliance refers to a Party meeting the minimum obligations necessary to implement the treaty by taking required legal steps. In the case of CITES, the question is whether domestic measures provide for a permit regime that mirrors CITES’ regime. Actual compliance, though, is a more purposive take on compliance, including acts and omissions related to the Parties’ performance with respect to the legal steps it has taken to incorporate treaty obligations into domestic law. It is a functional approach to compliance that examines the behavior of both States and their nationals.

A. Enforcement Obligations Under CITES: An Analysis of Article VIII

Among MEAs, CITES is unique in that it broadly mandates enforcement of the treaty and requires that Parties adopt specific domestic

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60 Shihata, supra note 56, at 37.
61 Id. at 38 (noting that practically compliance and enforcement mandates merge, especially in contemporary treaties, but that in its truest sense, “enforcement” refers to the actions of the State vis-à-vis its nationals).
62 This is a “rules-based” approach to compliance. See Robert Howse & Ruti Teitel, Beyond Compliance: Rethinking Why International Law Really Matters, 1 GLOB. POL’Y 127, 128, 132 (2010); see also Shima Baradaran, Michael Findley, Daniel Nielson & J.C. Sharman, Does International Law Matter?, 97 MINN. L. REV. 743, 771 (2013) (“Formal compliance with international law is relatively easy to determine. Formal compliance involves examining the regulatory framework that nations have put in place to enforce international laws. It looks strictly at what national laws have been passed and the level of enforcement of such laws.”).
63 Shihata, supra note 56, at 37.
64 See id.; see also Bodansky, supra note 55, at 68–71 (arguing that legal compliance and thus legal effectiveness is an insufficient measure of a treaty’s success).
measures toward that end. Articles III, IV, and V, as described above set out the permit regime that the treaty expects Parties to implement, and Article II(4) instructs Parties not to allow trade except in accordance with this regime. Article VIII of the Convention understands that for the treaty to be effective, Parties must also take enforcement actions in equal measure.

As one of the earliest of the MEAs, the drafters of CITES were working largely from whole cloth, rightsizing the provisions of the draft treaty to the scale of the problem at hand instead of hewing to standard language and model provisions. Capitalizing on the opportunity to innovate, the drafters enshrined one of the bases for CITES’ dub as one of the most effective MEAs in Article VIII, which sets out the Parties’ enforcement obligations.

Article VIII is a powerful complement to CITES’ regulatory regime because it recognizes that enforcement is the driving force of full implementation of the regime. Fundamentally, Article VIII makes enforcement an obligation of the treaty, one with which the Parties must comply. Articles III, IV, and V, as described above, set out the permit regime that the treaty expects Parties to implement, and Article II(4) makes plain that all Parties, importing and exporting alike, have a duty to not allow trade unless it comports with the permit regime. Article VIII links enforcement to these goals with its command that all Parties have a duty to “take . . . measures to enforce the provisions of the . . . Convention and to prohibit trade . . . in violation thereof.”

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66 See supra note 20 and accompanying text.
67 See supra note 2, art. VIII.
70 CITES, supra note 2, art. VIII.
71 Id. arts. II(4), III(1), IV(1), V(1).
72 See id. art. VIII(1).
This provision does two important things. First, it imposes an obligation on the State party to generally take enforcement actions with respect to trade in specimens of species covered by the Convention. Second, it requires Parties to adopt national legislation or regulations to prohibit trade in violation of the Convention. CITES is not a self-executing treaty. As such, States typically must enact legislation or other domestic measures that both authorize relevant government actors to make the necessary findings and issue permits—to implement the regulatory regime—and to make the treaty’s regulatory regime applicable and enforceable against national actors through domestic law. As stated by the CITES Secretariat, “[a]dequate national legislation is key to effective wildlife trade controls by the State agencies charged with implementing and enforcing the Convention.”

Given this, and the importance then of national legislation to the functioning of the Convention, the Parties established a compliance tool referred to as the National Legislation Project. Through the National Legislation Project, the Secretariat reviews national CITES legislation and assesses whether the legislation meets four criteria, drawn directly from CITES’ provisions.

According to Article VIII, all Parties must “take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof,” including measures to penalize trade in, or possession of, such specimens, and to provide for the confiscation or return to the State of export of such specimens. In order to have “adopted appropriate measures for effective implementation of the Convention,” a Party must have domestic measures that provide the authority to:

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73 Id.
75 See H. J. Justin & Sons, Inc. v. Brown, 519 F. Supp. 1383, 1390 (E.D. Cal. 1981) (“The Convention is not self-executing since implementing legislation must be enacted by Congress before the Convention has the force of law.”).
78 Id. (describing the CITES’ National Legislation Project).
80 CITES, supra note 2, art. VIII(1)(b).
i) designate at least one Management Authority and one Scientific Authority;

ii) prohibit trade in specimens in violation of the Convention;

iii) penalize such trade; or

iv) confiscate specimens illegally traded or possessed.  

When the Secretariat determines that a Party does not have adequate implementing legislation, this is reported to the Parties. The Parties then have the ability to recommend trade suspensions when a Party lacks adequate legislation to incentivize improvements.

Importantly though, Parties have two obligations in Article VIII(1): They are to take measures to prohibit trade in violation of the Convention, as elaborated by the National Legislation Project, and take measures to enforce the treaty generally. The latter, although linked to the National Legislation Project because domestic legislation allows for domestic-level enforcement against nationals engaging in illegal trade, requires measures beyond the adoption of national legislation. In fact, it requires Parties to enforce both CITES itself and national legislation through domestic measures. By linking enforcement of treaty obligations to implementation of the treaty through domestic law, the treaty escapes, at least to a certain degree, the “unenforceability” problem of international law. Once enshrined in domestic legislation, Parties oblige their nationals to the provisions of the treaty, and violations should trigger the weight of national systems of justice.

Where such measures are not deployed in the face of illegal trade through enforcement actions, the provisions provide a clear basis for finding non-compliance by Parties on the basis of illegal trade that flows to or from that Party. The ability to cast a failure to enforce in the face of persistent and pervasive illegal trade provides for application of the compliance mechanism in the face of either formal or actual non-compliance.

81 Res. Conf. 8.4, supra note 65, ¶¶ 1, 3.
82 Id. ¶ 1(c).
84 CITES, supra note 2, art. VIII(1).
85 National Legislation Project, supra note 79.
86 CITES, supra note 2, art. VIII(1).
87 SANDS & PEEL, supra note 48, at 15–16.
88 Res. Conf. 8.4, supra note 65, ¶ 3.
89 See supra notes 59–61 and accompanying text.
Overall, the relationship between these elements ensures that Parties, whether importing or exporting countries, may be found in non-compliance with the treaty because nationals of that Party engage in illegal wildlife trade and that Party has thus failed its duty under Article VIII. Most importantly, Article VIII does not distinguish between exporting and importing obligations. Because it takes two to trade, it equally takes two to enforce and each must comply.

This is true whether the object of the illegal trade is an Appendix I or Appendix II specimen. Because only trade in Appendix I specimens requires that both exporting and importing countries issue permits, some Parties have argued that importing countries do not have enforcement “obligations” vis-à-vis Appendix II trade but rather that they merely have some due diligence responsibilities that fall short of obligations.

The attempt to burden-shift here is surely underwritten by a legalistic interpretation of the treaty and a desire to evade the purview of the compliance mechanism. While it may be a logical argument in terms of implementation of the permit regime in isolation, it fails in view of Article VIII’s enforcement obligations, which extend across all CITES supply chains in a manner that reflects the “double control” nature of CITES. As so articulately noted by the Secretary-General in 1989:

[O]ne of the fundamental principles of CITES is the existence of a double control at the exportation and importation stages. While shortcomings may occur at one of these points, they can be compensated for at the other point. Enforcement of CITES and therefore the decrease in the number of infractions, depend on international collaboration.

Any attempt to undermine the fundamental relational approach to CITES regulation and enforcement, or any related effort to evade the CITES compliance regime in the face of illegal wildlife trade by importing countries, rests only on a geopolitically motivated narrative of asymmetrical obligations amongst Parties.

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90 CITES, supra note 2, pmbl., arts. III(1)–(2), VIII(1).
91 See CITES Conf. of the Parties, Interpretation and Implementation Matters, ¶ 3, CoP18 Doc. 40 (May 23–June 3, 2019) [hereinafter CoP18 Doc. 40].
92 See id. ¶ 6.
94 Doc. 7.20, supra note 1, ¶ 30.
B. Article XIII: The Compliance Framework

While Article VIII emphasizes the importance of combating illegal wildlife trade and provides a legal basis against which compliance may be measured, Article XIII outlines how the Parties address allegations and concerns regarding non-compliance.\(^{95}\) Although Article XIII provides the basis for the CITES compliance mechanism as established in Resolution Conference 14.3, it is notable because it is not merely an “enabling” provision, such as those found in more modern MEAs which call for the Parties to develop compliance mechanisms.\(^{96}\) Instead, Article XIII itself sets out the basic procedural framework and the substantive concerns that may be raised, which ensured that the Parties could handle compliance matters from the earliest days of the Convention.\(^{97}\)

Strictly speaking, non-compliance would occur in cases of failure to implement obligations, but application of Article XIII does not require a failure to comply with explicit obligations.\(^{98}\) Instead, it proffers a holistic perspective on both CITES’ effectiveness overall and potential of the compliance mechanism.\(^{99}\) Article VIII provides a broad basis for application of the compliance mechanism to both formal and actual non-compliance,\(^{100}\) but the substantive triggers for an Article XIII compliance matter arguably go beyond non-compliance. The Secretariat may consult Parties in cases when a species “is being affected adversely by trade” or when provisions “are not being effectively implemented.”\(^{101}\) Adverse impact and ineffective implementation do not necessarily derive from non-compliance. The understanding that cases may arise that fall short of strict non-compliance, but nevertheless undermine the object and purpose of CITES by adversely impacting listed species or by inadequate implementation is important to the ability of CITES’ Parties to tackle the pressing issues of the illegal wildlife trade.\(^{102}\)

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\(^{95}\) CITES, supra note 2, art. XIII.

\(^{96}\) CITES Conf. of the Parties, Interpretation and Implementation of the Convention General Compliance Issues, ¶¶ 5, 8–9, 21, CoP12 Doc. 26 (Nov. 3–15, 2002) [hereinafter CoP12 Doc. 26]; see also Goeteyn & Maes, supra note 68, at 803 (describing the “common practice” of providing the Conferences of the Parties the authority to develop compliance mechanisms).

\(^{97}\) CITES, supra note 2, art. XIII; Sand, supra note 19, at 251 (describing the earliest reporting of infractions to the CITES Parties).

\(^{98}\) CITES, supra note 2, art. XIII; Res. Conf. 14.3, supra note 83, ¶ 2.


\(^{100}\) Id.

\(^{101}\) CITES, supra note 2, art. XIII(1).

\(^{102}\) SANDS & PEEL, supra note 48, at 255.
When such cases do not result in a satisfactory resolution, Article XIII authorizes CITES Parties to agree to “whatever recommendations [they] deem[] appropriate.” The Parties have relied on this unfettered discretion to its fullest by incorporating trade suspensions into the suite of measures that may be taken to address Article XIII matters. Importantly, the decisions of the Parties to use trade suspensions are actually recommendations to suspend trade. By framing the measure as a recommendation to suspend trade, the Parties are ultimately relying on Article XIV(1) as the legal basis. Article XIV(1) explicitly recognizes that Parties may take stricter domestic measures—in other words, the permit regime and Appendices set an international floor for wildlife trade but Parties may regulate trade more strictly if they choose. Thus, while the recommendation to suspend trade is the effect of multilateral decision-making, the act of actually suspending trade is unilateral and incumbent on each Party individually.

Both the broad delegation of authority to respond to Article XIII matters with any appropriate measures and the use of recommendations to suspend trade as one appropriate measure stands in contrast again to more modern MEAs, which often limit responsive actions to facilitative, noncoercive approaches. While these approaches are key features of any compliance mechanism, as discussed below, particularly those that intend to respond to inadequate implementation and more systemic compliance concerns, the strength of the CITES compliance mechanism is often attributed to its use of trade suspensions.

C. The Evolution of the Compliance Mechanism

Procedurally, the Secretariat plays important gatekeeper and facilitator roles in Article XIII matters. Over the course of CITES' history this role has evolved, but it has always been significant. From CITES entry into force, the Secretariat would include descriptions of infractions it was aware of in its report on implementation of the Convention to the

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103 See CITES, supra note 2, art. XIII(3).
105 See CITES, supra note 2, art. XIV(1).
106 See id.
107 Id.
108 SANDS & PEE, supra note 48, at 126.
109 REEVE, supra note 14, at 10.
110 Id. at 2.
Starting in 1987, prior to the development of a formalized compliance mechanism, the Secretariat would produce infraction reports for the Conference of the Parties. The independent reports on infractions identified very specific cases of illegal trade and non-compliance as either illustrative of broader enforcement concerns or as particularly egregious instances of illegal trade. Initial iterations of these reports provided rich detail as to the nature of the Secretariat’s concerns and strongly worded recommendations for remediation, as discussed below.

Eventually, the Secretariat more clearly distinguished between infractions—i.e., instances of illegal wildlife trade committed by individuals—and enforcement shortcomings or failings attributable to Parties and identifiable as non-compliance. Ultimately, the Secretariat appears to have unilaterally established the precedent of not detailing specific infractions for the Parties, albeit partially in response to Parties’ discomfort with the level of detail provided in the Secretariat’s infractions reports. As early as 1989, Parties expressed displeasure at being named, and thus ostensibly shamed, in the reports. In fact, in the infraction report from 1989, the Secretariat noted that it would take into account “the necessity to avoid offending the Parties.”

The early reports were provided directly to the Parties and were not publicly available online until 1987, when “The Review of Alleged Infractions” became a fixture on the agenda of the meetings of the Conferences of the Parties. See, e.g., CITES Conf. of the Parties, Interpretation and Implementation of the Convention, ¶ 3, Doc. 6.19 (Rev.) (July 12–24, 1987) [hereinafter Doc. 6.19]; Doc. 7.20, supra note 1, ¶ 2; CITES Conf. of the Parties, Interpretation and Implementation of the Convention, ¶ 1, Doc. 8.19 (Rev.) (Mar. 2–13, 1992).

See Doc. 6.19, supra note 113, ¶ H.1 (“During 1985 and 1986, [Japan] allowed the importation of massive quantities of Appendix I sea turtle specimens from Party states without appropriate documentation. The export from many of these countries has been confirmed to be illegal and carried out without the issuance of export permits.”); Doc. 7.20, supra note 1, ¶ E10 (“In June 1988, Hong-Kong intercepted a shipment of two baby tigers Panthera tigris and two bear cubs Selenarctos thibetanus and Helarctos malavanus on board a ship. They came from Thailand and were destined for a zoo of Taiwan. They were not accompanied by any documents. Thailand furnished no information to the Secretariat about this affair.”)

See CITES, Review of Alleged Infractions and Other Problems of Implementation of the Convention, at 547, Doc. 10.28 (Rev.) (1997) (Secretariat comment: “In this case no infraction has been committed. However, the case has been included in the report to highlight an example of traders who circulate offers for sale for animals that, in fact, they are unable to provide. Although the majority of these offers are bogus, nevertheless the Secretariat would encourage Parties to investigate the circumstances surrounding such ‘dealers.’”).

See Reeve, supra note 69, at 71.

Doc. 7.20, supra note 1, ¶ 11.

See id.

Id.
Beginning in 2000, the Secretariat provided only a generalized report on enforcement concerns, highlighting “only those instances where it is of the opinion that a Party has flagrantly or deliberately flouted or ignored the provisions of either the Convention or Resolutions or where the Secretariat is unable to resolve matters of dispute.”\textsuperscript{120} Thus, in its report to the Parties in 2000, the Secretariat identified only one case of non-compliance with the treaty—namely, concern regarding the trade practices of the United Arab Emirates.\textsuperscript{121}

In parallel to the change in how the Secretariat reported infractions and instances of non-compliance to the Parties, the Parties began a process to revise, and ultimately modernize, its compliance mechanism.\textsuperscript{122} At this point, both the Secretariat and the Parties emphasized the “positive, facilitative approach to compliance” in Article XIII and noted that, at times, Parties had viewed the application of compliance measures as “negative and coercive.”\textsuperscript{123} Interestingly, the Secretariat also noted in a document it drafted for the Parties that “[s]ome Parties believe that developed and developing countries have occasionally been treated unequally in relation to compliance issues.”\textsuperscript{124}

At the same time the Parties to CITES were developing a revised compliance mechanism, the international environmental community generally had undertaken the development of guidelines for compliance and enforcement of multilateral environmental agreements.\textsuperscript{125} In 2001, at its meeting in Malmö, the United Nations Environment Programme (“UNEP”) agreed to strike an expert group to develop these non-binding guidelines, recognizing that compliance with international environmental laws was one of two significant barriers to the effective implementation of multilateral environmental agreements.\textsuperscript{126} These guidelines hew largely to what

\textsuperscript{120} CITES Conf. of the Parties, \textit{Interpretation and Implementation of the Convention Enforcement}, ¶ 46, Doc. 11.20.1 (Apr. 10–20, 2000).
\textsuperscript{121} \textit{Id.} ¶¶ 48–49.
\textsuperscript{123} CoP12 Doc. 26, \textit{supra} note 96, ¶ 20.
\textsuperscript{124} \textit{Id.} ¶ 21.
may be described as the managerial school of thought regarding compliance—that is, that facilitative measures that promote the development of strong institutions lead to compliance.\footnote{127} Facilitative measures include information sharing, advice and technical assistance, financial support, and other non-adversarial means of capacity development.\footnote{128} In contrast, the enforcement school of thought leans into the use of punitive measures as leverage to force compliance.\footnote{129} CITES’ use of trade suspensions is an example of a punitive measure used to strong-arm enforcement.

CITES Parties’ work on its revised compliance mechanism reflects the parallel work of the UNEP expert group on compliance. The result of the Parties’ review of the compliance mechanism led to a refined process, detailed in a new resolution, with a strong focus on facilitation but not without the possibility of resorting to stronger enforcement tools.\footnote{130} The balance of facilitative and punitive measures is key to a potentially effective compliance mechanism.\footnote{131} The new resolution, adopted in 2007, outlines a compliance process that involves four stages: (A) identification of potential compliance matters; (B) consideration of compliance matters and investigation; (C) measures to achieve compliance; and (D) monitoring and implementation of measures to achieve compliance.\footnote{132} The Secretariat and Standing Committee are responsible for carrying out and applying these steps to all Parties “in a fair, consistent and transparent manner.”\footnote{133}

Each stage in the process is meant to be progressive so that matters are handled expeditiously and with due regard for the conservation

\footnote{127} See Rep. of the Governing Council of UNEP, Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, ¶ 14(d)(i)–(iv), Doc. UNEP/GC/DEC/SS.VII/4 (Feb. 4, 2002) (suggesting MEA’s with non-compliance provisions consider: (1) establishing a compliance committee; (2) tailoring non-compliance mechanisms that allow for identification of potential non-compliance at an early stage and relatively quick correction; (3) ensuring non-compliance mechanisms are “non-adversarial and include procedural safeguards for those involved”; and (4) using a body under the agreement to make a “final determination of non-compliance of a party”).

\footnote{128} Goeteyn & Maes, supra note 68, at 799.

\footnote{129} See id. (identifying the differences between the enforcement and the managerial schools of thought regarding compliance).


\footnote{132} Res. Conf. 14.3, supra note 83, ¶ 14(a)–(d).

consequences of non-compliance. At the identification stage, the Secretariat is made aware of a compliance concern and dialogue ensues with the relevant Parties. The only actors relevant at this stage are the Secretariat, the Party of concern, and any Party who has raised concerns; the Standing Committee is not involved at this stage. In stage B, the Standing Committee is made aware of a potential compliance issue and further investigation ensues if reason exists to believe that there might be a compliance issue at hand. At this stage, the Secretariat may either continue its dialogue, or the Standing Committee may request further information and “seek an invitation from the Party concerned to undertake the gathering and verification of information in the territory of that Party or wherever such information may be found.” Stage C envisions various measures designed to facilitate or achieve compliance, depending on the circumstances of the compliance matter and the Party of concern. Stage D provides for the Standing Committee and Secretariat to follow up with respect to any recommendations made in Stage 3 in order for a Party to come into compliance.

III. THE COMPLIANCE MECHANISM, APPLIED: SYSTEMIC BIAS AND UNFAIR BURDENS

A review of the application of the compliance mechanism to concerns about illegal trade tells a story that smacks of bias. Consumer countries, those that hold the largest market share in terms of wildlife imports, tend to wield more power in international fora and no doubt influence the application of the compliance mechanism. As one scholar has noted in the context of treaty-based negotiations, “power politics and maximizing self-interest play a dominant, if not decisive, role.” Structural

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135 Id. ¶¶ 15–20.
136 Id.
137 Id.
138 Id.
139 Id. ¶ 16.
140 Id. ¶ 16.
142 M. Rafiqul Islam, History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination, in INTERNATIONAL ENVIRONMENTAL LAW
barriers exist across multilateral environmental agreements and at CITES, acting to constrain weaker states and exacerbate the dynamics of dominance that lead to asymmetric interpretations and applications of international law. First, importing countries fund proportionately more of CITES’ work by a wide margin. Second, these countries are more likely to operate strategically and directly during discussions, armed with savvy negotiators and the confidence of financial influence. Moreover, representation at meetings likely skews toward heavier participation by importing countries, which are more likely to afford attendance and larger delegations.

Over the course of CITES’ nearly fifty-year history, the Parties have shaped how the Secretariat has identified non-compliance and evolved their response to non-compliance allegations. A clear shift occurs where concerns are mainly addressed to exporting countries instead of all states involved in transactions of concern. More significantly, the importing countries appear to consistently escape both the application of the mechanism and the imposition of “appropriate measures,” whether facilitative or punitive.

A. Approaching Infractions from a Relational Perspective in the Early Days: The Role of the Secretariat

In its early reports, the Secretariat approached issues of non-compliance from a whole-of-supply-chain perspective, distributing the onus of addressing the illegal trade and non-compliance on all supply


143 See Bupinder S. Chimni, Third World Approaches to International Law and Individual Responsibility in Internal Conflict, in THE METHODS OF INTERNATIONAL LAW: STUDIES IN INTERNATIONAL LEGAL POLICY 3, 3 (Steven R. Ratner & Anne-Marie Slaughter eds., 2006).

144 Islam, supra note 142, at 31.


chain Parties. In fact, the Secretariat specifically noted that “[i]t is important for the Parties to remember that proper implementation of the Convention depends on the existence of a dual system of controls, covering both the export and import stages of trade.” Further, the Secretariat suggests that such perspective would lead to a decrease in the number of infractions, drawing down the scale of illegal wildlife trade.

The strong relational perspective taken to achieve “mutual cooperation which is fundamental to the philosophy of the Convention,” is evident throughout the Secretariat’s early infractions reports. Several examples from the 1987 infractions report stand out as demonstrative of the Secretariat’s approach. For example, in 1986, rhino horns were seized in Europe, traveling from Africa to China; the Secretariat recommended that China should “take appropriate action.” This is a clear request that China address the demand-side drivers causing the flow of rhino horn specimens from Africa to China.

Several cases during this time reflect a clear understanding that Parties, importing countries in particular, are responsible for compliance with Article VIII of the Convention. Regarding a re-export to Japan from Mexico of 25,000 pairs of sea turtle flippers that originated from Ecuador, the Secretariat recommended that Japan “should not allow the importation.” In the case of Appendix I specimens shipped without appropriate permits from Vietnam to the German Democratic Republic, the Secretariat called on the German Democratic Republic to “take appropriate action to confiscate illegal specimens and penalize those responsible.” When forty-nine hyacinth macaws were illegally imported into Austria from Paraguay, the Secretariat recommended that Austria “take action to confiscate such illegal shipments and penalize the trader(s) involved.”

In its initial report, the Secretariat included the names of all States involved: exporting, importing, and transit States. Doc. 6.19, supra note 113, ¶¶ A–H. For example, “[i]n 1986, the Secretariat received information concerning two shipments of raw ivory shipped from MO [Macau] and SG [Singapore] to CN [China] without CITES documents.” Id. ¶ B.3.


Id.

CITES Conf. of the Parties, Interpretation and Implementation of the Convention, at 566, Doc. 6.20 (Rev.) (July 12–24, 1987) [hereinafter Doc. 6.20].

Doc. 6.19, supra note 113, ¶ A.7.

Id.

Id. ¶ A.15.

Id. ¶ A.11.

Id. ¶ B.1.
These are just a few of the many examples in years of infraction reports where the Secretariat overtly called attention to the role of importing and consumer countries and directed recommendations accordingly.

Even when the non-compliance arose directly as a result of activities or omissions in the exporting country, the Secretariat called upon the importing country to take commensurate action to stem the flow of illegal wildlife trade. One of the most illustrative examples involves early challenges Paraguay faced in implementing the Convention.156 Noting that “huge” shipments of skins and other significant quantities of illegal wildlife shipments emanate from Paraguay and that Paraguay must control exports at its border, the Secretariat recommended “that the problem should be approached from two directions,” specifically calling on importing countries to take action to control illegal wildlife trade and noting that “implementation of the Convention is perfect nowhere.”157 The philosophy of the Secretariat at the time directly reflects the relational structure of CITES:

[T]he importing countries have the obligation to assist and co-operate with such countries in their attempts to eliminate illegal wildlife trade. Such co-operation is the most fundamental obligation of CITES Parties. Therefore, the Secretariat recommends that the importing Parties must increase their controls on imports from Paraguay to ensure that the illegal traffic is stopped.158

Despite the clear-eyed perspective from the Secretariat, Parties pushed back against the Secretariat’s framing of infractions and enforcement challenges, particularly with respect to the manner in which the Secretariat had been identifying alleged infractions.159 Moreover, little follow-up occurred to assess whether importing countries were following the recommendations of the Secretariat and where failures occurred, even persistently, in importing countries,160 neither the Secretariat nor the Parties, addressed either demand-side drivers or importing country enforcement actions.

156 See id. ¶ A.16.
157 Doc. 6.20, supra note 150, ¶ D(b).
158 Id.
159 See supra notes 119–20 and accompanying text.
160 See id.
B.  *Entrenching Bias by Overlooking Demand-Side Drivers and Importing Countries: The Decisions by the Parties*

In sharp contrast to the efforts of the Secretariat to spotlight the role of importing countries and demand-side drivers of illegal wildlife trade during the early stages of CITES non-compliance efforts, the Parties rarely responded with measures targeted at importing countries. Ultimate decision-making as to “appropriate measures” in cases of non-compliance rests with the Parties, and by and large, they did not exercise authority to recommend measures pursuant to Article XIII in a manner reflective of the important whole-of-supply-chain perspective presented by the Secretariat.

1.  1985–2002: The Secretariat Versus the Parties

Prior to 1989, the Parties only agreed to a few recommendations to suspend trade and almost all represent “relatively soft targets.” Bolivia was the first country to face a multilateral recommendation to suspend trade. Provoked by other Latin American countries concerned about the role that Bolivia played in regional wildlife losses, the Parties adopted a resolution recommending, among requests to Bolivia to improve its implementation and compliance with CITES, that all Parties suspend imports of CITES-listed species Bolivia. Other targets of trade suspensions included non-Parties, such as Macau, El Salvador, and Equatorial Guinea.

Thus, while the Parties were gaining comfort with the imposition of trade suspensions, and despite the Secretariat’s recognition of whole supply chain relationships in its infractions report and enforcement reports, persistent non-compliance in more “important” countries remained largely unaddressed by sanctions. Perhaps the most egregious soft peddling by the Parties involved Japan. Japan’s role in the illegal wildlife trade in the 1980s was well-known, documented, and reported...
by the Secretariat.\textsuperscript{167} At the time, Japan was the “second most important importing country” of wildlife as well as a significant financial contributor to the Convention.\textsuperscript{168}

Despite its reputation and the facts at hand, the Parties consistently failed to recommend trade suspensions, which would have cut off supply to Japanese markets and closed markets to Japanese wildlife products.\textsuperscript{169} In fact, the Parties even failed to adopt a plea from Latin American exporting countries, whose wildlife was dwindling in the face of Japan’s illegal wildlife consumption.\textsuperscript{170} Only when the United States began proceedings to possibly sanction Japan unilaterally in 1991, did Japan agree to tighten import controls.\textsuperscript{171} Japan’s response to U.S. action confirms that the threat of trade suspensions effectively coerces action and can have positive conservation impacts as a result. However, the lack of threat due to the power dynamics between source and consumer countries at CITES hamstrings efforts to control illegal wildlife trade.

Similarly, the Parties failed to act assertively toward rampant illegal trade between source countries and the European Union (“E.U.”).\textsuperscript{172} During the 1980s, the E.U. struggled with implementation of CITES and varying degrees of compliance and enforcement existed amongst E.U.

\textsuperscript{167} Id. at 101–02; Doc. 6.19, supra note 113, ¶¶ A.5, A.14, A.17, E.1, F.3, H.1; Doc. 7.20, supra note 1, ¶¶ E.1, E.3, G.1, G.3, H.10.
\textsuperscript{168} REEVE, supra note 69, at 100 (internal quotations omitted).
\textsuperscript{169} Id. at 101.
\textsuperscript{170} Id. at 101–02; CITES Conf. of the Parties, The Implementation of CITES in Japan, France and Austria, at 565, Doc. 6.19.1 (July 12–24, 1987).
\textsuperscript{172} For a comprehensive discussion of compliance concerns related to the E.U., see REEVE, supra note 69, at 112–20.
countries.\textsuperscript{173} In 1985, the Secretariat noted concerns regarding the “vast quantities” of illegally imported specimens, noting that illegal specimens of CITES-listed species were “flooding” the E.U. marketplace.\textsuperscript{174} Despite the grave concerns, the Parties never deployed trade suspensions, reflecting a failure on the part of the Parties to act aggressively.

In the face of a failure to act more strongly by the Parties, the Secretariat appeared to lean into a facilitative approach that the Parties appeared to prefer in this instance. The Secretariat and independent consultants conducted extensive studies and provided comprehensive reports on the failures of the E.U. (for part of this time known as the European Economic Community or E.E.C.).\textsuperscript{175} In one report, the Secretariat noted that despite the litany of accumulated and independently and thoroughly vetted recommendations, the E.U. had implemented only one.\textsuperscript{176}

As the E.U. case unfolded, the Secretariat began to express frustration at the lack of enforcement effort by Parties, noting that it was the singular barrier to an effective treaty regime, and that importing countries were primarily responsible for these enforcement failures.\textsuperscript{177} The sentiment of the Secretariat was made clear on multiple occasions: According to the Secretariat, illegal trade “would not constitute a major problem if both ‘exporting’ and ‘importing’ countries were conscious of the importance of their respective roles and responsibilities and of the . . . double control mechanism developed in the Convention.”\textsuperscript{178}

\begin{footnotes}
\textsuperscript{173} Id. at 112.
\textsuperscript{174} Id. at 114 (internal quotations omitted).
\textsuperscript{175} See, e.g., CITES Conf. of the Parties, Interpretation and Implementation of the Convention, ¶¶ 1, 6, Doc. 9.23 (Nov. 7–18, 1994) [hereinafter Doc. 9.23].
\textsuperscript{176} Id. ¶ 7 (“Despite the fact that the Commission announced that it would take any action that the independent study showed to be necessary, and despite many announcements that a new EU Regulation was being prepared and would be implemented soon, to date, only one recommendation (concerning database on decisions) has been fully implemented.”).
\textsuperscript{177} CITES Conf. of the Parties, Report of the Secretariat, ¶ 13, at 278, Doc. 5.8 (Apr. 22–May 3, 1985).
\textsuperscript{178} Id. In noting its concerns, the Secretariat painted an important contrast between the efforts of exporting and importing countries:

Unfortunately, it has become evident to the Secretariat that, as a general rule, while most ‘exporting’ countries make serious and responsible efforts to ensure proper implementation of the Convention (often with limited financial and human resources), some major ‘importing’ countries appear to be taking advantage of shortcomings on the part of exporting countries by authorizing the importation of illegal goods for so-called economic or legal considerations.

\textit{Id.}
The Secretariat’s frustration foreshadowed E.U. recalcitrance. The E.U. issue remained unresolved for years. In 1992, Paraguay raised concerns about E.U. enforcement issues. Paraguay noted that the E.U.’s lack of border controls undermined Paraguay’s attempts to control illegal trade. And again in 1994, the Secretariat reported ongoing problems, including laundering and inadequate border controls. The matter only appears settled as of 1998, when the attention focused exclusively on Greece.

2. 2002–Present: A Reformed Compliance Mechanism

By 2002, the Secretariat no longer framed enforcement and compliance issues from a relational perspective and the Parties had begun a redesign of the compliance mechanism, arguably “modernizing” it to emphasize a facilitative approach. Although in many ways it simply crystallized the steps taken during Article XIII matters, the adoption of Resolution 14.3 in 2007 marks a shift in the application of the CITES compliance mechanism. The Secretariat’s gradual move away from its whole-of-supply-chain approach coupled with the Parties’ revamp of the compliance mechanism seems to have formalized a fundamental change in the application of the compliance mechanism and arguably a loss of effectiveness.

Notably, relatively few Article XIII matters have been brought to the Parties attention since 2006, and those that resulted in recommendations to suspend trade remain seemingly intractable and are persistent concerns. However, during this time, the Parties handled several instances of non-compliance that were not categorized as “Article XIII matters”; in several of these cases, the Parties even recommended trade suspensions, often resulting from non-compliance with reporting requirements or failure to communicate or to respond to specific inquiries.
non-compliance related to illegal wildlife trade under Article XIII—in contrast—resulted in fewer cases, but a look at the trajectory of these matters and the illegal trade that spurred the Secretariat’s concern illustrates the bias now seemingly institutionalized in the compliance mechanism. The following section examines two cases. Article XIII procedures during this time resulted in trade suspensions against five countries in which the trade suspensions were in effect for four or more years. For four of these countries, trade suspensions remain in effect.\footnote{188}

\begin{itemize}
\item For Nigeria, from 2005 to 2011, the Standing Committee recommended a trade suspension of all CITES-listed specimens to and from Nigeria for failure to sufficiently implement CITES. CITES, \textit{Notification to the Parties}, ¶¶ 1, 8, No. 2009/003 (Feb. 3, 2009); CITES, \textit{Notification to the Parties}, ¶¶ 1–2, No. 2013/13 (May 2, 2013); CITES, \textit{Notification to the Parties, ¶} 1, 3–4 No. 2016/024 (Mar. 16, 2016).
\item For Madagascar, from 2010 to 2014, the Standing Committee recommended a trade suspension of Nile crocodile (\textit{Crocodylus niloticus}) from Madagascar because the species was adversely affected by trade due to Madagascar’s failure to effectively implement provisions of the Convention. CITES, \textit{Notification to the Parties, ¶} 1–2, No. 2014/064 (Dec. 30, 2014).
\item For Guinea, in 2013, the Standing Committee recommended a trade suspension of all CITES-listed specimens from Guinea due to implementation concerns “related to enforcement as well as broad compliance issues, such as the adoption of adequate legislation, the efficient issuance of permits, the monitoring of significant levels of trade and the making of non-detriment findings.” CITES, \textit{Notification to the Parties, ¶} 1, No. 2013/017 (May 16, 2013). In 2021, this trade suspension was partially withdrawn, allowing for “the export of pre-Convention specimens of Pterocarpus erinaceus with a maximum volume of 14,000 m3, subject to the safeguard measures.” CITES, \textit{Notification to the Parties, ¶} 4–6, No. 2021/037 (May 6, 2021).
\item For Lao People’s Democratic Republic (“Lao PDR”), in 2017, the Standing Committee recommended a trade suspension of commercial trade in \textit{Dalbergia cochinchinensis} specimens, except for finished products, from Lao PDR due to concerns regarding the management of the species. CITES, \textit{Notification to the Parties, ¶} 1, No. 2017/012 (Feb. 1, 2017). This trade suspension was modified in 2018 to include all \textit{Dalbergia} spp., including finished products. CITES, \textit{Notification to the Parties, ¶} 1, No. 2018/083 (Nov. 1, 2018).
\item For the Democratic Republic of the Congo (“DRC”), in 2016, the Standing Committee recommended a trade suspension of African grey parrots (\textit{Psittacus erithacus}) specimens from the DRC due concerns regarding the management of the species. CITES, \textit{Notification to the Parties, ¶} 1(a), No. 2016/021 (Mar. 16, 2016).
\end{itemize}
a. African Grey Parrots and the Democratic Republic of Congo

The Secretariat officially initiated an Article XIII matter against the Democratic Republic of the Congo ("DRC") in 2016 for, among other things, exports of African grey parrots (Psittacus erithacus) and illegal trade in general, noting compliance concerns regarding Articles IV (trade in Appendix II specimens) and Article VIII (domestic enforcement measures).\footnote{Id.} Regarding its exports of African grey parrots, DRC had been asked to impose an export quota of 5,000 specimens, but the Secretariat flagged that it appeared to regularly exceed this quota.\footnote{Id.} In so noting, the Secretariat shared a table showing the quantities of grey parrots originating from DRC and in international trade; the data was drawn from importing country annual reports.\footnote{See id.} Interestingly, at least one importing country—Turkey—alone was responsible for over 5,000 imports of African grey parrots from DRC.\footnote{Id.} Other countries included Hong Kong (SAR), Malaysia, Singapore, and South Africa.\footnote{Id.}

Despite the clear implication that the importing countries have consumer markets driving unsustainable and illegal trade in African grey parrots and one of those countries—Turkey—was importing grey parrots at a level in excess of multilateral recommendations and DRC’s own export quota, of which it should have been aware, the Secretariat did not directly address the role of importing countries in the specific context.\footnote{See id.} In its introduction to the issues generally in the DRC, the Secretariat notes that “[i]mportant CITES trade partners include the European Union, China, Singapore, South Africa, Thailand and Turkey, among others. The compliance measures that are recommended by the Secretariat have implications for transit and destination countries for CITES-regulated trade originating in DRC, and take into consideration...
the principle of shared responsibility.” However, the recommendations are all ultimately and pointedly directed at DRC.

In fact, regarding trade in African grey parrots, the Standing Committee agreed, based on the Secretariat’s recommendation, to suspend commercial trade with DRC. Given the information the Secretariat and the Parties had regarding the supply chains, the Standing Committee should have given equal consideration to recommending a trade suspension with Turkey, especially given it played a documented role in re-exporting grey parrots. In this case, suggesting that the importing country should have faced stronger compliance scrutiny and follow-up measures in no way diminishes the deeply troubling CITES compliance issues in DRC. It recognizes, instead, the inescapable truth that market access allows the problems to fester and even enables them. To this day, DRC remains under a commercial trade suspension for African grey parrots as the matters remain unresolved.

In addition to trade in African grey parrots, as part of the Secretariat’s review, it raised concern about pangolin and ivory trade. Among the several decisions taken by the Standing Committee directed at DRC, at least one stands out as likely equally as applicable for consumer countries. The Standing Committee decided that DRC shall intensify efforts to conduct analyses of available information to map organized crime groups active in the country and convene multi-disciplinary investigative teams involving all relevant authorities, to work in close

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196 Id. ¶ 23.
199 See Countries Currently Subject to a Recommendation to Suspend Trade, supra note 186 (listing recommendations to suspend trade currently in force). The list includes a reissued recommendation to suspend commercial trade in African grey parrots. See No. 2022/017, supra note 190, ¶ 1 (noting that the trade suspension has been in place since 2016).
collaboration with local authorities in key identified areas, and initiate intelligence-driven operations and investigations, with a particular focus on pangolins and ivory.  

Pangolin and ivory trade are well-known as the work of transnational organized crime groups, so why this decision would not also be directed at importing countries is puzzling.

b. Nigeria, China, and African Rosewood

Compliance concerns with respect to Nigeria began with the issue of illegal trade in African rosewood (*Pterocarpus erinaceus*). As initially flagged to the Standing Committee, the Secretariat indicated concerns with respect to both Nigeria and China. African rosewood is a highly prized timber commodity in China, where its red coloring is valued in the making of high-end traditional furniture, known as *hongmu*. According to reports, rosewood, including African rosewood, is the most illegally traded wildlife product in the global marketplace. The illegal trade is devastating for the conservation of Africa’s forests and a huge loss of gross domestic product in terms of lost taxes and revenue generated by sustainable, legal trade in African rosewood.

Interestingly, Nigeria was a proponent of listing African rosewood in Appendix II of CITES in 2016 at the sixteenth meeting of the Conference of the Parties. In its proposal, Nigeria and other co-proponents

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201 CITES Standing Comm., *Application of Article XIII: Reports of the Secretariat*, ¶¶ 2, 26, SC74 Doc. 28.2.2 (Rev. 1) (Mar. 7–11, 2022) (reporting the decision taken with respect to concerns about DRC’s role in “illegal trade”).


204 *Id.*

205 Sandy Ong & Edward Carver, *The Rosewood Trade: An Illicit Trail from Forest to Furniture*, YALE ENV’T 360 (Jan. 29, 2019), https://e360.yale.edu/features/the-rosewood-trade -the-illicit-trail-from-forest-to-furniture [https://perma.cc/6K3R-9TD7] (noting that rosewood trafficking exceeds that of other highly valuable wildlife products, such as elephant ivory and pangolin scales, according to the United Nations Office on Drugs and Crime).


flagged the environmental consequences of the illegal trade in rosewood and the fact that most of the West African range states had adopted harvest or trade bans, meaning that, from 2016 onwards, China and other importing countries were aware that Management Authorities in many exporting countries, including Nigeria, could not make legal acquisition findings, a finding necessary for the issuance of a legally valid export permit. In fact, the proposal itself states that “[a]n Appendix II listing will empower importing countries to assist range states by blocking shipments of illegally harvested and illegally traded wood, and make it easier to distinguish legal from illegal wood. In doing so, it can be expected to result in a significant reduction in illegal trade.” The proponents’ goal in listing African rosewood in Appendix II was to ensure that importing countries had clear legal obligations with respect to ensuring that their imports were the product of legal harvest and the subject of legally valid export permits.

Despite the initiative of exporting source countries to protect a valuable resource from a market in China fueled by illegal imports, the Article XIII matter remained focused only on exporting countries, specifically Nigeria’s non-compliance. When the matter was originally flagged in 2017, the Standing Committee, assuaged by assurances from China that they had systems in place to verify the authenticity of CITES permits, merely asked importing countries to pay close attention to African rosewood imports. By 2018, an official compliance procedure against only Nigeria was on the Standing Committee’s agenda, despite the fact that “Parties [had] expressed doubts” about the legality of the imports, despite the verification mechanism espoused by China. In fact, the Secretariat itself expressed concern about the authenticity of permits that had apparently accompanied trade deemed legal. According to the Secretariat, “[s]ome of the quantities indicated in the permit appeared

209 See id. ¶ A (“Given that most of the range States have passed and enforced harvest and/or trade bans in order to regulate the surge in international trade and mitigate its impacts, it has been demonstrated that a considerable share of the international trade in *Pterocarpus erinaceus* is of illegal origin.”).

210 Id. ¶ 6.4.

211 See id.

212 See CITES Standing Comm., *Application of Article XIII*, ¶¶ 7–8, 24, 30, 51(b), 52(e), SC70 Doc. 27.3.5 (Oct. 1–5, 2018) [hereinafter SC70 Doc. 27.3.5].


214 See SC70 Doc. 27.3.5, *supra* note 212, ¶ 4.

215 Id. ¶ 3.

216 See id. ¶¶ 21, 24, 49.
to be corrected or altered and at times it was hard to read the names of the importers or the exporters.”

The Secretariat’s report on the situational context for Nigeria’s alleged non-compliance is illustrative of a systemic bias infusing the compliance work of CITES. In its report in 2017, and again in its report in 2018, the Secretariat flagged important concerns regarding the role of importing countries in the illegal trade of African rosewood. However, the overarching focus of the report, and the Secretariat’s recommendations, is directed at the capacity and enforcement concerns in Nigeria. Notably, these concerns far exceed what a legalistic, or formal approach, to compliance would view as appropriately and legally within the scope of non-compliance vis-à-vis CITES’ requirements. In other words, it far exceeds what importing countries would argue is applicable to them.

After undertaking a technical mission upon the invitation of Nigeria, the CITES Secretariat noted in its report that it observed several other issues that stood out as part and parcel of systemic non-compliance with CITES in Nigeria. The Secretariat noted that illegal trade in pangolins and ivory trafficking are concerns, but it also identified issues such as corruption and the problematic storage of confiscated specimens as compliance concerns. That the Secretariat and the Parties deemed these issues within the purview of the compliance mechanism is telling—the interpretation here is of broad enforcement obligations that address actual compliance by the State and its nationals.

The Secretariat helpfully went so far as identifying various drivers of these issues, commenting on the credibility of Nigeria’s scientific institutions, the adequacy of its forestry laws, the role of organized criminal networks, the lack of cooperation and coordination amongst Nigerian authorities, and poor enforcement at ports of entry, amongst other

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217 Id. ¶ 21.
218 See Shihata, supra note 56, at 37 (framing “formal compliance” as adoption of any “legal steps” as opposed to “actual” compliance, which entails behavioral outcomes); see also Bodansky, supra note 55, at 65–67 (arguing that “legal effectiveness” is a function of complying with a treaty’s obligations in the strictest and narrowest sense, differentiating “behavioral effectiveness” and “problem-solving effectiveness”).
219 In one example related to the development of due diligence obligations, China made clear its perspective that obligations do not coequally sit upon exporting and importing countries. See CITES Conf. of the Parties, Summary Record of the Seventh Session for Committee II, ¶ 40, at 5, CoP18 Com. II Rec. 7 (Rev. 1) (Aug. 17–28, 2019) (“China expressed concern that the sovereignty rights of Parties should not be encroached upon.”).
220 SC70 Doc. 27.3.5, supra note 212, ¶¶ 3, 44.
221 Id. ¶¶ 31–50.
issues.\textsuperscript{222} Certainly, some of these or similar issues drive poor enforcement equally in importing countries.

The final recommendations adopted by the Parties are notable in the distinction they make between importing and exporting countries. In at least a slight nod to the role of importing countries, the Parties “invited the importing Parties to share with the Secretariat the administrative, legislative and enforcement arrangements put in place to ensure that trade in specimens of this species only takes place when Parties are satisfied that it is in line with the requirements of the Convention.”\textsuperscript{223} In contrast, the decisions taken by the Standing Committee insist that Nigeria “shall” undertake several actions in order to address compliance concerns, including assessing domestic law enforcement efforts, developing strategies to counter corruption, mapping the efforts of organized crime groups, adopting adequate controls for confiscated specimens, and establishing a national platform for cooperation between relevant authorities, amongst other things.\textsuperscript{224} The Standing Committee also recommended that Parties suspend trade in African rosewood with Nigeria.\textsuperscript{225}

In subsequent reports, the Secretariat documented enormous efforts by Nigeria to address the issues flagged in 2018, through both capacity-building efforts and more tactical approaches, such as a three-year export moratorium.\textsuperscript{226} Nonetheless, as the Secretariat noted in 2022—four years later—illegal trade in African rosewood, pangolins, and ivory remained a significant concern, as demonstrated by large-scale and high-profile seizures of pangolin scales and ivory, as well as ongoing illegal trade in rosewood.\textsuperscript{227} At this point, the illegal trade in African rosewood, originating in or routed through Nigeria, had been a compliance concern for five years;\textsuperscript{228} yet, no real change in the Parties’ approach to the issue occurred with respect to Nigeria. The Standing Committee, in 2022, maintained its suspension of trade with Nigeria\textsuperscript{229} and continued to note

\begin{itemize}
\item \textsuperscript{222} Id. ¶ 51.
\item \textsuperscript{223} CITES Standing Comm., \textit{Summary}, ¶ 27.3.5(1)(c), SC70 Sum. 12 (Rev. 1) (Oct. 1–5, 2018) (emphasis added).
\item \textsuperscript{224} CITES Standing Comm., \textit{Summary Record}, ¶¶ 27.3.5(1)–(4), at 27–29, SC70 SR (Oct. 1–5, 2018) [hereinafter SC70 SR].
\item \textsuperscript{225} Id. ¶ 27.3.5(1)(a).
\item \textsuperscript{226} CITES Standing Comm., \textit{Application of Article XIII: Reports of the Secretariat}, ¶ 7, SC74 Doc. 28.2.4 (Mar. 7–11, 2022).
\item \textsuperscript{227} Id. ¶¶ 18–22, 24: see also CITES Standing Comm., \textit{Inclusion of Pterocarpus erinaceus in the Review of Significant Trade}, ¶ 6(c), SC74 Doc. 35.1.1 (Mar. 7–11, 2022) [hereinafter SC74 Doc. 35.1.1] (taking note of “documented, widespread and pervasive illegal trade”).
\item \textsuperscript{228} See SC70 SR, \textit{supra} note 224, ¶ 27.3.5(1)(a).
\item \textsuperscript{229} As of the date of this writing, the recommendation to suspend trade in African
\end{itemize}
that Nigeria “shall” undertake an enumerated list of activities the pur-

positive function of which is to reduce the illegal export of CITES-listed

specimens from Nigeria, many of which are the same requests as made

in 2018.230 Similarly, the Standing Committee, just like in 2018, made

only hortatory requests of relevant importing countries, maintaining a

distinct distance between any relevant acts or omissions in those coun-

tries and the compliance mechanisms’ punitive aspects.231

The difference in 2022 was that the Standing Committee took up

the issue of illegal trade in African rosewood not just as a compliance

matter focused on Nigeria but as a broader enforcement issue in all range

States.232 The referral of this issue to the Standing Committee as a mat-

ter of concern arose out of a review by the Plants Committee of the

sustainability of African rosewood exports.233 In the course of that review,

the issue of the veracity of legal acquisition findings made by exporting
countries arose with respect to all range States.234

At the same Standing Committee meeting, Senegal submitted a
document that further drew attention to the nature and scale of illegal
trade in *Pterocarpus erinaceus*.235 The document paints a picture of the
illegal trade that is only gleaned if reading between the lines of the
Secretariat’s Article XIII compliance reports on Nigeria. In one telling
statistic, the document states that “[b]etween the Appendix II listing in
January 2017 and November 2021[,] China alone has imported a total of


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231 See id. ¶ 28.2.4(1)(b).

232 See SC74 Doc. 35.1.1, *supra* note 227, ¶ 6(b)–(c) (referring the issue of illegal trade in
African rosewood to the Standing Committee).

233 The Review of Significant Trade is an important compliance tool that reviews instances
of high-volume trade from Parties that is potentially indicative of a failure to a suffi-
ciently robust non-detriment finding prior to issuing an export permit. See CITES, *Review of
through the Animals or Plants Committees as appropriate for determination of appropriate
actions, which can include the setting of zero export quotas and trade suspensions if
Parties do not sufficiently address concerns raised by the relevant Committee. Id. In an
unusual action under the Review of Significant Trade, the Plants Committee identified all
range States as “action is needed” or warranting a close inspection of their non-detriment
findings. See SC74 Doc. 35.1.1, *supra* note 227, ¶ 6(a)–(c) (internal quotations omitted).

234 SC74 Doc. 35.1.1, *supra* note 227, ¶ 2.

3.49 million tons of *P. erinaceus* from West Africa, for a total value of US$1.98 billion.²³⁶

The document also describes, in figures, the problem of leakage. While the trade suspension with Nigeria reduced China’s imports of Nigerian rosewood by 97% between 2017 and 2018, imports from four other range States increased dramatically.²³⁷ Significantly, each of these four States had in place, at the time of these exports, strict regulatory measures, including prohibitions in each country regarding either harvest or export, that should have prevented China from legally importing most, if not all, African rosewood from these countries.²³⁸ Although the document proposes an appropriate action may be trade suspensions against all range States, it also tees up in black and white the role of China as a consumer country, driving illegal trade.²³⁹ The document does not explicitly say as much and does not point to acts or omissions that could be pegged as specific instances of non-compliance,²⁴⁰ but the scale of China’s imports framed against the legislative and regulatory efforts of the four main exporters tells a story hard to ignore. Yet, ignore it is just what the Standing Committee did: Only the exporting countries ended up subject to trade suspensions and no further effort was made by the Secretariat or the Standing Committee to flag, independently of Nigeria, China for compliance-related concerns in light of illegal trade in African rosewood.²⁴¹

IV. **TOWARD A MORE ROBUST EFFECTIVENESS**

To be sure, this Article is not accusing the Secretariat, or even the Parties, of explicit bias, but the manner in which contemporary compliance matters continue to unfold is representative of a more pervasive, implicit bias steering the focus and outcomes of CITES’ compliance mechanism. It is the same bias that infuses international negotiations generally.²⁴²

²³⁶ Id. ¶ 6 (citing Chinese customs data).
²³⁷ Id. ¶ 7 fig.3 (noting that China’s imports from Sierra Leone, Ghana, The Gambia, and Mali increased by 35% from 2018 to 2019).
²³⁸ See id. ¶¶ 12–15.
²³⁹ See id. ¶¶ 6, 9.
²⁴⁰ See id.
²⁴¹ See CITES Standing Comm., *Application of Article XIII: Reports of the Secretariat*, ¶ 2.1(c), SC75 Doc. 7.2.1 (Rev. 1) (Nov. 13, 2022) (containing the most recent communication from the Secretariat to the Standing Committee with respect to this issue, focusing exclusively on the issues in the exporting countries).
²⁴² See supra notes 139–42 and accompanying text.
In fact, as demonstrated in the early years of the CITES compliance process, the Secretariat took a strong stance against the bias it was witnessing.\textsuperscript{243} That stance has tempered but is not lost: The Secretariat now speaks of “shared responsibility,” likely the result of years of push back by the Parties.\textsuperscript{244} Nonetheless, the Secretariat plays a gatekeeper role that responds to geopolitics, as seen over the course of the application of the compliance mechanism.\textsuperscript{245}

Overall, the soft peddling with respect to the role importing countries play in driving illegal supply chains and thus enticing corruption, lackadaisical implementation, and enforcement challenges in exporting countries with capacity needs, even in the face of direct calls to action, is concerning. But focusing on developing country failures almost exclusively supports a dominant international environmental law narrative that lack of capacity, corruption, and other systemic enforcement challenges occur only in the Global South and thus that the facilitative measures of modern compliance mechanisms are only beneficial in the Global South.\textsuperscript{246}

Certainly, invocation of unfairness or injustice is not meant to shield an exporting country from culpability.\textsuperscript{247} However, facilitative measures, combined with the threat of punitive measures, could be very effective for addressing enforcement challenges outside of the Global South.\textsuperscript{248} In fact, the legitimacy of the compliance mechanism should

\textsuperscript{243} See supra note 171 and accompanying text.
\textsuperscript{244} See, e.g., CoP18 Doc. 40, supra note 91, ¶¶ B–C.
\textsuperscript{245} See supra notes 109–23 and accompanying text.
\textsuperscript{246} See, e.g., Goeteyn & Maes, supra note 68, at 798 (arguing that non-compliance is mainly due to capacity issues, and although noting that “[a]ll countries are susceptible to all of the above elements, . . . the capacity problem is a structural issue in a majority of developing countries”).
\textsuperscript{247} See Annakatrin Tritschoks, Rethinking Justice in International Environmental Negotiations: Toward a More Comprehensive Framework, 23 INT’L NEGOT. 446, 452–53 (2018) (acknowledging that strategic use of justice arguments occurs but noting that the role of justice in international environmental negotiations is a more dynamic and complex issue and that justice nonetheless plays an important role).
\textsuperscript{248} The case of Japan’s non-compliance due to its introduction from the sea of sei whale from its North Pacific Hunt is a great example. For a history and context of the non-compliance, see Lyman & Jamin, supra note 39, at 70. Japan responded to the matter of its non-compliance in clear-cut terms, agreeing to no longer import byproducts of sei whale from its legal “scientific research.” Simon Denyer & Akiko Kashiwagi, Japan to Leave International Whaling Commission, Resume Commercial Hunting, WASH. POST (Dec. 26, 2018, 11:22 AM), https://www.washingtonpost.com/world/japan-to-leave-international-whaling-commission-resume-commercial-hunt/2018/12/26/2c32fb20-08c9-11e9
depend on its application to those most able to disrupt activities that undermine the object and purpose of the treaty, including the major importing Parties.249

That trade suspensions remain in place for several years and concerns are repeated time and time again with respect to illegal trade suggests that a new approach to compliance procedures is due. In each of these intractable cases, importing countries and transit countries were known and could have been brought to the attention of the Standing Committee with the same force and in the same manner as the exporting countries.250 While geopolitics drive the fallacy of asymmetrical obligation and thus disproportionate attention to exporting countries, nothing in the treaty itself prevents the Parties from taking a more holistic, more realistic, more just, and more effective approach to their use of the compliance mechanism.

As the recent compliance procedures under CITES demonstrate, the Parties have requested targeted threat assessments that have value across any black-market supply chain.251 Using these threat assessments to develop further, specific requests in order to achieve compliance, coupled with the prospect of trade suspensions, could generate a sea change that might induce an effective response to illegal wildlife trade.
An effective CITES compliance mechanism can and should address illegal wildlife trade. Tackling illegal wildlife trade is a question of enforcement and the compliance mechanism can clearly address non-compliance with respect to the enforcement obligations of Article VIII. The very problem addressed by Article VIII is illegal trade, and thus the behavior of both exporting and importing countries should be the focus of compliance procedures deriving from persistent illegal trade.

While the treaty itself, through its regulatory regime, defines what constitutes illegal trade and thus cannot “address” illegal trade, the enforcement provisions of Article VIII set a standard for behavior vis-à-vis the treaty’s permit regime and offer the basis for tackling illegal trade by course-correcting behaviors that facilitate illegal trade. The compliance mechanism could be the forcing hand of solving the problem of illegal trade if exercised without bias.

As the history of CITES’ compliance mechanism makes clear, no barrier other than political will exists to prevent expanding the current view of non-compliance to include importing countries. Article VIII reflects a robust commitment to tackle the two-way dynamic of illegal wildlife trade by asking both exporting and importing countries to take measures to enhance enforcement efforts. In this way, compliance should be viewed expansively to encompass not just the capacity and structural challenges exporting countries often face but also the role that consumer countries play in driving demand and failing to stem illegal imports.

Understanding that the biases that result from self-preservationist approaches to international law also affect the CITES compliance mechanism could unlock its potential. The barrier has never been the design of the mechanism or differences between exporting and importing country obligations. Understanding that bias infiltrates CITES’ compliance mechanism is not to suggest that the system be overhauled stern to stem. In fact, the mechanism is structurally fully capable of realizing a just and holistic strategy for addressing non-compliance. From the perspective of procedural fairness, the mechanism is just. It is equally available to be triggered by all Parties and its design does not prohibit the equitable application of its facilitative or punitive elements. It is in its unjust distributional effects that its flaws arise.

252 See supra notes 146–50 and accompanying text (showing that the Secretariat’s interpretation of past compliance situations did not distinguish between exporting and importing countries in terms of the obligations of Article VIII and application of the compliance mechanism).
253 See CITES, supra note 2, art. VIII.
254 On the self-serving nature of treaty negotiations, see Islam, supra note 142, at 31.
While normative appeals alone are unlikely to shift compliance mechanism outcomes, CITES Parties take decisions by a two-thirds super-majority, and the Standing Committee by a simple majority.\textsuperscript{255} Consensus is obviously desirable, particularly with respect to compliance issues, but a vision for equitable application and political will from enough, if not all, Parties can reshape compliance and drive down the illegal wildlife trade.

\textbf{CONCLUSION}

Illegal trade only happens when there is demand. If the non-compliance mechanism focuses primarily on source countries, it does nothing to address the actions or inactions in importing countries that allow demand for illegal wildlife specimens to thrive and that create the conditions in source countries that allow illegal trade and traders to prosper. While trade sanctions against a given source country may prevent demand from being satisfied by that country, the market may just pivot to other source countries. The net demand—and the supply that can meet that demand through trade—is not likely to diminish at all. Like carbon leakage, the trade routes will change, sources will change, and the actors may change, but the overall volume of illegal trade will remain the same.

Looking specifically at the relational structure of CITES and how that was reflected in early infractions reports relative to the application of the compliance mechanism now, which even in the face of illegal trade streams where two actors are relevant, reveals a disproportionate focus on exporting countries. Correcting for this bias in future Article XIII matters by equally employing facilitative measures and recommendations to suspend trade across supply chains trade could lead to a significant reduction of illegal wildlife trade. The tools the CITES Parties need to realize their international commitments exist, but power dynamics that give rise to institutional bias must be called out, recognized, and rectified.

Deploying the compliance mechanism to address the problem of illegal wildlife trade has the potential to be an effective behavioral change and problem-solving tool if it tackles the problem as one of demand in equal measure as one of supply. Assertive and mutual application of the compliance mechanism amongst both importing and exporting countries is an untapped lever in the fight against wildlife trafficking.

\textsuperscript{255} See CITES, Rules of Procedure for the Standing Committee, at Rule 28 (2018) (noting that procedural matters are decided by a simple majority but matters of substance are decided by a two-thirds majority); see also CITES, Rules of Procedure for the Standing Committee, at Rule 15 (2022) (clarifying that while consensus is preferred decisions may be taken by a simple majority).