

PERSPECTIVE

Looking for Law in All the Wrong Places? Dying Elephants, Evolving Treaties, and Empty Threats

Geoffrey Wandesforde-Smith

1. Introduction: Understanding CITES as Law with Limitations

In the scholarship of international law there are a number of memorable defenses, made over the last several decades, of the value and importance of the 1973 Convention on International Trade in Endangered Species (CITES)¹ for helping to prevent wildlife extinctions.²

Most memorable, perhaps, are the classic case for the ultimate perfectibility of CITES as an instrument of international law made in the context of elephant conservation by Michael Glennon in 1990;³ the frequently cited brief for the possibly endless adaptability and evolutionary ingenuity of the Convention made by Peter Sand in 1997;⁴ and the vigorous, full-throated assertion of both the desirability and inevitability of continuance of the treaty pretty much in its present form made by John Scanlon, the Secretary-General of CITES, in a special journal issue devoted to an appraisal and assessment of the evolving treaty⁵ that appeared not long after the 16th Conference of the Parties (CoP) to CITES, held in Bangkok in March of 2013.⁶

Scanlon argued in 2013 that CITES CoP 16 manifested an unusually high degree of both comity among the parties and determination to stay the course in implementing the convention,

CONTACT Geoffrey Wandesforde-Smith gawsmith@ucdavis.edu Emeritus Professor of Political Science, University of California, Davis, CA 95616, USA.

¹ Its full name is the Convention on International Trade in Endangered Species of *Wild* Fauna and Flora (emphasis added). It was initially agreed and signed on 3 March 1973 and entered into force on 1 July 1975, after ratification by just ten countries. There are now more than 180 states parties. Up to date information about the content of the treaty and the list of participating states is maintained at <https://www.cites.org> (accessed 1 August 2016).

² Whether and how CITES prevents or helps to prevent the extinction of wild species is perennially controversial. The treaty regulates trade in species and parts of species on the assumption that in some cases trade can be a principal cause of species endangerment and possible extinction. This begs the question of whether trade is a more powerful cause of possible extinction than, say, habitat loss, which is conventionally identified as the chief cause of endangerment and extinction, or climate change, or some other driving variable.

³ Michael Glennon, *Has International Law Failed the Elephant?* 84 AM. J. INT'L L. 1-43 (1990).

⁴ Peter Sand, *The Evolution of a Treaty Regime in the Borderland of Trade and Environment*, 8 EUR. J. INT'L L. 29-58 (1997).

⁵ John Scanlon, *CITES at Its Best: CoP 16 as a 'Watershed Moment' for the World's Wildlife*, 22 REV. EUR. COMM. & INT'L ENVTL. L. (hereinafter RECIEL) 222-227 (2013). See also John Scanlon, *In a World of 7 Billion People How Can We Protect Wildlife?* THE GUARDIAN, Aug. 30, 2016 (online at <https://www.theguardian.com/environment/2016/aug/30/7-billion-people-how-protect-wildlife-endangered-species/> accessed 3 Sept. 2016).

⁶ The International Institute for Sustainable Development (IISD) routinely tracks the deliberations associated with all the major environmental treaties. For a summary of the CITES CoP 16 discussions in Bangkok in 2013, see <http://www.iisd.ca/vol21/enb2183e.html> (accessed 1 August 2016).

knowing full well that the next and upcoming CoP 17 would be held in Johannesburg, South Africa, in the Fall of 2016, and that there the ability of the treaty to protect African elephants from extinction would be a particularly divisive issue, perhaps so divisive that it would tear apart the thin veneer of international agreement that has kept CITES alive for more than forty years.⁷

Over those four decades or so, disappointments with the ability of CITES to save iconic species have shifted their focus somewhat among species.⁸ During this same period, the principal drafters, who are still staunch defenders in the developed world of the original treaty,⁹ have had to learn to share decision making power in the treaty regime with the countries that typically host within their sovereign territories¹⁰ the most iconic species the treaty seeks to protect,¹¹ none more iconic than the elephant. These developing countries, inclined to treat wildlife as a potentially profitable and sustainable resource, now represent a powerful force, perhaps the most powerful force, in treaty proceedings.¹² And so, from time to time, the politics of the CITES regime become very intense.

As these developments have unfolded, the scholarship focused on CITES has diversified.¹³ Overall, legal and other experts try periodically to reframe and reposition the treaty

⁷ The issues on the agenda for CoP 17 in Johannesburg are previewed in the documentation assembled for the 66th meeting of the CITES Standing Committee, held in Geneva from 11-15 January 2016. *See* <https://cites.org/eng/com/sc/66/index.php> (accessed 1 August 2016). The Standing Committee provides policy guidance to the Secretariat concerning the implementation of the Convention and oversees the management of the Secretariat's budget. *See* <https://cites.org/eng/disc/sc.php> (accessed 1 August 2016).

⁸ In terms of fauna, particular attention currently focuses on Asian big cats, elephants, great apes, pangolins, rhinoceroses, antelopes, sharks and rays, snakes, and sturgeons. *See* <https://cites.org/eng/com/sc/66/index.php> (accessed 1 August 2016). The total number of species of fauna and flora arguably afforded some degree of protection by CITES through the regulation of trade is now in excess of 35,000.

⁹ The origins of CITES received little serious scholarly attention until the appearance of RACHELLE ADAM, *THE ELEPHANT TREATIES: THE COLONIAL LEGACY OF THE BIODIVERSITY CRISIS* 70-79 (2014), although *see* Sand (1997), *supra* note 4, at 31-35. On the intertwining of the history of CITES with the involvement of Americans in the work of IUCN, and with U.S. efforts to strengthen endangered species legislation, *see also* the comments by Marshall Jones and Lee Talbot in U.S. Fish & Wildlife Service, *Fish and Wildlife News* (Winter 2013) at 13 and 15-16 (online at https://www.fws.gov/home/fwn/pdf/News_Winter'13_web.pdf, accessed 1 August 2016).

¹⁰ Many species' ranges are no respecters of national boundaries. On the legal and management challenges this raises in the case of the elephant *see* S.A. Jeanetta Selier et al., *The Legal Challenges of Transboundary Wildlife Management at the Population Level: The Case of a Trilateral Elephant Population in Southern Africa*, 19 J. INT'L WILDLIFE L. & POL'Y (hereinafter JIWLP)101-135 (2016).

¹¹ Iconic species can be identified by the attention they attract in the international conservation community, where they are often talked about as if they were or ought to be part of the common heritage of mankind. The elephant, for example, is the symbol of CITES and the panda plays the same role for WWF, the World Wildlife Fund. This iconic status may not and often is not of great interest to countries in the developing world that host internationally iconic species.

¹² The notion that sovereign states in the developing world can do whatever they like with their fauna and flora, even if they are endangered by trade or by some other cause, is enshrined in the principle of Permanent Sovereignty over Natural Resources, which found its way into the Stockholm Declaration, issued after the 1972 Stockholm Conference on the Human Environment, as Principle 21. ADAM, *supra* note 9, at 94-96; NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS & DUTIES* (1997).

¹³ The question, for example, of whether developing countries have sufficient incentives to protect species endangered by trade, especially at the local community level, and of how those incentives might be enhanced, attracted attention about a decade ago and yielded *ENDANGERED SPECIES, THREATENED CONVENTION: THE PAST PRESENT & FUTURE OF CITES* (Jon Hutton & Barnabas Dickson eds. 2000) and *THE TRADE IN WILDLIFE: REGULATION FOR CONSERVATION* (Sara Oldfield ed. 2003). There is some overlap between this concern with incentivizing conservation and the even more starkly neo-liberal thinking about what developing countries in Africa should be allowed and encouraged to do with their wildlife that yielded *PARKS IN TRANSITION: BIODIVERSITY, RURAL DEVELOPMENT & THE BOTTOM LINE* (Brian Child ed. 2004) and *EVOLUTION & INNOVATION IN WILDLIFE CONSERVATION: PARKS & GAME RANCHES TO TRANSFRONTIER CONSERVATION AREAS* (Helen Suich & Brian Child eds. 2009). *See also* Jonathan Liljeblad, *The Elephant and the Mouse That Roared: The Prospects of International Policy and Local Authority in the Case of the*

as a useful part of the international law of wildlife,¹⁴ not least by balancing, for example, the treaty's interest in protecting species in their natural environments, essentially as wild things, with its interest in allowing states, if that is their choice, to domesticate and farm wild things, which in the case of animals boils down to treating them much as if they were cattle or sheep.¹⁵

The most recent of these re-framings tries to paint the saving of internationally iconic endangered species as first and foremost a problem involving the detection, prosecution, suppression, and eventual elimination of transnational environmental crimes.¹⁶ Two very recent and hefty volumes address this topic,¹⁷ and both make it very clear that their contents are buttressed by a large and diverse penumbra of literatures exploring such topics as the magnitude of the crimes, the nature and motivations of the criminals, the sophisticated international networks that sustain assaults on wildlife for ill-gotten gains, and the staggering amounts of money involved not just in the illegal trade in species and their parts but also in the legal trade as well. Amounts of money large enough, arguably, to make the promotion of illegal wildlife trade look attractive as a source of threat finance, or support for terrorists, who can't raise the money to pay for their operations from taxes or philanthropic grants.¹⁸

This latest attempt to reframe the basic challenge that protecting species and avoiding extinctions poses for international law has attracted a star-studded and well-connected international cast, including members of the British royal family¹⁹ and the Presidents of both

Convention on International Species (CITES) (May 2008) (unpublished Ph.D. dissertation, University of Southern California) (online in the USC Digital Library, <http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll127/id/80014>, accessed 1 August 2016), chs. 2 & 3.

¹⁴ Andre Nollkaemper, Framing Elephant Extinction, 3(6) ESIL Reflections (July 2014), online at <http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflection%20-%20Nollkaemper.pdf> (accessed 1 August 2016). *But see* Laura Kosloff & Mark Trexler, *The Convention on International Trade in Endangered Species: No Carrot, But Where's the Stick?* 17 ENVTL. L. REP. 10222-10235 (1987); Mark Trexler, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Political or Conservation Success?* (Dec. 1989) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the University Library), 99-133 (arguing that CITES was unlikely ever to become a useful part of international wildlife law).

¹⁵ Rowan Martin, *CITES CoP 17 - Elephants*, 57 PACHYDERM 128-129 (Jun. 2015-Jul. 2016), responding to Phyllis Lee et al., *Conserving Africa's remaining elephants and ending the threat of ivory trade: the 'Big Five' proposals for CITES*, in *id.* at 125-127 (online at <http://www.pachydermjournal.org/index.php/pachy/issue/view/21/showToc>, accessed 1 August 2016).

¹⁶ Under most understandings, the illegal wildlife trade is only one part of a bigger transnational environmental crime picture that also encompasses illegal trade in toxic wastes, carbon credits, and ozone depleting substances.

¹⁷ HANDBOOK OF TRANSNATIONAL ENVIRONMENTAL CRIME (Lorraine Elliott & William Schaedla eds. 2016), hereinafter cited as HANDBOOK (2016); ENVIRONMENTAL CRIME IN TRANSNATIONAL CONTEXT: GLOBAL ISSUES IN GREEN ENFORCEMENT & CRIMINOLOGY (Toine Spapens, Rob White & Wim Huisman eds. 2016), hereinafter cited as GREEN ENFORCEMENT (2016).

¹⁸ One great value of the new literature on transnational environmental crime is its critical assessment of the alleged linkage between terrorist threat finance and illegal wildlife trade. *See especially* Lorraine Elliott, *The Securitization of Transnational Environmental Crime and the Militarization of Conservation*, in HANDBOOK (2016), *supra* note 17, at 68-87. For a brief survey of the non-legal literatures buttressing the emerging interest in transnational wildlife crime, *see* ANGUS NURSE, *POLICING WILDLIFE: PERSPECTIVES ON THE ENFORCEMENT OF WILDLIFE LEGISLATION* (2015).

¹⁹ The Royal Foundation of the Duke and Duchess of Cambridge and Prince Harry was instrumental in forming United for Wildlife, a collaboration between seven of the largest field based international conservation organizations and the Royal Foundation. The collaboration has focuses on engaging young people, developing advanced wildlife management technologies, and improving education for wildlife policing. *See* <http://royalfoundation.com/our-work/united-for-wildlife/> and <http://www.unitedforwildlife.org> (accessed 1 August 2016). Other international celebrities associating themselves with efforts to fight wildlife trafficking include Harrison Ford, Leonardo DiCaprio, Tom Hardy and Angelina Jolie.

China and the United States.²⁰ It has yielded large gifts of money, prompted chiefly by a desire to affirm and support the existence value of species.²¹ But, while the resulting publicity focuses tremendous public and private attention on the plight of the elephant, the new ideas and resources it has unquestionably brought to bear also bring controversy.

Mobilizing the international community to fight transnational wildlife crime with sophisticated detection technologies, more wildlife ranger boots on the ground, and better personnel training and weaponry, for example, is tantamount to the militarization of conservation.²² And it is not at all clear that this is either warranted or likely to be more effective than other ways of preventing wildlife crime,²³ even if the use of military means to accomplish conservation might be rationalized as a contribution to the fight against terrorism – a fight that presumptively unites the entire international community.

The strange thing in all of this is that, although much of the controversy about the best way to deal with illegal wildlife trade implicates CITES,²⁴ and swirls around the international conference halls where huge numbers of people and organizations congregate to participate in CITES proceedings of various sorts,²⁵ year after year, there are no provisions in the treaty itself that can be directly invoked to apply judicial sanctions to wildlife criminals. Moreover, apart from CITES there is no other international environmental law that can be invoked to counteract species loss from wildlife crime, and that is a large part of the reason why, despite its limitations, CITES continues to get so much attention.

²⁰ “The United States and China commit to enact nearly complete bans on ivory import and export, including significant and timely restrictions on the import of ivory as hunting trophies, and to take significant and timely steps to halt the domestic commercial trade of ivory. The two sides decided to further cooperate in joint training, technical exchanges, information sharing, and public education on combating wildlife trafficking, and enhance international law enforcement cooperation in this field. The United States and China decided to cooperate with other nations in a comprehensive effort to combat wildlife trafficking.” See <https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states> (accessed 1 August 2016). Prior to the state visit, Prince William, Duke of Cambridge, visited both heads of state and shared with them his concerns.

²¹ The Clinton Global Initiative committed, for example, to raise \$80 million in partnership with others by 2016 to fight wildlife trafficking and poaching as a security threat in Africa and the Howard Buffett Foundation gave \$25 million to Kruger National Park in South Africa to provide intensive protection for rhinos inside the park. See Rosaleen Duffy, *The Illegal Wildlife Trade in Global Perspective*, in HANDBOOK (2016), *supra* note 17, at 112-113.

²² Elliott (2016), *supra* note 18, building on ROSALEEN DUFFY, NATURE CRIME: HOW WE’RE GETTING CONSERVATION WRONG (2010); Rosaleen Duffy, *Waging a War to Save Biodiversity: The Rise of Militarized Conservation*, 90 INT’L AFF. 819-834 (2014); Rosaleen Duffy, *War, by Conservation*, 69 GEOFORUM 238-248 (2016); Elizabeth Lunstrum, *Green Militarization: Anti-Poaching Efforts and the Spatial Contours of Kruger National Park*, 104 ANNALS ASS’N AM. GEOGRAPHERS 816-832 (2014); Francis Massé & Elizabeth Lunstrum, *Accumulation by Securitization: Commercial Poaching, Neo-liberal Conservation, and the Creation of New Wildlife Frontiers*, 69 GEOFORUM 227-237 (2016).

²³ Julie Ayling, *What Sustains Wildlife Crime? Rhino Horn Trading and the Resilience of Criminal Networks*, 16 JIWLP 57-80 (2013); William Schaedla, *Local Sociocultural, Economic and Political Facilitators of Transnational Wildlife Crime*, in HANDBOOK (2016), *supra* note 17, at 45-67; Tanya Wyatt, *The Uncharismatic and Unorganized Side to Wildlife Crime*, in HANDBOOK (2016), *supra* note 17, at 129-145; Julie Ayling, *Reducing Demand for Illicit Wildlife Products: A ‘Whole of Society’ Response*, in HANDBOOK (2016), *supra* note 17, at 346-368.

²⁴ Margarita África Clemente Muñoz, *The Role of CITES in Ensuring Sustainable and Legal Trade in Wild Fauna and Flora*, in HANDBOOK (2016), *supra* note 17, at 433-443.

²⁵ Nineteen states parties are members of the CITES Standing Committee, representing various major regions of the world, but when the Committee held its 66th meeting in Geneva, in January 2016, there were altogether close to five hundred participants from national governments, intergovernmental organizations, and non-governmental organizations in attendance. See Summary of the Sixty-Sixth Meeting of the Standing Committee of the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 11-15 January 2016, 21(87) EARTH NEGOTIATIONS BULL. (18 Jan. 2016)(online at <http://www.iisd.ca/download/pdf/enb2187e.pdf>, accessed 1 August 2016).

CITES is an agreement among sovereign states to make trade in species legal and orderly as a matter of record, and safe and profitable for all concerned, and to prohibit trade only when it can be shown that otherwise legal trade is a threat per se to the continued existence of species known to be endangered. States failing to live up to their CITES obligations to keep track of their involvement and participation in trade can in theory be penalized for not fulfilling their reporting and conformance obligations²⁶ under the treaty, by having their participation in legal trade in species suspended, although this is not the way compliance typically plays out under CITES. Threats of trade sanctions against states for departures from treaty norms are more likely to be negotiated, extended, and forgiven on promise of more help, more money, and better behavior in the future.²⁷

The real power of wildlife law to protect iconic species under threat, such as elephants, rhinos, leopards, and lions, among others, lies with domestic law, domestic police and rangers, domestic prosecutors, domestic courts, and domestic conservation bureaucracies, *none* of which make any significant appearance in the newly burgeoning literature on transnational environmental crime.²⁸

So, where did the notion that international law, including CITES, could be an effective bulwark against the power of trade to endanger and even extinguish species originate?

What has kept it alive for more than forty years? And is avoidance of extinction for the elephant, now an issue of unquestioned salience in Africa, where CITES CoP 17 will be held, one of the things that international law can accomplish?

Are scholars of international wildlife law who would like to find good law to ensure good outcomes for species under grave threat, such as the elephant, looking in the wrong place?

2. Imagining CITES as the Steady Erosion of Sovereignty

From the perspective of 1990 and following close on the heels of the *Economist's* blunt assertion to its global readership that CITES had proven “utterly powerless” to control the ivory trade²⁹ Michael Glennon saw that the problem of saving elephants as wild animals in Africa had both legal and political dimensions. Looked at politically, there was no powerful or consistent support among African states for treating elephants as if they were part of the common heritage

²⁶ CITES requires parties, for example, to make regular reports to the Secretariat and, thus, to other parties, of their involvement in trade and, since 1992 under the CITES National Legislation Project, to bring their domestic legislation into conformity with key provisions of the treaty. Failures to meet these obligations were discussed at the 66th Standing Committee meeting and sanctions were recommended against non-complying states when the Conference of the Parties meets in Johannesburg in September of 2016. See CITES, Submission of National Reports, SC66 Doc.30.1, at ¶15 (27 Nov. 2015) and National Laws for Implementation of the Convention, SC66 Doc.26.1 at ¶ 27 (11 Dec. 2015), both accessible online at <https://cites.org/com/sc/66/index.php> (accessed 1 August 2016). In the past, similar recommendations for sanctions have been over-ridden by the CoP.

²⁷ Rosalind Reeve, *Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime*, 82 INT'L AFF. 881-897 (2006); Peter Sand, *Enforcing CITES: The Rise and Fall of Trade Sanctions*, 22 RECIEL 251-263 (2013).

²⁸ But see Jan Glazewski, *Transboundary International Fisheries Crime and Restitution for South Africa: The Case of United States v. Bengis, 2013*, in GREEN ENFORCEMENT (2016), *supra* note 17, 124-138. Other international and domestic legal instruments aimed at crime, terrorism and money laundering do make a significant indirect contribution.

²⁹ *Saving the Elephant: Nature's Great Masterpiece*, ECONOMIST, July 1, 1989, at 16, quoted in Glennon (1990), *supra* note 3, at 18.

of mankind.³⁰ On the contrary, some African states were quite comfortable dealing with elephants as exploitable natural resources, especially in a context in which the money earned, whether from hunting or the sale of ivory or perhaps tourism, would be a welcome addition to national income and might be expended, for example, on wildlife conservation programs. The legal challenge, then, was whether international law could be used to compel states to protect their elephants or other species – although elephants are the lodestar for CITES – and treat them almost entirely as non-consumptive goods, even if they didn't want to follow that path. And CITES was the obvious tool at hand for international lawyers to work this transformation.

So, Glennon sketched the textbook case for eroding state sovereignty in order to “protect wider humanitarian interests and prevent environmental degradation.”³¹ CITES needed to be understood, he said, as one of a number of focused treaties the international community had agreed to since the end of the Second World War to underline the fact that states no longer had *carte blanche* to do whatever they wanted within their own territory, either with respect to persons or the environment. Indeed, it was now possible to conclude, Glennon wrote, that “customary international law requires states to take appropriate steps to protect endangered species,”³² and that the relevant norms of international law had been created both by state practice and by convention. Moreover, he argued:

Because CITES requires domestic implementation by parties to it, and because the overall level of compliance seems quite high, the general principles embodied in states' domestic endangered species laws may be relied upon as another source of customary law. Even apart from the CITES requirements [accepted at the time Glennon was writing by 103 countries], states that lack laws protecting endangered species seem now to be the clear exception rather than the rule. That there exists *opinio juris* as to the binding character of this [state] obligation [to protect species] is suggested by the firm support given endangered species protection by the UN General Assembly and various international conferences (citations omitted).³³

Glennon was cautious in his judgment about the extent to which in 1990 South Africa and Zimbabwe, say, could be said to be prohibited from selling ivory by customary international law that corresponded to the trade restrictions agreed to in 1989 at CITES CoP 7 in Lausanne, when the African elephant was up-listed from Appendix II to the most trade restrictive Appendix I of CITES. But looking to the future, he argued the trend “cannot be doubted.”³⁴ Probably sooner rather than later “the customary norm requiring states to protect endangered species” would take on “the character of an obligation *erga omnes*.” And at that point international law would trump the politics of national resource sovereignty, because “obligations *erga omnes*...run to the international community as a whole; thus, their breach is actionable by any state since such matters are ‘[b]y their very nature...the concern of all States...[T]hey are obligations *erga omnes*.’”³⁵

³⁰ Although a former President of Tanzania did tell his country's Wildlife Conservation Society in a 1988 speech that their nation's rich wildlife resource was an accident of geography that really belonged “to all mankind,” who should help pay for its survival. *Id.* at 28. See also Michael Kidd & Michael Cowling, *CITES and the African Elephant*, in *INTERNATIONAL ENVIRONMENTAL LAW & POLICY IN AFRICA* 49-63 (Beatrice Chaytor & Kevin Gray eds. 2003).

³¹ Glennon (1990), *supra* note 3, at 30.

³² *Id.*

³³ *Id.* at 31-32.

³⁴ *Id.* at 33.

³⁵ *Id.* (quoting *Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3, 32 (Judgment of Feb. 5)).

3. Appreciating CITES as Evolutionary Adaptation

In fact, things have not worked out the way Glennon imagined, even though the six-step program he outlined for saving the elephant, including a number of changes to CITES itself,³⁶ was prescient and well-received. By the time Peter Sand evaluated the past, present and future of the treaty regime in 1997, however, the possibility that CITES could eventually become a legal cause of action in a judicial forum by some countries in the world against other countries of the world had clearly given way to a very different paradigm. The prospect that the treaty might be used to compel compliance with obligations *erga omnes* against states recalcitrant in their treatment of species in trade, endangered species first among them, had passed. The watchwords at CITES had rather become bargaining, negotiation, compromise, and bureaucratic elaboration,³⁷ particularly in the face of repeated and strenuous assertions of the principle of Permanent Sovereignty over Natural Resources by African states who believed they had or could sustainably produce an “excess” of elephants. One could argue, and Sand did argue,³⁸ and others have since echoed the thought,³⁹ that things had reached this pass through a process of evolutionary adaptation.

When it turned out, for example, that there was not nearly enough money available to do all the things that needed to be done, CITES established some degree of sustainable financial independence from the United Nations Environment Program.⁴⁰ When it became clear that the work of the treaty as written could only be accomplished if new institutions, not contemplated in the treaty text, were created, subsidiary bodies, including an executive Standing Committee, were invented to help guide the work of the treaty between CoPs.⁴¹ The parties to CITES learned to grapple, albeit not very forcibly, with the possibility of imposing sanctions against signatory states that failed to live up to their treaty commitments.⁴² They learned how to tolerate deviations from treaty norms by allowing reservations from CoP decisions about the listing of species in the appendices to CITES and by acknowledging increasingly that there could be exceptions to conformance with the rules governing trade in species.⁴³ They learned to value the

³⁶ *Id.* at 37-43.

³⁷ David Ong, *The Convention on International Trade in Endangered Species (CITES, 1973): Implications of Recent Developments in International and EC Environmental Law*, 10 J. ENVTL. L. 291-314 (1998).

³⁸ Sand (1997), *supra* note 4, principally at 35-46.

³⁹ “The use of...non-treaty-based strategies [has] been held out as evidence of the dynamic, flexible nature of CITES. While one of the older international environmental treaties, CITES is arguably among the most modern because it constantly seeks conservation strategies within the framework of CITES even if the language of CITES does not clearly provide for such mechanisms (emphasis in original).” DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW & POLICY* 1116 (3d. ed. 2007); MICHAEL BOWMAN, PETER DAVIES & CATHERINE REDGWELL, *LYSTER’S INTERNATIONAL WILDLIFE LAW* 484-485 and 533 (2nd. ed. 2010) (arguing that the success of CITES is largely attributable to its administrative system, which means there is “no chance” of it ever becoming a “sleeping treaty”). See also Geoffrey Wandesforde-Smith, *From Sleeping Treaties to the Giddy Insomnia of Global Governance: How International Wildlife Law Makes Headway*, 15 JIWLP 80-94 (2012); Geoffrey Wandesforde-Smith, *On the Life and Death of Wildlife Treaties*, 18 JIWLP 84-96 (2015); ED COUZENS, *WHALES & ELEPHANTS IN INTERNATIONAL CONSERVATION LAW & POLITICS: A COMPARATIVE STUDY* 121-154 (2014). The work that ostensibly focuses on the means and mechanisms of treaty adaptation in CITES is actually an historical reference work by a former CITES Secretary-General. See WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES* (9th ed. 2011), online at <https://portals.iucn.org/library/efiles/edocs/CITES-012-2011.pdf> (accessed 1 August 2016).

⁴⁰ Sand (1997), *supra* note 4, at 36.

⁴¹ *Id.* at 36-38.

⁴² *Id.* at 38-40; Sand (2013), *supra* note 27.

⁴³ Sand (1997), *supra* note 4, at 40-42.

sustainable use perspective developing countries brought to their management plans for wildlife and give it a greater role in setting criteria for listing species in the CITES appendices.⁴⁴ And they learned the value of serious and sustained investments in wildlife trade reporting and monitoring, as well as in compliance assistance, which means providing money and professional and technical help to countries that arguably cannot meet their CITES commitments without such help.⁴⁵

There was, in short, and over many years, a great deal of learning among the hundreds if not thousands of people and organizations involved in the day to day affairs of CITES, as well as in its interstitial administrative structures and growing number of states parties. And that learning was functionally adaptive inasmuch as, first, it kept the regime alive and, second, it allowed for the gradual improvement of the operation and usefulness of the border-control permit system that is the treaty's key compliance mechanism; a device that is at heart really rather mundane and amounts to little more than filling out and processing forms and certificates so that, as wildlife species are taken from the wild and move around the world in trade, there can be inspections made and movements traced and tallied.

But what difference does the steadily increasing country coverage and bureaucratic reliability of all this record-keeping and accounting make to wildlife species on the ground?

It seems...hazardous...to correlate the effectiveness of the Convention directly with the actual (positive or negative) conservation status of a species in its natural habitat or even with the overall volume of trade – considering the multitude of cause-effect relationships, most of which are outside the control of CITES, and recognizing that the Convention is not a priori anti-trade. Attempts at ‘measuring’ conservation success by the number of species transferred from Appendix I to II (on the assumption that de-listing or downlisting would indicate recovery or an ‘out-of-danger’ finding) are equally inconclusive, since many transfer decisions by the [CoP] were made for different administrative reasons.⁴⁶

So, if CITES is not accomplishing much in a legal sense, as Glennon imagined it someday might, and if it is not possible to demonstrate, despite the increasing levels of bureaucratic and administrative sophistication and adaptation Sand detailed, that the treaty regime is a sturdy bulwark against the multitude of cause-effect relationships that affect the status of species on the ground, what is it doing?

4. Applauding CITES as an Instrument for International Mobilization

Reviewing the judgments legal commentators had already entered about the treaty regime, Sand in 1997 found most of them favorable,⁴⁷ although in truth some amounted to little more than faint praise. The outlier judgments were, on the one hand, that the convention was “perhaps the most successful of all international treaties concerned with the conservation of wildlife,”⁴⁸ and that, on the other hand, its accomplishments were little more than symbolic and of no clear

⁴⁴ *Id.* at 42-46.

⁴⁵ *Id.* at 46-52.

⁴⁶ *Id.* at 54.

⁴⁷ *Id.* at 52-54.

⁴⁸ SIMON LYSTER, INTERNATIONAL WILDLIFE LAW: AN ANALYSIS OF INTERNATIONAL TREATIES CONCERNED WITH THE CONSERVATION OF WILDLIFE 240 (1993).

benefit to the status of wildlife.⁴⁹ Sand himself graciously offered that the jury was still out, but that the regime had probably reached the “outer limits”⁵⁰ of what it might reasonably be expected to achieve for endangered species through the regulation of trade.

Sand’s crucial insight was that a great deal had changed in the world since CITES was first negotiated. The controversy, for example, over whether the treaty was about the strict protection rather than the sustainable use of wildlife, or both, saw the regular proceedings of the regime riven by controversy, almost to the point of decisional paralysis, after the up-listing of the elephant to Appendix I at CoP 7 in Lausanne in 1989.

And this ongoing turbulence in the internal environment of the regime was mirrored by growing concern about how CITES, an “old watchdog”⁵¹ of international wildlife law, would adapt to a rapidly changing external environment, where large free trade areas, most notably the European Union, were bound to diminish the relevance of CITES-type border controls, and where there was a need to show that CITES could reinforce and supplement the work being done to protect wildlife through other multi-lateral environmental agreements (MEAs) that had, or arguably could have, an impact on the status of wildlife.⁵²

By 2013, Michael Bowman thought outliers of judgments about CITES had become more pointed than those observed by Sand, especially on the negative side.⁵³ A newer “radical critique”⁵⁴ was serious and threatening enough to deserve careful rebuttal, and in the process of making that case Bowman all but abandoned the adaptation paradigm. The regime instead needed to be much more assertively pluralistic in its embrace of conservation values.⁵⁵ It needed to be much more conscious of its dependence for success on building and maintaining strong networks of relationships with prominent actors in the international conservation community,⁵⁶ particularly other MEAs. And it needed above all to fight back against the perception that it could command and control through regulatory means the behavior of sovereign states whose treatment of wildlife, even endangered wildlife, diverged from treaty norms.

In particular, it should be recognized that the formal allocation of legal regimes to a ‘command-and-control’ category...typically presented for contrast with those that rely on ‘economic incentives,’ represents an analytical schematic which is much more meaningfully applicable at the domestic level, where it seems to have originated. [It offers] gravely diminished explanatory power when translated into the international arena, especially where conservation is concerned, for the reality is that...biodiversity-related treaties [are] less concerned with ‘commanding and controlling’ than with ‘committing and cajoling’, and for good measure tend to incorporate

⁴⁹ Kosloff & Trexler (1987); Trexler (1989), *supra* note 14.

⁵⁰ Sand (1997), *supra* note 4, at 55.

⁵¹ The description of both CITES and the International Convention for the Regulation of Whaling (ICRW, 1946) as old watchdogs of international wildlife law occurs in COUZENS (2014), *supra* note 39.

⁵² Sand (1997), *supra* note 4, at 55-58. See also Richard Caddell, *Inter-Treaty Cooperation, Biodiversity Conservation and the Trade in Endangered Species*, 22 RECIEL 264-280 (2013).

⁵³ Michael Bowman, *A Tale of Two CITES: Divergent Perspectives upon the Effectiveness of the Wildlife Trade Convention*, 22 RECIEL 228-238 (2013).

⁵⁴ *Id.* at 229.

⁵⁵ *Id.* at 238.

⁵⁶ *Id.* at 231 (noting the vital role a wide range of NGOs have long played in holding states to account for their compliance with CITES through monitoring and investigative work).

significant additional elements within their agenda – the aspirations to ‘elucidate and educate’ and ‘foster and facilitate’ being among the most obvious that come to mind (citations omitted).⁵⁷

Once it is negotiated and agreed, then, the work of a treaty regime like CITES is not accomplished, *pace* Glennon, through the legal process nor, *pace* Sand, through the increasingly inventive adaptation of initially primitive bureaucratic structures and processes, which then have a trickle down impact on range state behavior. The work with the most payoff is the work of persuasion,⁵⁸ of forging broad alliances,⁵⁹ of marshalling the best available science,⁶⁰ of high level political engagement,⁶¹ and of resource accumulation.⁶²

The fate of endangered species, especially of charismatic megafauna like the elephant, attracts tremendous international interest; in public opinion, in the media, in the conservation NGO community, in political leadership circles in many, probably most, of the now more than 180 countries that are parties to CITES, and among scholars.⁶³ This salient interest is what brings over 2,000 participants and more than 170 national delegations to a CITES CoP, like the last one in Bangkok.⁶⁴ It is what undergirds vigorous participation in the work of multiple CITES subsidiary bodies, month after month, year after year.⁶⁵

It is, in short, what enables the international mobilization on multiple fronts of the various political and scientific pressures that have some chance of helping to save dying elephants, because they extend the reach of CITES beyond the narrow set of trading variables it can attempt to control by virtue of its legal terms of reference, and on which in the past it has been fixated, to the multitude of cause and effect relationships it must try to influence, if it wants to appear responsive to international opinion and have some measure of real success in saving elephants,

⁵⁷ *Id.* at 235.

⁵⁸ Scanlon (2013), *supra* note 5, at 222-223 (noting how parties have been persuaded to forge broad alliances and set past differences aside so decisions can again start to be made, notably at Bangkok about marine species and tropical timber).

⁵⁹ *Id.* at 224 and 226 (profiling the strong and increasing involvement of CITES in the work of the International Consortium on the Combatting of Wildlife Crime [ICWC], the world’s leading intergovernmental initiative in the fight against wildlife crime and a coalition put together by CITES, the International Criminal Police Organization [INTERPOL], the UN Office on Drugs and Crime [UNODC], the World Bank, and the World Customs Organization).

⁶⁰ *Id.* at 223-224 (commenting on the advice provided about elephants and rhinos by the Monitoring the Illegal Killing in Elephants [MIKE] program, the Elephant Trade Information System [ETIS] managed by TRAFFIC, and the African and Asian Rhino Specialist Groups of the IUCN Species Survival Commission).

⁶¹ *Id.* at 224.

⁶² *Id.* at 225-226 (involving the African and Asian Development Banks, the Global Environment Facility, the World Bank, and the United Nations Development Program).

⁶³ See e.g., Bill Padgett, *The African Elephant, Africa, and CITES*, 2 IND. J. GLOBAL LEGAL STUD. 529-552 (1995); Beth Allgood, Marina Ratchford & Peter LaFontaine, *U.S. Ivory Trade: Can a Crackdown on Trafficking Save the Last Titan?* 20 ANIMAL L. 27-77 (2013); Joseph Vandegrift, *Elephant Poaching: CITES Failure to Combat the Growth in Chinese Demand for Ivory*, 31 VA. ENVTL. L. J. 102-135 (2013); Raneen Khooshie Lal Panjabi, *For Trinkets, Tonics and Terrorism: International Wildlife Poaching in the Twenty-First Century*, 43 GA. J. INT’L & COMP. L. 1-92 (2014); Liz Rasheed, *Is CITES Endangered?* NYU ENVTL. L. REV. SYNDICATE (23 Nov. 2015), online at <http://nyuelj.org/syndicate/environmental-law-review-syndicate-week-of-november-23rd> (accessed 1 August 2016); Troy Albert, *The Elephant in the Room*, 31 J. ENVTL. L. & LITIG. 121-146 (2015); Morgan Manley, *The (Inter)national Strategy: An Ivory Trade Ban in the United States and China*, 38 FORDHAM INT’L L. J. 1511-1584 (2015).

⁶⁴ Summary of the Sixteenth Meeting of the Conference of the Parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora: 3-14 March 2013, 21(83) EARTH NEGOTIATIONS BULL. (18 Mar. 2013) (online at <http://www.iisd.ca/download/pdf/enb2183e.pdf>, accessed 1 August 2016).

⁶⁵ See the calendar of CITES meetings reported on by the Earth Negotiations Bulletin of the International Institute for Sustainable Development just since CITES CoP 11 in Nairobi in April of 2000 at <http://www.iisd.ca/vol21/> (accessed 1 Aug. 2016).

and other species. It is the strategic vision for CITES that John Scanlon embraces,⁶⁶ looking ahead to CoP 17 in Johannesburg⁶⁷ and asserting that no other wildlife treaty can keep the pressure on. What really matters in the end, then, for the elephant and other species is not the law that is in the treaty but the “interest and passion for wildlife” that CITES can arouse.⁶⁸

All of which leaves us with two pressing questions, neither of which yet has very good answers.

The first is whether the mobilization of the interest and passion of the international community through CITES to combat wildlife crime is making any difference. The best available estimates of trends in the legal and illegal taking of key species were not likely to be released until just prior to CITES CoP 17. But the CITES Secretariat is clearly anticipating that the short term trends, at least, will be favorable. A press release in late July 2016 reported that:

Two CITES monitoring programs – [ETIS and MIKE] - indicate that the sharp upward trends in poaching, which started in 2006, have started to level off, with continental levels of illegal killing of elephants stabilizing or slightly decreasing. However, the levels of poaching remain far too high to allow elephant populations to recover, with some populations [still] facing risk of local extinction. Southern Africa continues to stand out as the sub-region where overall poaching rates have remained consistently lowest in the period 2006-2015, which was marked by a surge in poaching across Africa.⁶⁹

This news was good enough for a claim that the “momentum generated over the past five years” was paying dividends and that “sustained and collective effort with strong political support” had had an impact “on the front lines...from the rangers in the field, to police and customs at ports of entry and exit, and across illicit markets.”⁷⁰ There was no clear indication, however, of what this momentum had yielded in terms of interdictions, arrests, prosecutions, and convictions in courts of law.

The second question, then, is where *is* the law in all of this?

5. Looking Beyond CITES to Places Where Law Is Abundant -- but an Empty Threat

When Glennon asked his provocative question⁷¹ and then went on to imagine that states caring deeply about endangered species like the elephant would one day bring actions, perhaps in the International Court of Justice, against other states for breach of their obligations *erga omnes* to

⁶⁶ Scanlon’s strategic vision should be differentiated from that of the treaty regime itself. See CITES, Implementation of the CITES Strategic Vision: 2008-2020, SC66 Doc.14, (24 Nov. 2015), online at <https://cites.org/com/sc/66/index.php> (accessed 1 August 2016).

⁶⁷ But see Annecoos Wiersema, *Uncertainty and Markets for Endangered Species under CITES*, 22 RECIEL 239-250 (2013) (anticipating that at CoP 17 parties would likely be asked to consider authorizing legal trade in some of the most iconic endangered species covered by the treaty - elephants, rhinoceroses and tigers - many of the sub-populations of which have been listed on Appendix I of CITES for several years, and arguing that commercial international trade in them and their parts should continue to be banned).

⁶⁸ Scanlon (2016), *supra* note 5.

⁶⁹ CITES Press Release, Some Positive Signs but African Elephants Continue to Face Serious Threats (28 July 2016), online at https://cites.org/eng/news/pr/some_positive_signs_african_elephants_continue_face_serious_threats_280716 (accessed 1 August 2016).

⁷⁰ *Id.*

⁷¹ Glennon (1990), *supra* note 3.

protect endangered species, no-one considered him to be a starry-eyed idealist or published a rebuttal telling him that he was barking up the wrong tree.

In truth, Glennon's purpose was less to herald a coming golden age of international endangered species litigation and subsequent court judgments than it was to re-align the conversation about law and endangered species among international legal scholars. He wanted to turn away from talk about how law could be a *disincentive* to destructive wildlife trade – a purpose for which CITES was by his own analysis an imperfect instrument – and towards the neo-liberal dialogue about achieving conservation through *incentives* that had already intrigued resource economists and wildlife managers around the world but especially in Africa.⁷²

It was a clever turn on Glennon's part, and nicely timed. He dutifully said in plain language what every other scholar has had to say since the treaty was agreed in 1973, namely that to be effective CITES requires domestic implementation by parties to it.⁷³ But like his colleagues, both then and since, Glennon paid no serious attention to what domestic law was, or was not, accomplishing. He observed superficially and with a very considerable degree of optimism that the overall level of compliance with CITES requirements in domestic wildlife legislation seemed to be “quite high,” and high enough in his view to make the general principles embodied in states' domestic endangered species legislation, which he did not examine in detail, a valid source of international customary law.⁷⁴ But that was not then and is not now the case.⁷⁵

Indeed, it is only since the Royal Foundation and United for Wildlife thought to commission a desktop study of domestic wildlife law and litigation across a wide array of developing countries that it has become apparent, with a level of detail we have not seen before,⁷⁶ just how much of an empty threat the law is to those who take wildlife illegally, especially endangered wildlife, in African and Asian range states. The work was done in two parts on a *pro bono* basis by teams of lawyers and legal assistants working in the world-wide offices of DLA Piper.⁷⁷ The first report was compiled by a team of 55 lawyers working in 15

⁷² *Id.* at 28. See also the articles assembled and edited by Arielle Levine & Geoffrey Wandesforde-Smith in *Wildlife, Markets, States and Communities in Africa*, 7 *JIWLP* 135-216 (2004); DAN BROCKINGTON, ROSALEEN DUFFY & JIM IGOE, *NATURE UNBOUND: CONSERVATION, CAPITALISM & THE FUTURE OF PROTECTED AREAS* (2008); Geoffrey Wandesforde-Smith, Nicholas Watts & Arielle Levine, *Wildlife Conservation and Protected Areas: Darwin, Marx, and Modern Science in the Search for Patterns That Connect*, 13 *JIWLP* 357-374 (2010).

⁷³ Glennon (1990), *supra* note 3, at 31. See also the clear recollections of Marshall Jones and Lee Talbot of the bedrock understanding on this matter that prevailed when CITES was first negotiated, in *Fish and Wildlife News* (Winter 2013), *supra* note 9.

⁷⁴ *Id.*

⁷⁵ CITES, National Laws for Implementing the Convention, online at <https://cites.org/legislation> (accessed 1 August 2016) (only 48.3% of signatory states have national legislation that generally meets the requirements for implementing CITES, despite a special program initiated in 1992 to remedy this deficiency); CITES, National Laws for Implementation of the Convention, SC66 Doc.26.1 (11 Dec. 2015), *supra* note 26. See also Sand (1997), *supra* note 4, at 46-48. The early history of the CITES National Legislation Project is told in ROSALIND REEVE, *POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY & COMPLIANCE* 134-158 (2002).

⁷⁶ *But see* Library of Congress, *Wildlife Trafficking and Poaching: Botswana, Central African Republic, Democratic Republic of Congo, Kenya, Mozambique, South Africa, Tanzania* (Global Legal Research Center, Jan. 2013), online at <http://www.loc.gov/law/help/wildlife-poaching/trafficking-and-poaching.pdf> (accessed 1 August 2016) (summarizing what domestic wildlife laws say in these countries but not how they are implemented).

⁷⁷ DLA Piper, *Empty Threat: Does the Law Combat Illegal Wildlife Trade? An Eleven-Country Review of Legislative and Judicial Approaches* (London: February 2014) (hereinafter *Empty Threat* (2014)), online at <http://www.dlapiperprobono.com/export/sites/pro-bono/downloads/pdfs/Illegal-Wildlife-Trade-Report-2014.pdf> (accessed 1 August 2016); DLA Piper, *Empty Threat: Does the Law Combat Illegal Wildlife Trade? A Review of Legislative and Judicial Approaches in Fifteen Jurisdictions* (London, May 2015) (hereinafter *Empty Threat* (2015)),

offices around the world and covered 11 countries.⁷⁸ The second report involved 80 lawyers in 25 different offices and dealt with a further 15 jurisdictions.⁷⁹

The information contained in these reports and the methodology by which it was assembled both need to be treated with circumspection. The reports cannot be said to represent anything more than a first effort to come to grips with the sad state of wildlife law and related legal processes in 26 developing countries. The structure of the reports gives the appearance that data were collected systematically, so as to give a basis for comparative analysis as between the countries. Thus, for each of the 26 countries covered by the 2014 and 2015 reports the analysis is presented under a uniform set of headings: an executive summary, followed by sections dealing with each country's principal wildlife legislation, the penalties exacted for violating those laws, ancillary legislation dealing with topics such as money laundering, racketeering and customs violations, an assessment of each country's judicial process and its capacity for handling wildlife cases, and a set of conclusions.

In fact, however, the 26 country reports are substantially idiosyncratic and rely heavily in places on anecdotal information, sometimes from un-attributable sources. Comparisons among countries are also limited by the substantially different legal traditions and cultures of, say, the Anglophone and the Francophone range states of Africa and Asia, and of China, which is often of interest as a consumer rather than a producer state in wildlife trade but of great interest nonetheless.

But the DLA Piper reports provide a good, broad, cross-sectional slice of a reality about wildlife law that conventional legal scholarship has assiduously ignored for far too long,⁸⁰ most especially in relation to CITES, where the implementation of domestic law is crucial for success. The reports are perhaps best understood as an open invitation for international legal scholars and their students to roll up their sleeves and get to work, examining even more carefully and

online at <http://www.dlapiperprobono.com/export/sites/pro-bono/downloads/pdfs/Illegal-Wildlife-Trade-Report-2015.pdf> (accessed 1 August 2016).

⁷⁸ Empty Threat (2014), *supra* note 77, at 1 and 281-282. The countries are Botswana, Cameroon, China, Democratic Republic of Congo, Kenya, Malaysia, the Philippines, Tanzania, Thailand, Uganda, and Vietnam.

⁷⁹ Empty Threat (2015), *supra* note 77, at 1 and 491-493. The countries are Angola, Cambodia, Republic of the Congo, Gabon, Indonesia, Laos, Mongolia, Mozambique, Myanmar, Namibia, Pakistan, South Africa, Sri Lanka, Zambia, and Zimbabwe.

⁸⁰ Legal scholars are not alone in this. Social scientists learned the value of looking intently at the domestic politics and law of wildlife in critiques of the community-based natural resource management fad that swept through Africa in the 1980s and 1990s. See CLARK GIBSON, POLITICIANS & POACHERS: THE POLITICAL ECONOMY OF WILDLIFE POLICY IN AFRICA (1999); ROSALEEN DUFFY, KILLING FOR CONSERVATION: WILDLIFE POLICY IN ZIMBABWE (2000). But there was little subsequent work. For evidence of some interest in how CITES might work domestically, though not in how it actually works in domestic courts of law, see Joni Baker, *A Substantive Theory of the Relative Efficiency of Environmental Treaty Compliance Strategies: The Case of CITES*, 2 JIWLP 1-45 (1999); Lye Lin-Heng, *The Implementation of the Convention on International Trade in Endangered Species in Singapore*, 2 JIWLP 46-63 (1999); Govindasamy Agoramoorthy & Minna Hsu, *CITES Implementation Through the Wildlife Conservation Law of Taiwan*, 2 JIWLP 64-68 (1999); Joel Heinen & Diwakar Chapagain, *On the Expansion of Species Protection in Nepal: Advances and Pitfalls of New Efforts to Implement and Comply with CITES*, 5 JIWLP 235-250 (2002); Inés Arroyo-Quiroz, Ramón Perez-Gil & Nigel Leader Williams, *Developing Countries and the Implementation of CITES: The Mexican Experience*, 8 JIWLP 13-49 (2005); Jerry McBeath & Jenifer Huang McBeath, *Biodiversity Conservation in China: Policies and Practice*, 9 JIWLP 293-317 (2006); David Wilkie et al., *Can Taxation Contribute to Sustainable Management of the Bushmeat Trade? Evidence from Gabon and Cameroon*, 9 JIWLP 335-349 (2006); Govindasamy Agoramoorthy, *Enforcement Challenges of Taiwan's Wildlife Conservation and Animal Protection Laws*, 12 JIWLP 190-209 (2009); Melissa Geane Lewis, *CITES and Rural Livelihoods: The Role of CITES in Making Wildlife Conservation and Poverty Reduction Mutually Supportive*, 12 JIWLP 248-275 (2009).

systematically how and why wildlife and related laws work the way they do in any or all of the 26 countries covered by the reports, and other countries too, and how to achieve better outcomes for wildlife in conjunction with CITES.

In the interim, several important points are already in focus. “With few exceptions,” the larger and more recent of the two reports concludes, “weaknesses exist in the principal legislation of each of the [fifteen] countries analysed...[including] significant loopholes, [substantial] variations [in] provincial implementation [as in South Africa and Pakistan], inadequate penalties, and in some cases extremely antiquated legislation or legislation...expressly contrary to the country’s obligations under CITES.”⁸¹ So, while much domestic legislation exists and often looks good on paper, as in Kenya and Zimbabwe,⁸² it might not be backed up by implementing regulations, as also in Mozambique.⁸³ And the lack of resources and capacity for law enforcement is chronic.

Most states, for example, cannot properly monitor the status of their wildlife.⁸⁴ Borders often cannot be controlled, a telling deficiency vis-à-vis the permit and inspection system CITES tries to operate.⁸⁵ And in the rare instances where prosecutions are brought and cases tried, the underlying investigative and forensic work and the observance of basic judicial process in charging violators and bringing them to trial are often so poor that judges in their discretion feel compelled to waive fines, reduce or suspend sentences, and avoid custodial sentences altogether.⁸⁶ Across the countries observed “corruption within government agencies and the court system [is] a serious problem.”⁸⁷

All jurisdictions in [the 2015 report] were ranked in the bottom half of Transparency International’s Corruption Perceptions Index...with the exception of Namibia and South Africa... The link between corruption and wildlife trade is clear. Wildlife crime and trade is often facilitated by corruption, through bribery of...patrol officers, border guards and customs officials, falsification of documentation and other means. The legislative and prosecutorial framework that a country puts in place to tackle corruption and associated offences is therefore as important as other measures taken to tackle the illegal wildlife trade directly.⁸⁸

This last point is especially telling because, although every country has on paper a basic framework of law for wildlife, the materials needed to understand how it really works are typically difficult and sometimes impossible for external (and internal) observers to find. Across the 26 countries covered by the *Empty Threat* reports there is obviously great variability and some risk, therefore, in relying too heavily on a single country’s experience to highlight critical issues. But it ought to be the case that, if Glennon’s 1990 optimism about compliance with

⁸¹ Empty Threat (2015), *supra* note 77, at 2. South Africa is in *id.* at 353-390 and Pakistan in *id.* at 317-352.

⁸² For Kenya *see* Empty Threat (2014), *supra* note 77, at 98-126; for Zimbabwe, *see* Empty Threat (2015), *supra* note 77, at 453-459. *See also* Library of Congress, Kenya: Implementation of New Wildlife Law Expedited, online at <http://www.loc.gov/law/foreign-news/article/kenya-implementation-of-new-wildlife-law-expedited/> (accessed 1 August 2016).

⁸³ For Mozambique, *see* Empty Threat (2015), *supra* note 77, at 213-245.

⁸⁴ *Id.* at 4.

⁸⁵ *Id.*

⁸⁶ *Id.* at 6-7 (noting that in some countries there is no known record of a court ever imposing a custodial sentence for wildlife crime).

⁸⁷ *Id.* at 6.

⁸⁸ *Id.*

CITES requirements in domestic wildlife legislation were to be evident anywhere it would be in Kenya, which became a party to CITES nearly forty years ago in 1978 and where there is an internationally well-recognized capacity for wildlife management, focused in the Kenya Wildlife Service.⁸⁹

Kenya is also an interesting case because it recently adopted but has yet to fully implement a new statute⁹⁰ to replace the Wildlife (Conservation and Management) Act of 1976,⁹¹ it is home to an NGO that vigorously monitors wildlife law in Kenya,⁹² and there is access, quite unusually among the developing countries covered by the *Empty Threat* reports, to published records of judicial decisions, at least at the appellate level, through an online database maintained by the National Council for Law Reporting.⁹³ On their face, the three appellate cases cited in the *Empty Threat* report on Kenya⁹⁴ do not tell us much about Kenya's internalization of the norms embedded in the treaty, even though wildlife-related trials are increasingly subject to appeal.⁹⁵

But what we learn from a more thorough analysis of the way wildlife law works in Kenya is that outcomes in appellate cases are a reflection of what is happening elsewhere in the Kenyan legal system.

Thus, in eighteen local magistrate courts between 2008 and 2013 only 4% of those convicted of wildlife crimes went to jail and only 7% of offenders in ivory and rhino horn cases were imprisoned after conviction.⁹⁶ Among the 743 cases registered for the study, 70% of case files were missing and not one conviction could be found relating to the port of Mombasa, which is otherwise known to be a major transit point for illegally traded wildlife.⁹⁷ A chief reason for this is that the section of the much vaunted Kenyan wildlife law passed in 2013 that sharply increases penalties for wildlife crimes does not specify what constitutes an offence under the Act. So, it is hard to charge offences in the magistrates' courts in ways that will be uncontested on appeal or lead to conflicting appellate decisions and dismissals.⁹⁸

⁸⁹ See e.g. the fourteen papers assembled and edited by John Waitthaka in *The Kenya Wildlife Service in the 21st Century: Protecting Globally Significant Areas and Resources*, 29 GEO. WRIGHT F. 21-125 (2012).

⁹⁰ The Wildlife Conservation and Management Act, 2013, online at <http://faolex.fao.org/docs/pdf/ken134375.pdf> (accessed 1 August 2016). The new statute has not yet been determined to meet the criteria for compliance with CITES. See <https://cites.org/sites/default/files/eng/com/sc/66/Inf/E-SC66-Inf-19.pdf> (accessed 1 August 2016).

⁹¹ The Wildlife (Conservation and Management) Act, 1976, online at <http://faolex.fao.org/docs/pdf/ken7750.pdf> (accessed 1 August 2016).

⁹² WildlifeDirect is a charity registered in both Kenya and the U.S. and founded in 2005 by Richard Leakey. See Paula Kahumbu et al., *Scoping Study on the Prosecution of Wildlife Related Crimes in Kenyan Courts: January 2008 to June 2013* (WildlifeDirect, Nairobi, Kenya, 2014) (online at <http://www.thedswt.org.uk/wildlifecrimekenya.pdf>, (accessed 1 August 2016). A second project covering the years 2014 and 2015 was launched in June, 2016.

⁹³ See <http://www.kenyalaw.org/kl/index.php?id=115> (accessed 1 August 2016).

⁹⁴ Samuel Macharia Mwangi & Another v. Republic, [2009] eKLR (29 Jan. 2009), online at <http://kenyalaw.org/caselaw/cases/view/54332/> (last accessed 1 August 2016); Koyet Lemusini & Four Others v. Republic, [2011] eKLR (22 Feb. 2011), online at <http://kenyalaw.org/caselaw/cases/view/74286/> (accessed 1 August 2016); Joseph Kioko v. Republic [2012] eKLR (2 Aug. 2012), online at <http://kenyalaw.org/caselaw/cases/view/81923/> (accessed 1 August 2016).

⁹⁵ Sam Weru, *Wildlife Protection and Trafficking Assessment in Kenya: Drivers and Trends of Transnational Wildlife Crime in Kenya and its Role as a Transit Point 33* (TRAFFIC, Cambridge, UK, May 2016).

⁹⁶ *Id.* at 33, summarizing Kahumbu et al. (2014), *supra* note 92.

⁹⁷ Weru (2016), *supra* note 95, at 33.

⁹⁸ *Id.* (noting how this adds to the local burdens on investigators, prosecutors, and the courts, and stretches already thin resources for expert and professional witnesses).

Meanwhile, at the national level, although the 2010 Kenya Constitution makes all the environmental treaties to which Kenya is a party, including CITES, part of domestic law, “their importance is rarely considered at national level,”⁹⁹ adherence to international law is little more than “nominal,”¹⁰⁰ and there is, therefore, “a huge disconnect between international and local legal regimes.”¹⁰¹ One might suppose from the large amounts of data reported every month and summarized every year by TRAFFIC about arrests, seizures, prosecutions, and even occasionally convictions for wildlife trade offences in Kenya, and many other countries, some of them in the developed world, that together international and domestic law are having a major impact. The reported data are hard to distinguish, however, from random occurrences, their cumulative significance for the condition of wildlife is unanalyzed, and as Weru observes it’s impossible to tell whether the reported incidents “are targeting the middlemen and kingpins of illegal trade, rather than easily replaceable low-level poachers and transporters.”¹⁰²

This all seems to me to tend to the conclusion that the prospects for making international legal standards for the protection of endangered species effective in the judicial systems of developing countries, like Kenya, are substantially uncertain, whether the focus is on trade or crime as a source of threat. And this is notwithstanding the fact that the existence of the CITES regime has for several decades now created tremendous pressure on states parties,¹⁰³ including Kenya,¹⁰⁴ to conform their legislation to international norms and to ensure that their domestic judicial processes work in wildlife cases, both with respect to trade and more broadly, in support of those norms. Glennon, Sand, Scanlon, and others, have all been holding out the hope that one way or another an evolving international treaty on trade in species will eventually have positive spillover effects in range states on the other factors that endanger species. But now that we are able to shift our gaze to what is actually happening in those states this spillover hope for international law seems vain and domestic law but a collection of empty threats.

So, who or what or where are the legal resources that have some realistic chance of saving dying elephants?

⁹⁹ *Id.* at 35.

¹⁰⁰ *Id.* at 37.

¹⁰¹ *Id.* at 35.

¹⁰² *Id.* at 38.

¹⁰³ Bowman (2013), *supra* note 53; Scanlon (2013), *supra* note 5.

¹⁰⁴ At CITES CoP 16 in Bangkok in 2013, Kenya was one of eight source, transit, and consumer countries identified as most responsible for allowing illegal ivory trade to flourish and required to draft and implement a National Ivory Action Plan. For a progress report, *see* <https://cites.org/sites/default/files/eng/com/sc/66/E-SC66-29-Rev1.pdf> (accessed 1 August 2016).