

Chapter 19

Multilateral environmental agreements and illegality

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Introduction

A series of multilateral environmental agreements (MEAs), such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, follow policies and regulatory approaches that foresee restrictions on and supervision of international trade and/or transboundary movements of controlled commodities. These are crucial measures to fulfil the regimes' underlying objectives of environmental protection.¹ Unfortunately, however, the inevitable corollary of such regulatory measures are transboundary black markets that need to be addressed from a global, collective perspective.

The aforementioned MEAs feature provisions establishing *inter alia* prior informed consent procedures or licensing systems for imports and exports of controlled commodities. Nevertheless, the degree of explicitness with which these MEAs' provisions address the issue of illegality and, especially, that of criminalization of illegal trade, varies. Whereas the Montreal Protocol does not mention directly the issue, hence leaving it to the discretion of its implementation committee and the states parties in the Meeting of the Parties (MoP), CITES (Article VIII(1)) requires states parties 'to penalize trade in, or possession of, [CITES-listed] specimens, or both'. The Basel Convention (Articles 2(21), 9(1)), in turn, provides a specific definition of 'illegal traffic' and makes the normative assertion that any instance of illegal traffic in

¹ Other MEAs, such as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Stockholm Convention on Persistent Organic Pollutants, and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, also feature international trade control measures.

hazardous wastes or other wastes is to be considered as criminal (Basel Convention Article 4(3)). While some consider this particular wording as ‘fairly rhetorical’ (Kummer 1999, p. 70), in actuality, states must enact implementing legislation – *inter alia*, criminal measures – and ‘seek enforcement *vis-à-vis* private parties that act in contravention of the provisions of the convention (or, rather, in contravention of the national provisions that give effect to the convention)’ (Nollkaemper 2002, p. 170; Basel Convention Article 4(4)).²

In the context of the European Union, for example, Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law harmonizes the member states’ legislation, amongst other things, with respect to environmentally harmful conducts – whether committed intentionally or with negligence – that are to be typified as criminal offences. Amongst others, these include shipments of waste, trade in specimens of protected wild fauna or flora species, as well as the production, importation, exportation, placing on the market or use of ozone depleting substances (ODSs) (Directive 2008/99/EC Article 3(c), (g), (i)). These provisions had to be ‘transposed’, that is, incorporated, into the respective national legal orders and fully implemented by law enforcement bodies (customs, police and prosecutors) and the judiciaries of each Member State by the end of December 2010.³ Yet, in addition to weak national domestic enforcement capacities, especially in developing countries, one of the pervasive challenges for regime effectiveness that MEAs face is their uneven degree of incorporation into domestic legal orders of all states parties. Needless to say, substantive mismatches in the implementation and enforcement of domestic legislative measures that incorporate central provisions of MEAs on illicit trade in controlled commodities create legal loopholes that allow transnational black markets to flourish.

² Similar wording is found in CITES Article VIII(1) and, in more general terms, also in the Vienna Convention for the Protection of the Ozone Layer Article 2(2)(b), which serves as a framework convention to the Montreal Protocol.

³ See all national implementation measures at <<http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32008L0099&qid=1444030293125>> (accessed 5 Oct. 2015)

Furthermore, the way in which individual MEAs address the challenges of black markets in controlled commodities and, more specifically, the way in which they define and shape illegality is certainly not limited to the legal wording contained in given treaty provisions. Rather, MEAs ought to be seen as the foundational instrument of dynamic sectoral legal systems (Gehring 1990, 2007). The basic legally-binding principles and rules established in MEAs are ultimately fleshed out through decisions and resolutions adopted by the states parties. Those decisions and resolutions, in turn, contribute to shaping the actual content of states parties' international commitments (Brunnée 2002).

Against this backdrop, this chapter explores the ways in which individual MEAs such as CITES, the Montreal Protocol and the Basel Convention have addressed the challenges of black markets in key transnational environmental crime (TEC) sectors. In this context, it evaluates the extent to which those agreements have also had an influence on what constitutes criminal or illegal environmental practice across borders. It also examines the relationships established between and among individual MEAs through the use of memoranda of understandings (MoUs) and other partnership devices, as well as the normative and operational conversations that arise with the global crime prevention and criminal justice communities of practice.

To this end, the first section portrays MEAs as autonomous systems of governance that feature institutions with quasi-legislative and adjudicatory authority that have the capacity to effectuate normative and behavioural change at inter- and transnational levels and constitute essential parts of the regime or governance complex for TEC. The second, in turn, appraises the innovative patterns of inter-institutional coordination and cooperation among MEAs, and between MEAs and other international institutions so as to enhance regime effectiveness, particularly with respect to the prevention of illegal traffic in controlled commodities. At the same time, it focuses on normative and operational conversations that have been established with the global crime prevention and criminal justice communities of practice. The final substantive section provides insight on how these horizontal and vertical patterns of cooperation have contributed to shape illegality and combat black markets within each of the three aforementioned regimes, paying particular attention to key operational and enforcement

modalities and strategies for dealing with TEC. The chapter ends with some concluding reflections.

MEAs as autonomous systems of governance

International environmental law has been identified as one of the areas of international regulation where the consideration and protection of common interests has visibly shaped the evolution of that particular field of the international legal order, both from a substantive and from an institutional and procedural perspective. In terms of substance, the identification of issue areas that are perceived to be of ‘common concern to humankind’ has led to the incorporation of principles of inter- and intra-generational equity into global environmental law that have profoundly changed the formerly discretionary role of states in their mutual relations, towards a more functional role, according to which ‘[s]tates are to act in the interest of individuals and groups in society and in the common interest’ (Hey 2009, p. 154).

In the particular field of international environmental law, this shift from bilateralism towards community interests means that the traditional principles concerning the use and exploitation of shared resources in the context of mutual, bilateral relations in classic international law, have been complemented by multilateral treaties – MEAs – addressing the protection of global environmental goods (Fitzmaurice 1994, pp. 220–1). They constitute the multilateral contractual source for international obligations, compliance with which is no longer based on strict reciprocity, but is, rather, owed *erga omnes partes*, that is, to all parties collectively and indistinctively (Brunnée 2007, pp. 565–7).

On the other hand, from an institutional and procedural perspective, the protection of common interests has also encouraged evolution from the discretion of states towards the discretion of global institutions. In ratifying MEAs, rather than providing their specific consent to particular obligations, states issue a general consent to what Daniel Bodansky (1999, p. 604) describes as an ‘ongoing system of governance ... which creates institutions with quasi-legislative and adjudicatory authority’. This means that the capacity of decision-making in the normative development of global environmental law and its implementation in individual situations is being reallocated

from states to international institutions such as the Conference of the Parties (CoPs) in MEAs, which are not submitted 'to the checks and balances associated with the exercise of public powers at the national level' (Hey 2009, p. 155).

In this context, moreover, decision-making patterns that unfolded within the (global) MEAs' bodies for the development and implementation of the treaty provisions are shifting away from classical procedures based on the formal manifestation of consent in response to a general acknowledgment of the need for a more dynamic and flexible approach (Churchill and Ulfstein 2000; Brunnée 2002; Wiersema 2009). As Jutta Brunnée (2005, p. 123) has concluded with respect to this phenomenon, '[t]he reliance on COP decisions ... might suggest either that increasingly attenuated consent suffices to produce formally binding obligations, or that a pattern of non-binding regulation is emerging'. In fact, informal, non-binding norms have often been found to shape practice more effectively than legally binding ones, especially in potentially conflictual contexts (Toope 2007, p. 119). Hence, the MEA's conventional provisions are more and more deliberately implemented through interactional processes resulting in measures of a somewhat indefinite legal value. In sum, these specific features of environmental regimes underpin their notorious trend towards autonomy or self-containment – in other words, regime-specific law-making and enforcement solutions.

The overwhelming majority of MEAs have developed their own treaty-specific compliance regime (or are in the process of doing so). This is indeed the case with the Montreal Protocol (MoP decision IV/5 [1992]), the Basel Convention (CoP decision VI/12 [2002]) and CITES (CoP resolution 14.3 [2007]). Academic literature generally acknowledges that traditional approaches to international law enforcement, such as the suspension or termination of treaties for material breach (Vienna Convention on the Law of Treaties Article 60), state responsibility and liability, and adjudicative dispute settlement does not suit the aforementioned normative and institutional features of MEAs (Fitzmaurice and Redgwell 2000, p. 39ff). Under these circumstances, MEAs have developed endogenous compliance mechanisms akin to those established in other areas of international legal protection of community interests (Ulfstein, with Marauhn and Zimmermann 2007). These mechanisms are typically based on regular reporting and monitoring, as well as on a so-called non-compliance procedure (NCP) which is specifically designed to address individual issues concerning any party in the fulfilment

of their commitments. Operated within the institutional arrangements of the MEA through a small-sized implementation or compliance committee, NCPs are meant to identify, in a cooperative and non-confrontational way, the particular causes of the party's non-compliance so as to adopt bespoke (financial and/or technical) assistance measures to support the party to regain full compliance (Handl 1997). In some NCPs (such as those in the Montreal Protocol and CITES), hard measures, such as the suspension of rights and privileges under the MEA, may also be taken as a last resort.

With this characteristic managerial idiosyncrasy (Chayes and Handler Chayes 1995), NCPs have been widely praised as one of the largely overlooked success stories of international environmental law in the recent past (French 2009, p. 283): designed to elicit compliance with treaty obligations in individual critical situations, they forestall the emergence of legal disputes and, thus, the resort to adjudicative settlement, just as much as they avoid many of the complicated and largely unresolved legal issues of state responsibility for the breach of collective obligations, like those featured in many MEAs (Nègre 2010, p. 810). For the same reason, NCPs are seen as best-suited to foster compliance with dynamic environmental regimes in which the basic legally-binding treaty-based principles and rules are fleshed out to quite a significant extent through CoP decisions of a somewhat 'soft' or uncertain legal value. At the same time, however, despite the enormous administrative, technical and financial effort to implement MEAs and ensure regime effectiveness that NCPs stand for, their underlying managerial rationale has also been accurately criticized by Jan Klabbers (2007, p. 996) as suggesting that 'somehow, compliance seems to be intensely negotiable'.

Inter-institutional cooperation and patterns of coordination with transnational communities of crime prevention and criminal justice

MEAs have thus been shaped as constitutive legal instruments giving rise to legally self-contained or autonomous regimes that channel international cooperation to address a given environmental problem through collective action. The dynamic, multi-faceted and inter-related nature of the issues that MEAs deal with, however, calls for normative coordination and inter-institutional cooperation between them. Transboundary black markets of controlled commodities are undoubtedly one such issue.

In this regard, the scattered institutional framework of global environmental governance may be seen, intuitively, as an obstacle to its effectiveness and problem-solving capacity. Indeed, it has continuously fed the debate about the necessity for a world environment organization (Biermann and Bauer 2005). The United Nations system, in which most of the MEAs' autonomous institutional arrangements are integrated in one way or another (Churchill and Ulfstein 2000; Biermann and Siebenhüner 2009), has a somewhat 'complicated and confusing' track record of administrative coordination, especially in the field of environmental governance (Elliott 2005, p. 37). Nevertheless, the fragmented institutionalization of international environmental law also has a positive reading. According to Konrad von Moltke (2005), the loose network of the MEAs' autonomous institutional arrangements has precisely allowed for bespoke responses and, where necessary, for regional or thematic clustering of treaties and institutions. Therefore, from an institutional perspective, international environmental governance has been accurately described as a 'decentralized network of embedded, nested, clustered, and overlapping institutions' (Kim and Mackey 2013, p. 13; Young 1996, p. 20). As Ellen Hey (2007, pp. 751–5) points out, this network also features a remarkable variety of inter-institutional cooperative arrangements – both for normative regime development and for decision-making in individual situations – that suggest the discrete emergence of global administrative law in this field.

The outstanding flexibility of MEAs to adapt their principles, rules and institutions to changing external conditions has led some scholars to portray international environmental law as a 'complex adaptive system' (Kim and Mackey 2013). As these authors specify, however, this adaptability occurs in the absence of an overarching goal – a 'single, legally binding superior norm' able to steer this adaptive process towards safeguarding the integrity of Earth's life-support system (Kim and Bosselmann 2013). Rather, what drives the normative coordination and inter-institutional cooperation between MEAs, and among MEAs and other treaties and international institutions, are treaty-specific conflict clauses (Wolfrum and Matz 2003; Matz-Lück 2006), as well as secondary rules of general international law, such as the rule of consistent interpretation of treaties and the principle of systemic integration (McLachlan 2005; International Law Commission 2006), or the principle of mutual supportiveness (Pavoni 2010).

Accordingly, informal or de facto institutional interactions have emerged where the respective subject matters of MEAs are interdependent, by self-organizing in loose or informal networks able to address the need for mutual consistency. This strategy has led to ad hoc interlinkages and partnerships across specific MEAs (Scott 2011), as well as with other relevant international institutions (Chambers 2008) and transnational implementation networks. In the specific context of the fight against TEC and, in particular, against illegal trade in environmentally-sensitive controlled commodities, relevant MEAs have established a characteristic pattern of partnerships with international institutions such as the World Customs Organization (WCO), INTERPOL and the United Nations Office on Drugs and Crime (UNODC). The immediate aims of these partnerships were the exchange of information and good practices, as well as the coordination and streamlining of their respective overlapping activities.

The initial cooperative undertakings with the WCO, INTERPOL and UNODC by specific MEAs under discussion here (the Montreal Protocol, the Basel Convention and CITES) eventually developed along two different paths. On the one hand, it grew towards a broad-based United Nations Environment Programme (UNEP)-led cooperative network – the Green Customs Initiative (GCI) – encompassing all global MEAs addressing illicit trade issues including the Organisation for the Prohibition of Chemical Weapons and the aforementioned three institutions. On the other hand, where illicit trade featured discrete patterns that required more focused cooperation, specific coordination fora have been established. This is specifically the case of the International Consortium on Combating Wildlife Crime (ICWC) in the sphere of CITES and the Environmental Network for Optimizing Regulatory Compliance on Illegal Traffic (ENFORCE) under the Basel Convention. We will return to these later in this chapter.

The Green Customs Initiative

Whereas CITES, the Montreal Protocol and the Basel Convention had each, for their part, established cooperative partnerships with the WCO and INTERPOL on the basis of MoUs, their first attempt to seek insight, experience and best practices from each other came with the signature of a MoU between their respective secretariats in April 2002 (Secretariats of the Basel Convention, the Vienna Convention and CITES 2002).

In addition to the establishment of inter-institutional links, such as granting each other observer status, substantive cooperation primarily envisaged the dissemination of information to the relevant enforcement authorities in the respective states parties, such as most common types of illegally-traded commodities, *modus operandi* and routes, as well as the sharing of specific intelligence-gathering and analysing techniques (Secretariats of the Basel Convention, the Vienna Convention and CITES 2002, para. 6).

As already mentioned, however, this initial striving for inter-institutional cooperation was eventually surpassed by the more comprehensive GCI. This UNEP-sponsored informal partnership with the Organisation for the Prohibition of Chemical Weapons, the WCO, INTERPOL and UNODC came into existence in 2004. From its inception, its aim has been to strengthen the capacities of national customs and enforcement personnel, especially in developing countries, for combating illegal traffic in environmentally-sensitive commodities that are controlled under a series of MEAs, including CITES, the Cartagena Protocol, the Basel Convention, the Rotterdam Convention and the Stockholm Convention. The secretariat services for the GCI are provided by the OzonAction Branch of the UNEP Division of Technology, Industry and Economics (UNEP–DTIE) in Paris.

The GCI focuses its activities primarily on the development of training materials (see, for example, UNEP 2008a) and international workshops designed specifically for customs officers so as to increase their awareness of environmental issues as well as their capacity to enforce national environmental laws in line with relevant MEAs. In addition, the GCI regularly organizes regional, sub-regional, national and/or thematic training workshops aimed at customs officers and their trainers (train-the-trainers workshops) in specific (groups of) countries, according to the particular training necessities that have been identified in combating illegal trade with commodities controlled by one or more of the covered MEAs (for a full list of workshops and meetings organized through the GCI, see Green Customs 2013). Occasionally, training workshops have also been developed not only for law enforcement personnel, but also for Supreme and High Court judges and prosecutors as a way to provide ‘integrated capacity building of the enforcement chain’. This was particularly the case with the Judges Symposium held in Paris in June 2011, and hosted by the OzonAction Branch of

UNEP–DTIE and the UNEP Division of Environmental Law and Conventions (see Green Customs 2011).

In this sense, the GCI activities go hand in hand with those of the International Network for Environmental Compliance and Enforcement (INECE), which was founded in 1989 at the initiative of the Dutch Ministry for Environment and the US Environmental Protection Agency and which counts upon the membership and support, amongst others, of UNEP, the World Bank, the European Commission and the Organisation for Economic Co-operation and Development. The INECE portrays itself as ‘a partnership of government and non-government enforcement and compliance practitioners from more than 150 countries’, which aims at ‘raising awareness to compliance and enforcement; developing networks for enforcement cooperation; and strengthening capacity to implement and enforce environmental requirements’ (see INECE no date b). Its webpage features a rich resource library for training and capacity building in environmental law enforcement (INECE no date a). Also, the INECE builds upon partnerships with regional and sub-regional networks of law enforcement practitioners, such as the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL).

Defining and shaping illegality in MEAs

Addressing ODS black markets under the Montreal Protocol

In its original version, that is, prior to the 4 amendments and 13 adjustments adopted and entered into force since 1989, the Montreal Protocol did not directly address the issue of illegal trade in ODSs. It merely prohibited trade with third parties, that is, those countries that had not ratified the Montreal Protocol. By the mid-1990s, states parties became aware of the issue of black markets in controlled ODSs that threatened to jeopardize the regime’s effectiveness (Benedick 1998, p. 273ff). These black markets emerged as the production of controlled substances decreased sharply in developed Western countries, and as cheap, illegally-traded ODSs from developing countries and countries with economies in transition became an attractive alternative to expensive

chlorofluorocarbon-substitutes for small end-users in industrialized countries (Landers 1997, p. 471 ff).

A remarkable institutional reaction from the Montreal Protocol's institutions followed on two fronts. On the one hand, in a delicate diplomatic balancing act, the Implementation Committee proactively supported a series of eastern European countries and former Soviet Republics – most notably the Russian Federation – that were at the epicentre of black markets in ODSs, thus promoting the recovery of full compliance with their respective international commitments (Benedick 1998). This existential crisis of the ozone regime (Werksman 1996), on the other hand, brought about its normative development so as to address more comprehensively the challenge of illicit trade. In September 1997, the 9th MoP adopted the Montreal Amendment that introduced a series of changes into the wording of the Montreal Protocol's Article 4, clarifying the ban of trade in controlled ODSs with non-parties. More importantly, however, it introduced two entirely new provisions that generalized the ad hoc solution adopted in the aforementioned crisis with eastern European countries and former Soviet Republics. The first provision was incorporated in Article 4A, which also bans exports of used, recycled and reclaimed quantities of phased-out ODSs among parties, other than for the purpose of destruction. The second was Article 4B, which in turn requires parties to establish and implement a national licensing system for imports and exports of those substances, according to different schedules set out for developed and developing countries, respectively.

The Montreal Amendment entered into force in November 1999 among those parties that had ratified it. However, the overall ratification pace turned out to be relatively slow, which was understandable for a treaty seeking universal ratification. While having been ratified by 155 countries by the end of summer 2007, crucial countries such as China were still considering their adherence (Lesniewska 2010, p. 482). Universal ratification by all 197 states was finally achieved in April 2014, with

Libya's ratification of the 1997 Montreal Amendment and the 1999 Beijing Amendment.⁴

Despite the regulatory improvements of the Montreal Amendment, illegal trade has nevertheless constantly been on the agenda of the successive MoPs. The intrinsic elusiveness of black markets, uneven implementations of national licensing systems, as well as pervasive delays and incompleteness of reported national data led the Montreal Protocol's institutions and parties to consider the feasibility of developing a system of tracking trade in ODSs. By the mid-2000s, an increased sense of urgency to deal effectively with illegal trade in ODSs had re-emerged, as deadlines for the phase-out of a set of controlled ODSs was approaching, both for developed and developing countries (Lesniewska 2010, p. 482). Accordingly, terms of reference were established in MoP decision XVII/16 (2005) for assessing the feasibility of a system for tracking trade in ODSs. A report was commissioned and published in September 2006 prior to the 18th MoP (Chatham House and Environmental Investigation Agency 2006).

This report provided an assessment of persisting weaknesses in the Montreal Protocol's monitoring systems, comparative lessons from other regimes, interesting collaborative experiences in regional contexts and, finally, a roadmap with options for the immediate, medium and long term. After a brief consultation process with the states parties launched through MoP decision XVIII/18 (2006), MoP decision XIX/12 (2007) adopted a series of merely voluntary recommendations based on the report's central proposals. In particular, these included measures such as:

- (a) Sharing information with other Parties, such as by participating in an informal prior informed consent procedure or similar system;
- (b) Establishing quantitative restrictions, for example import and/or export quotas;
- (c) Establishing permits for each shipment and obliging importers and exporters to report domestically on the use of such permits;

⁴ For the status of ratifications of the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol and its successive Amendments, see Ozone Secretariat (2015).

- (d) Monitoring transit movements (trans-shipments) of ozone-depleting substances, including those passing through duty-free zones, for instance by identifying each shipment with a unique consignment reference number;
- (e) Banning or controlling the use of non-refillable containers;
- (f) Establishing appropriate minimum requirements for labelling and documentation to assist in the monitoring of trade of ozone-depleting substances;
- (g) Cross-checking trade information, including through private-public partnerships;
- (h) Including any other relevant recommendations from the ozone-depleting substances tracking study (Ozone Secretariat 2007, para. 3).

More recently, MoP also requested the Ozone Secretariat to liaise with the WCO ‘to examine the possibility of designating individual Harmonized System codes for the most commonly traded fluorinated substitutes for HCFCs [hydrochlorofluorocarbons] and chlorofluorocarbons (CFCs)’ in order to improve the tracking and monitoring of trade in these ODSs and, hence, interfere with black markets (Ozone Secretariat 2014, para. 1).

As regards the criminalization of illicit trade in ODSs, however, no MOP decisions explicitly require the states parties to complement their domestic legislation for the implementation of the national licensing systems with criminal measures. Rather, the criminalization of illicit trade in ODSs seems to be the result of the specific (informal) governance setting in which transnational black markets of such substances have been dealt, namely, cooperation with the OzonAction Branch of UNEP–DTIE, the WCO and INTERPOL, through the GCI. For instance, the clearest wording with respect to the requirements of criminal legislation for the implementation of Article 4B of the Montreal Protocol is found in fact sheets issued by the UNEP Compliance Assistance Programme. There it is stated that ‘[t]he legislation should recognise illegal production, import and export of ODS as an offence punishable under national laws, with proper penalties’ (UNEP 2004). Equally, these fact sheets recommend that environmental, commercial and customs legislation be complemented with ‘general criminal legislation

that prohibits making false declaration or presenting false documents or includes provisions for money laundering ... or general fraud against the government' (UNEP 2006). These de facto norm-setting activities are then complemented with supporting materials, such as training materials (UNEP 2008b) and strategy papers (UNEP and INECE 2013) elaborated by UNEP in collaboration with the partners of the GCI that provide national customs and enforcement officers, as well as prosecutors and judges, guidance on how to deal with cases of illegal trade in ODSs and networks through which to obtain additional information. These de facto norms, in turn, are relevant criteria that are integrated in the technical and financial support that the Multilateral Fund for the Implementation of the Montreal Protocol and the implementing agencies (the World Bank, the United Nations Development Programme, the United Nations Industrial Development Organization and UNEP–DTIE) provide under the authority of the Implementation Committee to non-compliant parties under the NCP. At the time of writing, countries like Botswana, Dominica, Libya, Mauritania and South Sudan are under the scrutiny of the Implementation Committee for issues concerning their respective national licensing systems (UNEP 2014).

Addressing illegal traffic of hazardous wastes under the Basel Convention

The Basel Convention lays down a series of general obligations regarding the illegal traffic of hazardous wastes, which includes the enactment and enforcement of domestic legislative measures that 'ensure compliance with the restrictions on hazardous waste traffic, the [prior informed consent] procedure, and other relevant provisions, by persons under their national jurisdiction or control' (Kummer 1999, p. 71). Hence, it establishes more detailed hard law obligations for the prevention and punishment of illegal traffic than does the Montreal Protocol. In this sense, it goes as far as allocating international responsibility to any state party involved in illegal movements of hazardous wastes, which are thus obliged to ensure the environmentally-sound disposal of wastes and, eventually, their re-importation (Basel Convention Article 9(2)–(4)).

However, in contrast again to the Montreal Protocol, the flipside of these quite far-reaching, legally-binding obligations is that the Basel Convention's treaty bodies – especially its Secretariat – were equipped with remarkably weak supervisory functions.

This has been generally perceived as one of the regime's major weaknesses (Kummer 1999, p. 82). States involved in an event of illegal movement of hazardous wastes have to cooperate in order to fully implement the aforementioned obligations and the Secretariat may merely 'assist Parties upon request in their identification of cases of illegal traffic and ... circulate immediately to the Parties concerned any information it has received' in this regard (Basel Convention Article 16(1)(i)). Nevertheless, even after the latest amendment of the terms of reference of the Basel Convention's compliance mechanism, the Secretariat generally lacks the capacity to trigger the NCP to bring any event of illegal traffic before the Committee for Administering the Mechanism for Promoting Implementation and Compliance (hereinafter, Implementation and Compliance Committee) (Cardesa-Salzmann 2012, pp. 118–21; Secretariat of the Basel Convention 2012a, p. 26, para. 13). Indeed, the Basel Convention's NCP was not even triggered by Ivory Coast after the Trafigura/Probo Koala incident of August 2006, a fact that reveals that states parties seem to expect little relief from this mechanism in this specific type of illegal traffic case. This feature of the Basel Convention's institutional arrangements exposes quite clearly that the centre of gravity of the compliance control and enforcement functions is displaced in a very significant proportion from the inter-state level to the national level, where not only the administration, but also the judiciary has an increasing role to play (Bodansky and Brunnée 1998).

Following the initial phase of prospective work that CoP commissioned the Open-Ended Ad Hoc Committee for the Implementation of the Basel Convention and the Secretariat for the assessment of ways and means of implementing the Basel Convention's provisions on illegal traffic, the first substantive results were captured in CoP decision III/5 (1995). Among other things, in this decision the parties adopted a 'Form for Confirmed Cases of Illegal Traffic' so as to incentivize states to notify any such events to the Secretariat. They further identified the classification and characterization of wastes as essential tools for the identification and prevention of illegal traffic, thus mandating the Secretariat to establish and consolidate cooperative links with relevant non-governmental organizations (NGOs) and international institutions such as the WCO and INTERPOL. Finally, states also set capacity-building and the development of appropriate technical and institutional infrastructures as

priorities so as to assist parties – especially developing countries – with the enactment and enforcement of stringent national legislation.

After the adoption of this form, the Secretariat also adopted a further guidance document for the detection, prevention and control of illegal traffic in hazardous waste (Secretariat of the Basel Convention 2002). Nevertheless, the Basel Convention's webpage has only published four notified confirmed cases (Secretariat of the Basel Convention no date a), again demonstrating the high legal complexity of illegal traffic cases and the small relief that this mechanism provides for states parties at present.

Notwithstanding, the weakest link in the implementation of the illicit traffic provisions of the Basel Convention is precisely the adoption of stringent national legislation. Indeed, CoP decision III/6 (1995) adopted a model law 'for immediate use' that had been drafted by the Legal Working Group (1995) on the basis of existing national legislations and institutions in different countries. This model law aims to provide guidance to those parties – especially developing countries – that need to enact implementing legislation. It deals specifically with illegal traffic where it describes illegal transboundary movements of hazardous wastes (the attempt, as well as aiding, abetting and conspiring) as an environmental crime that shall be punished (Legal Working Group 1995, Part VII). Moreover, following the request of CoP in decision VII/32 (2004), the Secretariat drafted a complementary checklist for preparation of national implementation legislation under the aegis of the Implementation and Compliance Committee (Secretariat of the Basel Convention no date b). These guidance instruments were recently withdrawn and substituted by the revised and updated manual for the implementation of the Basel Convention adopted through CoP decision 12/8 (2015), which had been prepared by the Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention (2015).

Also in this context, training materials for the prosecution of illegal traffic have been prepared, the latest edition (at the time of writing) having been adopted by CoP decision BC-10/18 (2011) (Secretariat of the Basel Convention 2012b). Finally, in 2013, CoP initiated ENFORCE under the Implementation and Compliance Committee's function of review of general issues of compliance and implementation (CoP decision BC-11/8 (2013)). Its mission is 'to promote parties' compliance with the provisions of the [Basel Convention] pertaining to preventing and combating illegal traffic ... through

the better implementation and enforcement of national law'. The network has a specific mandate to deliver capacity-building activities and tools through a de facto norm-setting process led by relevant experts (CoP decision BC-11/10, Annex I). For reasons of effectiveness, participation in ENFORCE is limited to 25 members and observers (see Secretariat of the Basel Convention no date c). Within this limit, it is open to representatives from state parties to the Basel Convention and to the Basel Convention regional and coordinating centres (having regard to a balanced representation of all five UN regions), as well as to entities with a specific mandate for delivering implementation and enforcement capacity-building activities or other specific roles of relevance for combating illegal traffic. These include, once again, the WCO, INTERPOL and UNEP-DTIE, as well as constituted enforcement networks, such as the Asian Network for Prevention of Illegal Transboundary Movement of Hazardous Wastes, IMPEL-TFS (Transfrontier Shipment of Waste), the GCI, the Regional Enforcement Network, INECE, UNODC and NGOs such as the Basel Action Network. So far, the most relevant outcome of ENFORCE is a report that features a gap analysis of the challenges and needs of countries and stakeholders in combating illegal traffic of hazardous wastes (Isarin 2014).

Addressing black markets in wildlife under CITES: From illegal wildlife traffic to transnational wildlife crime

CITES seeks to contribute to the protection of endangered species of flora and fauna through the regulation of trade in specimens, whether dead or alive, including 'any readily recognizable part or derivative thereof' (CITES Article I(b)). Any imports, exports, re-exports and introductions from the sea of specimens belonging to species covered by CITES need to be authorized through a national licensing system that states parties have to establish and enforce. Trade with CITES-listed specimens may be authorized according to a varying degree of standards and requirements, depending on the species' inclusion in any one of the three appendices. Appendix I, which includes species threatened by extinction, is subject to exceptional conditions; Appendix II, which includes species that are not threatened by extinction, but require trade-control measures in order to ensure its survival; and Appendix III, which includes species that

are protected under the laws of one or several states parties and require cooperation from the other parties to control international trade (CITES Articles III–VII). As pointed out in other chapters in this volume, global illegal wildlife trade associated with international organized crime has been a constant concern for the CITES treaty bodies and its states parties and continues to place the regime's effectiveness under strain 40 years after its entry into force.

As with the Montreal Protocol, and especially the Basel Convention, the focus of enforcement of trade control measures relies primarily on the domestic level. However, even though it differs in many regards from the Montreal Protocol's compliance mechanism, the CITES treaty bodies have gradually developed an analogous institutionalized compliance and enforcement strategy. From a legal perspective, it is based, on the one hand, on the states parties' right to unilaterally adopt 'stricter domestic measures' (that is, product-specific embargos) against non-compliant states under Article XIV(1). On the other hand, the CITES's institutions have developed over time an ad hoc compliance regime, which has been portrayed as a system of multilateral retaliation (that is, sanctions) based on the supervisory and recommendatory powers conferred to the CITES Secretariat and CoP, respectively, under Article XIII (Sand 2013). Under CoP Resolution 14.3 (2007), paragraph 30 states that the Standing Committee has the ultimate power to issue recommendations to suspend 'commercial or all trade in specimens of one or more CITES-listed species ... in cases where a Party's compliance matter is unresolved and persistent and the Party is showing no intention to achieve compliance'. Although praised for its extraordinary effectiveness in quickly eliciting formal compliance by sanctioned states (Sand 2013), the far reaching measures of the CITES compliance mechanism have nevertheless not been able to tackle the global phenomenon of illegal wildlife traffic in a comprehensive and effective way. Instead, consensus has steadily built up as to the necessity of a more holistic approach that also takes into account the criminal enforcement and national security dimensions of the illegal wildlife trade (Scanlon 2013, pp. 224–5), especially in those countries and regions in which that trade is linked to networks of organized transnational crime (Lin 2005). Whereas national implementation through domestic law is dealt with under the CITES National Legislation Project (Res. Conf. 8.4 [Rev. CoP15]), the broad-based approach to prevent and combat transnational wildlife crime has been coordinated

through the ICCWC since its establishment in November 2010 (CITES Secretariat et al. 2010).

Under the CITES National Legislation Project, which was established in 1992, the Secretariat is requested to scrutinize national implementation laws from all states parties according to four criteria – whether they designate at least one Management Authority and one Scientific Authority, whether they prohibit trade in specimens in violation of CITES, whether they penalize such trade and whether they confiscate specimens illegally-traded or possessed. Thereafter, countries are classified in one of the following three categories: countries having either legislation that is believed generally to meet the requirements for implementation of CITES (category 1), countries that are believed generally not to meet all of the requirements (category 2) and countries that are believed generally not to meet any of the requirements (category 3) (for the status of legislative progress for implementing CITES, see CITES Secretariat 2015). This classification is relevant for the action of the Standing Committee and CoP under the CITES NCP. As in the context of the Basel Convention, CITES features a series of guiding and training materials to assist parties in the enactment of stringent legislation, prepared by the Secretariat. These materials include *inter alia* a model law, a legislative checklist and a sample CITES legislative plan (see CITES Secretariat no date).

Moreover, the CITES institutions have sought to increase the regime's effectiveness through inter-institutional cooperation and coordination. As mentioned earlier, the CITES Secretariat had already established several cooperative relationships by the end of the 1990s through a series of MoUs with international institutions and NGOs relevant in the area of illicit wildlife traffic (WCO, INTERPOL and TRAFFIC). Later, it extended its cooperation to other MEAs through the GCI. Yet an increasing awareness of the unique features of illegal wildlife traffic led to a broadening of this cooperation to include institutions that specialize in transnational organized crime. Indeed, the CITES Secretariat cooperates with the United Nations Commission on Crime Prevention and Criminal Justice and UNODC (Sand 2013, p. 251; Zimmermann 2003, p. 1683ff) and with regional enforcement networks in Asia and Sub-Saharan Africa (the Association of Southeast Asian Nations-Wildlife Enforcement Network and the Lusaka Agreement Task Force). Nevertheless, after 2010, the ultimate cooperation forum for combating illegal wildlife traffic has been the ICCWC, which gathers the

CITES Secretariat, INTERPOL, UNODC, the World Bank and the WCO with the mandate to:

support national law enforcement agencies, and regional wildlife law enforcement agreements, bodies and networks in responding to transnational wildlife crimes through, inter alia, the provision of our available expertise and resources, and to raise awareness of wildlife crimes and other related violations in the wider law enforcement community (CITES Secretariat et al. 2010).

The ICCWC recently launched its Strategic Programme 2016-2020 (CITES Secretariat 2016a). Training materials elaborated by UNODC through the ICCWC include an analytic toolkit addressed to national enforcement officials in the wildlife and forestry administration and customs to appraise strengths and weaknesses of domestic preventive and criminal justice responses to this phenomenon (UNODC 2012 and CITES 2016b), as well as guidelines to support the deployment of forensic technology to combat elephant poaching (UNODC 2014). More importantly, however, this new setting of inter-institutional cooperation between international institutions embodies the paradigmatic shift from the prevention and combat of illegal wildlife trade towards a broader, more aggressive approach that focuses on transnational wildlife and forest crime. In terms of governance, this shift also encapsulates the gradual reallocation of the institutional centre of gravity in the fight against illegal wildlife traffic from CITES to UNODC and its Global Programme for Combating Wildlife and Forest Crime. At the policy level, this paradigmatic shift has also resulted in Resolution 2013/40 adopted by the United Nations Economic and Social Council, in which UN member states are requested 'to fully utilize the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption to prevent and combat illicit trafficking in protected species of wild fauna and flora' and encourages them 'to make illicit trafficking in protected species ... involving organized criminal groups a serious crime' (Resolution 2013/40, paras 3, 4). These results were endorsed by the CITES CoP in its 16th meeting (Scanlon 2013, p. 225) and, more recently, by the UN General Assembly (Resolution 69/314).

Conclusion

This chapter has provided an overview about the distinctive ways in which a sample of key MEAs involved in the fight against transnational environmental crime – the Montreal Protocol, the Basel Convention and CITES – have addressed issues of illegality and criminality. Further, it has evaluated how these have acquired salience on the global and/or crime and criminal justice agenda in each one of these regimes. In so doing, it has also paid attention to the roles in compliance and enforcement undertaken by actors other than governments, as well as innovative network and partnership strategies adopted by governments and international organizations. Four main conclusions may be drawn. First, MEAs that face significant compliance issues due to emerging black markets in environmentally-sensitive commodities have adopted a strategy of coordination and cooperation to increase their respective effectiveness. Second, inter-MEA coordination has furthered the significance of global and regional enforcement networks of practitioners as de facto norm-setting agents that have deeply influenced the normative development and implementation of MEAs. Third, this inter- and transnational process of cooperation has brought about a gradual criminalization of illegal trade in environmentally-sensitive commodities. This has indeed been so with the Montreal Protocol, the legally-binding provisions of which do not necessarily require a criminal law response to illegal trade in ODSs. But it has also intensified the degree of the criminal law and justice response to illegal wildlife traffic, which is henceforth conceptualized as transnational wildlife and forest crime and which requires a broad integrated approach consistent not only with CITES, but also with the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. Fourth, and finally, the evolution that has been highlighted in this chapter clearly hints at an increasing awareness of TEC for environmental regime effectiveness and for the discrete emergence of a body of transnational environmental criminal law.

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