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Transnational Legal Process in the Context of the International Trade in Endangered Wildlife: Explanations and Recommendations

滅種危機에 처한 野生動物의 國際去來 따른 超國家的 法律

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Claire O'Connell

Transnational Legal Process in the Context of the International Trade in Endangered Wildlife: Explanations and Recommendations

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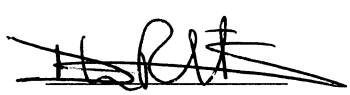
Signature	
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Signature	_____
Examiner	Paik, Jin-Hyun

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Academic Advisor: Paik, Jin-Hyun

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Graduate School of International Studies

Claire O'Connell

Confirming the master's thesis written by **Claire O'Connell**

May 2012

Chairman	安 德 根 (인)
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ABSTRACT

This paper analyses norm-internalisation in state compliance or non-compliance with The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) using the theoretical framework of Transnational Legal Process as articulated by Harold Hongju Koh. The paper argues that internalisation of norms plays an important role in long-term state compliance with CITES, and that Transnational Legal Process as both a theory and a blue print for action provides useful strategies for creating the conditions that can lead to norm internalisation and obedience (internalised compliance) with CITES. It argues that utilising a variety of norm generating fora to provoke interactions and prompt interpretations of law is particularly relevant to CITES as a strategy derived from Transnational Legal Process. This is on account of the particular importance of non-state actors in the area of wildlife trafficking, both in terms of those involved in the trade itself and those who work to prevent and detect it, and the relatively weak enforcement provisions within CITES. Finally this paper presents case studies in order to illustrate how TLP can work in practice and how interactions in a variety of fora can be a particularly useful strategy in the prevention and detection of illicit international wildlife trade. Changes in perception of the illegal trade in bear bile products into South Korea is the first case study and the second concerns

how the responses to the activity of the infamous wildlife smuggler Anson Wong demonstrate evidence of norm change through TLP in Malaysia. This paper finds that although norm internalisation is an important factor in why states obey CITES or not, there are also other relevant factors depending on the particular country circumstances, which may require different kinds of strategies. Norm change generally occurs over an extended time period, as the case studies suggest, and protecting species from extinction can sometimes require decisive short term action such as trade bans. However, Transnational Legal Process can help organisations devise strategies focused on norm change, which can aim to impact in the long-term and be complimentary to other strategies employed.

Key words: international law, wildlife trafficking, illegal trade, crime

Student No: 2010-22892

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CHAPTER 1: INTRODUCTION

1.1 Background and Research Purpose

There have been a number of attempts to estimate the scale of the illegal international trade in wildlife. In 2005, TRAFFIC Europe estimated that the total *legal* trade in wildlife was worth €17.2 billion, equal to $22.8 billion.[1] Jeremy Haken points out in his report on transnational crime that *illegal* trade is estimated to be around one-third of the legal trade which would set the figure for illegal wildlife trade at a range between $7.6 and $8.3 billion[2]. The Coalition Against Wildlife Trafficking (CAWT) estimates the figure to be $10 billion although they caution about the challenges of data collection, particularly the fact that countries' self reported data can be unreliable[3]. Haken's 2001 report which analyses various types of illicit trade provides a ranking of the funds estimated to be generated from each type of illicit trade. Wildlife ranks in 5th place, behind drugs, counterfeiting, humans, and oil.[4]

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[1] Maylynn Engler & Rob Parry-Jones, "Opportunity or Threat: The Role of the European Union in Global Wildlife Trade," *TRAFFIC Europe*, June 2007: Table 1, p. 10. quoted in Jeremy Haken, *Transnational Crime in the Developing World*, Global Financial Integrity, Center for International Policy, (2001), p.11.

[2] Jeremy Haken, *Transnational Crime in the Developing World*, Global Financial Integrity, Center for International Policy, (2001), p.11.

[3] *Ibid*., p.11.

[4] *Ibid*., p.11.

Aside from the financial losses in terms of revenue, illegal wildlife trade can have a devastating impact on species numbers and threaten them with extinction as well as threatening ecosystem services. For example, according to the World Wildlife Fund (WWF), between 2002 to 2006, almost 1,000 Egyptian tortoises were seized in the EU, traded illegally and representing around 13% of the species' entire wild population.[5] The loss of more than 90% of the black rhino population since 1970 has been attributed largely to the supply of rhino horn to the oriental medicine trade, which involves not only China but other countries including those in the West, Korea and Japan and also Vietnam as an emerging market.[6] The trade is highly lucrative and yet the criminal penalties worldwide are usually relatively weak compared to other transnational crime such as drug trafficking. This makes wildlife trafficking a high-profit low-risk area of transnational crime. The reason for demand for wildlife and wildlife products is diverse, ranging from meat to timber, rare orchid collections, medicinal ingredients, musical instruments, curios and the live pet industry.

[5] "Illegal Wildlife Trade", *World Wildlife Fund (WWF)*, Available at: http://www.wwf.org.uk/what_we_do/safeguarding_the_natural_world/wildlife/illegal_wildlife_trade/ (Accessed 5 May 2012).

[6] "Rhinoceros Trade Facts and Figures", *World Wildlife Fund (WWF)*, Available at: http://www.worldwildlife.org/what/globalmarkets/wildlifetrade/faqs-rhinoceros.html (Accessed 5 May 2012).

Irresponsible trade may also threaten the livelihoods of those people who rely on *legal* trade for their livelihoods, with the poorest people from developing nations tending to be worst affected[7]. Jeremy Haken's report refers to the link between wildlife trafficking and the funding of militias and extremist activities. For example, according to Interpol and the U.S. State Department, Somali warlords and two Islamic extremist groups in India with links to Al Qaeda, Harakat ul-Jihad-I-Islami-Bangladesh (HUJI-B) and Jamaatul Mujahedin Bangladesh (JMB), have sponsored illegal elephant and rhino poaching and channeled the profits into funding their groups' activities.[8] Haken also points out that health threats are a consideration for consumer countries given that according to the Government Accountability Office and the Center for Disease Control, 75% of emerging diseases reach humans through animals and the illegal trade in wildlife hinders national attempts to monitor potentially dangerous species. For example, it is believed that the SARS outbreak originated in China when an infected civet came into contact with humans. Civets are often illegally traded for the oriental medicine industry.[9]

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[7] "Wildlife Trade: What is it?", *TRAFFIC*, Available at http://www.traffic.org/trade/ (Accessed 3 March).

[8] Sharon Begley, "Extinction Trade: Endangered animals are the new blood diamonds as militias and warlords use poaching to fund death," *Newsweek*, March 1 2008, accessed October 7, 2010, http://www.newsweek.com/id/117875/output/print. Quoted in Haken, *supra* note 2. p.14.

[9] Haken, *supra* note 2. p.14

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international agreement between states that aims to specifically regulate the international trade in *endangered* wildlife in order to prevent its extinction through over exploitation. CITES, which monitors trade through a strict permit system, has one of the largest memberships out of all conservation conventions with 175 signatories, or 'Parties'.[10] However, as Hemley has pointed out, CITES is often thought of as a kind of hybrid treaty – one that concerns both trade and conservation in that it allows trade in certain species under certain circumstances while banning trade in species most seriously threatened with extinction.[11] CITES only catches international transactions in *wildlife* and does not apply to domestic trade in endangered species, although these should be protected under CITES implementing legislation. Neither does CITES cover specimens which have been captive bred and not taken from the wild.

Species listed under CITES are categorised according to the degree of protection they need. The convention has three appendices. Appendix I lists species, such as tigers, that are threatened with extinction and may only able to be traded in exceptional circumstances. Species in Appendix II are not

[10] *Convention on International Trade in Endangered Species of Fauna and Flora Website* www.cites.org (Last accessed 10 June 2012).
[11] Ginette Hemley, "CITES: How Useful a Tool for Wildlife Conservation?" *Wildlife Society Bulletin*, Vol. 23, No. 4, (Winter, 1995), p.635.

necessarily threatened with extinction but their trade must be monitored and controlled to prevent over exploitation and Appendix III lists species which are protected in at least country which has asked CITES Parties to assist in their protection.[12] Member states meet approximately once every three years, at the Conference of the Parties, and species lists may be updated at that time. Quotas may also be imposed on the trade of certain species which may be 'zero' quotas, for example in the case of pangolins.

Since CITES is a non-self-executing convention, member states or 'Parties' still have the responsibility for implementing it into their domestic legislation, assigning criminal penalties and enforcing it. The CITES Secretariat, administered by the United Nations Environment Program (UNEP) and located in Geneva carries out an important coordinating, monitoring, advisory, communication and servicing role in the working of the Convention, as well as arranging meetings of the Conference of the Parties every three years and the standing committees. Its full duties are set out in Article XII of CITES.[13]

[12] Appendices, Convention on International Trade in Endangered Species of Fauna and Flora (CITES)
[13] Article XII, CITES

Some significant successes in protecting endangered species can fairly be attributed to CITES and its application by Parties although CITES as a mechanism of crime prevention and detection is not perfect. Aside from the defects within the convention itself, there have also been many accusations that some states do not adequately comply with the provisions of CITES, for example in terms of implementation and enforcement.

The purpose of this research is to look at the role of norm-internalisation in whether State obey CITES or not through the lens of Transnational Legal Process, a theoretical framework devised by Harold Hongju Koh. Koh argues that obedience to international law usually occurs when the norms of that law are internalised (ie. genuinely believed in) and that most compliance comes from obedience. Obedience is therefore 'internalised compliance' which is brought about by interactions in norm creating fora which bring interpretations of law and internalisation of that into domestic law through legislation and through normative internalisation.[14]

Transnational Legal Process (TLP) can explain why states comply with CITES because it accepts the importance of many factors, including state

[14] Harold Hongju Koh, "Transnational Legal Process After September 11," *22 Berkeley Journal of International Law.* (2004), p.339.

interests but unlike theories which focus on state interests, it can explain why states comply when the benefits they derive from doing so seem small considering the cost of compliance. Further more it explains the important influence of non-state actors well and its emphasis on the *process* of norm internalisation in contrast to other theories, is supported by cases which reveal changes in state attitudes to wildlife trafficking, as well as enabling actual *practical* strategies to be derived and applied in the context of wildlife trafficking. In terms of these strategies the importance of pursuing interactions in a variety of fora can be shown to be particularly relevant to securing norm internalisation in this area.

So far TLP has not been applied to wildlife trafficking as a subject area although other legal process theories have been used to analyse other areas of environmental law as well as other transnational issues. This paper makes an important contribution by explaining how this theoretical framework can be used to formulate strategies by non-state actors who campaign to end illegal wildlife trade. Literature produced by NGOs in this area often refers to the need for greater understanding of state decision making and this paper attempts to begin filling this gap in understanding.

1.2 Structure and Methodology

To undertake the analysis this paper considered a number of reports from the CITES Secretariat and NGOs, academic literature on CITES and written and verbal interviews with NGOs workers, campaigners and several lawyers. The author spent approximately one month working as a legal intern at the offices of TRAFFIC in Malaysia in February 2011 which gave an appreciation of the nuances and subtleties of the work that NGOs do in this area and how they relate to other actors. In Malaysia the author worked on a project to identify loopholes in Malaysian domestic legislation and the customs tariff with some of her findings being included in TRAFFIC proposals for legislative change put forward to the Malaysian government.

The first chapter seeks to provide an overview of CITES and the issues relevant to considering compliance. It then moves on to a literature review of CITES related work. The second chapter delves into the issue of why states obey international law and sets Transnational Legal Process in an academic context with other theories, explaining it is most appropriate for analysing this area. Chapter three analyses the normative aspects of some compliance problems with CITES and then applies the strategies derived from Transnational Legal Process to suggest how internalisation of norms through

the process of TL can be encouraged. It shows that the suggestion of TLP that a wide range of fora should be utilised is particularly relevant to CITES and can be particularly effective. The fourth chapter utilises case studies of Korea and Malaysia in order to demonstrate further the importance of using a range of fora in order to bring change and to demonstrate some positive examples of TLP in action.

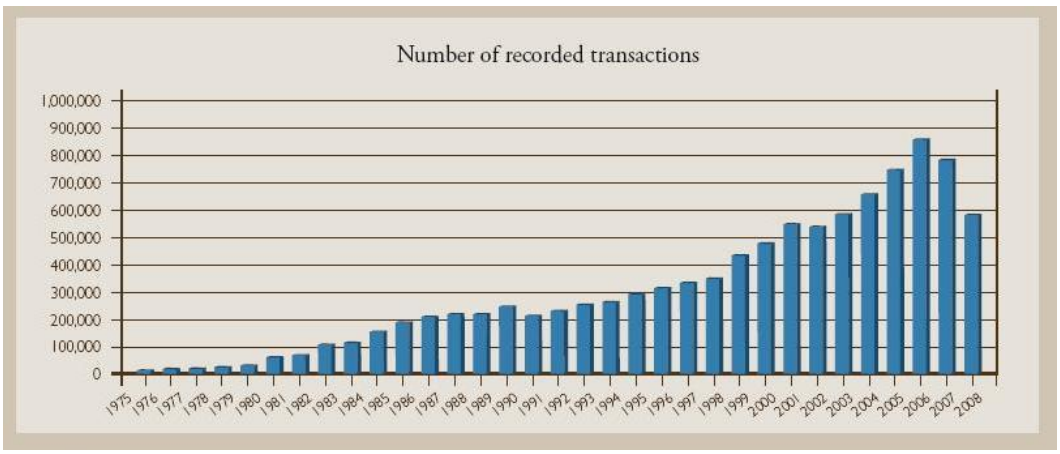
1.3 The General Picture of Compliance

There are positive indications that in general states comply with CITES. Firstly we can consider the increase in membership since CITES came into force. During the years 2008 and 2009, three new countries joined CITES: Armenia, Bosnia and Herzegovina, and Oman joined, bringing the total number of Parties to 175 (compared to 18 in 1975, the year the Convention entered into force). [15] This suggests in broad terms that some states are taking conservation issues such as this seriously, although we cannot study all their motivations in this paper.

The graph below which is from the Activities Report of the CITES Secretariat 2008-9 with figures derived from the CITES trade database

[15] "Activity Report of the CITES Secretariat 2008-2009," *United Nations Environment Program (UNEP)*, p.19.

shows a significant increase in the number of worldwide transactions in which CITES permits were used[16]. It is worth noting that the figures for 2007 and 2008 were incomplete at the time of publication, hence the apparent drop off. The CITES Secretariat argues that this graph shows not necessarily that wildlife trade has increased a lot over the last three decades but that more of it has become regulated that reporting has improved. This demonstrates states co-operating in checking documents and reporting back to CITES.



(y axis shows number of recorded transaction using CITES permits)

However to build up a detailed picture of overall compliance as opposed to non-compliance would be extremely difficult if not impossible, partly because of the scale of information needed from each country and the evidential difficulties. For example, there is difficulty in establishing the true rate of crime in comparison to seizures of wildlife. Such a report, while not yet

[16] *Ibid.*, i.

in existence would no doubt be very useful but at the same time controversial. Therefore this paper does not aim to argue that one state is more compliant than another.

This paper accepts that in general states may comply with CITES but considers the areas where non-compliance does occur and how that might be linked to norm internalisation. The purpose of this paper is not to analysis whether states do comply in general terms since there is sufficient evidence to suggest there are compliance problems to be addressed.

CITES Obligations for Parties

The main obligations for Parties as set out in the Convention are:

- complying with the requirement not to allow trade in species included in Appendices I,II & III except in accordance with the provision of CITES[17], including the issue and content of permits and certificates[18].
- taking appropriate measures to enforce the provisions of CITES and prohibiting trade in specimens in violation of it, which includes penalising trade in, or possession of, such specimens or

[17] CITES Article II (4).
[18] CITES Article VI.

both and providing for the confiscation or return to the State of export of such specimens[19]

- maintaining records of trade in specimens of species included in Appendices I,II and III[20]

- preparing periodic reports on its implementation of CITES and transmitting to the Secretariat an annual report with CITES species trade data and a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of CITES[21]

- designating at least one Management Authority competent to grant permits or certificates on behalf of the Party and informing the Secretariat of their details plus designating at least one Scientific Authority[22]

- reviewing the implementation of CITES at meetings, where regular or extraordinary

- co-operating with the Secretariat as set out in Article XIII when it receives a communication that a species contained in Appendix I or II is being adversely affected by trade in which the Party is concerned or that the provisions of CITES are not being

[19] CITES Article VIII (1).
[20] CITES Article VIII (6).
[21] CITES Article VIII (7).
[22] CITES Article IX (1), IX (2).

effectively implemented.[23]

As previously mentioned, CITES is not a self-executing treaty and hence must be separately implemented into domestic legislation.

The duties of Parties described under CITES therefore fall into three broad categories: implementation, enforcement and reporting/cooperation with the CITES Secretariat on certain issues. The preamble to CITES also states that the contracting states "recognise that "international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade"[24]. Failures in international co-operation can also therefore be regarded as non-compliance.

How can compliance be measured?

There are clearly difficulties with measuring compliance of CITES. For example, with regard to enforcement, customs may make large seizures of contraband wildlife products but does this indicate effective enforcement? Without knowing the scale of the illegal wildlife trade occurring it is not easy to say. For example major seizures in Malaysia are consistently reported and yet the country has come under heavy criticism for its enforcement including

[23] CITES Article XIII.
[24] CITES preamble.

accusations of corruption. There implication is that there may be a very large volume of illegal trade that is not being detected. The same problem plagues the reporting of any crime statistics. For years police and researchers have struggled to come up with valid and reliable methods of measuring crime. Crime detection rates are one method but they can be deceptive. If drugs crime detection rates in a neighbourhood remain stable or decrease while detection of other types of crime increases?

As TRAFFIC, the wildlife trade monitoring group point out, "by its very nature, it is almost impossible to obtain reliable figures for the value of illegal wildlife trade"[25]. There are some strides being made with regard to ivory with the establishment of The Elephant Trade Information System (ETIS), the central component of which is a data on seizures of elephant specimens that have occurred in the world since 1989. As the CITES website describes 'the seizure database is supported by a series of subsidiary database components that assess law enforcement effort and efficiency, rates of reporting, domestic ivory markets and background economic variables. These database components are time-based and country-specific and are used to mitigate factors that cause bias in the data and might otherwise distort the analytical

[25]"Wildlife Trade: What is it?". *supra* note 7.

results".[26] However, there are other possible indicators of compliance or lack of it. The CITES Trade Database managed by the UNEP World Conservation Monitoring Centre (UNEP-WCMC) on behalf of the CITES Secretariat currently holds 10 million records of trade in wildlife.[27] Countries report their annual figures meaning that at least the scale of CITES permitted trade can be collated in one place and used to predict levels of illegal trade. Seizures of contraband wildlife and wildlife products can also give helpful indications.

If convictions for wildlife trafficking are shown to be linked to involvement of corrupt customs officers, as in the case of Anson Wong in Malaysia, which will be discussed later, then we can be very concerned about the structures in place to enforce CITES and this could be regarded as evidence of non-compliance.

The openness of trade can also be evidence of lax enforcement despite strong wildlife protection laws. The case of the Indonesian trade in the slow loris is an example. According to Chris Shepherd, deputy regional director of TRAFFIC South-East Asia "the openness of the slow-loris trade highlights the fact that having one of the region's best wildlife protection laws and promising to protect species is not enough — there must be stronger enforcement in

[26] "The Elephant Trade Information System", Available at: http://www.cites.org/eng/prog/etis/index.shtml (Accessed 5 June 2012).
[27] "A Guide to Using the CITES Trade Database", Version 7, 2010, Available at: http://www.unep-wcmc-apps.org/citestrade/docs/CITESTradeDatabaseGuide_v7.pdf (accessed 24 March 2012). p.3.

Indonesia and the public should stop supporting the illegal wildlife trade."[28]

Further on the point about openness of trade, surveys have been used gathered information from the traditional medicine practitioners indicating the extent to which they are willing and able to purchase products derived from endangered species from abroad. Such surveys are very useful in building a picture of wildlife trade. In other countries, such as in Malaysia NGOs are actively involved in monitoring products sold in traditional markets and documenting this. If goods are openly available or easily obtainable it indicates lax enforcement by police.

We can also ask whether a country's domestic laws are consistent or contradictory with CITES or contain loopholes if so this suggests non-compliance in terms of implementation. What we do know is that the substantial economic rewards from smuggling compared to the relatively low penalties mean that smugglers are creative and will exploit any loopholes or weak domestic legislation available. Therefore when we find such loopholes it is most likely they are already being exploited.

[28] Erik Ortiz, "Cuddy – yet deadly – slow lorises are abused are as part of Asia's exotic pet trade", 12 May 2012, Available at: http://www.nydailynews.com/news/world/cuddly-deadly-slow-lorises-abused-part-asia-exotic-pet-trade-article-1.1074917#ixzz1uRvWXrUB (Accessed 12 May 2012).

If some cases, *domestic* trade in Appendix I & II species may be legal, as is the case in South Korea and Vietnam with Asian black bears who are still farmed mostly for bile products in Korean Traditional Medicine, but may be fuelling a black market elsewhere in Asia. This could arguably be considered a form of indirect non-compliance at least with the aims of CITES.

In many cases NGOs and campaigners will have inside knowledge on trade through word of mouth which cannot be referenced in an academic sense.

Where senior government officials are found to be knowingly involved in illegal trade themselves this would seem to indicate that a deeper problem with enforcement in the country concerned. It may point to corruption in some cases..

1.4 Literature Review

The literature on wildlife trafficking ranges from scientific reports on wildlife trade, economic analysis of the impact of trade bans on population levels through to policy recommendations for reducing wildlife trade. In terms of literature specifically on CITES there are reports and articles analysis of the problems within CITES itself and the consequences of these, plus a number of

studies on enforceability issues. The backgrounds of the writers vary with a large number being of scientific background, a smaller number of a legal background and some from an international relations field. There is a lack of study on how states make decisions and how policymakers can be influenced in the context of CITES although work done so far suggests this is needed. Neither is there any analysis of legal process theories which would give the practical framework for devising strategies.

Paul Matthews (1996) highlights an important point which is the delicate balance that conservation law like CITES tries to strike between subjectivity and objectivity, recognising that different countries have different attitudes, approaches to implementation as well as cultures, which should be respected and yet ensuring that the law is upheld.[29] Yet Matthew's paper is generally concerned with picking out the particular flaws in CITES itself as a piece of legislation. He is very dismissive of conservation law on an international level stating that "any conservation treaty….faces serious difficulties in enforcement". This is relevant to the study of norm internalisation.

Related to this matter, and further on the issue of enforcement, Stefan Carpenter (2011) advocates for a community based approach to conservation to

[29] Paul Matthews, "Problems related to the Convention on the International Trade in Endangered Species", *International & Comparative Law Quarterly*, 1996. p.1

improve enforcement, highlighting the importance of non-state actors in preventing of wildlife crime. He criticises CITES for the adoption of a "classical" approach which is ineffective in many developing countries since they often lack the resources or political will necessary, and argues that removing communities ability to use and therefore benefit from the protected species may incentivize the communities to undermine the developing countries' conservation efforts.[30] On the other hand there is evidence which reveal that protection of native rights to hunt endangered species can create a loop hole exploited by criminals.[31]

In contrast to this, Bulte and Kooten (2001) emphasize the importance of *state* action and are sceptical about the power of legislation They argue that "legislation (protection on paper) needs to be supplemented with state action, including wise management (e.g., of state- owned resources such as coastal fisheries), influence on management of privately owned resources to protect endangered species, and enforcement (e.g., action to prevent poaching)."[32] Their analysis of the role of the state is important in highlighting the fact that government policy can often be determined by the need to win elections.

[30] Stefan Carpenter. "The Devolution of Conservation: Why CITES Must Embrace Community-Based Resource Management," *Arizona Journal of Environmental Law and Policy*. 2(1) (Fall 2011): pp.1-52.

[31] section.53 Wildlife Conservation Act 2010

[32] Erwin H. Bulte and G. Cornelis van Kooten, "State Intervention to Protect Endangered Species: Why History and Bad Luck Matter," *Conservation Biology* , Vol. 15, No. 6 (December 2001), p.1800.

The 2008 TRAFFIC report on 'What's Driving the Wildlife Trade' gives a number of indications that more research is needed on how to internalize norms at the highest level. It argues that increased policy attention and action is required including a need a need to shift the way in which wildlife trade is perceived, securing high level political support "to ensure that measures to address illegal and unsustainable trade are accorded a high priority and mainstreaming wildlife trade issues not only within conservation policies, programmes and budgets, but also within policies, programmes and budgets targeted towards meeting development and poverty reduction goals."[33] The report also refers to strengthening the judicial sector's understanding of the significance of illegal and unsustainable trade[34] as "such understanding is necessary to promote the foundations of good environmental governance, particularly the establishment of sufficient deterrents in the form of penalties and prosecutions". [35] It goes without saying that the power of the judiciary to interpret the law depends on police actually pursuing prosecutions in this area since judges will only be able to deliver verdicts on cases which actually come before them. Despite the recognition of a need for change in these areas, the

[33] TRAFFIC, "What's Driving the Wildlife Trade? A Review of Expert Opinion on Economic and Social Drivers of the Wildlife Trade and Trade Control Efforts in Cambodia, Indonesia, Lao PDR and Vietnam," *East Asia and Pacific Region Sustainable Development Discussion Papers*. East Asia and Pacific Region Sustainable Development Department, World Bank, Washington, DC. (2008) p. xv

[34] *Ibid*., xiv.

[35] *Ibid*., p.73.

report covers a large number of ‘drivers’ and proposes a number of solutions which are too thin to be of much practical use in the area of changing government behaviour. The scope of the report is too wide and neither are the normative issues set against any theoretical framework for understanding how process affects them. Other studies point to the importance of internalisation of law without specification mentioning it. For example Nowell and Xu (207) observed that national legislation and trade bans are more effective than international trade bans suggesting that internalisation of law at the domestic level is important. Internalisation of international law into domestic law is a step on a road to internalisation of the norms that are attached to it.

In summary, none of the literature reviewed on CITES attempts to apply a theoretical framework to the normative problems of compliance in order to find solutions and yet it recognises that there is a need for understanding of and ability to influence those in high places. This paper seeks to marry the theoretical and the practical, applying theory to help understand and suggest practical solutions and demonstrates how Transnational Legal Process can be helpful and applicable to an area in which it has not been considered before. Therefore this research is unique and original.

CHAPTER 2: THEORETICAL FRAMEWORK

2.1 Why Nations Obey International Law

Why does Harold Koh's TLP theory best explain compliance or non-compliance in the area of CITES? To answer this I consider the theory in relation to others regarding why States obey and specifically in the content of the illegal wildlife trade.

Ideas on why states comply with international law have a long history, stretching back into the history of discourse on international law itself and evolving in response to the given world political situation. In 1979 Louis Henkin declared optimistically that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."'[36] It is clear that in the context of CITES there is both compliance and non-compliance, but what determines *why* states obey CITES or not, as well as any other international law? The implications of the question are important and multi disciplinary in their impact. If we cannot predict any pattern of behavior in this respect how can states rely on each other in international agreements? How can international crime be reduced if nations sometimes fail to comply with international commitments which tackle it and

[36] Louis Henkin, quoted in Harold Hongju Koh, "Why Do Nations Obey International Law?" *Faculty Scholarship Series.* Paper 2101. (1997): p.2655.

we don't understand why?

In the context of wildlife trafficking any discussion of the 'state' implies not only governments and politicians but relevant agencies too, such as law enforcement and customs agencies. Not only that but non-state actors play a decidedly prominent position. Any theoretical framework for this paper must be able to recognize and explain this. What then are the major theories of why states comply with or obey international law and how useful are they for this paper?

In the last 60 years or so arguments on state compliance with international law have been generally based around concepts of 'interest', 'identity' or 'international society'.

The interest arguments generally assert that states only comply with international law when it suits their own short or long-term interests to do so and can be manipulated as an instrument for obtaining their own goals. They use co-operative strategies to pursue long term interests where compliance with legal norms brings benefits. This rationalist perspective of international law bears some relation to realist assertions in the field of International

Relations by scholars such as Kenneth Waltz and Hans Morgenthau [37] which view international law with scant regard especially since there is, they argue, no neutral third party with the legitimate right to punish offenders. The implication is that the content of the law itself is largely irrelevant - the question is how it fits with the state's own goals and interests.

States can certainly benefit from participation in international treaties and compliance with international laws in a variety of ways, from reputation to building relations with other states they may wish to pursue economic relations with. However there are problems with using this as a framework for analyzing CITES. Firstly, the rationalist perspective tends to discuss compliance at the system level focusing on the interests of 'states'. It does not adequately appreciate the role of non-state actors in influencing compliance. In the context of CITES there are numerous non-state actors who play an important role in compliance. Indeed perhaps in this area more than others, NGOs, for example, are actively involved in training government staff and customs officers, monitoring levels of trade, reporting on state compliance, pressuring governments both in public and behind the scenes, advocating for law change and advising the government on legislative changes needed, educating the public on the importance on conservation and exposing non-compliance and

[37] Stephen Walt, "International Relations: One World, Many Theories," *Foreign Policy*. 110 (Spring 1998): pp.29-46.

corruption. Any framework for discussing CITES must be able to explain the impact of their role.

Secondly, the view point that states only act according to their interests does not hold water when it comes to CITES. The benefits a state may derive from enforcing CITES may not be immediately apparent or particularly pronounced in the state's view, for example in terms of national security or promoting (legal) trade. Indeed putting the required structures for implementation and enforcement of CITES in place is a costly affair. Using the rationalist logic, if states complied only on the basis of their interests then no state would bother to comply with CITES. And yet they do in many cases and it has 175 signatories. In Malaysia, a country where high natural resources and weak institutions create a climate for corruption in which even government staff have financially benefited from illegal trade, the state has recently overhauled wildlife law for the first time in four decades in a way which increases domestic law's compliance with the contents and spirit of CITES. The process through which this came about is discussed in more detail in the case study on Malaysia. Furthermore most rationalists

Identity arguments, which tend to draw on more liberal international relations theory, include workd by scholars such as Andrew Moravcsik and

Anne-Marie Slaughter who view the domestic structure level as more determinative of whether states obey than the systemic level. Slaughter's work argues that states operate in a 'zone of law' or a 'zone of politics'[38]. According to Slaughter, states which operate within the 'zone of law' can be defined as 'liberal' in identity, by which she means that a state should have "some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law". She goes further and suggests that liberal democracies are more likely to 'do law' with one another[39].

This is not an appropriate framework for analysis of CITES since while it is true that less developed countries have difficulty putting systems in place to support the implementation and enforcement of CITES, they have, on a number of occasional worked closely with developed countries and the CITES Secretariat to comply. A good example is the establishment of the Association of Southeast Asian Nations' Wildlife Enforcement Network (ASEAN-WEN)[40] which is the world's largest intergovernmental wildlife law enforcement network and works to increase capacity and better coordination and collaboration of law enforcement agencies between Southeast Asian countries.

[38] Anne-Marie Slaughter, "International Law in a World of Liberal States," *6 European J.Int'l L.*503,509 (1995): p.503.
[39] *Ibid.*, p.503.
[40] The Association of Southeast Asian Nations Wildlife Enforcement Network (ASEAN-WEN) http://www.asean-wen.org/ (Accessed 15 April 2012).

ASEAN consists of both developed and developing countries. International co-operation is essential in international wildlife crime prevention and detection. In addition there are countries whose governments conform to the conditions for 'liberal' as put forward by Slaughter and yet have a relatively bad record on enforcing aspects of CITES. For example Japan, a highly developed democracy with a respected judicial system, would fit the conditions for being described as liberal and yet Japanese domestic legislation, under *the Law for the Conservation of Endangered Species of Wild Fauna and Flora*, only protects Appendix I species and is therefore not compliant with CITES in terms of implementation. Penalties are also weak[41]. Most of the wildlife seizures in Japan are for reptile species whose export is restricted in their countries of origin or who are on the IUCN Red List of Endangered Species. However only some of these species are listed in Appendix I of CITES and so Japanese domestic law cannot penalise their import. TRAFFIC believe this is one of the reasons for the illegal reptile trade into Japan[42]. In 2010 CITES members voted against a ban on bluefish tuna hunting despite a clear warning from WWF that the species could go extinct in 2 years without a ban in place. Lobbying hardest against the ban was Japan whose profits from the fish at that time were estimated as $7.2 billion US dollars. Although there were clearly

[41] Akiko Ishihara, Kahoru Kanari, Tsugumi Saito & Soyo Takahashi, "The State of Wildlife Trade in Japan". *TRAFFIC East Asia*, Tokyo, Japan. (2010): p.16.
[42] Ibid., p.17.

state interests at stake here a revealing insight into Japan's attitude came when the endangered tuna was served up at the Japanese Embassy's reception the night before the vote and Japan declared that even if the ban were approved they would ignore it anyway. If norms of CITES were truly internalised within the Japanese state one would not expect to witness this behaviour. Japan has a long tradition of cross-border trade in wildlife stretching back hundreds of years and there are cultural aspects which would need to be considered for a detailed account of the process of norm-internalisation there and the obstacles to it.

Other theories which extend from this identity idea recognise the importance of norms in a more significant sense. For example a "constructivist" strand argues that rather than state interests being given, they are "socially constructed by commonly held philosophic principles, identities, norms of behaviour, or shared discourse"[43] Norms are seem to play an important part in the formation of national identities. The constructivist school which is predominantly American has close ties to the Groatian notion of "international society" where states comply with international law for communitarian reasons: not merely because of cost-benefit calculations but because "particular rules

[43] Quoted in Harold Hongju Koh, *supra* note 36. p.2599.

are "nested" within a much broader fabric of ongoing communal relations". [44] While this recognizes that norms can be important it doesn't explain in details how they are shaped in a framework that can be applied to many situations.

Theories on Legal Process in general move closer to marrying the role of norms with state interests. They tend to see treaty compliance as determined by 3 factors - efficiency, national interest and regime norms – arguing that these factors foster a general propensity for nation-states to comply with treaty rules. "international legal process"" school of Abram Chayes, Thomas Erlich, Andreas Lowenfield and the New Haven School of International Law pioneered at Yale by Myres McDougal, Harold Lasswell, and their associates. Both strands argued that transnational actors compliance with IL could be explained by reference to the process by which these actors interact in a variety of public and private fora. Through this interactive process, law helps translate claims of legal authority into national behaviour. Legal Process Theory in general has been applied to a range of transnational issues including environmental fields, arms control and use of force, international negotiations, and human rights[45].

There are individual problems with various legal process theories. For

[44] *Ibid*., p.2645.
[45] *Ibid*., p.2621.

example Chayes suggests the ultimate impetus for compliance comes not from fear of sanctions but from loss of reputation - loss of reputation not occurring unless the non-complying states defies a mutually accepted interpretation of the treaty norm. But this cannot explain states who fail to comply with treaties in ways which would be widely understand as defying a mutually accepted interpretation. Once again one might quote the example of Japan given earlier. Neither does it consider the process of internalisation of norms.

What is needed is a flexible theoretical framework that can accept and acknowledge the different forces that influence state compliance while explaining how they come to comply and obey. The Transnational Legal Process theory of Harold Koh is most appropriate for analysing why states comply with CITES and how compliance can be encouraged for a number of reasons. Firstly

2.2 Transnational Legal Process

Harold Koh's theory of Transnational Legal Process (TLP) goes further than other legal process theorists by focusing on how norms actually become internalized and by implication why states comes to obey. His theory is a flexible one which does not discount the power of state interests and other reasons for compliance but which argues that the most important reason for

obeyance, not just compliance is internalisation of norms.

Koh offer has offered 5 general explanations for why nations obey international law and why they sometimes disobey:

1. reasons of power
2. reasons of self interest
3. reasons of liberal theory – both rule legitimacy and political identity
4. communitarian reasons
5. reasons of legal process[46]

He is of the opinion that the most complete answer to why states do or do not obey in each case is some combination of the five factors, however, the last factor, reasons of legal process, is the most important in determining state's obedience.

Transnational legal process consists of an *interaction* which prompts *interpretation* of law, bringing *internalisation* of international laws in the domestic systems of countries and through this internalisation of international

[46] Harold Hongju Koh, *supra* note 14. p.338

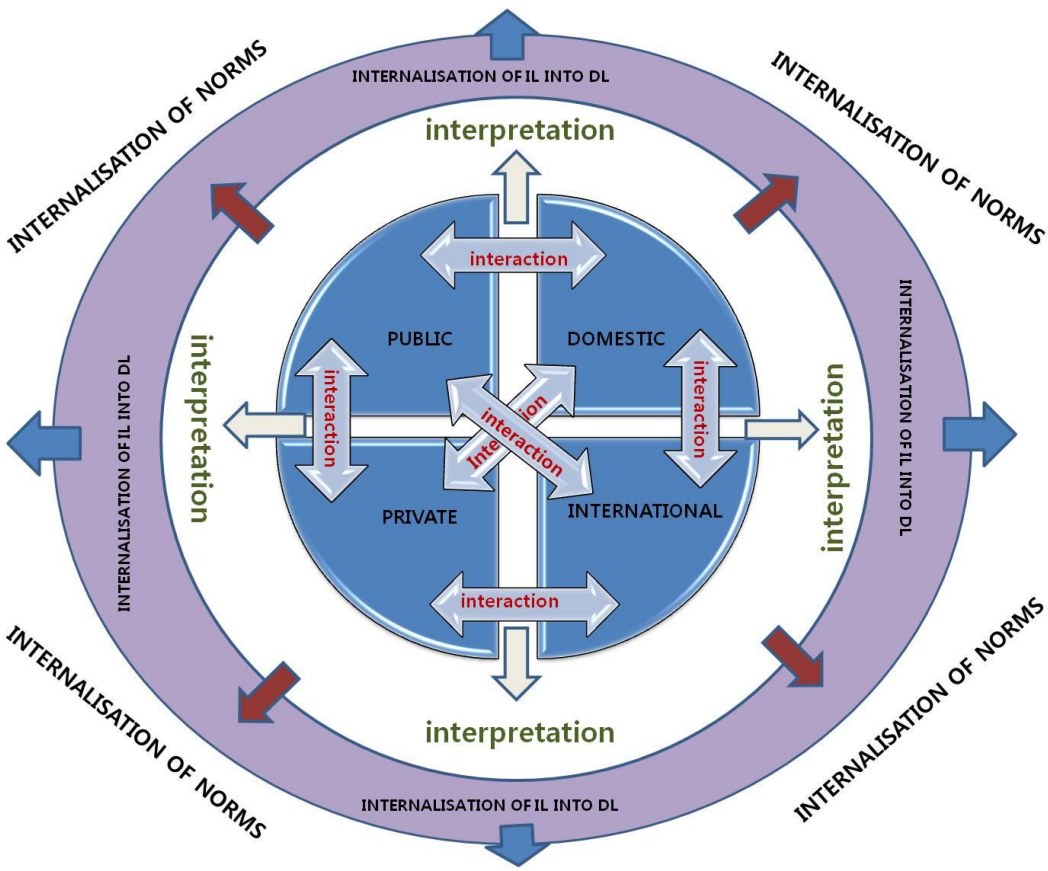
norms.[47] He says that in part, actors obey law as a result of "repeated interactions with other governmental and non governmental actors in the international system" Repeated compliance brings obedience.[48] Actors are repeatedly enmeshed in processes, regimes and institutions that force them to internalize the rules we want them to obey.

In addition to being normative, Koh argues that this process is non-traditional, non-statist and dynamic. TLP is referred to as non-traditional in that it breaks down what he describes as two "traditional dichotomies that have historically dominated the study of international law" - that of the distinction between domestic v international, and public v private. It is non-statist in that, in contrast to many other theories, the actors in the process are not just states or even primarily nation states but include non-state actors as well. Finally TLP is 'dynamic' in that it is not static; Koh argues that "transnational law transforms, mutates and percolates up and down, from the public to the private, from the domestic to the international and back down again"[49].

The diagram on the next page attempts to show this graphically. The centre section is a dynamic mess of interaction which can take place between

[47] *Ibid.*, p.337.
[48] *Ibid.*, p.203.
[49] *Ibid.*, p.206.

public, domestic, international and private actors in any direction and in a variety of different fora. This interaction produces an interpretation, for example which may then be internalised into domestic law (DL). Eventually through repeatedly compliance it may become internalised as a norm. The process can be two way – norms may themselves over time become subject to new interactions and interpretations and may change.



One example Koh gives of TLP is the Anti-Ballistic Missile Treaty Reinterpretation Debate. This was when the US and USSR signed the Anti-Ballistic Missile Treaty (ABM Treaty) in 1972 that banned the development of space-based systems for territorial defence of countries. After 13 years the Reagan administration proposed the Strategic Defence Initiative (SDI) known popularly as "Star Wars". The Reagan administration sought to reinterpret the treaty to permit SDI by essentially unilaterally amending the treaty without the consent of either the Senate or the Soviet Union. This decision triggered an 8 year battle in which numerous present and former government officials rallied in support of original treaty interpretation. It played out in senate hearings, journals and articles, and finally congress withheld appropriations from SDI tests that did not conform with the treaty. Although the Reagan and Bush administrations continued to argue their interpretation was correct they also announced they would comply as a matter of policy.[50] Koh views this as the most powerful country in the world eventually yielding to international law and the norms of the ABM Treaty become internalised in the domestic realm.

Why is Koh's theory the best one for explaining and analysing CITES compliance if the others referred to are not suitable (for the reasons given)?

[50] Harold Hongju Koh, *supra* note 36. p.2647.

Firstly, the key to TLP is the focus on the process of norm *internalisation* to bring obedience. For treaty regimes like CITES with relatively weak enforcement mechanisms or no international court to enforce them this is highly important. If states cannot be compelled by the international community to comply then it is important that they believe in the norms behind the treaty. This will make it more likely that they will obey them.

To illustrate how TLP explains compliance in relation to CITES and the ivory trade can be considered. In the 1980s, at least 700,000 elephants, maybe as many as 1 million, were killed throughout Africa by poachers for their ivory tusks, which would be made into jewelry. International organized crime arose around the trade of this "white gold", so called because of its high value.[51]. In 1989, through the norm creating forum of the CITES Secretariat a worldwide ban on ivory trade was voted for by CITES member states, this interaction in a forum leading to an interpretation that some states were in breach of international law by their failure to enforce CITES. Following the ban, Western governments provided African ones with funding to crackdown on poaching, enmeshing the offending state in the process of enforcement. Levels of poaching fell dramatically. The ban was prompted by calls from the

[51] Bryan Walsh, "African Nations Move to 'Downlist' the Elephant," *Time Magazine*, 11 March 2010, http://www.time.com/time/health/article/0,8599,1971610,00.html#ixzz1ubhW19vv (accessed 5 May 2012).

US and also from civil society, through NGOs such as the Born Free Foundation and was hailed as a success of CITES. The role of both state and non-state actors was therefore crucial in bringing about the interaction leading to the ban. Later on when elephant populations recovered, CITES authorised several controlled sales of ivory to Japan, although many argue that this action fuelled demand for more and led to more poaching. China was another state which bought ivory through this scheme but as the state controls the ivory market they maintained the high price and therefore the demand for illegally sourced material was unaffected. Regardless of these problems with the sales, the norm of elephants as endangered and in need of protection was well internalised in societies around the world, thanks in part to the media exposure of the trade. Out of the process of interactions, interpretations and internalisation came the African Elephant Coalition which is formed of 23-African elephant range States (who represent the majority of countries with wild African elephants, including states who had previously failed to enforce CITES properly) and who strongly oppose recent efforts by Tanzania and Zambia to have the elephants down listed to a lower protection level in CITES. The AEC argues for extension of a CITES moratorium on trade. This demonstrates how countries may, through TLP, internalise international norms of wildlife conservation.

Secondly, the theory recognises the importance of non–state actors in shaping state behaviour in a way that rationalist theories do not. NGOs such as TRAFFIC actively advise governments on legislation changes, monitor trade and train government staff and work with them to educate them on the importance of CITES and species identification, hosting joint events and sharing information. These activities blur the lines between state and non-state since the non-state actors are carrying out activities which arguably the state would do in other kinds of organised crime. It may be the scientific and technical nature of this area and the need for everyday application of that knowledge on the ground, in airports, that makes non-state actors like TRAFFIC (whose staff frequently have a great deal of scientific knowledge) so important in ways that they might not be in other environmental treaties. Koh's theory recognises this kind of dynamic interaction and its real power to influence at the state level.

Transnational Legal Process accepts that if the costs outweigh the benefits of compliance then a state may not comply but it also describes how national interests can be reconstituted so that complying with norms that the state fundamentally believes to be valid and legal is also perceived to be in the national interest. It is a flexible and relevant framework for analyzing and explaining CITES compliance.

CHAPTER 3: COMPLIANCE ISSUES WITH CITES & NORMS

The duties of Parties described under CITES fall into three broad categories: implementation, enforcement and reporting/cooperation with the CITES Secretariat on certain issues. The preamble of CITES also states that the contracting states "recognise that *"international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade"*[52].

A consideration of the kind of compliance problems with CITES reveals that in some cases non-internalisation of norms of compliance can be implied.

3.1 Problems with Compliance and Normative Elements

Implementation

As previously mentioned it is the responsibility of the Parties to implement CITES through their domestic legislation. However there cases where the domestic legislation does not implement all the terms of CITES and leaves loopholes which can then be exploited. Those who exploit such loopholes may be breaching CITES but cannot be prosecuted and penalised as

[52] CITES preamble

the power to do so rests with domestic legislation. The CITES 2008 report revealed the purpose of the domestic legislation as being to:

1) designate a CITES 'Management Authority' and a CITES 'Scientific Authority';

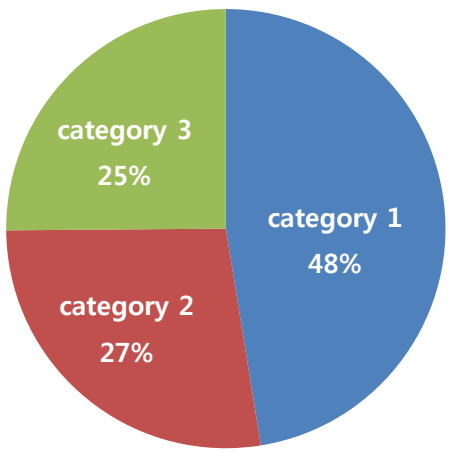
2) regulate trade in accordance with the Convention;

3) penalize illegal trade; and

4) confiscate specimens that are illegally traded or possessed.

At the end of 2009, there were 83 Parties and 13 dependent territories whose legislation met all four requirements (Category 1), 48 Parties and 14 dependent territories whose legislation met one or more (but not all) of the requirements (Category 2), and 44 Parties and 2 dependent territories whose legislation did not meet any of the requirements (Category 3).[53]

[53] Activity of the CITES Secretariat, 2008-2009 http://www.cites.org/eng/disc/sec/ann_rep/2008-09.pdf p.21



[54]

At Standing Committee Meeting 58 in 2009, the countries identified as requiring attention as a priority were Bolivia, El Salvador and the United Republic of Tanzania. Other priority countries are: Algeria, Belize, Comoros, Djibouti, Guinea Bissau, Kazakhstan, Kenya, Liberia, Malaysia, Mauritania, Mozambique, Nigeria, Pakistan, Paraguay, Peru, Rwanda, Somalia, South Africa and Venezuela, (Bolivarian Republic of).[55] According to Hemley a major impediment to CITES implementation has been the lack of financing to assist countries with implementing science and enforcement requirements. She argues that "treaty founders in 1975 didn't foresee the broad demands

[54] "Activity Report of the CITES Secretariat 2008-2009," *supra* note 15, p.21.
[55] CoP13, Doc20. P.3 Fifteenth meeting of the Conference of the Parties Doha (Qatar), 13-25 March 2010.

associated with implementation including activities for collecting information about status of traded species, administering a trade monitoring and reporting system, investigating illegal trade and penalizing offenders".[56] It was assumed that Parties would absorb the costs or building the infrastructure. That said this is not the only factor involved as she states that "many countries lack the expertise, interest or political will to address specific wildlife trade control needs and to make wildlife control enough of a priority that it can compete on the national agenda with other development and economic expansion needs"[57] Malaysia is one case of a country whose domestic legislation is still inadequate despite its relatively high level of economic development in the last decade and it acceding to the convention all the way back in 1977 with it coming into force the following year.

Weak domestic laws can indirectly work against the aims of CITES. For example despite the extinction threat to tigers, with only 3,200 tigers estimated to be left in the wide[58], (partly due to the wildlife trade but also to large scale loss of habitat) the United States has no way of knowing how many captive tigers there are in the country, who owns them, where they are or what happens to them when they die. In many states there are no restrictions on keeping

[56] Ginette Hemley, *supra* note 11. p.637
[57] *Ibid.,*. p.637.
[58] "Top 10 Most Endangered Species in the World" *The Telegraph* http://www.telegraph.co.uk/earth/wildlife/6927330/Top-10-most-endangered-species-in-the-world.html (accessed 5 May 2012).

tigers as pets. TRAFFIC argues in their report "*Paper Tigers?: The role of the U.S. captive Tiger population in the trade in Tiger parts"* that this may make them a target for illegal wildlife traders[59]. Since the US has been very active in the prevention of wildlife trafficking this is somewhat contradictory.

Countries which allow hunting of endangered species but are also signatories to CITES contradict the Convention which is aimed at preservation of endangered wildlife. For example, in Malaysia there are laws which allow native Indians to hunt some protected species. This loophole is believed among NGO workers to be exploited as a cover for illegal trade, the indigenous populations possible then selling the wildlife products on to a dealer.

Implementation problems can also occur in terms of the training of customs officers to identify illegal wildlife products and false documentation. Customs officers are not zoologists and have to make decisions in a short space of time. However in some countries surprisingly little has been done to train them. Again, although this may be explained by lack of funding, NGOs such as TRAFFIC who participate in the training are often the ones to take the lead in encouraging and organising it. In Malaysia TRAFFIC are actively involved in

[59] Douglas Williamson & Leigh Henry, "Paper Tigers?: The Role of the U.S. Captive Tiger Population in the Trade in Tiger Parts". *TRAFFIC North America*, Washington D.C. World Wildlife Fund (2008) p.10.

training ustoms officers on smuggling techniques and species identification but the lack of attention previously given to this by the customs authorities and the Ministry of Environment suggests it was not considered of high importance for their officers to identify wildlife smuggling.

Enforcement

As with many international agreements, enforcement of CITES is left to the Parties which explains why there is wide variance in practice. In some countries such as Vietnam and Malaysia, open selling of illegal wildlife products from other countries serves to demonstrate lack of enforcement by police and lack of detection by customs. In countries with greater resources (usually developed countries) this is explained better by lack of funding prioritisation than lack of funding per se. Lack of funding prioritisation can be linked to lack of norm-internalisation since it implies conservation if not a priority.

Cases demonstrating involvement of government and high ranking officials in illegal wildlife trade also demonstrate failure to enforce at the highest level and lack of norm internalisation by the state. This cannot be attributed to lack of funding but to greed and total disregard for the purpose of CITES. Arthur Blundell has written about the active involvement of

governments in the mahogany trade. Mahogany has been on CITES Appendix III since 1997, which requires a finding of legal acquisition in order to obtain an export permit. Blundell, writing in 2003, states however that "currently most of the harvest of mahogany is unmanaged and illegal".[60] For example in 2004, planes from the Peruvian navy were flying mahogany from remote forests in Madre de Dios, where the mahogany had been stolen from indigenous reserves containing "uncontacted" Indians[61]

Reporting and co-operation with CITES Secretariat

There are some problems getting Parties to compile their reports in accordance with the Guidelines for the preparation and submission of CITES annual reports.

In the notification to the Parties No. 2010/013 of 17th June 2010 it was recorded that common departures from these guidelines were as follows:

"• Many annual reports do not clearly state whether the data were derived from the actual number of specimens traded or from the quantity for which the permits or certificates were issued (often

[60] Arthur G. Blundell, & Bruce D. Rodan. "Mahogany and CITES: moving beyond the veneer of legality." *Oryx*, 37(1) (January, 2003): p. 87.
[61] *Ibid*,. p.87.

considerably different);

• Information on seized or confiscated specimens is often absent or provided in insufficient detail;

• Information on the source of the material, e.g. wild-caught or bred in captivity, and the purpose of the trade, e.g. for commercial or non-commercial purposes, is sometimes lacking or used in a different way by trading partner countries; and

• Non-standard units are often used to describe the volume of articles or commodities in trade, e.g. boxes.[62]"

In terms of annual reports not all Parties submit them on time and some are incomplete. When countries face internal problems such as civil war or lack of resources they may not submit them for a number of years but there are other examples which cannot be explained on that basis, such as the Philippines who have not submitted annual reports for 2008, 2010 and 2011.[63] While these complaints might seem trivial they no doubt impact on the effective working of CITES and the ability to more accurately estimate rates of illegal wildlife trade, something which is already difficult to ascertain. They seem to indicate that submitting reports may not be a top priority for some

[62] CITES Trade Database http://www.unep-wcmc-apps.org/citestrade/docs/CITESTradeDatabaseGuide_v7.pdf p.4

[63] CITES Annual Reports http://www.cites.org/cms/public/common/resources/annual_reports.pdf

countries.

Co-operation and Information sharing

CITES itself stresses how important international cooperation is to the protection of species from over exploitation. CITES Secretariat reports repeatedly cites the need for better co-operation implying that it is an issue. In the area of wildlife trafficking NGOs are often heavily involved in monitoring and reporting crime to authorities, speaking to and influencing government, while the cross border nature of the trade means that law enforcement agencies from different countries have to be able to work closely together. In the CITES 2005 Strategic Vision many of the goals related to the need to improve coordination for example objective 1.3 mentions improving coordination between Management Authorities and other agencies for example police, customs etc to improve enforcement capacity[64]. There can be many reasons for lack of co-operation and this is not really an area where there are any clear indications of how non-internalisation of norms could be involved. Detailed country case studies might in some cases reveal it.

Problems in CITES itself

In addition to the above, states are not aided in their enforcement efforts

[64] "CITES Strategic Vision 2005", www.cites.org/eng/news/E-SV-indicators.pdf p.9

by several problems within the CITES convention itself. Since these issues do not concern internalisation of norms this paper does not go into detail, but they are worth mentioning as they reveal the difficult balance CITES tries to achieve between allowing discretion to states in how they handle trade while ensuring that endangered species are adequately protected by the legislation. Several of the problems in CITES relate to giving too much discretion in the exemptions to the treaty. For example species who have been captive bred are not covered by CITES and may be traded, subject to any other non-CITES laws and regulations in place. However it is very difficult to establish whether a species is captive bred or not, and impossible in some cases. DNA testing can help but obviously cannot be used for every shipment. Secondly the exemption regarding specimens that are "personal or household effects" is confusing and CITES conferences have tried to resolve some of the vagueness of its terms. If the meaning is difficult enough for CITES experts to agree on, how customs officers on the ground are expected to apply it is anyone's guess. CITES also gives power to Parties to determine the strictness of regulations they put into effect. Blundell writes about the concern that they are given too much power and this could lead to a "race to the bottom" where countries implement lax regulations to attract commerce.

3.2 Transnational Legal Process Strategies

Harold Koh argues that Transnational Legal Process is *"not just a theory of explanation. It is also a blueprint for action"*[65]

A theory of TLP predicts that "nations will come into compliance with international norms if trasnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm internalisation".[66]

The practical strategies suggested by TLP are useful and applicable to CITES. They can be summarised as four strategic approaches:

1. Use of a variety of fora
2. Enmesh a variety of state and non-state actors in process
3. Increase friction caused by non-compliance
4. Repeated Interaction and Compliance brings internalisation of norms

Use of a variety of fora

This strategy is arguably one of the most effective TLP strategies for

[65] Koh, Harold Hongju. "Why Do Nations Obey International Law?" *Faculty Scholarship Series.* Paper 2101 (1997): p. 2599.
[66] Alvarez Machain case referred to in Koh, Harold Hongju. "Transnational Legal Process." *Faculty Scholarship Series.* Paper 2096 (1996): p. 207

CITES issues. Koh suggests that a variety of fora should be used to maximize the impact of interactions. These fora should be capable of generating legal norms. Examples could include domestic courts, public meetings, the media, conferences, academic work, and international organizations like the United Nations. Some countries, such as the US, have laws which allow them to prosecute individuals for wildlife crime committed overseas. Any such opportunities should be pursued. States may have signed up to other international agreements which relate to CITES in some way, such as trade agreements or other environmental conventions. These may provide fora in which CITES issues can be raised. Fora need not necessarily be public. It may be that private meetings with policy makers result in interactions and interpretations among key individuals in government. The exact circumstances will depend on the country. In the case study section this paper goes into detail with regard to South Korea and Malaysia.

Enmesh a variety of state and non-state actors in process

Transnational Legal Process shows how non-state actors can have a key role in prompting interactions on international law.. As referred to earlier in the area of CITES and wildlife trafficking non-state actors have a large role to play in carrying out some of the actions that governments should be doing themselves, for example in terms of monitoring illegal trade. Actors involved

in the wildlife trade are numerous and include rural harvesters, professional hunters, intermediate traders, wholesalers and retailers and final consumers. Those on the preventative side include government (customs, police, environment ministries etc), NGOs, regional bodies like ASEAN-WEN, Interpol, academics and individual campaigners and writers. One of Koh's arguments is that in order to influence and internalize norms, actors should be enmeshed in process, giving the example of when you have a student with discipline problems then you should put them on the disciplinary committee.[67] Repeated participation in the process helps actors internalize the norms you want them to have. The CITES regime provides an important example of this kind of process. Actors have to participate, to report and to enforce the system that CITES establishing.

While it may sounds surprising TLP would logically suggest that those in a position to commit crime should be enmeshed in process. This could involve training and setting up of focus groups or public meetings or conferences which involve a wide range of actors that include, for example oriental medicine practices or associations. In fact there are several Chinese medicine associations in the United Kingdom who have pledged not to use CITES protected species. Some writers argue about the importance of local customary

[67] Koh, Harold Hongju. "The Value of Process." *Faculty Scholarship Series* Paper 1784 (2004): p. 28

norms in changing behavior at the harvester level.[68] Some feedback system to ensure that some organizations and also retailers are able to make their opinions and voices heard could be important. In terms of those working in prevention of wildlife crime customs officers, who are already given training on pieces identification should also be able to give feedback, including confidential feedback and perhaps be involved in training each other. In Malaysia there have been concerns about the Wildlife Department failing to communicate with and support the customs officers who were specially assigned to deal with wildlife trade. One of the suggestions in the literature review section was that the judiciary and policy makers needed to be educated about the relevance of wildlife trafficking. It should be possible for training of such individuals to take place, perhaps enmeshing them further in the process by requiring them to spend a day with customs officers on the job to learn about the challenges and realities of CITES enforcement.

Within the CITES regime itself there is evidence of enmeshment of actors in process to increase interactions. In the 1980s CITES became subject to more enforcement with serious infractions by Parties being subject to

[68] TRAFFIC, "What's Driving the Wildlife Trade? A Review of Expert Opinion on Economic and Social Drivers of the Wildlife Trade and Trade Control Efforts in Cambodia, Indonesia, Lao PDR and Vietnam". *East Asia and Pacific Region Sustainable Development Discussion Papers*. East Asia and Pacific Region Sustainable Development Department, World Bank, Washington, DC. (2008) p.8.

detailed analysis by the CITES secretariat[69]. An "infractions report" was first issued in 1987 and at the biennial Conferences of the Parties (COP) thereafter. The 1987 report highlighted activities such as permit forgery and fraud, abuse of diplomatic privileges, and other smuggling tricks. A full-time enforcement officer was assigned to the CITES Secretariat in 1992 to track infractions problems, develop training tools, and host government enforcement seminars. Hemley argues that this has brought not only a more structured approach to international enforcement issues but also in some cases, attention to the problem at higher political levels.[70]

Although 175 states are Parties to CITES, the first step to enmesh states is for as many as possible to actually participate in the system and therefore all efforts to encourage remaining states to join, when possible, should be made. One country which springs to mind would be East Timor, which being relatively new should be enmeshed in the CITES regime as soon as possible to establish norms of wildlife preservation from the beginning.

Another example of the power of the CITES regime to enmeshing states in larger processes is its recommendations to States. In Resolution Conf. 11.3 (Rev. CoP15) of the Conference of the Parties to CITES, it is recommended

[69] Ibid., p.657.
[70] Hemley, Ginette. *supra* note 11. p. 637.

that "Parties that are not yet signatories to, or have not yet ratified, the UN Convention on Transnational Organized Crime and the UN Convention against Corruption consider doing so".[71] Such efforts should be extended where possible.

A further example is the provisions for trade in some crocodilian species such as the Nile and saltwater crocodiles. Countries wishing to export crocodile products are given a reasonable amount of time to develop a national management plan, and exports depend on approval and biannual review by the CITES Conference of the Parties. Regular reports are required from the exporting country and provides for an international feedback loop to make adjustments in allowable trade levels, when needed. Regular dialogue with each country and independent reviews determine the success of this system to a large extent[72].

Increase friction caused by non-compliance

Further on the point of shaming, Koh argues non-compliance with international law can cause states to experience friction with other states and so they prefer to comply. The more difficult a state can be made to feel the better

[71] Resolution Conf. 11.3 (Rev. CoP15)
[72] 'Review of Crocodile Ranching Programs," *IUCN/SSC Crocodile Specialist Group (CSG)* 2004.

in that case. Although trade bans and sanctions might be thought of coercive, when they pass through the CITES 'forum', they can be regarded as part of TLP. This point has been confirmed by Koh. The "interaction" occurs in the CITES Secretariat producing an interpretation that non-compliance is serious enough to warrant action which may prompt a state to change its laws and practice, leading to internalisation of international norms. That said, there is debate over whether trade bans work in all cases as some evidence suggests they may actually fuel a black market instead.[73]

There are other disadvantages that a state may suffer if it fails to comply with international law. For example, as Koh points out "a nation's leaders may shift over time from a policy of violations of international law to one of compliance to avoid such frictions in its continuing interaction"'. He gives the Alvarez Machain case as an example. In this case the US engaged in extrajudicial governmental kidnapping of Mexican citizens but it nonetheless impaired their ability to negotiate the North American Free Trade Agreement with Mexico[74].

[73] "Elephant Ivory Stockpile Sales Help Create a Deadly New Currency in China," *Care for Chinese Animals,* June 6 2012. Available at ; http://careforchineseanimals.net/category/ivory/ Accessed June 8 2012.

[74] Harold Hongju Koh,"Transnational Legal Process," *Faculty Scholarship Series.* Paper 2096 (1996): p. 3.

Repeated Interaction and Compliance brings internalisation of norms

Koh points out, that repeated compliance leads to obedience and so interactions should be repeated ones. He gives the example that after the oil crisis of 1974 and application for a 55mph speed limit - those who drove repeatedly, and therefore interacted with the process, encountered highway speed patrol and other enforcement mechanisms. Complying vehicles blocked lanes and made it harder to speed. In the context of illegal wildlife trade examples of repeated interactions could occur through the system of issuing annual reports and having to respond to complaints about illicit constantly whether from CITES or from NGOs. A state might introduce double-checking procedures, such as in the United Kingdom, which involve establishing reliable import checks in consuming countries for trade in Appendix II species. Usually an importing country is only required to see that a permit accompanies the shipment of Appendix II species – control of trade in these species is entirely with the exporting party.

CHAPTER 4: CASE STUDIES

4.1 South Korea: Bear bile

This section presents evidence from South Korea to demonstrate how Transnational Legal Process is showing signs of success in getting the state to internalise norms on the need to protect endangered bears and prevent international trade in their parts, albeit very slowly. It also further reinforces the point made about the important of multi-fora interactions as a strategy derived from TLP. In Korea there are fewer issues about lacking or funding and capacity to explain non-compliance, than there would be in a less developed country.

Despite its rapid economic development since the 1980s, many traditions hold strong in South Korean society including the importance of Korean Traditional Medicine (KTM), which along with Chinese Traditional Medicine occasionally recommends the use of species which are now endangered, for example tiger bone, rhinoceros horn, pangolin scales and bile from the gall bladders of bears[75]. Therefore norms relating to the use of wildlife may be

[75] Also known as gall; a fluid produced by the liver and stored in the gall bladder that aids in digestion. It is sought after in oriental traditional medicine to fight fever, cleanse the liver and improve vision but its commercial production has also led to its use in non-

quite different compared to other nations and well cemented in culture.

South Korea became a party to CITES in Oct 1993, almost 20 years after the Convention was established. It was actually US concern over South Korean use of ivory and tiger bones, despite a 1983 ban on this by the Ministry of Health and Welfare (then called the Ministry of Social Affairs)that prompted its joining[76]. The Global Environment Division of the Ministry of Environment serves as the CITES Management Authority. The Vertebrates Research Division of the National Institute of Biological Resources serves as the CITES Scientific Authority. Under the CITES National Legislation Project Korea meets all of the requirement for implementing CITES[77]

Two species of bear; the Asiatic Black Bear and the Brown Bear, are native to the Republic of Korea. Asiatic black bears (commonly referred to as moon bears) were once abundant in Korea, but as a direct result of the huge demand for their gall bladders, they have been hunted almost to extinction. It is thought that there are fewer than 20 individuals left in the wild. Despite this

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traditional medicine products such as shampoo, soap, cough drops and soft drinks. Three bears are typically targeted for the bear bile trade. They are the Asiatic Black Bear *Ursus thibetanus*, Sun Bear *Helarctos malayanus* and Brown Bear *U. arctos*

[76] Marcus Phipps & Sue Kang, "A Question of Attitude: South Korea's Traditional Medicine Practitioners and Wildlife Conservation." *TRAFFIC East Asia Report* (2003): p. 1.

[77] Source: CITES SC59 Doc.11 (2010) quoted in Kathryn E. Foley, Carrie J. Stengel & Christopher .R. Shepherd, "Pills, Powders, Vials and Flakes: the bear bile trade in Asia," *TRAFFIC Southeast Asia,* Petaling Jaya, Selangor, Malaysia (2011): p. 8.

there are estimated to be over 1000 bears in farms around Korea where bear farming remains legal. The *Bear Farm Administration Index* (2005) published by the Ministry of Environment contains various guidelines. It is illegal to extract bile from live bears and bears cannot be killed for their parts until they reach 10 years of age.

Korea lists the Asiatic Black Bear in category I of the list of *Endangered Species of Wild Fauna and Flora (protection of Wild Fauna and Flora Act (2005)*[78]: Category I includes species facing extinction due to human and natural factors. Penalties for the illegal poaching and capture of the species include fines of up to KRW3 million and/or imprisonment for up to 5 years.

Ginette Hemley in her article on CITES usefulness as a tool of conservation is scathing about lack of enforcement in Korea. Although she does not go into detail she argues that East Asia, in particular including China and Korea are places where there has been a serious lack of enforcement combined with a burgeoning demand for products as a result of rapid economic growth and consumer purchasing power[79].

Despite the legality of bear farms in Korea there is plentiful evidence to

[78] Ministry of Environment, Republic of Korea
[79] Ginette Hemley, *supra* note 11. p.637.

show that bear bile products are imported into Korea from abroad in breach of CITES. All bears are listed on CITES and the Asiatic Black Bear and Sun Bear are listed on Appendix I.

In a recent TRAFFIC South East Asia which included a study of South Korea, surveys were conducted of KTM shops in Seoul, Seongnam and Daegu in 2010. Out 61 shops in total.[80] 26 sold bear bile primarily in whole gall bladder form (see table below – extracted from the report), over 50% of the gall bladders found in TM shops were claimed to be of Russian origin 38% claimed to be from China and 7% domestically sourced. Ten of the 26 shops (38%) reported a steady demand for bear bile and majority of shops (77%) said that their customers would not consider alternative products.

The report suggests that bear bile is a highly priced commodity in comparison with other countries and that the price of a whole gall bladder was reported as being between $1,200 and $3,600[81]. Korean consumers favour bear bile from wild bears as opposed to captive bred ones. The TRAFFIC report also reports that prices range from $16 to $160 per gram. Conversations with shop owners revealed that many were aware that selling imported bear bile products with CITES permits was illegal. These shop keepers reported that

[80] *supra* note 77.
[81] *Ibid.,* p.27..

products could be easily ordered in advance from a dealer and a few even recommended making a pre-order for wild caught bears to guarantee authenticity. The issue of authenticity was reported as a concern with some shops stating that they would not sell gall bladder as it was too difficult to distinguish it from other species.

The table below is a reproduction of the table from the report:

Available Product	**Number of shops selling product**	**Open Display % of Shops**	**Product Origin**	**Sold in (form)**	**Price range ($ US dollars)**	**Average Price $US/Unit**
Gall bladder	25	0%	China Russia South Korea	Whole gramme	Whole: $480-$3,600 Gramme: $9-$240	55.38/g
Flakes	2	0%	China Russia	bottle	$96-$160	128/bottle

The TRAFFIC report also refers to a study by Ng and Tan (2006) found that bear bile products for sale in Singapore were often sourced from China but

also from Russia, Thailand, India, DPR Korea, Malaysia and Indonesia suggesting there is some, but probably very little export of Korean bile products.[82]

The evidence above demonstrates inadequate enforcement of CITES in Korea with respect to bear bile from overseas, as products have been imported in breach of the Convention. They are clearly available to those who request them suggesting an absence of monitoring and police enforcement. Korea has no special police division to tackle wildlife crime and trafficking at present.

There have been attempts internationally to bring Korea to heal on this issue. At CITES Resolution conference 10.8 in 1997 on the 'Conservation of and trade in bears' passed at the 10th CoP meeting (CoP10) Parties were urged to 'take immediate action in order to demonstrably reduce the illegal trade in bear parts and derivatives'[83] In 2000 at the 11th meeting of the parties (CoP11) decision 11.43 stated that parties were required to report to the Secretariat about action taken to implement resolution conference 10.8 including any national legislation in place to control trade in bear parts/derivatives and enforcement efforts and penalties In 2002 at CoP12 2 decisions were made relating to the sale of bears and bear products. Decision 12.27 states that

[82] *Ibid.*, p.8.
[83] *Ibid.*,. p.8.

parties that had failed to report to the Secretariat in 2001 as required were listed as parties who were believed to be large consumer and producer states for bear parts and derivatives. These included South Korea and Malaysia among others.

At the 2004 meeting the standing committee identified that the major problem for many parties was distinguishing gall bladders of bears from those of other animals so the Secretariat addressed this by advising the use of forensic analysis which could also differentiate between captive bred and wild animals but stated that due to the lack of information from the parties it was difficult for the secretariat to provide proper counsel on effectively combating the illegal trade of bear parts and derivatives. It had taken 8 years to reach this point begging the question why Korea did not co-operate with CITES on the matter.

In the last few years the issue has come to a head for several reasons. The first is due to a spat with Vietnam. One method of inward flow of bear bile product to Korea comes from Korean tourists who, as part of package holidays arranged by Korean travel agencies are taken to Vietnamese bear farms and encouraged to buy products. Bears are often “milked” in front of them to prove that the liquid is genuine. As in Korea it is illegal in Vietnam to extract bile

from live bears, although farming remains legal in both countries. Despite Vietnam's repeatedly complaints about this Korea failed to take any action. In Autumn 2009 Korea's Joongang Daily reported that sale and transport of bear bile has grown to such an extent that one Vietnamese lawmaker was in the process of taking action against the Korea government.[84]

Nguyen Dinh Xuan a Vietanemese National Assembly member said that he had sent a letter to Korea's Environment Ministry urging the government to find a solution- this was confirmed by the Korean ministry. He asked that the Korean government request the public to refrain from engaging in this activity. Xuan claimed that many farms in Vietnams are being run by Koreans who extract bile and sell it to tourists. This has been confirmed elsewhere, including by Education for Nature Vietnam who conducted an undercover survey in 2011 – they report that there were more than 100 tourist buses transporting around 1,500 Korean tourists to bear farms in the span of just 10 days in April and August. Travel agencies pick up commission from this.[85] In 2009 at the time of the article Vietnamese media reported that the Environmental Police in Vietnam had raided one bear bile farm in Ha Long. Koreans were among those

[84] Moon Gwang-lip "Vietnamese urge Korean not to travel for bear bile", *Korea Joongang Daily.* 28 October 2009 http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2911817 (accessed 10th May 2012). http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2911817

[85] Education for Nature Vietnam http://envietnam.org/our-work/end-bear-crime.html

caught, allegedly involved in the sale and purchase of bear bile and had their passports temporarily confiscated, copied and filed by police before being deported back to Korea. This led to a meeting at the Korean embassy in Vietnam, where tensions ran high with the Vietnamese suggesting that next time they would arrest Korean citizens. This went unpublished but was communicated to the writer of this paper through a reliable source who campaigns on bear bile issues in South Korea and is directly involved with International and Korean NGOs. The dispute came in the context of recently renewed relations between Korea and Vietnam and there was concern that the matter would drive a wedge between them. Finally the Korean government started to take action, although slowly and the Korean Customs Service launched an awareness campaign at Incheon International Airport with the NGO Green Korea United. Bear bile is now, since last year, specifically listed by name in the customs checklist that passengers submit when they land at Incheon. Conservationists had argued that in many cases Koreans were not aware that bringing the bile into Korea was illegal.

Secondly, discussions above also occurred in the backdrop of negotiations between the Ministry of Environment and national and international NGOs (including World Society for the Protection of Animals or WSPA and Green Korea United) to discuss phasing out of bear farming in

Korea. This has resulted in a bill that would end the practice. The process is currently stalled while compensation arrangements for farmers are worked out but it appears that eventually bear farming will become illegal in Korea.

In Transnational Legal Process terms this is a good example of repeated interactions by state and non-state actors, in a variety of fora – through parliament in the case of the new law and almost through court in the case of the threat from the Vietnamese lawmaker. This prompted an interpretation that domestic and international law were being breached and prompted action (through discussions on banning bear bile and improved commitment by customs) to internalise international law by enforcing it. In time, as passengers are educated about bear bile the norm against bringing bear bile into Korea should become internalised and repeated compliance will become obedience.

Support for bear bile farming is certainly waning as are the profits from it. In national surveys, 98% of Korean nationals claimed they believed bear bile farming was wrong, and should be stopped.[86] In a 2007 survey of Korean bear farmers conducted by Green Korea United, 80% of farmers agreed to abolish bear farms if the government agreed to purchase their bears and compensate

[86] "Illegal Bear Farm Discovered, Bear Gunned Down," *Bear Necessity Korea*, Availabe at: http://bearnecessitykorea.com/2012-commitment/illegal-bear-farm-discovered-bear-gunned-down/ Accessed 29 April 2012.

farmers for their business at an average price of $11,350 US dollars per farm. The ban on live milking in 1992 had occurred as a result of public outcry at the cruelty involved although evidence has suggested the practice has remained since then.[87]

Problems still remain in improving the process. More media attention is needed to educate people that transporting bile into Korea is illegal, plus the authorities need to clamp down on the travel agencies involved. Korea needs to improve its data reporting to CITES and work with CITES closer to stop the trade. The only Korean NGO that deals with wildlife trafficking matters in Green Korea United. They have chosen to try and work closely with government to influence in that manner. For these reasons they do not attempt to name and shame which can make it difficult for international NGOs and researchers to understand the scale of the problem in Korea. It may arguably also be a lost opportunity to educate the public and to create vigorous interactions that may produce interpretations and so forth. On the other hand it may be that the interactions they produce with the government in private are already working. Applying the strategies of TLP, use of the media as a forum

[87] Evidence of illegal practice in Korea (milking) came out when a 2 year old bear who had escaped from an illegal bear farm was shot down April 23rd this year and found to have a tube mark in its body indicating illegal practice although no drainage facilities were discovered at the farm. http://news.jtbc.co.kr/html/994/NB10098994.html

for interaction is an important opportunity which is currently being missed, although in the last few years there have been a handful of documentaries on bear bile.

4.2 Malaysia: The Case of Anson Wong

Malaysia has been a CITES member country since 1977, with the Convention coming into force on 18th January 1978[88]. Malaysian authorities have designated Management Authorities throughout the country to implement CITES. Since that time there have emerged a number of obstacles to enforcement as well as implementation, monitoring and supporting infrastructure. CITES was implemented into domestic legislation at the federal level by the Customs Act 1967 (as amended), the Customs (Prohibition of Imports) Order 1998 and the Plant Quarantine Regulations 1981, in Peninsular Malaysia by the Wildlife Protection Act 1972[89] (amended 1991), National Forest Act 1984 and the Malaysian Timber Industry Board Act 105 (1973). The Customs Prohibition Order provides penalties. The Protection of Wildlife Act 1972 which deals with fauna, has provisions for appointing all relevant CITES agencies, details the administration, management and

[88] Chen Hin Keong & Balu Perumal, "In Harmony with CITES?: An analysis of the compatibility between current forestry management provisions and the effective implementation of CITES listing for timber species in Malaysia," *TRAFFIC Southeast Asia, WWF, IUCN*, October 2002.

[89] sometimes seen referred to as the Protection of Wildlife Act 1972.

enforcement for CITES species. This was superseded by The Wildlife Conservation Act 2010[90]. The Management authorities able to issue permits for CITES are the Department of Wildlife and National Parks (DWNP), Fisheries Department (FhD), Department of Agriculture (DOA) and Malaysian Timber Industrial Board (MTIB). Sarawak and Sabah, the other provinces of Malaysia, located on the island of Borneo have some separate implementing legislation.

Malaysia is incredibly bio-diverse, being both a producer (range) and consumer country with regard to wildlife trade, plus the dubious reputation for being the wildlife trafficking hub of Asia. General compliance issues in Malaysia are primarily lack of enforcement, lack of adequate legal implementation, contradictory domestic laws, weak permit provisions, systemic corruption within customs and at higher levels, and lack of will from law enforcers who have to be routinely badgered by NGOs to take action against reported illegal trade.

The circumstances surrounding the pursuit and arrest of the Malaysian wildlife smuggler Anson Wong Keng Liang demonstrate how Transnational Legal Process is contributing to norm change in regards to CITES and the particular importance of provoking interactions in a wide variety of fora as a

[90] The Wildlife Conservation Act 2010 (Act 716)

strategy for encouraging norm internalisation. It also suggests that linking the CITES issue to another societal issue, in this case corruption can assist.

Anson Wong's speciality was sourcing the rarest of specimens and his empire stretched across continents. As his biographer Bryan Christy describes, when Wong was arrested in 1998 at Mexico City Airport off a Japan Airlines flight, it was the catch of a lifetime for the U.S. Fish and Wildlife Service. Wong was the world's most wanted smuggler of endangered species. "His arrest, involving authorities in Australia, Canada, Mexico, New Zealand, and the United States, was a hard-won victory, the culmination of a half-decade-long undercover operation still widely considered the most successful international wildlife investigation ever"[91] Special Operations had to go so far as to set up several companies to lure Wong into selling illegally obtained species. Despite Wong being Malaysian the authorities in the US did not involve the Malaysian government given that it was common knowledge that Wong had people in the government agencies, including the Wildlife Department working for him. The investigation revealed much about his tactics. A corrupt FEDEX employee and the use of fake addresses, a huge network of contacts and exploitation of the CITES captive breeding loophole were all

[91] Bryan Christy, "The Kingpin: An exposé of the world's most notorious wildlife dealer, his special government friend, and his ambitious new plan," *National Geographic*, January 2010.

utilised by Wong to run his empire.

The US used the Lacey Act to convict Wong and he was sentenced to 71 months in jail, fined $60,000 and banned from exporting to the US for 3 years after his release. The Lacey Act allows the US to enforce other countries' wildlife laws by making it a federal law violation for anyone to import or to export animals taken, owned, transported or sold in violation of the laws of *any* state, Indian tribe, foreign country or in violation of any treaty.[92] In TLP terms, an interaction occurred in a norm generating forum (the US court) which created an interpretation that Wong was in breach of international and domestic law.

While in the US the case would have served as repeated compliance contributing to norm internalisation and obedience with CITES, in Malaysia the case did not appear to impact on Wong's ability to operate or to bring any immediate internalisation of norms. In 2003 when he was released he returned to Malaysia Wong received funding and permission from Penang government to build a tiger zoo which was expected by many to become a front for him to start illegally trading in big cats. Wong had friends in high places including

[92] The Lacey Act referred to in Shennie Patel "The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn." *18 Houston Journal of International Law.* 157 (1995-1996): p. 178.

Misliah Mohamad Basir, who was the Wildlife Department official directly responsible for policing Wong and who counted him as a 'good friend'. Despite this, the US conviction and the work of those writing about Wong in the media had brought his activities and connections with government to the attention of Malaysian society.

One of the issues with the Malaysian media has been the level of state control making it difficult for journalists to criticize the government directly. However they are free to discuss foreign reports on Malaysia[93]. However, in January 2010 there was public and media outcry over an article in National Geographic that detailed Wong's activities, including his connections to government officials and this led to increased attention[94]. According to Bryan Christy, "dozens of articles - many of them on Malaysian newspapers' front pages - finally told the story of Operation Chameleon, Wong's Penang operations, and the history of poor management by the country's wildlife department, exposing years of bad policy and official venality"[95].

The Ministry of National Resources and Environment (MNRE) soon announced a revamp of its wildlife department promising to rotate senior

[93] Bryan Christy. "The Serpent King." *Foreign Policy.* 28 December 2010. Available at http://www.foreignpolicy.com/articles/2010/12/28/the_serpent_king?page=0,0 (Accessed 5 May, 2011).
[94] Bryan Christy, *supra* note 91.
[95] Bryan Christy. *supra* note 93.

officers every three years, MNRE stripped the department of some of its key powers and transferred Basir who is now under investigation by the Malaysian Anti-Corruption Commission. NGOs were active in advising the government on legislation and Malaysia's wildlife laws were overhauled in 2010 for the first time in four decades. The new law attempts to bring domestic law into line with CITES, although some problems remain and TRAFFIC have been analysing areas of Malaysian domestic law to spot loopholes and compliance problems, a project which the writer of this paper had the chance to be involved in on an internship.

While law changes are one thing, enforcement is another. Although there may be a long way to go in terms of improving enforcement in Malaysia, there are promising signs of change. The practical evidence of norm change in Malaysia came on 25 August 2010 when Wong stepped off a plane carrying near 100 baby boa constrictors, two vipers and a South American turtle hidden in his suitcase. A faulty catch on the case led to the discovery. The Malaysian government revoked his business license, shut down his zoo and seized the entirety of his animal collection. In November 2010 he was sentenced to five years in prison which was an unprecedented punishment for a wildlife trafficker in Malaysia.

Therefore, as a result of these interactions in various fora, including the US and Malaysian courts and international and Malaysian media, involving a range of state and non-state actors, the interpretation that Malaysia was not enforcing CITES led to actions which internalised CITES further into domestic law and suggest that norm internalisation is occurring. This is all promising although there is a disappointing footnote. In February 2012 his appeal for a sentence reduction was allowed and he was released after serving 17 and a half months. The reasoning was that the High Court which had imposed the 5 year term had wrongly considered certain factors such as the two vipers, which were in the badg but not included in the charge sheet, the fact that the snakes were stuffed into the bag and therefore subject to cruelty and that Wong was greedy in making profit. Furthermore, the panel who reduced the sentence set aside the RM190,000 fine imposed on Wong by the Sepang Sessions Court on the basis that it was beyond the ceiling of RM10,000 which the Court could legally impose.[96]

Therefore in Malaysia there is evidence that TLP can contribute towards norm internationalisation and yet there remain problems in the domestic legislation, practices and the existence of corruption that provide challenges.

[96] "Wildlife trade Anson Wong freed after court reduces jail term," *The Star,* 22 February 2012. Available at http://thestar.com.my/news/story.asp?file=/2012/2/22/nation/20120222193558&sec=nation (accessed 5 May 2012).

It shows how the use of different fora is powerful and that norm change requires time. In terms of future prospect, Malaysia is already part of the Association of Southeast Asian Nations' Wildlife Enforcement Network (ASEAN-WEN) which is the world's largest intergovernmental wildlife law enforcement network. Nationally, members operate an inter-agency task force comprised of police, customs and environmental officers. The network facilitates inter-agency and cross-border collaboration in the fight against the region's illegal wildlife trade.[97] There is a Secretariat based in Bangkok called the Program Coordination Unit (PCU) that coordinates training and workshops, organizes annual meetings, facilitates communication, and builds high-level support.[98] In TLP terms this is exactly the kind of interactive strategy that should promote repeated compliance and eventually obedience.

It seems in the case of Wong that there was a genuine will by the sentencing court to apply a stronger sentence but that legally there were obstacles to doing so. Interactions in domestic fora to achieve changes in legislation to become tougher on wildlife trafficking will enable domestic law to be more consistent with not with the terms of CITES but also its spirit of

[97] The Association of Southeast Asian Nations Wildlife Enforcement Network (ASEAN-WEN) http://www.asean-wen.org/

[98] "Frequently Asked Questions," ASEAN-WEN website. Available at http://www.asean-wen.org/index.php?option=com_content&view=article&id=48&Itemid=56#6 Accessed 5 May 2012).

wildlife conservation. To aid this, anti-wildlife trafficking NGOs should consider building or expanding legal teams, employing lawyers who also share a concern for the aims of CITES and who can confidently guide strategy towards changing laws, sharing their skill-sets with the skills already present in NGOs.

Owing to the restrictions on criticism of the government, as referred to earlier it is important that foreign media continue to write about the governments role in wildlife trade using evidence collected from inside the country. International cooperation is therefore essential to ensure this happens. It was seen how important public anger was in changing the conduct of the Wildlife Department and this ought to be encouraged.

As mentioned, a difficult problem which Malaysia is corruption. The case of the Anson Wong demonstrated how wildlife traffickers have friends at all levels, from customs officers who turned a blind eye to government officials. However since Malaysia is now a signatory to the UN Convention Against Corruption there have recently been moves by those campaigning against the illegal timber trade in Malaysia to launch a complaint with the UN. Although it is beyond the scope of this paper to consider the legal merits of such a claim, the logic of pursuing interactions in fora where conventions with more teeth

than CITES could apply is consistent with TLP suggestions. By connecting wildlife trafficking with another domestic issue such as corruption increased attention can be gained and more fora for interactions opened up.

CHAPTER 5: CONCLUSION

This paper demonstrates that norm-internalisation is an important factor in explaining internalised compliance of states with CITES. Transnational Legal Process as a strategic theory both explains aspects of how states come to comply with CITES as well as providing strategies for improving this, especially the pursuance of interactions in a variety of norm generating fora.

Chapter one of this paper introduced CITES and gave background information on trade and compliance, finishing with a review of existing literature on CITES which suggested that there is a gap in understanding of how states behave in this area and a need for analysis on norm internalisation in the area of CITES. Chapter two argued why Harold Hongju Koh's theory of Transnational Legal Process can help explain state obedience and non-obedience to CITES by considering the theory's merits in comparison with other theories on why states obey international law. TLP explains best the *internalisation* of norms while being flexible enough to acknowledge the influence of other factors such as state interests. Its also recognises the role of non-state actors, something which is particularly relevant in the area of CITES. Its nature as both a theory and a blue print for action make it suitable for deriving practical, strategic suggestions for norm internalisation.

Chapter three considered the the norm-related aspects of non-compliance with CITES and applied the strategies suggested by TLP to wildlife crime, thereby making suggestions on how norm internalisation could be improved. The chapter argued that provoking interactions in a wide rage of fora cold be particularly important in this area. Chapter four extended this argument through case studies of South Korea and Malaysia. Both case studies demonstrated that interactions in a wide range of fora can generate interpretations which can in turn lead to internalisation of international law and norms. Both case studies revealed that norm internalisation is a long-term process. The South Korean case study revealed that change has occurred in attitudes towards the wildlife trade. It suggests that there is a need for more interactions to take place in the media, and for the issues around bear bile and use of endangered species in Korean Traditional Medicine to receive wider attention. Since there is only one, very stretched NGO who deal with CITES matters in Korea, among many other issues, and they have taken a conciliatory approach towards the issue with the government, they are likely to be of limited use in raising public awareness even though they may be very effective behind the scenes. There is a need for a second NGO to work specifically on wildlife trafficking in a more direct way.

The case of Malaysia reveals how interactions in fora outside of the country, for example in the US Courts and in international media, can impact on domestic law change and internalisation of international law and norms. However, even though there is evidence of a change of attitude towards the wildlife trade, Malaysia's domestic laws are currently still an impediment to compliance with CITES, despite the overhaul of wildlife legislation several years ago..

TLP does not seek to deny the role of state interests or identity in compliance behaviour. It acknowledges that states may comply for a range of reasons. However given that literature suggests a need to better understand the behaviour of states when it comes to wildlife policy, focusing specifically on norm internalisation within a theoretical framework, can provide lateral thinking on the issue on compliance and suggest logical strategies for action.

As Bryan Christy has pointed out, "for too long placing the word "wildlife" in front of the word "crime" has diminished its seriousness". [99] Transnational Legal Process provides a strategy to help end this.

[99] Christy, Bryan "The Kingpin: An exposé of the world's most notorious wildlife dealer, his special government friend, and his ambitious new plan." *National Geographic*, January 2010.

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滅種危機에 처한 野生動物의 國際去來 따른 超國家的 法律節次: 說明 및 勸告事項

초록

본 논문은 Harold Hongju Koh에 의해서 강조된 초국가적 법률절차(Transnational Legal Process, TLP)의 이론적 관점을 적용하여 멸종위기에 처한 야생 동식물종의 국제 거래에 관한 협약(The Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES)에 관련된 국가 준수 또는 비준수에 따른 규범의 내면화에 관한 연구이다. 본 논문은 CITES와 관련된 국가의 장기적 준수에 있어서 규범의 내면화가 중요한 역할을 하고 있고, CITES의 규범 내재화 또는 이를 따르게 끔 유도하는 환경을 조성을 위한 효율적인 전략을 제시하는데 있어서 이론적이면서도 실질적인 조치를 위한 청사진을 TLP가 제공할 수 있다고 주장하였다. 또한 상호작용과 즉각적인 법률의 해석을 유발할 수 있는 포럼을 형성하게 하는 여러 규범을 활용하는 것이 특히 TPL에서 도출된 전략으로써 CITES와 관련 있다고 논하였다. 이는 밀매에 관여하는 사람이나 이를 방지하고 발견하고자 하는 사람들의 입장에서 야생동물 밀매에 관해 비국가적 요소의 중요성과 CITES 내의 상대적으로 약한 집행 조항 때문이다. 마지막으로 본 논문은 실제적으로 어떻게 TLP가 적용되고 있고, 또한 여러 형태의 포럼들에서의 상호작용이 국제 야생동물 밀거래를 방지하고 발견하는데 얼마나 효과적인 지에 관한 사례연구를 제시하였다. 한국에서의 웅담(熊膽) 관련 제품들의 불법거래에 대한 인식의 변화가 첫 번째 사례연구이고, 두 번째로는

TLP를 통해 규범의 변화에 대한 증거로 말레이시아에서 악명 높은 야생동물 밀거래자 Anson Wong의 행위에 대한 대항하는 방법들을 제시하였다. 본 연구는 정부가 CITES를 따르는지 또는 따르지 않는지에 대한 사항에서 중요한 요소가 규범의 내재화이며, 특히 각 국가에 따라서 처한 환경에 따라 차별화된 전략을 요하는 기타 요소들이 있음을 밝혔다. 사례연구들이 제시하는 것처럼 규제의 변화는 일반적으로 오랜 기간을 통해서 일어나고, 생물을 멸종에서 보호하는 데에는 무역금지와 같이 과감하면서 짧은 기간 동안 시행될 수 있는 방법이 필요하다. 이에 반하여, 초국가적 법률 절차는 여러 기관들이 장기간 동안 영향을 주고 활용된 다른 전략을 보완할 수 있는데 목적을 둔 규범의 변화에 초점을 맞춘 전략을 개발해 내는 데에 도움을 줄 수 있다.

주요어: 국제법, 야생동물 밀매, 암거래, 범죄

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