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## **The implementation of international law in the national legal order : a legislative perspective**

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8.1 IMPLEMENTATION OF THE CONVENTION ON INTERNATIONAL TRADE IN  
ENDANGERED SPECIES

## 8.1.1 General

During the 1960's and 1970's the international trade in wildlife has increased dramatically.<sup>678</sup> In 2005 the value of legitimate global trade in wildlife and plants, excluding timber, was estimated at 21 billion US dollars.<sup>679</sup> The illegitimate trade in international trade in wildlife, on the other hand, is valued at between 5 billion and 20 billion US dollars.<sup>680</sup> High demand for wildlife has had detrimental effects on the survival of species, which, apart from the species' intrinsic value, has several negative consequences. For instance, animals and plants may be indispensable for the development of new drugs and other forms of medical treatment. Similarly, plants are a source of information which may prove important to increase the world's food production. If species become extinct, their value is lost.<sup>681</sup> In an attempt to address the disadvantages of the international trade in wildlife, the international community deemed it necessary to provide for an international approach, which has resulted in the Convention on International Trade in Endangered Species, known by its abbreviation CITES. It can be traced back to the United Nations Stockholm Conference on the Human Environment in 1972, during which a recommendation was adopted which called for an international convention on the export, import and transit of certain species of wild animals or plants.<sup>682</sup> The treaty was adopted in March 1973 and entered into

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678 D. Kueck, 'Using international political agreements to protect endangered species: a proposed model' 2 *University of Chicago Law School Round Table* (1995) 345-354, 345. This estimate dates back to 1987.

679 G.E. Rosen and K.F. Smith, 'Summarizing the evidence on the international trade in illegal wildlife' 7 *EcoHealth* 1 (2010) 24-32, 24. Also J.E. Scanlon 'The international dimension of illegal wildlife trade' (Presentation on the occasion of the 1<sup>st</sup> session of the United Nations Environment Assembly (UNEA) in Nairobi, Kenya, on 24 June 2014) <[https://cites.org/eng/international\\_dimension\\_of\\_illegal\\_wildlife\\_trade](https://cites.org/eng/international_dimension_of_illegal_wildlife_trade)> (accessed 29 March 2018). Scanlon adheres to an estimation of 20 billion US dollars.

680 Rosen and Smith, 'Summarizing the evidence on the international trade in illegal wildlife' (n 679) 24.

681 D. Mahony, 'The Convention on International Trade in Endangered Species of Flora and Fauna. Addressing problems in global wildlife trade enforcement' 3 *New England International and Comparative Law Annual* (1997) 1-23, 2-3.

682 Recommendation 99, third paragraph, of the Stockholm Action Plan. 'Report of the United Nations Conference on the Human Environment' (Stockholm 5-16 June 1972) UN Doc A/CONF.48/14/Rev.1.

force in July 1975 pursuant article XXII CITES. As yet, 183 states are party to the treaty, which has been described as perhaps the most successful of all international treaties concerned with the conservation of wildlife.<sup>683</sup>

### 8.1.2 Content of the Convention

The purpose of the CITES is the 'protection of certain species of wild fauna and flora against over-exploitation through international trade'.<sup>684</sup> To this end, it regulates international trade in endangered species, encompassing both plants and animals, thus balancing the interests of lucrative trade and the protection of wild life.<sup>685</sup>

The CITES distinguishes between three categories of species, each of which is included in appendices I, II or III. Appendix I contains species which are threatened with extinction. In order not to endanger further their survival, it is stipulated, trade in specimens of these species may only be authorised in exceptional circumstances.<sup>686</sup> The species included in appendices II and III are subject to less strict regulations, as they do not (yet) face the threat of extinction.<sup>687</sup> The core provision of the CITES is laid down in article II, fourth paragraph, which provides that trade in specimens and species included in the appendices I, II and II to the CITES, is prohibited. From this prohibition is exempted trade in accordance with the provisions of the CITES, which essentially consists of a permit system.<sup>688</sup>

The articles III, IV and V prescribe for the species included in each appendix the applicable trade restrictions.<sup>689</sup> They include the presentation of permits for the import or export of a specimen to which appendix I applies; re-export or introduction from the sea of a specimen of this category is allowed only with a certificate.<sup>690</sup> States must designate one or more authorities which are authorised to issue permits and certificates

683 M. Bowman, P. Davies and C. Redgwell, *Lyster's international wildlife law* (2<sup>nd</sup> edn CUP, Cambridge 2010) 484. For the number of state parties visit <http://www.cites.org> (accessed 29 March 2018).

684 Preamble.

685 S. Patel, 'The Convention on International Trade in Endangered Species: enforcement and the last unicorn' 18 *Houston Journal of International Law* 2 (1995) 157-213, 161. Similarly, K. Hill, 'The Convention on International Trade in Endangered Species. Fifteen years later' 13 *Loyola of Los Angeles International and Comparative Law Journal* 2 (1990) 231-278, 232.

686 Art II, first paragraph. 'Specimens' are defined as 'any animal or plant, whether alive or dead [or] any readily recognizable part or derivative thereof' (Art I, sub b).

687 Art II, second and third paragraph.

688 Bowman, Davies and Redgwell, *Lyster's international wildlife law* (n 683) 485.

689 For a more extensive discussion of the applicable trade restrictions, see Bowman, Davies and Redgwell, *Lyster's international wildlife law* (n 683) 499-509.

690 'Re-export' means export of any specimen that has previously been imported (article I, sub d). 'Introduction from the sea' means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State (art I, sub e).

and give advice on behalf of that state.<sup>691</sup> Furthermore, the CITES provides which conditions must be fulfilled before the required document can be issued. For instance, for this species an export permit may only be granted if a (scientific) state authority of the exporting state has advised that such export will not be 'detrimental to the survival of that species' and if a state authority is satisfied that a living specimen will be 'so prepared and shipped as to minimise the risk of injury, damage to health or cruel treatment'.<sup>692</sup> A separate permit is required for the import of the specimen, which may only be granted if the specimen is not to be used for primarily commercial purposes.<sup>693</sup> In sum, the international trade of such species may only be authorised in 'exceptional circumstances'.<sup>694</sup>

The CITES imposes similar, but less stringent, requirements on permits and certificates for trade in species included in appendices II and III.

The CITES also provides for exemptions to the permit system. Permits are not required for the 'transit or transshipment of specimens through or in the territory of a Party while the specimens remain in Customs control'.<sup>695</sup> Neither do the limitations prescribe by the CITES apply to specimens that can be considered 'personal or household effects'.<sup>696</sup>

In addition, the CITES imposes some related requirements on state parties, such as the obligation to minimise the delay caused by the formalities which are part of the trade in specimens under the CITES and the obligation to keep records of trade in specimens which fall within the scope of the CITES. Such records must include the names and addresses of importers and exporters, the official documents that were issued, the types of specimens etc.<sup>697</sup>

### 8.1.3 Legislative standards

#### 8.1.3.1 Implementation and harmonisation

The CITES does not contain an obligation of a *general* nature which requires the adoption of domestic measures in order to give effect to its norms. However, in March 1992 the Conference of the Parties adopted a resolution, which 'urges all Parties that have not adopted appropriate measures for effective implementation of the Convention to do so [...]'.<sup>698</sup> In 2013,

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691 Art IX, first paragraph.

692 Art III, second paragraph, sub a and c.

693 Art III, third paragraph, sub c.

694 Art II, first paragraph.

695 Art VII, first paragraph.

696 Art VII, third paragraph.

697 Art VIII, third and sixth paragraph.

698 Conference of the Parties to the Convention on the International Trade in Endangered Species, 'National laws for implementation of the Convention' Resolution Conf. 8.4 (March 1992) <<https://www.cites.org/eng/res/index.php>> (accessed 29 March 2018).

ensuring compliance with and implementation and enforcement of the treaty was identified as one out of three 'strategic goals' as part of CITES Strategic Vision.<sup>699</sup>

Leaving aside these documents, any binding obligation to adopt implementing legislation must be derived from the CITES provisions of a *special* character, such as the aforementioned duty to prohibit trade of endangered species which is not in accordance with the CITES.<sup>700</sup> Pursuant to article XIV, first paragraph, states are permitted to apply stricter domestic measures to the trade, possession or transport of specimens of species included in the appendices to the CITES, including the complete prohibition thereof. The CITES thus prescribes minimum norms.<sup>701</sup>

### 8.1.3.2 *Information to the public*

Another obligation that may be considered a legislative standard consists of the requirement to make available to the public the periodic reports on the implementation of the CITES. These reports must encompass a summary of the records of trade in specimens, as was discussed above, and a report on the legislative, regulatory and administrative measures that were taken to enforce the provisions of the CITES.<sup>702</sup> Under the condition that will be discussed in section 8.1.3.3, these reports must be made public.

### 8.1.3.3 *Observance of applicable international and national law*

There are few examples of CITES provisions that refer to domestic laws. One of them can be found in the obligation to prepare periodic reports on the implementation of the treaty, which was discussed in the previous section, and to make these reports available to the public, if such publication 'is not inconsistent with the law of the Party concerned'.<sup>703</sup>

Furthermore the CITES contains an express provision on its 'effects on domestic legislation and international conventions'.<sup>704</sup> In addition to the right of state parties to impose domestic restrictions on trade of endangered species that go beyond the minimum requirements of the CITES, state

699 Conference of the Parties to the Convention on the International Trade in Endangered Species, 'CITES Strategic Vision 2008-2020', Resolution Conf. 16.3 (March 2013) <<https://www.cites.org/eng/res/index.php>> (accessed 29 March 2018).

700 See also art VIII, first paragraph, which provides that states 'shall take appropriate measures [...] to prohibit trade in specimens in violation [of the Convention]'.<sup>701</sup>

701 In the same vein, state parties may impose restrictions on the trade in specimens of species which are not included in the appendices to the Convention (art XIV, first paragraph, sub b).

702 Art VIII, seventh and eighth paragraph.

703 Art VIII, seventh and eighth paragraph.

704 Art XIV.

parties have the right to maintain domestic laws pertaining to other aspects of trade, taking, possession or transport of specimens such as customs, public health, veterinary or plant quarantine.<sup>705</sup>

The same applies to similar norms which derive from international treaties; they are not affected by the CITES.<sup>706</sup> Domestic implementing legislation must also be consistent with the obligations that flow from international treaties establishing transnational trade areas or customs unions.<sup>707</sup> Moreover, if a state party is also bound by an international treaty that provides protection to marine species which are included in appendix II and which are taken by ships that are registered in that state, that treaty prevails over the CITES.<sup>708</sup>

#### 8.1.3.4 Enforcement

Pursuant to article VIII, first paragraph, state parties are obliged to take measures required for the enforcement of the treaty.<sup>709</sup> These must include, as a minimum, measures to provide for the penalisation of unlawful trade in, or possession of, specimens, and measures to provide for the confiscation or return to the state of export of such specimens.<sup>710</sup> State parties may choose to provide for internal reimbursement for expenses incurred as a result of such confiscation.<sup>711</sup>

These elementary legislative standards do not further provide for criteria applicable to penalisation, such as the severity of sanctions.<sup>712</sup> Resolution 11.3 of the Conference of Parties on compliance and enforcement of the CITES offers some additional guidance, albeit in a non-binding manner. In this resolution it is recommended that state parties advocate sanctions for infringements that are 'appropriate to their nature and gravity'.<sup>713</sup> In the view of several scholars, the enforcement of the CITES has been a major weakness. Hill, for instance, asserts that '[w]ithout a central administrative body, any compliance and enforcement takes on a ragged, almost anarchic

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705 Art XIV, second paragraph.

706 Art XIV, second paragraph.

707 Art XIV, third paragraph.

708 Art XIV, fourth paragraph.

709 Also E. McOmber, 'Problems in enforcement of the Convention on International Trade in Endangered Species' 27 *Brooklyn Journal of International Law* 2 (2002) 673-701, 678.

710 See also art VIII, fourth paragraph.

711 Art VIII, second paragraph.

712 Also W. Burns, 'CITES and the regulation of international trade in endangered species of flora. A critical appraisal' 8 *Dickinson Journal of International Law* 2 (1990) 203-223, 221.

713 Conference of the Parties to the Convention on the International Trade in Endangered Species, 'Compliance and Enforcement', Resolution Conf. 11.3 (April 2000) <<https://www.cites.org/eng/res/index.php>> (accessed 29 March 2018).

quality'.<sup>714</sup> Mahony describes the general enforcement provision, embedded in article VIII, as 'relatively innocuous'.<sup>715</sup> Similarly, Wijnstekers argues that in many states party to the Convention penalties are 'insufficiently high and not much of a deterrent for illegal traders'.<sup>716</sup> A slightly less pessimistic argument is made by Patel, who adds that:

'[h]eavier sanctions will not necessarily eliminate the incentives to smuggle, but they might reduce the trade involving small wildlife dealers who cannot afford to take the risk of being apprehended.'<sup>717</sup>

#### 8.1.4 Overview

In the view of the above, the international legal regime embodied in CITES hardly provides for legislative standards that must be observed in the adoption of domestic implementing legislation by state parties. The drafters of the CITES have, however, considered it important to ensure that treaty implementation would not jeopardise the observance of certain national laws and international conventions. In addition to this requirement of consistency with existing law, the CITES imposes an obligation on state parties to provide for enforcement measures. In particular, domestic laws must provide for penalties to be imposed for infringements of the CITES' provisions and for measures to enable authorities to confiscate and return specimens which have been traded in contravention of the treaty. As a result, it seems justified to conclude that domestic legislators are largely free to choose the most suitable means and methods for its implementation.

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714 K. Hill, 'The Convention on International Trade in Endangered Species' (n 685) 273. Also McOmber, 'Problems in enforcement' (n 709) 696-698; Patel, 'The Convention on International Trade in Endangered Species' (n 685) 184-188; T. Hewitt, 'Implementation and enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the South Pacific Region. Management and scientific authorities' 6 *Queensland University of Technology Law and Justice Journal* 2 (2002) 98-130, 115.

715 Mahony, 'The Convention on International Trade in Endangered Species of Flora and Fauna' (n 681) 11.

716 W. Wijnstekers, *The evolution of CITES. A reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (9<sup>th</sup> edn International Council for Game and Wildlife Conservation, Budakeszi 2011) 238.

717 Patel, 'The Convention on International Trade in Endangered Species' (n 685) 206.



## 8.2 IMPLEMENTATION OF THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

### 8.2.1 General

The desire to improve the international regulation of toxic waste may be traced back to the 1970's and 1980's.<sup>718</sup> Typically, at least in the view of the public,<sup>719</sup> such waste had originated from the developed countries and was moved to developing countries for disposal. The main incentive for this transport was economic: due to a lack of environmental regulation, toxic wastes could be dumped at lower costs in the developing world. This led to a situation in which the countries responsible for the production of the lion's share of toxic waste placed the burden of disposal on other, often developing, countries. Of course, the 'waste colonialism'<sup>720</sup> posed severe risks to the environment and public health in those regions, as was demonstrated in several disasters.<sup>721</sup> Against this backdrop, it may not come as a surprise that the elaboration of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (CCTMW) was hampered by opposing interests between the developed world and the developing world: whereas many developing countries, supported by environmental organisations, demanded a complete ban on the transboundary movement of hazardous wastes, industrialised states were reluctant to accept such a ban and proposed regulation instead.<sup>722</sup> To substantiate their claim, the latter maintained that a complete ban would result in the flourishing of illegal markets.<sup>723</sup> The negotiations culminated in a compromise solution: a limited ban on the international movement of hazardous waste. Under this limited ban, importing states have a right to refuse the import of hazardous waste.

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718 W. Schneider, 'The Basel Convention ban on hazardous waste exports: paradigm of efficacy or exercise in futility' 20 *Suffolk Transnational Law Review* (1996) 247-288, 250.

719 Kummer, writing in 1992, notes that 'the focus of public opinion during the negotiation process on the Basel Convention was almost exclusively on the "North-South" aspect of the problem [...]. The fact that the vast majority of international waste transport takes place between industrialized nations was widely ignored'. K. Kummer, 'The international regulation of transboundary traffic in hazardous wastes: the 1989 Basel Convention' 41 *International and Comparative Law Quarterly* 3 (1992) 530-562, 535.

720 V. O. Okaru, 'The Basel Convention: Controlling the movement of hazardous wastes to developing countries' 4 *Fordham Environmental Law Report* 2 (1992) 137-165, 152.

721 For an extensive discussion of the development which sparked the drafting of the Basel Convention, see Okaru, 'The Basel Convention' (n 720) and Schneider, 'The Basel Convention' (n 718).

722 Kummer, 'The international regulation of transboundary traffic in hazardous wastes' (n 719) 535-536.

723 Okaru, 'The Basel Convention' (n 720) 152.

The drafting of the CCTMW started in 1987 and was completed in March 1989, when it was adopted in the Swiss city that has given the treaty its name. The CCTMW entered into force on 5 May 1990 in accordance with article 25, first paragraph. As yet, there are 186 state parties to the treaty.<sup>724</sup>

Whereas the original treaty text (which is currently in force) imposed a limited ban on the movement of hazardous waste, as mentioned above, debate has continued on the scope of the ban. The main driving force behind the discussion was the developing world, which had felt that their interests had been taken into account insufficiently. A renewed negotiation process unfolded and led to the 'ban amendment', which was adopted in 1995 and constitutes a complete prohibition on the transfer of hazardous wastes from developed countries (OECD-countries, the member states of the EU and Liechtenstein) to developing countries for disposal.<sup>725</sup> Furthermore, in 1999 states adopted a supplementary protocol on liability and compensation for damage resulting from the transboundary movement of hazardous waste and their disposal, in accordance with article 12 CCTMW.<sup>726</sup> Both the ban amendment and the protocol, however, have not yet entered into force due to a lack of ratifications.<sup>727</sup>

## 8.2.2 Content of the Convention

The purpose of the CCTMW may, in the absence of an express statement in the articles of the treaty, be inferred from the preamble. It refers to the determination to 'protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes'.<sup>728</sup> This policy aim is pursued in three ways: to reduce to a minimum the amount of transboundary shipments of hazardous waste, to encourage the treatment and disposal of hazardous wastes as close to their points of origin as possible and to reduce the amount of hazardous waste in total.<sup>729</sup>

<sup>724</sup> The number of state parties is available at <<http://www.basel.int>> (accessed 29 March 2018).

<sup>725</sup> United Nations Environmental Programme, 'Amendment to the Basel Convention' (Decision III/1 of the Conference of the Parties to the Basel Convention, 3<sup>rd</sup> Meeting, 18-22 September 1995) (28 november 1995) UN Doc UNEP/CHW.3/35. See also K. Kummer, 'The Basel Convention. Ten years on', 7 *Review of European Community and International Environmental Law* 3 (1998) 227-236, 229.

<sup>726</sup> Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (adopted 10 December 1999, not yet in force) UN Doc UNEP/CHW.1/WG.1/9/2. For a discussion of the protocol, see M. Tsimplis, 'Liability and compensation in the international transport of hazardous wastes by sea: the 1999 Protocol to the Basel Convention' 16 *International Journal of Marine and Coastal Law* 2 (2001) 295-346.

<sup>727</sup> Status of ratifications of both instruments is available through <<http://www.basel.int>> (accessed 29 March 2018).

<sup>728</sup> Final preambular section.

<sup>729</sup> M.L. Buckingham, 'The Basel Convention' 10 *Colorado Journal of International Environmental Law and Policy* (1999) 291-298, 291. Also Schneider, 'The Basel Convention' (n 718) 268.

Similar to the CITES, the scope of the CCTMW is limited to 'hazardous' or 'other' wastes which are included in annexes to the treaty, or which have been designated as 'hazardous' under domestic law.<sup>730</sup> Schneider correctly notes that the CCTMW fails to define 'hazardous' precisely. As a consequence, the CCTMW's exact scope remains unclear. This problem, however, cannot be easily resolved, as it must be considered impractical to exhaustively and specifically enumerate wastes that must be viewed as 'hazardous'.<sup>731</sup> Under the CCTMW, the term 'waste' must be understood as substances or objects which are disposed of.<sup>732</sup> The meaning of the term 'disposal' is clarified in a separate annex to the treaty (IV).<sup>733</sup>

The main obligations of the CCTMW are the following. First of all, states must prohibit the export of hazardous or other wastes if importing states have indicated their objection to it. This objection may result from a state's right to prohibit the import of the waste, or from the state's refusal to consent in writing to the anticipated transport.<sup>734</sup> These restrictions constitute what has been called the 'limited ban', as opposed to a 'complete ban'. States thus have a right to prohibit the import of hazardous wastes, which may be based on another international treaty: the Bamako Convention.<sup>735</sup> This treaty, which was adopted in the framework of the Organisation of African Unity and entered into force in 1998, prohibits the import of hazardous wastes into Africa.<sup>736</sup>

In addition, under the CCTMW states are under a duty to take appropriate measures in order to reduce the generation and transboundary movement of hazardous wastes to a minimum, to ensure the availability of adequate disposal facilities and to prevent pollution due to hazardous and other wastes.<sup>737</sup> Furthermore, states must not allow the export of hazardous wastes to countries which have prohibited by their legislation all imports, or if they have 'reason to believe that the wastes in question will not be managed in an environmentally sound manner'.<sup>738</sup> The meaning of the latter phrase is hardly clarified by the definition included in article 2, sub 8, which refers to environmentally sound management as 'taking all practi-

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730 Artt 1, first and second paragraph, and 3.

731 Schneider, 'The Basel Convention' (n 718) 271.

732 Or, as article 2, first paragraph, provides: *intended or legally required* to be disposed of.

733 Operations that amount to 'disposal' are, for instance: deposition into or onto land, release into a water body, incineration on land etc.

734 Art 4, first paragraph, sub a-c.

735 United Nations Environmental Programme (Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention), 'Manual for the implementation of the Basel Convention' (24 June 2015) UN Doc UNEP/CHW.12/9/Add.4/Rev.1, 12.

736 Bamako Convention on the ban of the import into Africa and control of transboundary movement and management of hazardous wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177, art 4, first paragraph.

737 Art 4, second paragraph, sub a-d.

738 Art 4, second paragraph, sub e.

cable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes’.

States have to prohibit all persons under their jurisdiction from transporting or disposing of hazardous wastes, with the exception of persons which are expressly authorised to perform these tasks.<sup>739</sup> Article 4, ninth paragraph, imposes additional restrictions which *inter alia* consist of the requirement that hazardous and other wastes are only exported for recycling purposes or if the exporting state does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in an environmentally sound and efficient manner.<sup>740</sup>

In order to facilitate the implementation of the CCTMW, states are under the duty to designate one or more competent authorities and one ‘focal point’.<sup>741</sup> These national bodies serve as a channel of communication between the exporting state and the importing state or states whenever hazardous or other wastes are proposed to be transported across the border. The applicable procedure, which is prescribed by article 6 CCTMW and referred to as ‘prior informed consent procedure’, is initiated when the competent authorities of the anticipated importing state or states are informed by the exporting state of a planned transboundary movement of hazardous or other waste. The authorities that have received the notification shall respond with a written consent to the planned transport, either with or without conditions, with a refusal or with a request of additional information.<sup>742</sup> The transport may only commence after the written consent of the importing state and on the condition of the existence of a contract between the exporter and the disposer.<sup>743</sup>

Other obligations embodied in the treaty concern international co-operation with regard to, *inter alia*, the development of new waste-related technologies and systems for waste-management and the exchange of information between state parties engaged in the transboundary movement of hazardous or other wastes.<sup>744</sup> Such information may relate to the occurrence of accidents during the transport of waste and to decisions made by state authorities to limit or ban the export of hazardous or other wastes. States must also annually submit a report on various aspects covered by the CCTMW.<sup>745</sup>

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739 Art 4, seventh paragraph, sub a.

740 Art 4, ninth paragraph, sub a and b.

741 Art 5. It is not necessary that such designation is performed through the adoption of implementing legislation. See UNEP, ‘Manual for the implementation of the Basel Convention’ (n 735) 14.

742 Art 6, first and second paragraph.

743 Art 6, third paragraph.

744 Artt 10 and 13.

745 Art 13, third paragraph.

### 8.2.3 Legislative standards

#### 8.2.3.1 *Implementation and minimum requirements*

Under article 4, fourth paragraph, CCTMW, state parties are under the obligation to take 'appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention'.<sup>746</sup> Aside from this *general* obligation to ensure the realisation of the CCTMW on the domestic level, norms of a more *special* character, as was discussed in the previous section, will often require the adoption of domestic legislation. For instance, article 4, seventh paragraph, sub a, can only be complied with if the state puts in place some domestic regulatory framework which provides for a legal prohibition complemented with certain exceptions.<sup>747</sup> Similarly, the designation of national competent authorities in accordance with article 5 may also require a legal act of the state.

States retain the right to impose additional requirements for the protection of human health and the environment, under the condition that those domestic laws are consistent with the provisions of the CCTMW and with international law in general.<sup>748</sup> In other words, the CCTMW contains minimum requirements.

#### 8.2.3.2 *Observance of applicable international and national law*

As may be derived from several CCTMW provisions, domestic implementing legislation must be consistent with other applicable legal instruments, both international and national. For instance, hazardous wastes and other wastes that are intended to be the subject of transboundary movement, must be packaged and labeled in conformity with 'generally accepted and recognized international rules and standards'.<sup>749</sup> Similarly, radioactive wastes and garbage which result from normal shipping operations, are excluded from the treaty's scope, as they are subject to other international regimes.<sup>750</sup> Apparently, the contracting parties have intended to avert a situation in which the aforementioned subject matter is covered by more than one international legal regime.<sup>751</sup> Furthermore, whenever a state party

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746 Art 4, fourth paragraph.

747 Art 4, seventh paragraph, sub a, stipulates: '[Each Party shall] prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to perform such types of operations'.

748 Art 4, eleventh paragraph.

749 Art 4, seventh paragraph, sub b.

750 Art 1, third and fourth paragraph.

751 Okaru, 'The Basel Convention' (n 720) 143-144.

chooses to adopt stricter requirements for the protection of the environment and of public health, those additional domestic laws must respect 'rules of international law'.<sup>752</sup> More generally, it is stipulated that the CCTMW shall not:

'affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for by international law and as reflected in relevant international instruments'.<sup>753</sup>

Article 11 governs legal relations among state parties beyond from the CCTMW and relations between a state party and a third state. It provides that state parties may enter into bilateral, multilateral or regional agreements regarding the transboundary movement of hazardous or other wastes, under the condition that those agreements are not less 'environmentally sound' than the CCTMW.<sup>754</sup> The CCTMW thus imposes limitations on the conclusion of *other* treaties on hazardous waste. In this way, the treaty aims to avoid waste exports to regions where applicable standards are less stringent.<sup>755</sup> For the same reason, export to or import from third states is prohibited if no agreements, referred to in article 11, apply.<sup>756</sup>

Similarly, several of its provisions refer to national law. Most notably, in accordance with article 1, first paragraph, sub b, state parties may designate certain wastes not included in the annexes to the CCTMW as 'hazardous' under domestic law. In other words, the scope of the CCTMW may be broadened through the adoption of a national legal act.<sup>757</sup>

Put briefly, the aforementioned provisions indicate that under several specific CCTMW provisions, states that adopt domestic implementing measures have to pay heed to other relevant international law and national law.

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752 Art 7, eleventh paragraph.

753 Art 4, twelfth paragraph.

754 Art 11, first paragraph. Also Kummer, 'The international regulation of transboundary traffic in hazardous wastes' (n 719) 546.

755 Ibid, 532.

756 Art 4, fifth paragraph.

757 Pursuant to article 3, first paragraph, a state party shall, within six months after it has become a party to the Convention, notify the Secretariat of the Convention of wastes which are labelled as 'hazardous' under its domestic law. Amendments to the applicable domestic laws must be brought to the attention of the Secretariat in accordance with article 13 second paragraph, sub b.

### 8.2.3.3 *Enforcement*

Above we argued that parties to the CCTMW are not only under the duty to take appropriate measures to implement the treaty, but also to 'enforce [its provisions], including measures to prevent and punish conduct in contravention of the Convention'.<sup>758</sup> Thus, the mere adoption of domestic implementing legislation does not suffice; it must also be enforced.

In particular, the CCTMW imposes the obligation to 'consider that illegal traffic in hazardous wastes or other wastes is criminal' and to enact appropriate domestic legislation to prevent and punish illegal traffic.<sup>759</sup> Kummer notes that the labeling of illegal traffic as 'criminal' must be viewed as a 'fairly rhetorical statement'.<sup>760</sup> This statement, however, seems to differ from the approach taken in the relevant excerpt of the (non-binding) 'Manual for implementation', which reads: '[i]n deciding what penalties to impose, parties should also take into account article 4(3), which states that illegal traffic in hazardous wastes or other wastes is criminal'.<sup>761</sup>

Conduct that amounts to 'illegal traffic' is specified in article 9, first paragraph, and encompasses, in short, the transboundary movement of hazardous waste without the (valid) consent of concerned states or otherwise in contravention of the CCTMW. With regard to the obligation to prevent and punish illegal traffic, the Manual for implementation emphasises that state parties 'have no discretion to implement administrative or other measures towards that end'; the enactment of domestic legislation is required.<sup>762</sup>

Whenever the occurrence of the illegal traffic on the part of the exporter or generator is established, the exporting state must ensure that the hazardous or other wastes are taken back by the exporter or generator, or to ensure the disposal of those wastes in accordance with the CCTMW.<sup>763</sup> If, on the other hand, illegal traffic is the result of conduct on the part of the importer or disposer, the importing state have to ensure that the wastes are disposed of in an environmentally sound manner by the importer or disposer or, if necessary, by itself.<sup>764</sup>

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758 Art 4, fourth paragraph.

759 Artt 4, third paragraph, and 9, fifth paragraph.

760 Kummer, 'The international regulation of transboundary traffic in hazardous wastes' (n 719) 551.

761 UNEP, 'Manual for the implementation of the Basel Convention' (n 735) 19.

762 Ibid.

763 Art 9, second paragraph.

764 Art 9, third paragraph.

#### 8.2.4 Overview

The analysis of the CCTMW, conducted in the previous sections, justifies the conclusion that the treaty imposes only a few legislative standards that must be observed in its implementation. First of all, applicable international law must be respected, for instance norms with regard to labelling and packaging of hazardous wastes or other wastes. Domestic law may be relevant for the implementation as well, as categories of waste that are deemed 'hazardous' may be brought under the the scope of the CCTMW through a national legal act. These references to international and national law may indicate that the drafters of the CCTMW have made efforts to fit the treaty itself, and the national implementing measures to be adopted on the basis of the treaty, in the existing regulation of the transport of hazardous waste. Second, the CCTMW provides for the legislative standard to ensure the treaty's enforcement on the domestic level. More specifically, it requires state parties to adopt the necessary measures for the prevention and punishment of violations of the CCTMW, most notably through the imposition of criminal sanctions.