

ENFORCEMENT MECHANISMS FOR ENDANGERED SPECIES PROTECTION IN HONG KONG: A LEGAL PERSPECTIVE

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"Stealing the world's natural resources takes a toll that cannot be measured in dollars. It robs the country's natural heritage, disrupts the ecosystem, and shortchanges the future generation."¹

I. INTRODUCTION

Illegal trade in endangered species, their body parts, and derivatives² amounts to a staggering \$10 billion annually.³ These profit margins are close to those in drugs and arms trafficking.⁴ Such illegal trade is disturbing the ecological balance and posing a challenge to law enforcement authorities all over the world. The trade in endangered species has created immense problems for enforcement authorities in Hong Kong⁵

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¹ Sandra Cleva & Patricia Fischer, *Probe of International Reptile Trade Ends with Key Arrests*, U.S. Fish and Wildlife Service News Release (Sept. 15, 1998), available at <http://www.r6.fws.gov/pressrel/98-45.htm> (last visited Dec. 22, 2003) (commenting on arrests made by the U.S. Fish and Wildlife Service (US-FWS) under a five year undercover operation to hunt illegal traders in reptiles).

² Endangered species are listed in Appendix I of the Convention on International Trade in Endangered Species (CITES) as those species endangered due to over-exploitation through international trade. See CITES, available at <http://www.cites.org/eng/disc/text.html> (last visited Apr. 14, 2004). Endangered species include rare or threatened wildlife and plants which are in danger of extinction. The survival of these species is unlikely if the causal factors like unregulated or over-exploitative international trade practices continue to operate. "Endangered species" in this paper also refers to the trade in endangered plants and animals body parts and their derivatives. See World Wildlife Fund-Hong Kong (WWF-HK), Species Conservation, available at http://www.wwf.org.hk/eng/conservation/spe_cons/endangered_species.html (last visited Dec 22, 2003).

³ See Kathleen E. Du Bois, *The Illegal Trade in Endangered Species*, 6 AFRICAN SECURITY REVIEW 1 (1997), available at <http://www.iss.co.za/PUBS/ASR/6No1/DuBois.html> (last visited Dec. 22, 2003) 1; other sources reveal that illegal trade in wildlife species amounts to a little over \$5–8 billion annually in United States dollars (USD); see e.g., Dianne E. Mahony, *The Convention on International Trade in Endangered Species of Flora and Fauna: Addressing Problems in Global Wildlife Enforcement*, 13 NEW ENG. INT'L & COMP. L. ANN. 1–18 (1997) (estimating illegal trade at \$5 billion). See also WWF-Hong Kong Fact Sheet No. 5, available at <http://www.wwf.org.hk/eng/pdf/references/factsheets/factsheet5.PDF> (last visited Dec. 22, 2003) (calculating illegal trade figure at over USD \$5 billion); Hunters Driving Asian Species to Extinction, Environment News Service, available at <http://ens-news.com/ens/apr2002/2002-04-10-06.asp> (last visited Dec. 22, 2003) (calculating illegal trade at USD \$8 billion).

⁴ See Du Bois, *supra* note 3.

⁵ Martin Williams, Hong Kong's Wild Stars: Endangered Species among Hong Kong's diverse wildlife show the city's conservationist side, WHERE HONG KONG, 20–22, (Dec. 2000). Listed species particularly significant to Hong Kong are the Asian Pangolin, the musk deer, the Asian box turtle, sharks, pink

because Hong Kong consumes a large amount of imported high demand species.⁶ Illegal traders in Hong Kong act as middlemen in these trade activities. Hong Kong is a transit port for Chinese goods intended for sale in Europe, the United States (U.S.), and several other parts of the world.⁷ Millions of dollars of wildlife medicine products manufactured in China containing, or claiming to contain, parts of endangered species (such as tiger bone, rhinoceros horn, and bear bile) are funneled through Hong Kong illegally.⁸ Reports⁹ released by the Agriculture and Fisheries Conservation Department (AFCD)¹⁰ and the World Wildlife Fund Hong Kong (WWF-HK) unmistakably show significant illegal trade in endangered species. Hong Kong is not equipped to deal with this level of illegal activity.

Attempts to control legal and illegal trade in endangered species began in 1976 when the Animal and Plant Ordinance (the Ordinance) was enacted.¹¹ It provided for control of trade in endangered species and created an authority to regulate and monitor the illegal trade.¹² The Ordinance provided fines and penalties for violations, and the AFCD was authorized to seize and prosecute illegal traders. The Ordinance has since been amended to combat the increased level of illegal trade. In 1995, it was amended to

dolphins, black faced spoonbills, brown frogs, yellow striped dragonflies and ginseng among others. “Forty percent of land area in the Hong Kong SAR is designated country park supporting a rich diversity of wildlife including reptiles, amphibians and birds.” *Id.* at 20. Although “Hong Kong long ago lost its elephants, tigers, crocodiles” and other wildlife species that once inhabited the South China Sea and the island, four of the species recently brought to attention as being highly endangered species include the Chinese white dolphin or Hong Kong pink dolphin, Romer’s tree frog, black faced spoonbill and the unique yellow dragonfly only to be found in Hong Kong.” *Id.* at 20–21.

⁶ Hong Kong has been labeled as a large consumer of rhino horn (an endangered species body part), *see* <http://www.acapworldwide.com/rhino1.htm> (last visited Dec. 22, 2003). *See also* Animal Alliance of Canada, Bear Alliance Project, *From Forest to Pharmacy*, at <http://www.animalalliance.ca/projects/bearalliance.html> (last visited Dec. 22, 2003) [hereinafter Bear Alliance]; WWF-HK, *Fact Sheet No. 4*, at <http://www.wwf.org.hk/eng/references/index.html> (last visited Apr. 14, 2004); WWF-HK, *Fact Sheet No. 5*, at <http://www.wwf.org.hk/eng/references/index.html> (last visited Apr. 14, 2004); WWF-HK, *Fact Sheet No. 20*, at <http://www.wwf.org.hk/eng/references/index.html> (last visited Apr. 14, 2004).

⁷ Sheila Tefft, *Hong Kong is Smuggling Hub for Banned Animal Parts*, CHRISTIAN SCIENCE MONITOR (Nov. 30, 1993), available at http://www.csmonitorarchive.com/csmonitor/display.jhtml?_requestid=43501 (last visited Dec. 22, 2003).

⁸ *See, e.g.*, <http://www.animalalliance.ca> (last visited Dec. 22, 2003).

⁹ *See* Press Release, AFCD (Feb.25, 1999), available at <http://www.afcd.gov.hk/web/epress/pr47.htm> (last visited Mar. 16, 2004); *see also* Press Release, AFCD (May 18, 1999), available at <http://www.afcd.gov.hk/web/epress/pr54.htm> (last visited Mar. 16, 2004); Press Release, AFCD (Dec. 6, 1999) available at <http://www.afcd.gov.hk/web/epress/85.htm> (last visited Mar. 16, 2004); Press Release, AFCD (Apr. 10, 2001), available at <http://www.afcd.gov.hk/web/epress/pr188.htm> (last visited Mar. 16, 2004); WWF-HK, *Fact Sheet No. 5*, available at http://www.wwf.org.hk/efsheets/fs_05.htm (last visited Mar. 16, 2004).

¹⁰ AFCD is the statutory management authority under the Hong Kong Animal and Plant (Protection of Endangered Species) Ordinance, Cap 187. *See* the Ordinance, Cap 187, available at http://66.102.7.104/search?q=cache:GXhEy_0WB1MJ:www.legco.gov.hk/yr00-01/english/hc/papers/l5-5.pdf+the+ordinance+Cap+187&hl=en&ie=UTF-8 (last visited Dec. 22, 2003) [hereinafter The Ordinance].

¹¹ *Id.* The Ordinance provides the title and objective which is to “restrict the importation, exportation and possession of certain animals and plants, and parts of such animals and plants, and to provide for matters connected therewith.” *Id.*

¹² *Id.*

provide increased fines and imprisonment, up to two years, for commercial trading in highly endangered species.¹³ This legislative amendment reflected the intent to deal strictly with illegal traders.¹⁴ Nonetheless, the Ordinance has gaps. Further, the increased sanctions have not deterred illegal traders. The few judicial decisions against such traders have not made a significant difference. Illegal traders seem to be a part of international organized crime, and Hong Kong remains a lucrative market for illegal trade in endangered species.¹⁵

This paper examines: how Hong Kong law attempts to deal with the trade in endangered species; the mechanisms for controlling illegal trade and; whether enforcement authorities have been successful in deterring unscrupulous traders. The Ordinance needs to be amended in certain respects because of gaps similar to those found in the Convention for International Trade in Endangered Species (CITES or The Convention),¹⁶ to which Hong Kong is a signatory. Authorities and the courts need to enforce the law in an exemplary manner so that offenders are brought to justice. However, the courts only impose fines rather than prison sentences.¹⁷ Unscrupulous traders, individuals, and sellers of traditional Chinese medicine (TCM)¹⁸ are quite happy to pay fines and continue their activities. In contrast, Hong Kong drug laws are treated very seriously and are a much greater deterrent.

There is a need for changes in the law, as well as in its enforcement. In addition, there should be an establishment of an independent task force to combat, control, and monitor illegal trade. Furthermore, the imposition of harsher sentences by Hong Kong courts is necessary. The courts might be able to achieve this by looking at the manner in which drug laws are interpreted in Hong Kong as well as the strict approach adopted by courts in other countries.

¹³ See generally THE HONG KONG GAZETTE LN 3, 13, 341 of 1995; the Ordinance §§ 2(1), 4(1A), 4(3), (4) 5(1A), 5(4), 6(1A), 6(4), 7A, 7B, 13A.

¹⁴ As a result of increased penalties under the 1995 amendments, the government and the enforcement authorities are determined to adopt a serious attitude towards illegal wildlife trading in Hong Kong.

¹⁵ See WORLD WILDLIFE FUND FOR NATURE, REPORT OF WORLD WIDE FUND FOR NATURE: ORGANIZED GANGS LINKED TO WILDLIFE TRAFFICKING (June 19, 2002), available at <http://asp.wlv.ac.uk> (last visited Dec. 22, 2003).

¹⁶ See CITES, *supra* note 2. The Ordinance does not apply to species not listed under CITES. See PETER H. SAND, COMMODITY OR TABOO INTERNATIONAL TRADE IN ENDANGERED SPECIES, Green Globe Yearbook, 19–36 (1997) (providing a discussion of CITES history and problems).

¹⁷ See *infra* Part VI Judicial Oversight of Endangered Species Cases in Hong Kong.

¹⁸ Although a random survey conducted by TRAFFIC East Asia reveals that TCM users still exist in Hong Kong, “a significant proportion of the Hong Kong Chinese population (59%), especially those people who are younger and better educated expressed concerns about endangered species.” See WildNet Africa, News Archive, *Wildlife Trade Becomes a Matter of Attitude*, (Nov. 23, 1998), available at http://www.wildnetafrika.com/bushcraft/dailynews/1998archive_5/archive_19981123_w (page no longer active). Yet, the report suggests that “more than half of TCM users would not ask about the ingredients of the medicines they consume . . . they would rather rely on the judgment and advice of TCM practitioners and shop assistants.” *Id.* See also *R. v. Tsoi Wai Ching* [1997] HKLY 399, *R. v. Ki Chor On* [1996] HKLY 558, *R. v. Chong Ping Tung* [1997] HKLY391, *R. v. Kong Chi Yue* [1997] HKLY428, and *infra* Part VI (A-C).

This paper is divided into six parts. Part II provides a general background on illegal trade and highlights the prevalence of illegal trade in Hong Kong. Part III provides a short discussion of relevant provisions of Hong Kong's Basic Law dealing with the protection of natural resources including trade in wildlife and the relevant provisions of CITES. Part IV examines and discusses the provisions of the Ordinance, including the function of enforcement authorities, the potential loopholes, and the problems authorities face in enforcing the law. Part V discusses a few features of endangered species protection laws and the judicial responses in the U.S. and Australia. Part VI outlines a study of the existing cases in Hong Kong and the response of the judiciary when dealing with illegal traders. Part VII concludes this paper with certain recommendations and suggestions that point out the need to adopt changes in the current law, as well as the need to establish a new endangered species task unit, the need for judicial activism, and the need for law enforcement authorities to speed up their activities so that Hong Kong can clear itself of its ill-gained reputation.

II. ILLEGAL TRADE IN HONG KONG

Endangered species conservation has become a controversial issue both at local and global levels. Each species forms an important link in the food chain and is essential for maintaining the delicate balance required within an ecosystem.¹⁹ Despite the concerted efforts of international organizations, non-governmental organizations, government agencies, and individuals many wildlife species face extinction due to environmental degradation, over-exploitation, and illegal trade.²⁰

A. *Escalating Illegal Trade Globally*

All over the world, illegal trade in endangered species is escalating.²¹ Like drug and weapons trafficking, illegal trade in endangered species involves high risks,

¹⁹See generally World Resources Institute, Homepage, at <http://www.wri.org> (last visited Dec. 22, 2003) (website for introduction to biodiversity, ecosystems and people); see also CITES, Preamble, *supra* note 2.

²⁰ See CITES, Preamble, *supra* note 2. Objectives of the Convention on Biological Diversity, available at <http://www.wri.org> (last visited Dec. 22, 2003); see also SAND, *supra* note 16, at 19-36.

²¹ "The global trade in wildlife and their by products is estimated to be about [USD] \$159 billion. A quarter of this trade is said to be illegal although it is difficult to predict an accurate figure as it is a hidden crime. But what is clear is that apart from other factors which are leading to the decline of endangered species," (now listed in IUCN Red list) (such as population boom, over industrialization, depletion of natural resources, desertification, social and economic unrest, international terrorism, strict bans on drug and arms trade, civil wars and other factors), "illegal wildlife trade has alarming financial costs." Dee Cook, Martin Roberts, & Jason Lowther, *The International Wildlife Trade and Organized Crime: A review of the evidence and the role of the UK*, Regional Research Institute, University of Wolverhampton 7, 23 (June 2002). "Global illegal trade runs into billions of dollars and impacts the biological diversity." *Id.*; see also Press Release, CITES News and Highlights (Nov. 6 2002) (on file with author); "profits from the illegal harvesting, smuggling and sale of tiger skins, bear gall bladders, ivory, rare orchids and other wildlife products are now only exceeded by those of trafficking in narcotics and weapons. This illegal trade risks pushing species that are already highly endangered over the edge." The WWF Panda Organization reports that "levels of exploitation of some animal and plant species are high, and the trade in them, together with other factors such as habitat loss, is capable of heavily depleting their populations and even bringing some species close to extinction." WWF Panda Organization, *Species: The Problems They Face*, available at http://www.panda.org/about_wwf/what_we_do/species/problems.cfm (last visited Dec. 22, 2003).

substantial amounts of money, and presents a serious threat to a country's natural and economic resources and social stability.²² A prevalent enemy of endangered species seems to be organized crime, which has added illegal trade of endangered species to its activities.²³ An impetus for this demand is the use of endangered species in TCM, due to the belief that they can do wonders where other forms of medicine may fail.

Hong Kong is a major financial and trade hub of Asia which acts as a gateway in and out of China.²⁴ A recent CITES trade record for one specimen shows that from 1991-2000, the quantity of illegal consignments of pangolin increased from around 2700 pangolins in 1991 to approximately 9000 pangolins in 2000.²⁵ Thousands of illegal wildlife products are confiscated in Hong Kong each year including reptile skins, rare and exotic plants, medicines containing tiger bone, rhinoceros horns, bear bile, and lizard skins.²⁶ Nonetheless, the WWF-HK and TRAFFIC East Asia, as well as government authorities admit such seizures do not reflect the magnitude of illegal trade in endangered species in Hong Kong.²⁷

B. *The Scope of Illegal Endangered Species Trade in Hong Kong*

The motivation behind capturing and killing endangered species is largely economic.²⁸ In India, a poacher can expect to make ten years' income from a single

²² See, e.g. *Drug Smugglers Jump into Endangered Species Trade*, Reuters (Aug 13, 2002) available at http://www.enn.com/news/wire-stories/2002/08/08132002/reu_48112.asp (on file with VT J. ENVTL L.); Rahul Gupta, *Tigers, Leopards . . . Burning Bright*, THE TIMES OF INDIA, Oct. 6, 2000, available at <http://www.timesofindia.com/today/06mdel2.htm> (last visited Mar. 16, 2004).; see also *The Culture of Killing*, available at http://www.blackmarketmedia.org/The_Culture_of_Killing.html (on file with VT J. ENVTL L.).

²³ See, e.g., Du Bois, *supra* note 3.

²⁴ Tefft, *supra* note 7; Bear Alliance, *supra* note 6.

²⁵ Rob Jones, *Convention On International Trade in Endangered Species of Wild Flora and Fauna, (CITES) and Trade in Wildlife in East Asia Region*, 6.2 HKELA Newsletter Special Edition, 2–10 (Summer 2001); Yiu Keung Chan, *Protection of Endangered Species in Hong Kong*, 6.2 HKELA Newsletter Special Edition, 12–14 (Summer 2001). The author was an organizer of the Hong Kong Environmental Law Association (HKELA) and WWF-HK (HKELA Seminar) titled, "Wildlife Trade in Endangered Species: The Legal and International Trade Aspects in Hong Kong and Asia" which was held in December 2000 at the City Univ. of Hong Kong available at <http://www.hkela.org/newsletter/2000NL621.pdf> (last visited Dec. 22, 2003) [hereinafter HKELA Seminar, Dec. 2000].

²⁶ Jones, *supra* note 25; see also WWF-HK, *Fact Sheet No. 5*, at <http://www.wwf.org.hk/eng/references/index.html> (last visited Apr. 14, 2004).

²⁷ Many of author's comments and observations have been collected from conversations with WWF-HK, TRAFFIC seminar participants, and AFCD officers at the HKELA Seminar. See HKSAR, *Protection of Endangered Species*, at <http://www.info.gov.hk/info/endanger.htm> (last visited Dec. 22, 2003).

²⁸ The world trade in wildlife is a multi-billion dollar business. See e.g., Cook *supra* note 21. See also Regional Environmental Center for Central and Eastern Europe, *Cracking the Illegal Trade in Wildlife*, at <http://www.rec.org/REC/Bulletin/Bull64/WWF.html> (last visited Dec. 22, 2003); BBC News, *World Environmental Crime-a Global Problem* (Apr. 5, 1998), available at <http://news.bbc.co.uk/1/hi/world/74317.stm> (last visited Dec. 2003). Reported instances of illegal trade in wildlife seem to add weight to the above supposition and the billions of dollars in legal trade also supplement this statement. Endangered species are exploited for a number of purposes including food, clothing shelter, medicines etc., and legal trade of such species is controlled and regulated by the CITES.

tiger.²⁹ A rhinoceros horn can be worth up to half a million dollars.³⁰ In Japan, whale meat sells for about USD \$300 per pound.³¹ The illegal trade in species such as the Chinese alligator may fetch USD \$15,000, USD \$8000 for a Gray's monitor lizard, USD \$2000 for a spider tortoise, or as high as USD \$30,000 for a ploughshare tortoise.³² As noted by Rob Jones:

Wildlife trade is also big business, estimated to be worth billions of dollars and involve[s] hundreds of millions of plants and animals every year. For example, declared value of freshwater turtles and tortoises imported into Hong Kong in 1998 was around [USD] \$40 million; wholesale value for live reef fish imported into Hong Kong for food is estimated to exceed [USD] \$500 million per year. Most of the trade is legal but a significant portion of it is not.³³

In the early 1980s, Hong Kong was one of the centers of illegal ivory trade. Dealers in Hong Kong acted as middlemen for eight tons of rhinoceros horns exported from Taiwan to China illegally.³⁴ Millions of dollars in patented wildlife medicine products manufactured in China and claiming to contain parts of endangered species have been funneled through Hong Kong illegally.³⁵ Hong Kong authorities, especially the Customs and Excise Departments, have been instrumental in re-seizing and confiscating large quantities of skins (lizard, pangolin, and crocodile), but these seizures reflect only a small percentage of illegal trade actually occurring in Hong Kong.³⁶

²⁹ Rhino horns and tiger bones are sold at high prices in Asian countries. "A trader who buys a rhino horn from a poacher in India for USD \$350 may now sell it in Hong Kong or China for as much as USD \$450,000, whilst 1 kilogram of tiger bones purchased in South Asia for USD \$70 can command prices ten times higher in Hong Kong or China," available at http://www.blackmarketmedia.org/The_Culture_of_Killing.html (on file with the author). See also Mahony, *supra* note 3.

³⁰ Mahony, *supra* note 3, at 2.

³¹ *Id.* Illegal trade of whales in Japan has led to reduction in the numbers of humpbacks and other whales. Even though Japan is a member of the International Whaling Commission (IWC), which has pledged to protect these whales, a report by Dr. Scott Baker et al., of Earthtrust reports that whaling now involves high levels of illegal trade activities. It may be driven by market forces and "is almost similar to drug smuggling" involving a lot of money. See Earthtrust, *Saving Whales with DNA: A Global Strategy for Whale and Dolphin Conservation*, available at <http://leahi.kcc.hawaii.edu/~et/dnproj.html#anchor1139253> (on file with author).

³² Cleva & Fischer, *supra* note 1.

³³ Jones, *supra* note 25.

³⁴ In 1988, Taiwanese businessmen bought up approximately 80% of the rhino horn on the market in Taiwan--between 5 and 10 tones. They sold this to Hong Kong middlemen, who in turn sold to Chinese dealers. See Asian Conservation Awareness Programme: Endangered Species: Rhino details at ACAP Hong Kong-Earth Care, available at <http://www.acapworldwide.com/part.htm> (last visited Jan. 1, 2003). In Hong Kong trade in rhino horn has been banned since 1988 but illegal trade still goes on. See American University, Mandala Projects, Trade & Environment Database, 387 TED Case Studies, *Black Rhino and Trade*, available at <http://www.american.edu/TED/rhinoblk.htm> (last visited Apr. 14, 2004). An Environmental Investigation Agency report reveals that a Hong Kong smugglers network was apprehended with a USD \$130,000 ivory haul, which was being smuggled into China. The "group had been active since mid-1980s and had many fake companies and pseudonyms to cover its track." See Save the Elephants, Homepage, available at <http://www.save-the-elephants.org> (last visited Jan. 1, 2004).

³⁵ Jones, *supra* note 25.

³⁶ From 2000-2001, the AFCD "made 369 seizures and 290 prosecutions." See Chan, *supra* note 25, at 14.

III. THE BASIC LAW OF HKSAR³⁷

Article 7 of the Basic Law states that:

[L]and and natural resources within the Hong Kong Special Administrative Region shall be State property. The Government of the Hong Kong Special Administrative Region shall be responsible for their management, use and development and for their lease or grant to individuals, legal persons or organizations for use or development. The revenues derived shall be exclusively at the disposal of the government of the Region.

Accordingly, the management of natural resources falls squarely on the HKSAR government.³⁸ Natural resources would include animals, plants, aquatic, and mineral resources.³⁹ Under Article 7 and Article 8, legislation can therefore be promulgated and existing legislation enforced to deal with problems created by illegal trade in endangered species or other natural resources management issues.⁴⁰ Most of the laws relating to environmental protection, wild animals, birds and plant protection, and trade have existed in Hong Kong prior to 1997.⁴¹ The most pertinent provisions dealing with the issues and problems arising from illegal trade in endangered species are embodied in the Ordinance, passed in response to Hong Kong's ratification of CITES in 1976.⁴² CITES continues to apply to Hong Kong even after the change in sovereignty to the People's Republic of China (P.R.C.). International obligations previously implemented in Hong Kong remain in force after the handover whether or not the P.R.C. is a party to the Convention.⁴³

³⁷ Basic Law of Hong Kong, *available at* http://www.info.gov.hk/basic_law/fulltext/index.htm (last visited Apr. 14, 2004). The Basic Law enshrines Hong Kong's constitutional mandate and was adopted as of July 1997 after the United Kingdom handed over to the People's Republic of China (P.R.C.) under Article 31 of the Constitution of the P.R.C.

³⁸ Article 8 of the Basic Law provides that "the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

³⁹ See Article 7, The Basic Law, *supra* note 37.

⁴⁰ YASH GHAI, HONG KONG NEW CONSTITUTIONAL ORDER 65 (Hong Kong Univ. Press 1999) (quoting "Article 7 is [a] self executing" provision).

⁴¹ There are 16 ordinances which deal with some or the other aspect of environment in Hong Kong. Among these, apart from Animals and Plants (Protection of Endangered Species Ordinance) Cap 187, there are three which deal with trade in live animals. These include Public Health (Animals and Birds) Ordinance Cap 139, Prevention of Cruelty to Animals Cap 169, and Rabies Ordinance Cap 421. A few provisions relating to protection and prohibition on hunting and conservation are contained in other Ordinances including Country Parks Ordinance Cap 208, Environmental Impact Assessment Cap 499, or Wild Animals Protection Ordinance Cap 170, or the Marine Parks Ordinance, Cap 531.

⁴² See Chan, *supra* note 25, at 12.

⁴³ Before the Hong Kong handover to the P.R.C., Hong Kong had implemented CITES in 1976 following the United Kingdom. Chan, *supra* note 25, at 12. CITES is still applicable to Hong Kong, now through the PRC. The document for continued application of international conventions and treaties to the HKSAR was submitted by the P.R.C. and the British governments to the U.N. Secretary General. See Diplomatic Notes submitted to the U.N. Sec'y General (Jan. 7, 1997); see also Roda Mushkat, *International Environmental*

A. *The Convention on International Trade in Endangered Species (CITES)*

The purpose of CITES is to establish an international legal framework and procedural mechanism to prevent illegal trade in listed species.⁴⁴ It has been signed by over 150 countries. The Preamble to the Convention states that increasing international cooperation is required to protect certain species that are over-exploited through international trade.⁴⁵ The Convention basically requires member states to adopt a permit system for trading in species listed in the appendices of the Convention, so trade in such species is regulated and controlled based upon the identification, existing population and distribution of the listed species within a particular region or member state.

Article II (4) of the Convention states that “the Parties [to the Convention] shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.”⁴⁶ Appendix I lists species that are threatened with extinction because of trade. Appendix II contains those species which may become endangered if trade is not regulated. Appendix III contains those species which a member state may identify as requiring international assistance in protection from overuse or exploitation.

The procedural mechanisms of CITES prevent illegal trade through issuing export and import permits or certificates.⁴⁷ Accordingly, trade in Appendix I species for commercial purposes is prohibited while for non-commercial purposes it is permitted only with special export-import permits issued by the Management and Scientific Authorities of relevant trading party states. On the other hand, commercial trade of listed species in Appendix II and Appendix III is permitted subject to export or re-export permits issued by the relevant authorities. The administrative authorities under the Convention include the Secretariat, Management and Scientific Authorities, and the Conference of Parties.

Article XII of CITES instructs, *inter alia*, the Executive Director of the United Nations Environment Programme (UNEP) to establish a Secretariat accountable for CITES implementation.⁴⁸ This Article further provides that the Executive Director may be assisted by inter-governmental, non-governmental, international or national agencies and bodies which are technically qualified in protection, conservation and management of wild animals. The Secretariat performs a number of functions including undertaking

Law: How Green is the Future, in New Legal Order in Hong Kong, 1999, HONG KONG UNIVERSITY PRESS, 632 (Raymond Wacks ed.).

⁴⁴ See also CITES, *supra* note 2 (this includes regulating trade non-listed of species, which may also be threatened).

⁴⁵ *Id.* at preamble.

⁴⁶ *Id.* at Art. II (4).

⁴⁷ See Art. II. See generally CITES.

⁴⁸ See *id.* at Art. XII (1).

technical studies in accordance with the Conference of Parties so as to contribute to the implementation of the Convention.⁴⁹

Article IX of the Convention provides that each Party State to the Convention must designate “one or more Management Authority which is competent to grant permits or certificates on behalf of that Party and one or more Scientific Authority.”⁵⁰ The function of the Scientific Authority, *inter alia*, is to monitor both the export and import permits granted by the State for specimens of species included in Appendix I and to give advice that such export or import shall not be detrimental to the survival of that species. It may also advise the Management Authority of suitable measures to limit the grant of export permits if it determines that the export of specimens should be limited to maintain that species throughout its range consistent with its role in the ecosystem for Appendix II species. Member states are also obliged to maintain continued relations with the Secretariat and related organizations in order to monitor trade in listed species.

IV. THE ANIMALS AND PLANTS ORDINANCE

As a result of signing CITES, Hong Kong enacted the Animal and Plants (Protection of Endangered Species) Ordinance, Cap 187 on August 6, 1976. The provisions under the Ordinance declare that any import, export, or possession of a scheduled species⁵¹ alive or dead is prohibited unless done with the required licenses issued by the Director of the AFCD.⁵² The Ordinance thus prohibits any person to import,⁵³ export,⁵⁴ or have possession⁵⁵ of any scheduled plant or animal, their parts or derivatives without a valid license.⁵⁶

⁴⁹ This includes “studies concerning standards for appropriate preparation and shipment of living specimens and the means of identifying specimens to study the reports of Parties and to request from parties such further information with respect thereto as it deems necessary to ensure implementation of the present Convention . . . to publish periodically and distribute to the parties current editions of Appendices I, II, and III together with any information which will facilitate identification of specimens of species included in those appendices, Article XII (2)(c)–(d), (f). Article XI provides for the establishment of a Conference of Parties to be organized by the Secretariat every two years.

⁵⁰ *Id.* at Article IX (1)(a)–(b). A party can import, export or re-export a specimen only under a valid permit. In order to get clearance for import, export or re-export of the specimen the permit needs to be presented at the port of entry or exit, as the case may be. Import permits are issued by the Management Authority of the concerned State. Whereas export permits are issued by the Scientific Authority of the State concerned. For an explanation of how an import, export or re-export certificate may be obtained for trade in Appendices, I, II and III, *see* Chan, *supra* note 25, at 12–13.

⁵¹ This provision also includes rare and endangered plants.

⁵² *See* the Ordinance, *supra* note 10, at §§ 4–6.

⁵³ *Id.*

⁵⁴ *Id.* at § 5.

⁵⁵ *Id.* at § 6.

⁵⁶ *Id.* at §§ 2, 2A, 2B, 4, 5, 6, 7(1), 18. The Ordinance lists six schedules. Schedule 1 lists scheduled animals (endangered species), and Schedule 6 includes highly endangered animals, plants, or scheduled parts contained in Appendix I of CITES. All listed species under the Schedules 1, 2, 3, and 6 require a license for import, export or possession.

The Ordinance contains six schedules which contain species listed in CITES Appendices I, II and III.⁵⁷ Schedules 1, 2 and 3 of the Ordinance lists species, their derivatives and parts according to their status under CITES Appendices and in Hong Kong. Schedule 1 lists all animal species which are declared endangered. Schedule 2 lists all animal parts and derivatives which are used or can be used for various purposes. Schedule 3 lists all the endangered plant species. Schedule 4 provides the details of the fee for each license issued under Section 7(1) of the Ordinance. Schedule 5 lists CITES Appendix I endangered animal species whose body parts are used in controlled medicine, namely the tiger and the rhinoceros, and lists them as “highly endangered species.” Lastly, Schedule 6 lists CITES Appendix I endangered species both animals and plants in which commercial trade is banned absolutely.

In 1995, through an amendment to the Ordinance, tiger and rhinoceros were added to a category of highly endangered species by way of the Schedule 5 in which a complete trade ban was imposed. In contrast to CITES, the Ordinance contains two categories of threatened species: “endangered species” and “highly endangered species.”⁵⁸ Although the Ordinance does not define endangered species, it is understood to mean those species listed as endangered or soon to be extinct because of over-exploitation in trade (listed in Appendixes I and II species of CITES). The Ordinance defines highly endangered species to mean “an animal specified in the second column of Part 1 of the Sixth Schedule, an animal part of such an animal or a plant specified in the second column of Part 2 of that Schedule,” in which any form of trade is completely prohibited or restricted.⁵⁹ No licenses are issued for the import or export of any highly endangered species,⁶⁰ except under strict conditions meeting the requirements of the Ordinance and CITES.⁶¹ The Ordinance makes a further distinction between “highly endangered” and “endangered species” by imposing a higher penalty for trading or possessing “highly endangered species.”⁶²

Trade in animals, plants, body parts and their derivatives, listed under Schedule 1, 2, and 3 needs to conform to the procedures established under the Ordinance for obtaining an import or export license from the AFCD. Thus, one of the objects of the act is to restrict the importation, exportation, and possession of certain endangered animals

⁵⁷ See Chan, *supra* note 25, at 12.

⁵⁸ Schedules 1–3 which contain the endangered species, and Schedules 5–6 of the Ordinance which contain the highly endangered species (Trading tigers and rhinos is absolutely banned.).

⁵⁹ See *id.* at § 2(1) (“Highly endangered species” are those species in second column of the Ordinance Part I, Schedule 6.).

⁶⁰ Various examples of highly endangered species include rhino horn, tiger bone, ivory, bear gall bladder, and bear bile.

⁶¹ The Ordinance provides harsher penalties for import, export or possession of “highly endangered species” (fine of USD \$12,600 and imprisonment up to one year), while for other scheduled species the penalties are lighter (fine of USD \$6,300 and imprisonment up to 6 months). Section 13A adds a higher penalty of a fine of USD \$62,500 (HK \$500,000) and up to 1 year imprisonment for persons prosecuted and convicted under the Ordinance. Schedule 6 violations result in two-year prison sentences and a fine of USD \$625,000 (HK \$5 million).

⁶² *Id.*

and parts of such animals.⁶³ This is in accord with CITES requirements. There are restrictions on export, import, or possession of endangered species (those species listed in Schedule 1, 2, and 3) under the Ordinance for which a license may be issued under Section 7(1). The license for exporting or importing an endangered species may be obtained if and only if the person applying for the license can show, *inter alia*, that he is doing so for a non-commercial purpose, the item is a personal or household item, the item was acquired by that person before the provisions of CITES applied to such an animal or plant, or that the export, import, or possession for a non-commercial purpose is in the public interest.

A further restriction imposed by the Ordinance which one does not see under CITES, requires a license to import and possess scheduled species.⁶⁴ The only exception being that an import permit may not be required for species under Appendix III, CITES-listed plant species that have been artificially propagated or are manufactured products from species listed under Appendix II.⁶⁵ Yet even such species require a valid permit issued by a competent authority of the exporting state.⁶⁶

A. Penalties⁶⁷

Violations of the Ordinance are punishable by the imposition of criminal penalties.⁶⁸ The fines under Sections 4, 5, and 6 are at Levels 5 and 6 range from “[L]evel 5 with imprisonment for 6 months to level 6 with imprisonment for one year.”⁶⁹ Section 4 deals with restriction on importation, Section 5 deals with restrictions on exports, and Section 6 deals with restrictions on possession of scheduled species.

To import a species listed in Appendix I or Schedule 1, 2, or 3, an importer needs to obtain a valid CITES export permit from the CITES Management Authority of the exporting state. An individual also needs to apply to the AFCD for an Import License (IL), which is granted if the import is not detrimental to the survival of the species and the species will not be used for commercial purposes.⁷⁰ To export a species under

⁶³ The Ordinance contains six schedules and nineteen sections dealing with provisions regarding import, export, and possession of animal and plant species, over which the Director of the AFCD has search and seizure powers.

⁶⁴ *Id.* Exemption Order 187A, §§ 6, 7 [hereinafter Exemption Order].

⁶⁵ *Id.* §§ 1, 5.

⁶⁶ *See* Chan, *supra* note 25, at 13.

⁶⁷ *See* The Ordinance, *supra* note 10, at §§ 4–6, 10, 11 & 13A, and Schedule 8. *See also* the Criminal Procedure Ordinance (Cap 221) § 113C, *available at* <http://www.justice.gov.hk/Home.htm> (last visited Jan. 1, 2004) [hereinafter Criminal Procedure Ordinance].

⁶⁸ *See* The Ordinance, *supra* note 10, at §§ 4–6.

⁶⁹ *See, e.g.*, Criminal Procedure Ordinance, *supra* note 67. In accordance with Section 113(B), the penalty includes fines starting at USD \$250 (HK \$2000) for Level 1, increasing to USD \$625 (HK \$5000) for Level 2, USD \$1250 (HK \$10,000) for Level 3, USD \$3,125 (HK \$25,000) for Level 4, USD \$6300 (HK \$50,000) for Level 5, and USD \$12,600 (HK \$100,000) for Level 6; *see also* The Ordinance, *supra* note 10, at §§ 2B, 4(1A), 4(3), 4(4), 5(1A), 5(3), 5(4), 6(1A), 6(3) 6(4), 13(A).

⁷⁰ Paragraph 4 of CITES provides: “(1) Subject to section 18, no person shall, except under and in accordance with a license issued under Section 7(1), on his own behalf or on behalf of any other person, import any scheduled animal, scheduled animal part or scheduled plant; (1A) Subsection (1) shall not apply

Appendix I, an exporter needs to apply for an Export License (EL); this will only be granted if the export is not detrimental to the survival of the species and the exporter holds a valid import permit from the importing country.⁷¹ An EL will be granted only if the AFCD is satisfied that “the specimen concerned was legally acquired.”⁷²

For trade under Appendix II, the Ordinance requires an importer to obtain a valid IL from the AFCD and a valid EL from the exporting state. There is no licensing requirement for manufactured products of species under Appendix I, as well as many of the Schedule 2 parts are exempted from the licensing requirement in accordance with the Animals and Plants (Protection of Endangered Species) Exemption Order Cap 187A.⁷³ Similarly, in cases of export or re-export of Appendix II species an exporter must obtain a valid EL which will be granted if the AFCD is satisfied that the export of the specimen is not detrimental to the survival of that species. For importing an Appendix III listed species an export permit is required from the exporting state along with a certificate of origin, while re-export from Hong Kong requires an EL from the AFCD.⁷⁴ Lastly, a Possession License (PL) is required for possessing a CITES Appendix I, II, or III species.⁷⁵ Possession of an endangered species without a license is treated differently than the export or import of an endangered species. This is because the Ordinance gives courts the discretion to impose a fine and/or imprisonment for illegal possession of an endangered species.

The licensing requirement and the conditions for application of all kinds of licenses are provided under Section 7 of the Ordinance. The AFCD will only issue licenses if all conditions are met and a fee is paid. The Ordinance provides mandatory forfeiture of goods upon conviction, fines up to five million Hong Kong dollars, and imprisonment for two years. The Ordinance creates criminal penalties for the offenses of import, export, and possession of scheduled species. Since the Ordinance provides for criminal penalties in form of fines at a specific level, the various levels of fines mentioned can be construed in accordance with the Criminal Procedure Ordinance, Cap 221.⁷⁶ The objective of the Criminal Procedure Ordinance is to provide for consolidation and amendment of the laws relating to criminal procedure, evidence, and practice. In this respect, Section 113(B) provides for different levels of fines.⁷⁷ If a person is found to

to any highly endangered species; (2) Any person who contravenes subsection (1) shall be guilty of an offense and shall be liable on conviction to a fine at level 5 and to imprisonment for 6 months;(3) Subject to section 18, no person shall, except under and in accordance with a license issued under section 7(1), on his own behalf or on behalf of any other person, import any controlled medicine or highly endangered species; (4) Any person who contravenes subsection (3) shall be guilty of an offense and shall be liable on conviction to a fine at level 6 and to imprisonment for 1 year.” CITES, *supra* note 2. See also §§ 7(1) & 7B; Exemption Order §§ 6, 10. See also Chan, *supra* note 25, at 12–13 (for an explanation of how the AFCD issues various licenses).

⁷¹ See *id.* at §§ 5, 7(1), 7B. Section 5 deals with “restriction on export and the penalty for exporting a scheduled species including controlled medicine and highly endangered species without a license.”

⁷² See Chan, *supra* note 25, at 12–13.

⁷³ See Exemption Order, *supra* note 64, at §§ 2–11.

⁷⁴ See Chan, *supra* note 25, at 13.

⁷⁵ *Id.*

⁷⁶ See Crim. P. Ordinance, *supra* note 67.

⁷⁷ *Id.* at § 113B:

have contravened any of the sections of the Ordinance and illegally imports, exports, or possesses a scheduled species, he or she may be liable to imprisonment for six months and a level 5 fine.

B. The 1995 and 2000 Amendments: A Higher Penalty

As mentioned earlier, the Ordinance was amended in 1995 to provide stricter penalties for offenses committed for commercial purposes and to create the category of “highly endangered species.”⁷⁸ Import, export, or possession of a highly endangered species or controlled medicine without a license carries a penalty of imprisonment for one year and a Level 6 fine. Section 13A provides that where a person has been convicted of importing, exporting, or possessing a scheduled species not “highly endangered,” that person shall be liable for a fine of \$62,500 and imprisonment for one year. If a person has been convicted for importing, exporting, or possessing a controlled medicine or highly endangered species for a commercial purpose, the punishment is a fine of \$625,000 and imprisonment for two years.⁷⁹ Furthermore, the Section 13A defines “commercial purpose” to mean:

- (a) any purpose relating to trade or business;
- (b) buying, selling or exchanging for benefit, gain, profit or reward of any scheduled species or controlled medicine, or any article or medicine, which is, by virtue of [S]ection 2B deemed to be a scheduled species or a controlled medicine, as the case may be.⁸⁰

In May 2000, the Ordinance was again amended to extend legal controls over the import, export, and possession of endangered species to cover medicines made from

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- (1) Where an Ordinance provides for a fine for an offence by reference to a level, the fine applicable for the offence is the amount shown for that level in Schedule 8;
 - (2) Where a provision in an Ordinance specifies a level of fine that may be prescribed under subsidiary legislation, the level specified is a reference to the level as set out in Schedule 8;
 - (3) The Chief Executive in Council may by regulation amend the amounts set out in Schedule 8 to reflect his opinion of the effect of inflation on the value of the amounts set out in the Schedule since the date when the Schedule came into operation or since the date that the amounts in the Schedule were last amended.”

In accordance with schedule 8 of the Crim. P. Ordinance for the purposes of the present Ordinance this includes fines starting from USD \$250 (HK \$2000) for level 1, USD \$625 (HK \$5000) for level 2, USD \$1250 (HK \$10,000) for level 3, USD \$3125 (HK \$25,000) for level 4, USD \$6300 (HK \$50,000) for level 5, and USD \$12,600 (HK \$100,000) for level 6.

⁷⁸ *Id.* at §§ 2B, 4(1A), 4(3), 4(4), 5(1A), 5(3), 5(4), 6(1A), 6(3), 6(4), 13A. “Commercial purpose” is explained at § 13A(5).

⁷⁹ *Id.* at §13A(1)–(5).

⁸⁰ *Id.* § 13A(5).

“highly endangered plant species.”⁸¹ Previously, only medicines containing tiger or rhinoceros ingredients were subject to legislative control.⁸² Permits issued by the Director of the AFCD are required for non-commercial possession of these medicines.⁸³ This provision has not been used frequently to prosecute illegal traders, and the deterrent effect that it strives for has yet to be seen.

C. Enforcement Authorities

The enforcement authorities working under the Ordinance include the following: the AFCD; Customs and Excise Officers; and local police. The AFCD is the designated CITES Management Authority and operates the licensing system, inspects the shipment of licensed goods, and inspects retail stock and outlets.⁸⁴ Customs and Excise Officers look for endangered species during their trade inspection work, while the police investigate any information suggesting a violation of the Ordinance.⁸⁵ The AFCD, comprised of scientific experts, has its own endangered species division.⁸⁶ On average, the AFCD issues 15,000 licenses and inspects about 7,000 shops annually.⁸⁷ It also maintains connections with forensic labs and other nature conservation organizations.⁸⁸

⁸¹ See Press Release, AFCD (May 19, 2000), available at <http://www.afcd.gov.hk/news/epress/pr111.htm> (last visited Jan. 1, 2004). The usual types of highly endangered animal species parts and derivatives which can be used for making medicines include bear bile, sea turtle scales, plant species include cacti, aloes, pitcher plant, Venus fly trap, cycads, cyclamens and orchids.” *Id.*

⁸² Artificially propagated plants are also covered under this amendment. “The amendment takes into account the import and export of artificially propagated plants which now require a permit from the Director of the AFCD and a valid export permit issued by the competent authority of the exporting country is also required for import of such plants. Exemptions for possession of such plants were given to those traders who were able to maintain an accurate transaction record up to the requirement of the AFCD.” *Id.*; see also Exemption Order, *supra* note 64, at § 1A(1) (personal effects), §§ (a)–(b), § 5(1)(e), § 5(2).

⁸³ *Id.*

⁸⁴ See The Ordinance, *supra* note 10, at §§ 2(1), 7.

⁸⁵ *Id.* § 2(1). An authorized officer may include an officer of the Customs and Excise Services or a public officer authorized by the Director under section 3 of the Ordinance. See also the statement of Deputy Director of the AFCD, Richard Yip, who stated that AFCD work is supported by “an Endangered Species Protection Liaison Group which is convened by the AFCD with representatives from both the Customs and Excise Department and the Police.” See http://www.afcd.gov.hk/index_e.htm (last visited Jan. 1, 2004) and <http://www.afcd.org.hk/web/epress/pr85.htm> (on file with author).

⁸⁶ The AFCD Endangered Species Protection Division has a staff of 42; 15 of whom issue licenses. The whole ESPD works in co-operation with CITES on endangered species trade control work. However, Ms. Phoebe Sze, of the AFCD says that the Customs and Excise Department does not have a task force on endangered species enforcement. E-mail from Ms. Phoebe Sze, AFCD (July 28, 2001) (on file with the author).

⁸⁷ See Press Release, AFCD (May 19, 2000), *supra* note 81.

⁸⁸ In Hong Kong Special Administrative Region v. Bharti Ashok Assomull, Case no. SKS 4957/98, South Kowloon Magistracy, DOH 20, 21 & Jan. 28, 1999 and Feb. 25, 1999, a recent prosecution of a businesswoman found trading in ‘shahtoosh’ shawls (made from Tibetan antelope, a highly endangered species, listed under Schedule 6 of the Ordinance). The scientific proof that the shawls actually came from the skin of the dead antelope was provided by forensic scientists from the U.S. National Fish and Wildlife Forensic Laboratory. See also <http://www.traffic.org> (last visited Jan. 1, 2004). See, e.g., Press Release, AFCD (Dec. 6, 1999), *supra* note 9, available at <http://www.afcd.gov.hk/web/epress/pr85.htm>. The AFCD also works in close cooperation with the CITES Secretariat, TRAFFIC International, WWF-UK & WWF-New Zealand and has close ties with China, India and Nepal.

Although the AFCD has an Endangered Species Protection Department (ESPD), there are only a small number of officers who can work with the police and customs departments to participate in raids or seizures.⁸⁹ The Ordinance provides for formation of an Advisory Committee whose task is to advise the Director on any question pertaining to the administration of the Ordinance.⁹⁰

Prosecution of illegal traders also requires aspects of international law enforcement. An attempt to address this aspect was made in 1993 with the formation of the Endangered Species Protection Liaison Group (ESPLG).⁹¹ The ESPLG coordinates major enforcement operations and maintains liaison with national and international bodies.⁹² The ESPLG is composed of representatives from the AFCD, the Customs and Excise Department, and local police.⁹³ It coordinates the enforcement of controls on illegal trade in endangered species. The ESPLG also cooperates with the CITES Secretariat, TRAFFIC International, Wildlife Trade Monitoring Unit (WTMU), and the World Conservation Monitoring Centre (WCMC).⁹⁴ Further, it coordinates with non-governmental organizations such as the WWF-HK and TRAFFIC in anti-poaching and smuggling operations.⁹⁵

However, looking at the scale of illegal trade and significant amounts of money involved, there is an urgent need to mount a special task force with scientifically trained personnel for apprehending international smugglers. Presently the police, customs, and NGOs in Hong Kong are not properly equipped to adequately deal with the ingenious ways traders use to slip past law enforcement authorities while smuggling endangered species through international borders, or smuggling species from Hong Kong into the mainland or vice versa.

D. Function and Powers of the AFCD

Under the Ordinance, and in addition to CITES requirements,⁹⁶ the Director of the AFCD must be satisfied that the endangered species being exported, imported, or possessed is a personal or household effect.⁹⁷ The Director's approval may also be based on whether this animal was acquired before the species was listed under a CITES Appendix, whether the purpose of export or import is to give effect to a non-commercial

⁸⁹ See Sze, *supra* note 86.

⁹⁰ The Ordinance, *supra* note 10, at § 14.

⁹¹ The ESPLG, which has representatives from AFCD, Customs and Excise Department and the Police, convened in 1993. It is not the designated authority under the Ordinance, but it contributes to and coordinates the enforcement work on illegal trade in endangered species carried on by the AFCD. Sze, *supra* note 86.

⁹² Chan, *supra* note 25, at 13. See also HKSAR, *supra* note 27, available at <http://www.info.gov.hk/info/endanger.htm> (last visited Jan. 1, 2004).

⁹³ *Id.*

⁹⁴ WCMC is responsible for maintaining the computerized database of all CITES trade transactions and providing a comparative tabulation of annual data in trade.

⁹⁵ See AFCD epress, *supra* note 88.

⁹⁶ The Ordinance, *supra* note 10, at § 7(1).

⁹⁷ See CITES, *supra* note 2, at Arts. VII(2), VII(7), III, IV.

loan,⁹⁸ whether the animal forms part of a traveling zoo or circus,⁹⁹ or whether the import or export is for a non-commercial purpose which is in the public interest.¹⁰⁰

Any person may apply to the Director of the AFCD for a license to import, export, or possess any species if the person satisfies the Ordinance requirements as mentioned above.¹⁰¹ Further, the Director must be reasonably satisfied, based on objective considerations, that a license to import or export a highly endangered species meets the requirements of the provision and is for a non-commercial purpose.¹⁰² Otherwise, the Director has the power to refuse a license and prosecute those who violate the law.¹⁰³ The Director can also cancel or revoke a license if any of the Ordinance requirements are violated. For example, if any fact is falsely represented, or if the applicant commits any unlawful act the Director can cancel or revoke the license.¹⁰⁴ The Directors and authorized officers have the power of forfeiture.¹⁰⁵ This power is subject to court orders when an offender has been convicted.¹⁰⁶ The provisions under Section 11 also authorize the Director or authorized officers to require information, search with a warrant, seize, or remove any scheduled species or controlled medicine.

1. Existing and Potential Loopholes in the Ordinance

Despite the Ordinance's stricter punishment, illegal traders are not deterred. Due to five inadequacies of the Ordinance, Hong Kong continues to be a transit port for illegal trade in endangered species.

First, a trader can import an unidentified species into Hong Kong without breaching any legal provisions if the species is not listed in the Ordinance or the CITES Appendices.¹⁰⁷ Currently, there is no provision for species which are unique and have

⁹⁸ This loan includes donation, exchange of herbarium specimens or other preserved, dried or embedded museum specimens between scientists and scientific institutions.

⁹⁹ A "circus" may include a menagerie, plant exhibition or other traveling exhibition. See CITES, *supra* note 2, at Art. VII(6).

¹⁰⁰ "The animal or plant or parts thereof for purposes of import or export are personal or household effects made of such an animal or plant or parts thereof; the animal or plant a part thereof was acquired before the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed in Washington, D.C. on March 3, 1973, applied to such an animal, plant or parts thereof; the purpose of export or import is to give effect to a non commercial loan, donation or exchange of herbarium specimen or other preserved, dried or embedded museum specimen between scientists or scientific institutions; the animal, plant or part thereof to be imported or exported forms parts of a traveling zoo, circus, menagerie plant exhibition or traveling exhibition; import or export is for any non-commercial purpose which is in public interest." The Ordinance, *supra* note 10, at § 7B.

¹⁰¹ *Id.* at § 7(2) and subject to § 7B. See also Exemption Order, *supra* note 64.

¹⁰² *Id.* at § 7B.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at § 7A (penalty for furnishing false information), § 8 (for cancellation of license).

¹⁰⁵ *Id.* at §§ 11, 13.

¹⁰⁶ See the Criminal Procedure Ordinance, Section 102, which empowers the court to dispose of or return property connected with an offense. Crim. P. Ordinance, *supra* note 67, at § 102. See also the Ordinance, *supra* note 10, at §§ 13(3)–(5).

¹⁰⁷ For example a *Dugong Dugon*, a native species of Australia, was listed in Hong Kong as a scheduled species under the Ordinance in 2000. A dugong, although listed in CITES is listed under Appendix II rather

never been discovered or recognized by the government's scientific authorities.¹⁰⁸ Also, the Ordinance does not control situations where a trader has imported a species from a country not a party to CITES.¹⁰⁹

Second, the categories of endangered species are not closed. When the authorities include new species as endangered, Section 19 provides that during the grace period a trader can trade in that species without restrictions.¹¹⁰ Unscrupulous traders can abuse this provision because raids are rarely made soon after the expiration of the grace period.¹¹¹ This lack of timely enforcement creates a legal and de facto grace period that illegal traders can exploit.¹¹² This extended grace period threatens the extinction of listed species due to the potential increase in deaths before the grace period expires.

than in Appendix I. It was only in recent years that Australia urged and recommended it be listed in Appendix I. "Transfer of the Australian population of *Dugong dugon* (Dugong) on Appendix I of the Convention. The listing of the Australian population of *Dugong dugon* (Dugong) on Appendix I is in accordance with the provisions of Resolution Conf. 9.24, Annex 3 that states that "wherever possible split listings (where different populations of a species are listed on different Appendices) should be avoided." The listing should be annotated to state that "the Australian population is not endangered and is included on Appendix I to eliminate potential enforcement problems caused by split listing." See United Nations Environment Programme, CITES, available at <http://www.unep.ch/cites/eng/cop/11/prop/26.pdf> (on file with author).

¹⁰⁸ Earth is home to an estimated 14 million species but only 1.75 million have been documented. Many become extinct even before they are identified. Associated Press, *11,000 Species Face Extinction*, SOUTH CHINA MORNING POST, Oct. 9, 2002, at 12. See also Convention On Biological Diversity, Sustaining Life On Earth, available at <http://www.biodiv.org/doc/publications/guide.asp> (last visited Jan. 1, 2004).

¹⁰⁹ Vietnam or North Korea, non-members, are possible examples. Currently, there are 161 countries members of CITES. "According to CITES Secretariat, Libyan Arab Jamahiriya ratified the Convention on Jan. 28, 2003, making it the 161st Party." AFCD, *Conservation*, available at http://www.afcd.gov.hk/conservation/con_e.htm (last visited Dec. 22, 2003).

¹¹⁰ Section 19(1A) of the Ordinance provides that the "Chief Executive in Council" may amend any Schedule to the Ordinance:

(1A) Without affecting the power conferred on the Chief Executive in Council under subsection (1) to amend any Schedule, the Secretary for the Environment and Food may, by notice published in the Gazette, amend Schedule 1, 2 or 3 or the Sixth Schedule. (Added 3 of 1995 s. 13. Amended 65 of 1999 s. 3; 78 of 1999 s. 7);

(2) Where at the commencement of an order amending Schedule 1, 2, 3 or 5 any person has in his possession or under his control any scheduled species or controlled medicine in respect of which, prior to the commencement, there was under section 6 no requirement for a license, that section shall come into operation in respect of such scheduled species or controlled medicine with effect from a date which is 3 months after the commencement of the order. (Amended 25 of 1989 s. 16).

The Ordinance, *supra* note 10, at § 19(1A).

¹¹¹ TCM Traders may maintain stock piles of medicines containing prohibited scheduled animals or plant parts, or may get more stocks of the same TCM within the grace period. By acquiring a permit, stockpiles can be converted into a legal stockpiles. This type of conversion mitigates the killing of endangered and highly endangered species because the stock has not been sold.

¹¹² CITES also allows that when a state becomes a member, or when a new species is listed, there is a grace period allowing the state to trade species without regulation. CITES, *supra* note 2, at Arts. X, XIII, XIV(1)(a)–(b), XV. The grace period leads to stockpiling in anticipation of the new law. "Discovery of a new species can lead to a surge in demand." - See Jones, *supra* note 25, at 6–7. Stockpiling can have adverse effects by increasing the over-exploitation and killing of endangered species. Stockpiling also has

Third, when this grace period is in effect, international trade in these species becomes illegal, but domestic transactions in such species remain unaffected. After the grace period, if an owner's stock of TCM (from plants such as aloes, cacti, pitcher plants, Venus fly-traps, orchids, and medicines made from bear bile or sea turtle) has not been depleted then an owner can carry on trade after getting a possession license. Although traders must show and maintain an accurate transaction record, few shops and establishments can be actively policed by the AFCD. The ivory trade provides a glaring example. Ivory trade has been banned internationally since 1989.¹¹³ Yet, traders in Hong Kong are not subject to any restrictions on the sale and purchase of ivory unless the amount of ivory sold or bought is more than five kilograms.¹¹⁴

Fourth, there is the opportunity for undetected trade of endangered species under the pretext that such items are processed items being manufactured into various products, skilled work, personal effects, or personal property.¹¹⁵ These exceptions are allowed through the Ordinance's Exemption Order.¹¹⁶ The Exemption Order allows trade in manufactured products made from any scheduled animal or plant such as: garments, ties, scarves, gloves, boots, wallets, briefcases, belts, jewelry, tie-pins, utensils, furniture, or musical instruments.¹¹⁷ It also exempts specimens for herbariums, dead species or specimens for scientific, museum, or educational purposes.¹¹⁸ The problem is that it is very difficult to identify Schedule 1 and Appendix I species that look similar to, and mixed with, Appendix II species for trade purposes.

Fifth, the Ordinance allows other ways to trade abusively in highly endangered species. A license may be granted upon reasonable proof that a species is shown to have been acquired as a household effect, before CITES applied, for a zoo or circus, or for

the potential to eliminate and make a whole species extinct within a relatively short time. Jones, *supra* note 25, at 7 (providing examples of elephant ivory, pitcher plant, tiger bones, and shahtoosh).

¹¹³ See HKSAR, Endanger, available at <http://www.info.gov.hk/info/endanger.htm> (last visited Jan 1, 2004). Elephant ivory tusks are only exempted from the scope of the Ordinance if they are "manufactured products" or "personal effects or personal property." Exemption Order, *supra* note 64, at § IA (1) "personal effect" "(a) provides that (i) in the case of any tusk or part thereof of Elephantidae species (Elephants), being a manufactured product imported by any person and of which the Director is satisfied is not for the purpose of trade or business, not more than one kilogram thereof; or (L.N. 335 of 1989). (ii) in the case of any tusk or part thereof, of Elephantidae species (Elephants), being a manufactured product exported or intended for export by any person or otherwise in the possession or under the control of any person and of which the Director is satisfied is not for the purpose of trade or business, not more than 5 kilograms thereof; or (L.N. 335 of 1989)." See also *id.* at IA(1)(a)(i)-(ii).

¹¹⁴ The Exemption Order provides for a range of 1 to five kilos of ivory can be imported or exported. *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at § 18 ("The Chief Executive may, by order published in the Gazette, exempt from [S]ections 4, 5 and 6 any person or scheduled species or controlled medicine or group or description of persons or scheduled species or controlled medicines generally or for any purpose or by reference to any circumstances."). For example, carved ivory, jewelry or a manufactured product such as furniture furnishings may be exempted.

¹¹⁷ Exemption Order, *supra* note 64, at §§ 2, 3, 5, 8-11.

¹¹⁸ *Id.*

purposes of a museum collection.¹¹⁹ The reasonable satisfaction test may be satisfied by unscrupulous traders who provide a front of maintaining a circus or a zoo.¹²⁰ Instances of illegal trade in live birds, reptiles, their parts and derivatives, are reported widely by various bodies (WWF-International, Traffic International, Traffic East Asia, Wildlife Protection Society of India, the CITES Secretariat and Interpol).¹²¹

2. *Problems of Enforcement*

Another obstacle to protecting endangered species is enforcement. The AFCD has a staff of forty-two officers in its Endangered Species Protection Division (ESPD), fifteen of which are responsible for issuing licenses.¹²² The ESPD works in cooperation with CITES authorities on endangered species trade control work, but neither the AFCD nor the Customs and Excise Department have a task force specifically for endangered species enforcement.¹²³ Established in 1993, the ESPLG comprising of AFCD officers working in conjunction with the police and customs officers to seize illegal shipments, inspect stocks, gather information, and help catch illegal traders. Its main task, however, is to coordinate major enforcement operations and maintain links with international bodies and NGOs.¹²⁴

Hong Kong, in contrast to the U.S., South Africa, and Australia, has not established a specialized task force to enforce the law by working with other international

¹¹⁹ See the Ordinance, *supra* note 10, at § 7; see also the Exemption Order, *supra* note 64, at § 1A for “manufactured products” and “personal effects.”

¹²⁰ See *supra* notes 21, 28, 34, 82, 88.

¹²¹ See generally CITES, TRAFFIC and WWF websites for illegal trade. Since many of Interpol's (178) Member States are trying to protect their fauna and flora, the General Secretariat collaborates with CITES to combat traffic in endangered species. A Memorandum of Understanding between the two organizations was signed on Oct. 15, 1998. Memorandum of Understanding (Oct. 15, 1998), available at <http://www.interpol.int/public/ICPO/LegalMaterials/cooperation/AgrList.asp> (last visited Dec. 22, 2003). See also CITES—Notification to Parties, No. 677 (June 30, 1992), United Republic of Tanzania: illegal trade. Various methods have been used for illegal trade of endangered species in Tanzania, including forging export and import permit documents as well as altering copies of genuine “origin permits.” See Notification, United Republic of Tanzania, Illegal Trade in CITES Specimen, No. 677 (June 30, 1992), available at <http://www.cites.org/eng/notifs/1992/677.doc> (last visited Dec. 22, 2003). Many reports and TV presentations suggest that many illegal traders in Asia and Africa carry on a legitimate front of a protected area or private zoo under the cover of illegal trade in endangered species—especially from Africa (endangered or exotic parrots smuggled from Ghana to the Ivory Coast to the U.S.), and South East Asia (birds and reptiles like the Komodo dragon for example, to the U.S.). See Notification CITES Ivory Coast, Trade In African Grey Parrots, No. 744 (May 7, 1993), available at <http://www.cites.org/eng/notifs/1993/746.txt> (last visited Dec. 22, 2003); see also Press Release, World Wildlife Fund, Reptile Smuggler Sentenced to Nearly Six Years in Prison (June 11, 2001), available at <http://www.worldwildlife.org/news/headline.cfm?newsid=278> (last visited Mar. 16, 2004). Many of the endangered species smuggled from these countries end up in Europe. See Cook, Roberts, & Lowther, *supra* note 21; Bear Alliance, *supra* note 6; see also BBC News: World: Asia Pacific, *Thailand Carving an Illegal Trade* (June 13, 2002), available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/2043001.stm> (last visited Dec. 22, 2003).

¹²² Sze, *supra* note 86.

¹²³ *Id.*

¹²⁴ Chan, *supra* note 25, at 13.

nature conservation and police forces.¹²⁵ Although the AFCD and the ESPLG have connections with the CITES Secretariat, the AFCD and the Customs and Excise officers lack resources, special training, and facilities necessary to apprehend illegal traders.¹²⁶ Additionally, international smugglers and wildlife poachers are often equipped with better information, technology, and expertise.¹²⁷

Identification of species poses yet another problem for law enforcement agencies. As the volume of trade increases, it becomes difficult for Custom Officers to identify illegal shipments when one illegal specimen may be hidden among thousands of similar looking legal specimens.¹²⁸ Despite strict enforcement and high criminal penalties for one particular kind of species, illegal traders deal in different species or change their routes to countries where controls are less effective or absent. Hence, illegal traders continue to evade capture.¹²⁹

Enforcement of illegal trade in endangered species also occurs on a local level. Accordingly, the AFCD, the ESPLG, and the Customs and Excise Department have to act in conjunction with anti-smuggling and anti-poaching strategies undertaken by various groups at the local level.¹³⁰ Coordination between the ESPLG, scientific institutions, forensic laboratories, and other conservation organizations is crucial for the effective implementation of the law.

V. ENDANGERED SPECIES PROTECTION LAWS IN THE U.S. AND AUSTRALIA

The U.S. Endangered Species Act (ESA) and the Australian Environment Protection and Biodiversity Conservation (Wildlife Amendment) Act of 2001 deal more seriously and effectively with the problems of illegal trade in endangered species than Hong Kong law.¹³¹ Although penalties under the Hong Kong Ordinance are strict in comparison to other Asian countries such as India, the enforcement of these provisions is

¹²⁵ Du Bois, *supra* note 3.

¹²⁶ Jones, *supra* note 25, at 8–9.

¹²⁷ There have been reports where customs officers have seized bear gall bladders dipped in chocolate that have been illegally exported from Canada into Hong Kong, China, Taiwan, and Korea. See K. Highley & S.C. Highley, *Bear Farming Trade in China and Taiwan*, available at <http://www.earthtrust.org/bear.html> (last visited Dec. 22, 2003). See also Bear Alliance, *supra* note 6.

¹²⁸ Jones, *supra* note 25, at 8.

¹²⁹ Report of CITES Secretariat on Conservation of and Trade in Specific Species for the 45th Meeting of Standing Committee, June 19–22, 2001, Paris, SC45 Doc.21-p1, available at <http://www.cites.org/eng/cttee/standing/45/E45-21.pdf> (last visited Dec. 22, 2003).

¹³⁰ Sze, *supra* note 86.

¹³¹ The U.S. Endangered Species Act of 1973, 16 U.S.C. § 1537 [hereinafter ESA] and the Australian Environment Protection and Biodiversity Conservation Act 1999 (Amended 2000) [hereinafter EPBC] coordinating with the Australian Wild Life Protection (Regulation of Export and Import) Act 1982 (WLP). The EPBC was amended in 2001. The amendments were introduced to cover the provision of CITES and to integrate the WLP Act. It has been effective as of Jan. 11, 2002. For the EPBC, see Environment Protection Biodiversity Conservation Act, 1999, (Austl.), available at <http://scaleplus.law.gov.au/html/pasteact/3/3295/top.htm> (last visited Dec. 22, 2003).

not as strict as the equivalent U.S., Australian, and Canadian statutes.¹³² In India, the maximum penalty for a violation of the Wildlife Protection Act of 1972 is a \$2000 fine and imprisonment of up to two years.¹³³ In the U.S., there are several laws apart from the ESA that fortify CITES requirements and provide strict enforcement and efficient cooperation mechanisms.¹³⁴ These laws also allow authorities to prosecute illegal traders even when CITES is not violated.¹³⁵

A. Endangered Species Protection Laws in the U.S.

The ESA prohibits trade in listed species and empowers the U.S. Fish and Wildlife Service (FWS) to enforce CITES requirements.¹³⁶ Further, the President of the U.S. is empowered to provide financial assistance to foreign nations for species conservation programs and to direct the Secretary of Interior to encourage foreign governments to protect rare species, as well as foster agreements between the U.S. and other countries for species conservation.¹³⁷

¹³² In 1994, export, import or possession of tiger parts or any products claiming to contain tiger parts were banned. In 1996 the AFCD prosecuted two pharmacists selling pre-packaged manufactured TCM claiming to contain tiger bone and rhino horn, imposing fines of USD \$31,250 (HK \$250,000) and USD \$18,750 (HK \$150,000). See Lee, Hoover, Gaski, and Mills, *A World Apart? Attitudes Towards Traditional Chinese Medicine and Endangered Species in Hong Kong and the United States*, TRAFFIC East Asia, TRAFFIC North America and WWF-US, 15 (1998). It is only recently that the court has imposed a very strict fine upon an illegal trader who was prosecuted for trading in Tibetan antelope skin shawls (a highly endangered species). The offender was fined HK \$40,000 and sentenced to three months imprisonment, which was later suspended. See Traffic News Report at TRAFFIC-East Asia (Hong Kong), Oct. 21, 1999, available at <http://www.traffic.org/> (last visited Dec. 22, 2003). The U.S. provides civil and criminal penalties. ESA *supra* note 103, at § 1540 (a)–(b). Additionally, the Lacey Act, 16 U.S.C. § 3373 (a)–(d) (2000), may be used to prosecute foreign offenders and the penalty is high. In Australia, “an offence against subsection (1) or (2) is punishable on conviction by imprisonment for a term not more than 7 years, a fine not more than 420 penalty units, or both,” EPBC, *supra* note 131, at § 18A(3). See also *id.* at §§ 18, 18A, 196A–E. Furthermore, Section 18A calculates penalties in accordance with the Australian Criminal Code §§13 & 19 and the Crimes Act 1941. Similarly in Canada, the penalties for export, import, or possession of prohibited species without a permit are higher. See, e.g., Canada Wildlife Act R.S.C. 1985 c. W-9, §§ 11, 13 and Canada National Parks Act S.C. 2000 § 25.

¹³³ Even the State of Jammu and Kashmir (India), where the wool was smuggled to manufacture shawls, has declared that such a trade is illegal and violates state law. Although the national law, i.e., the Wild Life Protection Act (1972) prohibited trade in shahtoosh there was no ban on such an item in the state of Jammu and Kashmir. The High Court of Jammu and Kashmir, in a landmark decision filed by the Wildlife Protection Society of India, a judgment declared that wildlife trade in Tibetan antelope is illegal and called for a ban on manufacture of shawls made out of shahtoosh. *HC asks JK to regulate trade in Shahtoosh*, THE INDIAN EXPRESS, May 8, 2000, available at <http://www.indianexpress.com/ie/daily/20000508/ina08044.html> (last visited Dec. 22, 2003).

¹³⁴ ESA, *supra* note 131, at § 1537(a)–(b). See also the Lacey Act, *supra* note 132, at § 3371; Wild Exotic Bird Conservation Act, 16 U.S.C. § 4912 (2002) [hereinafter Wild Bird]; Rhinoceros and Tiger Conservation, 16 U.S.C. § 5305a, Ch. 69 and 73 respectively [hereinafter Rhino]. (Lexis Nexis Document 16 U.S.C. 2002).

¹³⁵ See e.g., Lacey Act, *supra* note 132, at § 3373 (2002).

¹³⁶ ESA, *supra* note 131, at § 1531; Lacey Act, *supra* note 132, at § 1540(11).

¹³⁷ ESA, *supra* note 131, at § 1537 (a)–(c)(1), (c)(2), (d).

Another U.S. law, the Lacey Act, prohibits wildlife trade in violation of any state, federal, foreign law, or treaty signed by the U.S.¹³⁸ Accordingly, a product possessed by an individual in violation of a Hong Kong Ordinance could be seized, a fine imposed of up to \$20,000 (up to \$50,000 for an organization or business), as well as a sentence of up to five years imprisonment.¹³⁹ The Lacey Act also classifies violations as criminal acts.¹⁴⁰

1. Relevant Judicial Decisions in the U.S.

Several successful prosecutions demonstrate how U.S. courts interpret the above-mentioned wildlife acts. In a few landmark cases, the U.S. District Court for the Southern District of Florida found liability under the ESA, CITES, and the Lacey Act for import, export and illegal possession of crocodile hides, Peruvian parakeets, and Taiwanese salmon.¹⁴¹

¹³⁸ See generally, Lacey Act, *supra* note 132.

¹³⁹ See *United States v. Proceeds of Sale of Approx. 15,538 Panulirus Lobster Tails*, 834 F. Supp. 385 (2002), where a USD \$10,000 fine was imposed for illegal importation of lobster tails. The US-FWS Special Agent Tara Donn busted an illegal trade racket involving importers from Bombay, India and Hong Kong for trade in smuggled shahtoosh shawls in August 2000. The importers Iqbal Memon, Linda Ho McAfee, and Janet Mackay-Benton entered guilty pleas before N.J. federal court for violating the ESA in March 1995. The defendants admitted exporting 100 shawls to sell at a fashion boutique in Paris. In addition, to violating CITES and the ESA, the defendant Memon's Navarang Company understated the value of the shawls and underpaid the U.S. customs Service by nearly USD \$32,000 declaring that the items were woven cashmere shawls. The report states that Memon's company faces a maximum penalty of up to USD \$500,000 and the other two offenders may each face a six month imprisonment with fines of USD \$25,000 each. See Tara Donn & Diana Weaver, *Shahtoosh Dealers Plead Guilty*, available at <http://news.fws.gov/NewsReleases/R9/A11C3D68-AC20-11D4-A179009027B6B5D3.html> (last visited Dec. 22, 2003). Defendant Cocoon Co. paid USD \$41,729, but the court imposed a USD \$5,000 fine and five-year probation to Navarang Exports and its Bombay-based president, Iqbal Memon. He could have faced fines up to USD \$500,000. See Aseem Chhabra, *Fashion Store Fined For Selling Shahtoosh*, available at <http://www.rediff.com/us/2001/jun/26us1.htm> (last visited Jan. 1, 2004). Trading or possessing shahtoosh shawls is prohibited in India, Hong Kong and the U.S. by the ESA, foreign laws and the Lacey Act. Under §3372(a) (2) (A), the term "foreign law" is sufficiently clear, and the Lacey Act is constitutional. See *U.S. v. Lee*, 937 F.2d 1388, 1391 (9th Cir. 1991); see also CDOS 5106, 91 Daily Journal DAR 7840 which held Taiwanese regulations prohibiting taking of salmon by Taiwanese squid fishing vessels is "foreign law" for the purpose of prosecution under 16 U.S.C. § 3372. See also *United States v. 594,464 Pounds of Salmon* 687 F. Supp. 525 (D. Wash. 1987) [hereinafter *Pounds of Salmon*].

¹⁴⁰ Lacey Act, *supra* note 132, at § 3373 (a) & (d). The Lacey Act provides that the offender who participates in prohibited acts involving wildlife with market value over USD \$350 is subject to felony; the mens rea requirement and the due care requirement indicate misdemeanor violations of the Lacey Act.

¹⁴¹ *United States v. 3210 Crusted Sides of Caiman Crocodilus*, 636 F. Supp. 1281 (S.D. Fla. 1986) [hereinafter *Crocodilus*], *United States v. 2,507 Live Canary Winged Parakeets*, 689 F.Supp. 1106 (S.D. Fla. 1988) [hereinafter *Parakeets*], and *Pounds of Salmon*, *supra* note 139. In *Crocodilus*, the defendant was taking a consignment of crocodile skins (hides) from Bolivia to Paris when his flight stopped in the US. The district court held that the hides were subject to seizure and forfeiture under Lacey Act and CITES, and the whole of consignment was forfeited. The court further held that the government had probable cause to bring forfeiture proceedings for violation of ESA because testimony confirmed that the crocodile hides in question were actually of the subspecies *yacare* and not *crocodilus* as alleged. The court also held that the crocodile hides were shipped from Bolivia and that the vast majority of the hides were from undersized caiman, hunted in violation of Bolivian law. The court applied the Lacey Act and held that "in order to prevail under defense of innocence, claimant to property which is subject of forfeiture proceeding must demonstrate lack of involvement in the underlying wrongful activity, lack of knowledge of the wrongful activity, and that claimant did all that was reasonably possible to prevent illegal use of his

In *United States. v. 2507 Live Canary Winged Parakeets*¹⁴² an action was brought by the U.S. government to seize canary-winged parakeets from defendant Pet Farm Inc. The parakeets were imported in violation of Peruvian law, the Lacey Act, and the ESA.¹⁴³ In 1995, Pet Farm imported approximately 3000 parakeets from Peru. The court found these birds required an import permit, signed by the shipper, because the species was listed in a CITES Appendix. . Although the defendants held a permit, it was actually an export permit for a different kind of parakeet. The Peruvian Director of Forests and Fauna had signed the original permit and initialed it for export of the parakeets, yet a Peruvian ministerial decree was also needed but not obtained. The Director of Forest and Fauna had insufficient legal authority to sign the CITES permit. The shipment was seized in the U.S. by FWS officers. The court held that once the plaintiff established probable cause, the burden of proof shifted to the defendant to provide a viable defense. The court rejected the claim of “innocent owner” made by the defendant and held that the “innocent owner” defense was not available in actions under the Lacey Act.¹⁴⁴

Similarly, in *United States v. 594,464 Pounds of Salmon*,¹⁴⁵ the U.S. alleged certain fish exported from Taiwan violated a Taiwanese regulation and importation of that particular salmon into the U.S. was part of a complex international smuggling scheme.¹⁴⁶ The court found that the Taiwanese Board of Foreign Trade has the power to approve goods before they can be exported and that salmon falls within a “controlled” category that required the Board’s approval.¹⁴⁷ The court held that because the salmon were imported in violation of the Taiwanese law, it triggered the Lacey Act’s civil forfeiture provisions.¹⁴⁸ The court allowed the seizure of the shipment of fish and held

property.” The court further held that “the permit accompanying the defendant hides was not an original, but an ‘unendorsed Xeroxed copy.’” Therefore, the permit accompanying the hides violated CITES requirements. CITES also requires a separate permit or certificate to accompany each group of exported specimens. The court held that that the defendant had violated Articles II (2)(A), IV (2)(A), and VI (5) of CITES. The evidence presented by the government in this case indicated that 7665 hides were imported into the U.S., within the meaning of ESA§ 1532(10), without the required permit. The permit indicated only 3210 hides. The bulk of the hides, therefore, were traveling without documentation and violated CITES Article VI (5), which states that “[a] separate permit or certificate shall be required for each consignment of specimens.” The court held that the purpose of the ESA and CITES was to prevent extinction of certain species by over exploitation through international trade and the defendant could not get away by adopting an innocent owner defense, which was not applicable in this case. *Crocodilus*, *supra* note 141 at 1281. This case demonstrates that U.S. courts have used and applied ESA provisions and the Lacey Act strictly to deter unscrupulous wildlife traders. See also Mahony, *supra* note 3, at 8, 20.

¹⁴² *Parakeets*, *supra* note 141, at 1–17.

¹⁴³ *Parakeets*, *supra* note 141, at 1–2.

¹⁴⁴ *Id.* at 12, 17. The Lacey Act provides for forfeiture on a strict liability basis because merchandise was in fact contraband. The court held that good faith is immaterial. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

¹⁴⁵ *Pounds of Salmon*, *supra* note 141, at 1–9.

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.* at 2, 9.

¹⁴⁸ *Id.* at 9.

that the defendant should have been aware that violation of a foreign regulation triggers the forfeiture provision of the Lacey Act.¹⁴⁹

In another important case, three importers were brought before a U.S. federal district court for violating the ESA.¹⁵⁰ The defendants entered guilty pleas. In a period of one year, from 1994-95 they had imported, exported, and distributed almost 308 shahtoosh shawls, while declaring the shawls were made of cashmere wool.

In 2000, a U.S. federal district court sentenced an illegal reptile smuggler to six years imprisonment and ordered him to pay a fine of USD \$60,000.¹⁵¹ The defendant pleaded guilty to forty federal felony charges including money laundering, conspiracy, smuggling, and violations of the Lacey Act and the ESA.¹⁵² The defendant was dealing in endangered species such as the Komodo dragon and the Madagascan spurred tortoise, valued at over USD \$20,000 and USD \$30,000, respectively.¹⁵³ The harsh sentences imposed by these courts provide a much needed deterrent, and set an example to other countries mindful of endangered species protection.

B. Endangered Species Protection Laws in Australia

The Australian Environmental Protection and Biodiversity Conservation Act of 1999 (EPBC) contains provisions integrating five commonwealth statutes: the Environment Protection (Impact of Proposals) Act of 1974; the Endangered Species Protection Act of 1992; the National Parks and Wildlife Conservation Act of 1975; the World Heritage Properties Conservation Act of 1983; and the Whale Protection Act of 1980.

The 2001 amendment of the EPBC (Wildlife Protection) Act enhanced the capacity of the Commonwealth to control the international trade of wildlife.¹⁵⁴ The 2001 amendments aim at providing “sound wildlife management principles.”¹⁵⁵ The EPBC Act

¹⁴⁹ Lacey Act, *supra* note 132, Section 3374 provides “all fish or wildlife or plants imported, exported... contrary to the provisions of section 3372 of this title (other than 3372(b) of this title (Conservation) or any other regulation shall be subject to forfeiture to the United States.” Lacey Act, *supra* note 132, at § 3374. See also Mahony, *supra* note 3.

¹⁵⁰ See, e.g., Press Release U.S. Fish & Wildlife Service, Shahtoosh Dealers Plead Guilty in Landmark Case (July 10, 2000), available at <http://news.fws.gov/NewsReleases/R9/A11C3D68-AC20-11D4-A179009027B6B5D3.html> (last visited Dec. 22, 2003).

¹⁵¹ See Nancy Engelhardt, *supra* note 121. See also Press Release, U.S. Fish & Wildlife Service, Probe of International Reptile Trade Ends With Key Arrests (Sept. 15, 1998), available at <http://usembassy-israel.org.il/publish/press/global/archive/1998/september/gi1916.htm> (last visited Dec. 22, 2003).; Environment News Service *International Trafficker in World's Rarest Reptiles Jailed* (June 8, 2001), available at <http://forests.org/archive/general/intrworl.htm> (last visited Dec. 22, 2003).

¹⁵² Craig Hoover, senior program officer for TRAFFIC, WWF-US stated that “it was an important moment for conservation. The case is very significant as the sentence of six years is one of the highest ever assessed for illegal trade in live animals. This obviously sends a very strong signal that illegal trade in endangered wildlife will be dealt with very strictly.” *Id.* See also Nancy Engelhardt, *supra* note 121.

¹⁵³ See <http://www.worldwildlife.org/news/headline.cfm?newsid=278> (last visited Dec. 22, 2003).

¹⁵⁴ EPBC Act, *supra* note 131, Part 13A.

¹⁵⁵ See Annual Report (2000–2001) on the Operation of the EPBC 1999, available at <http://www.erin.gov.au/about/annual-report/01-02/report-epbc.html#overview> (last visited Dec. 22, 2003).

includes the provisions of the repealed Wild Life Protection (Regulation of Exports and Imports) Act of 1982 and “imposes bans on commercial exports of live native animals.”¹⁵⁶ It covers export and import of endangered species and incorporates “the precautionary principle to be considered in making decisions with respect to wildlife.”¹⁵⁷

The EPBC contains over five hundred sections and integrates the objectives of sustainable development and conservation of biological diversity.¹⁵⁸ Several significant features of the EPBC relate to the management of wildlife trade; provide adequate funding and resources; create sanctions for providing false and misleading information in relation to wildlife trade provisions; and provide tough enforcement provisions that put the burden of proof on an importer caught with any species listed on a CITES appendix. These penalties can be up to \$550,000 in Australian dollars (AUD) for an individual and AUD \$5.5 million for a corporation, as well as imprisonment of seven years for criminal offenses.¹⁵⁹

Part 13A of the EPBC deals with international movement of wildlife and sets up a system for regulating the movement of such species under a permit system for import, export and possession of CITES listed species.¹⁶⁰ Under the current law, there are specific EPBC officers and committees to monitor wildlife trade.¹⁶¹ In the words of Glenn Sant, TRAFFIC Oceania Director, “the crucial test of the Bill's potential will be the government's guarantee of adequate funding to implement and enforce the legislation to ensure it is more than just a 'paper Tiger'.”¹⁶² Further, the provisions don't merely extol the objectives of conservation and stopping illegal trade, but empower authorities to actually enforce the law.¹⁶³ According to the WWF-Australia, Humane Society International, and TRAFFIC Oceania, “the bill sets new world standards for wildlife trade and protection and provides the federal government with the necessary resources to enforce wildlife protection laws.”¹⁶⁴

¹⁵⁶ *Id.*

¹⁵⁷ EPBC, *supra* note 131, §§ 3, 3A(b)–(c).

¹⁵⁸ *See generally*, EPBC Act, *supra* note 131.

¹⁵⁹ EPBC, *supra* note 131, §§ 224-238 A, 303 EV & 303BA, BC, CA, CAA- 303GX, 443A, 444A-K, 450,450(1A), 572 B–C, 528. All these provisions set a comprehensive scheme of regulation of trade in wildlife and the CITES protected species. The penalties under the provisions range from an imprisonment of 2 years and a fine of 1000 units or both. *See also* EPBC §303GN (for possession of illegally imported species as listed under CITES). *See also* TRAFFIC, available at <http://www.traffic.org> (last visited Jan. 1, 2004). In October 2001, the first injunction order under the EPBC was granted to a wildlife researcher and member of the Queensland Conservation Council to enjoin using electrified wires to protect lychee crops from spectacted flying foxes. *See C. McGrath, The Flying Fox Case*, 18 ENVTL & PLANNING L.J. 540 (2001).

¹⁶⁰ *See* EPBC, *supra* note 131.

¹⁶¹ *See* Part 17 of the EPBC §§392–412A Enforcement: Wardens and Rangers and Part 19 § 503: Threatened Species Scientific Committee.

¹⁶² *See* Traffic Network, *Australia's wildlife trade bill sets new standards*, available at <http://www.traffic.org/news/australia.html> (last visited Dec. 22, 2003) [hereinafter Traffic Network].

¹⁶³ EPBC Act, *supra* note 131, §§ 18, 18A, 196 A-E, 211, 233, 268, 302, 481, 486.

¹⁶⁴ Traffic Network, *supra* note 162.

VI. JUDICIAL OVERSIGHT OF HONG KONG CASES INVOLVING ENDANGERED SPECIES PROTECTION

Hong Kong cases involving violations of the Ordinance over the past two decades reveals that only a few cases reach courts compared to the actual volume of illegal trade and number of seizures in Hong Kong.¹⁶⁵ Most of the cases relate to illegal import, export and possession of endangered species and those concerning technical violations of the Ordinance.

A major question arising from these decisions has been whether liability for violation under the Ordinance gives rise to a strict liability offense. Obviously, whether a statute imposes strict liability depends upon the intention of the Legislature. If a provision in a statute is silent with respect to fault whereas other provisions of the same statute require mens rea for the commission of an offense, such dichotomy might influence the court in holding that the provision creates strict liability.¹⁶⁶ Three factors are taken into account by a court in determining whether strict liability will be applied:

- (1) whether the words of the statute, on their face, indicate that the legislature intended to impose strict liability;
- (2) whether the danger to the community is so great as to require strict liability and;
- (3) whether an honest and reasonable belief standard would defeat the purpose of the statute.¹⁶⁷

Differing judicial determinations of this analysis provide arguments for not imposing strict liability.¹⁶⁸

Despite the judicial wrangling on this issue, courts in Hong Kong have widely recognized the threat to endangered species. They have taken into account CITES provisions and Hong Kong's commitment to enforce its international obligations.¹⁶⁹ Nevertheless, the split of authority on strict liability remains. Some violations of the Ordinance have been interpreted as a strict liability offense for export and import of

¹⁶⁵ Lexis search for Hong Kong cases (HKC) between 1980–2002 revealed less than 20 cases which came up to Hong Kong courts.

¹⁶⁶ *Pharmaceutical Society of Great Britain v. Storkwain* [1986], 83 Cr. App. R. 359 (1986).

¹⁶⁷ *R. v. Man Hing Express & Godown Co. Ltd.*, 1980 HKC 1 *considering*, *Sweet v. Parsley* (1970) [hereinafter *Godown*], AC 132, *Koon Pok Man* (1975) HKLR 271, *R. v. Halim Sulman* (1977) HKLR 214 and *R. v. Howells* (1977) 2 WLR 716 for interpretation of a strict liability offense under the Ordinance in *R. v. Man Hing Express*.

¹⁶⁸ *Id.*

¹⁶⁹ *R. v. Kong Chi Yue* Magistracy Appeal No 1405, 1997 HKCU LEXIS 700 [1997], 702 HKCU 1, 1997, at 1 (Supreme Court of Hong Kong (Appellate Jurisdiction), 1996); *Attorney General v. Yau Kwok-Lam Johnny*, 2 HKLR 394, 1988, Civil Appeal No 18 of 1988).

scheduled species,¹⁷⁰ and others have only treated violations by merely imposing fines.¹⁷¹ Judges have also refrained from imposing imprisonment longer than two months and have suspended sentences in several other cases.¹⁷² Even when people have traded or possessed highly endangered species for commercial purposes, the fines have been minimal.

It is apparent that these judicial decisions are not in line with the policy behind the Ordinance, which seeks to deter trade in endangered species through stiff penalties for violations. The following section provides an insight into these cases.

A. Import of Endangered Species Without a License

In *R. v. Man Hing Express & Godown Co. Ltd.*, the defendant was an export and import company.¹⁷³ It was found guilty by the district court for possessing 220 imported hides of clouded leopard¹⁷⁴ without the required license. The company claimed it did not know that the import or possession of clouded leopard skins was prohibited or that the bales contained clouded leopard hides until it received the delivery note. Nonetheless, Judge Silke held that ignorance of the law was not an excuse and the intention of the appellant was dishonest.

The court further stated that the Ordinance envisioned granting licenses to restrict, but not prohibit, trade in endangered species.¹⁷⁵ By referring to Section 6 of the Ordinance, the Court held that liability under the Ordinance was not strict.¹⁷⁶ The decision turned on the fact that the legislature did not intend to impose strict liability for innocent possession of scheduled goods.¹⁷⁷ Clearly, this holding reduces the rigor of the law.

¹⁷⁰ See *Godown*, *supra* note 167; *HKSAR v. Bharti Ashok Assomull*, *supra* note 88. See also News Report, available at <http://www.traffic.org/shahtoosh/hongkongstory.html> (last visited Dec. 22, 2003).

¹⁷¹ Imposed fines have increased the importance of protection of Hong Kong wildlife and control of trade in endangered species in accordance with international obligations. However, in most cases offenders have been let off the hook by paying smaller fines or a suspended sentence. See *R. v. Ki Chor On* 1996-4-HKC 361; 1996 HKC LEXIS 507; *R. v. Both Prime Co. Ltd.* 1996-1 HKC 641; 1996 HKC LEXIS 395; *R. v. Tsoi Wai Ching* (1997) HKLY 399 (Mag. App. No. 27 of 1997); *R. v. Kong Chi Yue* (1997) HKLY 428 (Mag. App. No. 1405 of 1996); *R. v. Chiong Ping Tung* HKLY 391 (Mag. App. No. 1505 of 1996) (1997).

¹⁷² *R. v. Kong Chi Yue*, *supra* note 171, at 428. The offender was imprisoned two months and fined \$120,000 for trading animal parts of scheduled species for commercial purposes.

¹⁷³ See *Godown*, *supra* note 167.

¹⁷⁴ *Neofelis Nebulosa*, i.e., scheduled animal part or scheduled animal species, possession of which is prohibited under the Ordinance.

¹⁷⁵ The court considered *Warner v. Metropolitan Police Commissioner* 2 All ER 356 (1968), *Sweet v. Parsley* (1970) AC 132, *Koon Pok Man* (1975) HKLR 271, *R. v. Halim Sulman* (1977) HKLR 214 and *R. v. Howells* 2 WLR 716 (1977). In this case, the appellants were found to have a dishonest belief and were rightfully convicted.

¹⁷⁶ *Godown*, *supra* note 167, at 5.

¹⁷⁷ *Id.* at 5-6.

In *R. v. Leung Kam Hung*, the defendants were convicted for criminal conspiracy to import 619 pieces of ivory tusks and 225 crocodile hides without a license.¹⁷⁸ The Court held that the import and export of endangered species was a strict liability offense.¹⁷⁹ Judge Moylan said that the intent of the Ordinance was best served by making liable those responsible for shipping items into Hong Kong and ensuring that the items listed in Schedule 2 were imported only with a license.¹⁸⁰ A person responsible for recording what goods are brought onto a vessel is under a duty to inspect the goods and ensure that they have the required licenses.¹⁸¹ However, the act of an innocent agent bringing unlicensed goods into Hong Kong is insufficient for a charge of conspiracy to import unlicensed goods.¹⁸²

HKSAR v. Assomull,¹⁸³ shows an exceptional stiffening of the court's attitude. Two traders were convicted under the Ordinance for illegally possessing Tibetan Antelope wool. The significance of this case is that the judge stressed the importance of the decision in light of strict bans on trade in endangered species worldwide, the apparent ignorance of the law by Hong Kong citizens, and the lax attitude of businesspersons.

The traders had placed an advertisement for the sale of shahtoosh shawls in 1997, which was brought to the attention of AFCD officers by WWF and TRAFFIC Hong Kong investigators. AFCD officers arrested the traders and seized 140 shawls.¹⁸⁴ The defendants claimed that they were ignorant of the fact that shahtoosh shawls were made from a protected species and that trade in such items without a license is prohibited under the Ordinance.¹⁸⁵ The judge stressed the importance of CITES and Hong Kong's international obligation to punish those who indulged in illegal trade in derivatives of endangered species. The offenders were ordered to pay a fine of USD \$40,000 and sentenced to three months in prison, although the court later suspended this sentence.¹⁸⁶

B. Possession for Non-Commercial Purpose

In *R. v. Tsoi Wai Ching*, the defendant pleaded guilty for illegally possessing a bear gall-bladder¹⁸⁷ and was fined HK \$15,600 by the magistrate.¹⁸⁸ On appeal, the court

¹⁷⁸ *R. v. Leung Kam Hung*, HKDCLR 39 (1986). This case provides the only example where the court held that violation of the Ordinance created a strict liability offense.

¹⁷⁹ *Id.* Godown, *supra* note 167, at 2 (where an offense under the Ordinance was held not to be the one falling under strict liability).

¹⁸⁰ *Kam-Hung*, *supra* note 178, at 42 A–C. (Consistent with *Gammon (Hong Kong) Ltd v AG of Hong Kong* (1985) 1 AC, 1 and *Pharmaceutical Society of Great Britain v Storkwain*, *supra* note 166, to distinguish the case from *Godown*).

¹⁸¹ *Id.* The court seems to be imposing a strict duty here on the importer of the goods.

¹⁸² *Id.* at 44.

¹⁸³ *HKSAR v. Assomull*, *supra* note 88.

¹⁸⁴ *Id.*

¹⁸⁵ See Belinda Wright, *Hong Kong Court Sentences Shahtoosh Dealer*, *Indian Jungle's News Flash* (Apr. 14, 1999), available at http://www.indianjungles.com/flasap17_99.htm (last visited Nov. 9, 2003).

¹⁸⁶ See Press Release, TRAFFIC, *Fashion Statement Spells Death for Tibetan Antelope* (Oct. 21, 1999), available at <http://www.traffic.org/shahtoosh/hongkongstory.html> (last visited Dec. 22, 2003).

¹⁸⁷ A scheduled animal part, included as a scheduled species in 1994.

¹⁸⁸ *R. v. Tsoi Wai Ching*, *supra* note 171, at 399.

held that she was only liable for a Level 5 fine which would be HK \$6250, but reduced the fine to \$5000. The reason the court did not impose the higher penalty as provided under Section 13(A) was because there was no evidence that the defendant possessed the gall bladder for a commercial purpose. The magistrate did not hold an inquiry as to the reason for possession of the bear gall bladder, and the appellate court did not remand the case for such an inquiry. The reduction of the fine in this case does not reflect the deterrent effect which the Ordinance seeks to achieve.¹⁸⁹

C. Possession for Commercial Purpose

In *R. v. Ki Chor On*, the defendant was a Chinese herbalist and proprietor of two traditional Chinese medicine shops.¹⁹⁰ He prescribed medicine containing pangolin scales, musk grains, sea turtle scales, and bear gall bladder to his patients.¹⁹¹ He also sold ready-made medicine, the packaging of which claimed to contain rhinoceros horn and tiger bone.¹⁹² He pleaded guilty to a total of eight charges, resulting in a fine of HK \$53,125.

On appeal, he claimed the medicines only contained the parts of endangered species in small quantities. The court reduced his fine by drawing a distinction between Sections 113(B) and 113(C) of the Criminal Procedure Ordinance.¹⁹³ The court justified its decision on the ground that the penalty sufficient to deter owners of small medicine shops might not be the same to deter companies in wholesale businesses. The court pointed out that the fines imposed must be within the defendant's ability to pay, must not have a crippling effect on the financial situation of the offender, and that the totality of the fines is important.¹⁹⁴

In *R. v. Chong Ping Tung*,¹⁹⁵ the defendant pleaded guilty to possessing 880 pills containing *Panthera tigris* and was sentenced to one month imprisonment. On appeal, Judge Sears reduced the fine imposed by the magistrate from HK \$12,500 to \$6250 and eliminated the prison sentence.¹⁹⁶ He held it was a serious matter to stock these pills, but that the level of the fine must be kept within reasonable limits.¹⁹⁷ He stated that although magistrates are "determined to uphold community standards,"¹⁹⁸ his duty was not to impose a sentence to please a particular sector of the community. Rather, he sentenced

¹⁸⁹ "There is increasing evidence that the Asian demand for bear gall bladder is impacting bears in nearly all of their diverse habitats around the world." See TRAFFIC NETWORK REPORT, THE BEAR FACTS: THE EAST ASIAN MARKET FOR BEAR GALL BLADDER (July 1995), available at <http://www.traffic.org/publications/summaries/summary-bear.html> (last visited Nov. 9, 2003).

¹⁹⁰ *R. v. Ki Chor On* HKLY 558 (1996); HKCFI 507 (1996) (Maximum number of cases can be put in this category of offense and may contravene sections 6 and 13A).

¹⁹¹ HKCFI 507, 508 (1996).

¹⁹² *Id.*

¹⁹³ *Id.* at 509.

¹⁹⁴ *Id.* at 510.

¹⁹⁵ *R. v. Chong Ping Tung*, HKLY 391 (1997); HKCFI 100 (1997).

¹⁹⁶ *Id.* at 102.

¹⁹⁷ The court held that the magistrate incorrectly imprisoned the defendant under the given facts.

¹⁹⁸ *R. v. Chong Ping Tung*, *supra* note 196, at 102.

the defendant based on the facts of the case.¹⁹⁹ In another 1996 case, *R. v. Both Prime Co. Ltd.*, the defendant was a wholesaler of Chinese medicine found with a number of pills listing tiger bone or tiger penises in the ingredients.²⁰⁰ He pleaded guilty to possessing controlled medicine contrary to Section 6(3) and 6(4) of the Ordinance. The court fined the defendant HK \$62,500, but on appeal the court reduced the fine to HK \$25,000. The appellate court held that this case fell within the lower range of offenses and that the crime did not merit a fine as high as HK \$62,500.

In *R. v. Kong Chi Yue*, the defendant was found with seventeen grams of pangolin scales, a few grains of musk pod, elephant scarp, a number of pills containing or claiming to contain tiger parts, and sea pig teeth.²⁰¹ The court held that the duty of the judge is to ensure that any fine imposed is within the defendant's means to pay and that he could do so within a reasonable time period.²⁰² Accordingly, the court imposed a fine of HK \$15,000.

D. Observations and Summation

The Ordinance distinguishes possession from the import or export for commercial and non-commercial purposes, and many offenders have been subjected to only minimum fines by the courts. These conflicting judicial attitudes may result from the court's disparate characterization of the nature of the offense. The following observations can be summarized from the Hong Kong cases:

- While earlier decisions reflect the court's view that the Ordinance was enacted merely to impose restrictions on illegal trade or possession of endangered species, the decisions beginning in 1986 show a marked stiffening of the court's attitude.²⁰³
- The emphasis in the post-1986 decisions is to classify violations of the Ordinance as a strict liability offense, yet penalties do not seem to reflect this principle.
- The courts' attitude reflects that while the offenses of importing and exporting without a license have been treated as strict liability offenses,²⁰⁴ possession for non-commercial purposes does not seem to be considered as seriously as export, import, or possession for commercial purposes.²⁰⁵

¹⁹⁹ Section 13A of the Ordinance was not relied on by the court in this case. Thus, the maximum fine could only be level 6—half the amount of the next higher level.

²⁰⁰ *The Queen v. Both Prime Company Limited*, 2 HKCLR 29 (1996).

²⁰¹ *R. v. Kong Chi Yue*, HKLY 428 (1997).

²⁰² *Id.* at 428-429.

²⁰³ See The Ordinance, *supra* note 10; see also *infra* Part V notes 170, 172, 173, 179, 189, 191.

²⁰⁴ *R. v. Leung Kam-hung*, *supra* note 179, at 39, 41.

²⁰⁵ *R. v. Man Hing Express Godown Co. Ltd.*, *supra* note 167 (The court accepted a distinction between a warehouseman in Hong Kong receiving and storing goods and persons concerned with importing and exporting cargo into Hong Kong.); *Kam-Hung*, *supra* note 178. See also 1 Halsbury's Laws of Hong Kong, [20.058]: Animals, 479.

- If possession and import or export without a license is a strict liability offense, then the penalty should be fixed within the Ordinance.²⁰⁶ The gap in the legal provisions based on the distinction between an offense for a commercial purpose, a repeated offense, and an offense for other purposes makes it possible for illegal traders to escape the penalties and continue trading. This gap weakens the Ordinance's deterrent effect.
- The courts are only complying with the legal provisions despite the fact that they recognize that illegal trade in endangered species must be curbed. If the enforcement authorities adopt an attitude as strict as they do in dealing with violations of drugs laws, they will enhance the protection of endangered species, and an Ordinance violation will be treated seriously by the public and the media.
- Since 1996, there has been an increase in recorded number of Ordinance violations, although offenders have been let off the hook by making a distinction between possession for commercial purposes and for other purposes.²⁰⁷
- The Ordinance should be amended to reflect the provisions of the Dangerous Drugs Ordinance (DDO).²⁰⁸ The DDO imposes higher penalties for trafficking in drugs and makes it a strict liability offense for possessing, exporting or importing any prohibited drug.²⁰⁹ This is emphasized by the fact that such dealing with any drugs for non-commercial purposes does not reduce the penalty. Although this may seem draconian, such an amendment would achieve the desired deterrence. A review of cases under the DDO suggests that because of the strict liability imposed by it, more offenders have been severely punished as opposed to the lower number and severity of convictions for offenses under the Ordinance.²¹⁰

VII. CONCLUSION

Under Hong Kong law, the import, export, or possession of highly endangered species is entirely banned, and trade in less endangered species is regulated under strict licensing controls. Penalties under the Ordinance include fines, imprisonment, and forfeitures. A person may end up paying HK \$12,500 to \$625,000 and be imprisoned for six months to two years. The Ordinance provides enforcement authorities with wide powers of search, seizure, and prosecution. Although the Ordinance contains strict penalties, it still contains significant loopholes. Because of the difficulties encountered in

²⁰⁶ See The Ordinance, *supra* note 10, *infra* Part III notes 67–83 (penalties).

²⁰⁷ See, *id.*, *infra* Part V notes 170–172, 179, 189, 191.

²⁰⁸ Dangerous Drugs Ordinance (Cap 134).

²⁰⁹ *Id.* at §§ 2–10, 34A, 35, 36.

²¹⁰ Statistics from the last 15 years show the conviction rate at magistrate's court has been 80% for drug related offenses in Hong Kong. Over 220 appeals have gone to the High Court against a magistrate court's conviction. By contrast less than 20 cases have come and gone on appeal against prosecution and fines imposed by magistrate's court for violation of the Ordinance. Prison sentences under the Ordinance are rare and often times suspended even if imposed. In the recent Shahtoosh case, the offender got a three month suspended term, but the offender did not serve any jail term. *HKSAR v. Assomull*, *supra* note 88.

enforcement, many illegal importers escape liability or detection. Even though Hong Kong courts appreciate the CITES objective of preserving endangered species, fines imposed upon offenders have been minimal. Further, these decisions suggest that an offense committed for non-commercial purposes does not carry grave consequences.²¹¹ Accordingly, the penalties are not a deterrent, especially for big traders. Such offenders, if ever caught, are hardly ever imprisoned and can pay the fine and continue their activities. The big traders are hardly ever involved directly, as they get small-time traders or carriers to do their dirty work. Thus, there is a need to impose still higher penalties to deter companies from getting involved in such business in Hong Kong.

A significant black market in endangered species still exists in Hong Kong. If the Hong Kong government is going to protect the endangered species and combat the illegal trade, it needs to take stringent steps by amending the Ordinance and adequately funding the enforcement authorities in manpower as well as money.

The pace of development and trade in different countries also presents obstacles to successful local administration and enforcement of wildlife laws across the border. The government has to adopt initiatives to work with other conservation organizations, invest resources into research, and increase the expertise of the agencies involved in order to curb such illegal activities.

Further, the mystery and aura attached to TCM using endangered species has perpetuated the demand for products made from these species. If the authorities do not take the fact that people in Hong Kong are illegally trading and making available parts, derivatives, medicines or pills containing endangered species seriously, then the supply of such items will increase and spur the killing of already endangered animals. There is already ample proof that this occurs, and courts should be vigilant to ensure that the public is not exposed to shops that sell or deal in illegal animal parts.²¹²

The amendments made to the Ordinance in 1995 and 1999²¹³ suggest that the government is making a genuine effort to combat illegal trade in endangered species. The increasing reports of seizures of smuggled goods, the opening of a new resources center for Endangered Species in 2001,²¹⁴ the continued press and media coverage, as well as website press releases, reflect the increased concern for fighting illegal trade in endangered species in Hong Kong. Further, enforcement authorities and other non-

²¹¹ Whether a product has used a genuine or fake tiger bone is indicated by the label which states if the product is prepared in such a manner. This creates increased demand for real tiger bone and products containing such items. Thus, the only ethical solution is to ensure that apart from the legal mechanisms of enforcement the government must also ensure that labeling is accurate. It therefore becomes the responsibility of the manufacturers and traders to ensure that a product neither contains endangered species, nor labeled as containing them.

²¹² See *supra* notes 6, 8, 18.

²¹³ Possessing and trading artificially propagated plants and medicines made from highly endangered animal species is now prohibited, unless done with a license. Exemption Order (Cap 187A), *supra* note 64, at §§ 2–10.

²¹⁴ See Press Release, AFCD, *Endangered Species Resource Center Opens Thursday* (May 10, 2001), available at <http://www.afcd.gov.hk/web/epress/pr197.htm> (on file with author).

governmental agencies should organize lectures, seminars, and exhibitions to inform the public and warn traders about illegal animal trading.

Nonetheless, what is really required is a change in law to deal with the problems of illegal trade in endangered species by implementing more severe punishment. If endangered species are to be protected for future generations the Ordinance must be amended to reflect the following considerations:

- Clear guidelines should be set for trade with non-CITES members. By doing so, Hong Kong would set an example for other countries to follow. Provisions should state whether CITES or a local provision has been violated when a trader imports or exports a species listed under CITES (but not covered under the Ordinance), or if it is a rare and unknown species not yet identified.
- Because there is a potential of stockpiling during the grace period of three months, the AFCD needs more resources and manpower in order to raid and seize illegal stocks of traders who do not possess a license once the grace period is over. This requires the establishment of an Endangered Species Task Unit under the leadership of the ESPLG. Such a unit needs to be empowered with police and seizure powers, as has been done in other countries around the world. It should also police trading outlets within the Hong Kong TCM community immediately after the grace period. The AFCD and the ESPLG need to be empowered to prosecute traders who violate foreign law, as has been recognized under the Lacey Act.
- Domestic trade in highly endangered species needs to be completely banned. There is a need for strict licensing with respect to endangered species, as even the domestic trade provides evidence of over-exploitation and over-consumption of these species.
- The AFCD should be able to exercise discretion in matters of forfeiture. Once there is suspicion of illegally smuggled goods, they should be seized and not be subject to release based upon the offenders' conviction, unless there is a genuine mistake in the seizure.
- The high penalty provisions do not have any deterrent effect. There is no minimum fixed penalty for an offense under the Ordinance. Further, a distinction is made between possession and import or export for commercial and non-commercial purposes. The value of fines imposed for violations of the Ordinance needs to be set at a level sufficient to deter non-commercial possession and import or export for first time offenders, small traders and individuals. Commercial possession and import or export needs to be strictly penalized.
- In order to make the Ordinance effective, the burden of proof should be reversed. Once the government demonstrates probable cause that the species are obtained illegally, or are contraband, it should be the offender who has to

show the species in possession are legally obtained and not endangered anywhere else.²¹⁵

- In dealing with Ordinance violations, courts should adopt the strict liability approach used in enforcing drug and arms trafficking laws in Hong Kong.²¹⁶
- Enforcement authorities also need to focus on the training of AFCD and Customs officials, education and information dissemination through the media, wider public awareness, and cooperation with the TCM community.
- Efforts at educating and making people aware of the dangers of species extinction need to be communicated more forcefully by governmental and non-governmental agencies. If the consumer is aware of the consequences to the species of such consumption and over-exploitation, the result would be the curtailment of the demand for such products. NGOs should be encouraged to create awareness and education programs through governmental funding.

It is imperative for Hong Kong to adopt a multifaceted strategy of conservation, preservation, and protection against illegal trade in endangered species if it wants to enjoy its reputation as the fragrant harbor, as a successful financial hub, and to clear its name of the ill-gotten reputation it seems to have attained within the international environmental community. Hong Kong needs a strict law with strict enforcement to combat what seems to be a growing international crime around the illegal smuggling of endangered species.

²¹⁵ ESA, *supra* note 134, at § 1539.

²¹⁶ If the criminal offense under the Ordinance is compared to the offense under the DDO then the offense of illegal possession of an endangered species or import and export of highly endangered species does not seem to be taken as seriously as a drug offense. *See generally* DDO, *supra* note 209.