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The Legal Hurdles to Cooperation between Thailand and China in Suppressing Illegal Trade in Endangered Species

อุปสรรคในทางกฎหมายที่กระทบต่อความร่วมมือ ในการปราบปรามการค้าขายสัตว์ใกล้สูญพันธุ์ โดยผิดกฎหมายระหว่างไทยและจีน

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Abstract

The paper examines legal obstacles for cooperation between Thailand and China in suppressing illegal trade in endangered species. This trade becomes one of the hot issues of the Belt and Road Initiative (BRI), since China has become a big market for the products derived from the endangered species, particularly to meet the demands of Chinese traditional medicine. Both Thailand and China have attempted to enforce the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973 to deal with the issue. However, this Agreement does not take into account the specific characteristics of Thailand and China. Under the influence of CITES, crime of the illegal trade is defined in Thailand and China narrowly as the trade in violation of administrative controls. Because administrative laws of Thailand and China are very different, it may affect the

effectiveness of cooperation between the law enforcement agencies of these countries. The main suggestion of this paper is that Thailand and China must adopt a broader concept of the crime of illegal trade in endangered species which is not necessarily bound to different administrative regulations. Instead, this crime must be expressed in the general terms of harm to the survival of species. A broader definition of the illegal trade against endangered species will certainly facilitate the successful cooperation between Thailand and China.

Keywords: environmental policy coordination, illegal trade in endangered species, CITES, Thai law, Chinese law.

บทคัดย่อ

บทความนี้จะพิจารณาถึงอุปสรรคในทางกฎหมายที่กระทบต่อความร่วมมือในการปราบปรามการค้าขายสัตว์ใกล้สูญพันธุ์โดยผิดกฎหมายระหว่างไทยและจีน การค้าขายสัตว์ใกล้สูญพันธุ์ดังกล่าวกลายเป็นประเด็นร้อนประเด็นหนึ่งสำหรับโครงการ “หนึ่งแถบหนึ่งเส้นทาง: Belt and Road Initiative (BRI)” ของจีน เนื่องจากจีนกลายเป็นตลาดใหญ่ในผลิตภัณฑ์ที่ผลิตจากสัตว์ใกล้สูญพันธุ์ โดยเฉพาะเพื่อตอบสนองความต้องการของผู้บริโภคชาวจีน ทั้งไทยและจีนพยายามบังคับใช้ข้อกำหนดของไซเตส (อนุสัญญาว่าด้วยการค้าระหว่างประเทศในสัตว์ป่าและพืชป่าที่ใกล้สูญพันธุ์ปี 1973: the Convention on International Trade in Endangered Species of Wild Fauna and Flora: CITES) เพื่อจัดการกับปัญหาเหล่านี้ อย่างไรก็ตามข้อตกลงดังกล่าวมิได้คำนึงถึงลักษณะเฉพาะของไทยและจีน ภายใต้อิทธิพลของไซเตส อาชญากรรมที่เกี่ยวกับการค้าขายโดยผิดกฎหมายถูกจำกัดความอย่างแคบว่าเป็นการค้าที่ละเมิดต่อการควบคุมของฝ่ายบริหาร เนื่องจากกฎหมายปกครองของไทยและจีนมีความแตกต่างกันอย่างมาก ซึ่งการจำกัดความแบบนี้อาจส่งผลกระทบต่อประสิทธิภาพในการร่วมมือระหว่างหน่วยงานบังคับใช้กฎหมายของไทยและจีน ข้อเสนอแนะหลักที่จะกล่าวถึงในบทความนี้คือ ไทยและจีนต้องเปลี่ยนแนวความคิดของอาชญากรรมการค้าสัตว์ใกล้สูญพันธุ์ที่ผิดกฎหมายให้กว้างขึ้น ซึ่งไม่จำเป็นต้องผูกพันกับกฎระเบียบของฝ่ายบริหารที่แตกต่างกัน คำจำกัดความที่กว้างขึ้นของการกระทำความผิดประเภหานี้ต้องอ้างถึงอันตรายต่อการอยู่รอดของสิ่งมีชีวิตมากกว่าการละเมิดกฎระเบียบของฝ่ายบริหาร การจำกัดความการค้าสัตว์ใกล้สูญพันธุ์ที่ผิดกฎหมายให้กว้างขึ้นจะเอื้อต่อความร่วมมือในการปราบปรามการค้าขายสัตว์ใกล้สูญพันธุ์โดยผิดกฎหมายระหว่างไทยและจีนให้ประสบความสำเร็จ

คำสำคัญ: ความร่วมมือทางนโยบายเกี่ยวกับสิ่งแวดล้อม การค้าขายสัตว์ใกล้สูญพันธุ์โดยผิดกฎหมาย อนุสัญญาว่าด้วยการค้าระหว่างประเทศในสัตว์ป่าและพืชป่าที่ใกล้สูญพันธุ์ (CITES) กฎหมายไทย กฎหมายจีน การกำหนดความผิดทางอาญา



1. INTRODUCTION

The trade in endangered species becomes one of the hot issues of the Belt and Road Initiative (BRI), since China has become a big market for the products derived from the endangered species, particularly to meet the demands of Chinese traditional medicine.¹ Thailand and China take a significant part in the global commercial exchange of wildlife (live animals and plants) and wildlife products (hides and fur skins, ivory, and other derivatives).² Various reports estimate it at the sum between US\$5-50 billion annually.³ Indeed, there are reports that significant amounts of illegal trade going through Thailand is ‘one belted’ towards its powerful neighbor.⁴ There are increasing contacts between Thailand and China to address jointly the problems of illegal trade in endangered species. These contacts have been made not only bilaterally,⁵ but also within the ASEAN – China political framework.⁶ This cooperation has resulted in some joint police actions by which, for example, a significant amount of ivory has been confiscated and destroyed.⁷

¹ Richard Hardiman, ‘Environmental Considerations of the Belt and Road Initiative’ in F J B S Leandro and P A B Duarte (eds) *The Belt and Road Initiative* (Palgrave Macmillan 2020) 173.

² Vincent Nijman, ‘An overview of international wildlife trade from Southeast Asia’ (2010) 19(4) *Biodiversity and conservation* 1101, 1101-1114; Rebecca WY Wong, ‘The organization of the illegal tiger parts trade in China’ (2016) 56(5) *British Journal of Criminology* 995.

³ Rebecca WY Wong (n 2) 995; Tiphaine Bernard, ‘La lutte contre le commerce illégal d’espèces sauvages’ (2016) 49(2) *Criminologie* 72.

⁴ Suzanna Stephens & Matthew Southerland, ‘China’s Role in Wildlife Trafficking and the Chinese Government’s Response’ (U.S.-China Economic and Security Review Commission, 6 December 2018) 6 <https://www.uscc.gov/sites/default/files/Research/2018.12.06%20-%20Wildlife%20Trafficking%20-%20Final%20Version.pdf> accessed 6 April 2019.

⁵ ‘China in Action: Protecting Wildlife and Combating Illegal Trade’ (State Forestry Administration of China, June 2014) 36 <http://english.forestry.gov.cn/uploads/Information_Services/Latest_Publication/China_in_Action.pdf> accessed 6 April 2019.

⁶ ‘Strong cooperation among Asean countries to combat transnational organized crime on wildlife’ (USAID Wildlife Asia, 2017) <<https://www.usaidwildlifeasia.org/updates/news-articles-press-releases/strong-cooperation-among-asean-countries-to-combat-transnational-organized-crime-on-wildlife>> accessed 6 April 2019.

⁷ Apinya Wipatayotin, ‘Asean unites on illegal wildlife trade: China offers training support, exchanges’ (Bangkok Post, 14 September 2017) <<https://www.bangkokpost.com/thailand/general/1323707/asean-unites-on-illegal-wildlife-trade>> accessed 12 March 2021.

However, according to a report of the UN Office on Drugs and Crime, the cooperation between law enforcement agencies of Thailand and China remains unsatisfactory.⁸ Even though there is already a treaty between Thailand and China (1993)⁹ on extradition, there are no reports that any offender has been extradited in the cases of illegal trade in endangered species. Offences which are punishable under the laws of the two countries by the penalty of imprisonment or other forms of detention for a period of more than one year or by any heavier penalty (including death penalty) are subject to this treaty (Article 2). In this paper, it will be shown that the crimes of illegal trade in endangered species are serious enough to warrant extradition procedures between Thailand and China, but there are more serious legal obstacles not only for extradition but also for any joint successful prosecution of the criminals involved in the illegal trade.

Both Thailand and China are parties to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) (1973)¹⁰ which aims at a better cooperation between countries to suppress illegal trade in endangered species. The opinion that it is successful in controlling trade¹¹ may be an exaggeration. The Convention has many weaknesses which affect its successful implementation in the developing countries. Several of them should be mentioned here as they bear an impact on cooperation between Thailand and China.

According to Article 2 of the Convention, the regulation of the trade is based on the principle of singling out particular species to be subject to a control that must be mentioned in annexes to the main text of the agreement. In order to carry on trade, there must be permits as well as limits on the volume of trade for a particular species. In Thailand and China, there are often difficulties, common for all developing countries,

⁸ United Nations Office on Drugs and Crime (UNODC), 'Criminal justice response to wildlife crime in Thailand: Rapid Assessment' (UNODC, June 2017) 17 <https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Thai_Assessment_13_16_May_2017.pdf> accessed 6 April 2019.

⁹ 'Treaty between the Kingdom of Thailand and the People's Republic of China on Extradition' (Thailand Law Forum, 1993) <<http://www.thailawforum.com/database1/Treaty-of-China-7.html>> accessed 6 April 2019.

¹⁰ Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) (1973); Status and ratifications are available at <https://cites.org/eng/disc/parties/chronolo.php>.

¹¹ Chris Huxley, 'Endangered species, threatened convention: the past, present and future of CITES' in Jon Hutton and Barnabas Dickson (eds) *The Convention on International Trade in Endangered Species of Wild Fauna and Flora* (Earthscan 2000) 11.



concerning species identification and proof that permit limits have been exceeded.¹² Restricted species often closely resemble non-restricted ones. In some cases, genetic confirmation is required. At the time of writing, CITES protects roughly 6,000 species of animals and 32,000 species of plants.¹³ The problem with this approach is that China and Thailand do not have the capacity to control this trade effectively, even though they may write down impressive legislation. One of the leading Chinese legal experts in the wildlife protection law, Jiwen Chang, has acknowledged that “a lack of regulatory personnel and a limited regulatory capacity makes it difficult to find and combat all trafficking.”¹⁴

The Convention fails to describe the illegal trade as an international crime in general or objective terms. For example, Article VIII of CITES states that: “the Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State of export of such specimens.” Even though the Convention can be interpreted as requiring a certain degree of criminalization of the illegal trade, the text of the Convention does not explicitly make illegal trade in endangered species and possession of its specimens a serious criminal offence which warrants a higher degree of cooperation between criminal law enforcement agencies of various countries. Nor does the Convention call upon the Parties to penalize the government officials who issued the permits without a due examination of their impact on the well-being of the protected species. Further, the issues of illegal trade and illegal possession of the species should not be treated separately as Article VIII of the agreement suggests. A particular consequence of that is a weak mechanism for international cooperation among national *criminal* law enforcement agencies.¹⁵

The absence of clear specific provisions obliging the states to criminalize illegal trade and possession of the species creates the situation of a significant

¹² Dinah Shelton and Alexandre Charles Kiss, *Judicial Handbook on Environmental Law* (UNEP/Earthprint 2004) 105 <https://www.elaw.org/system/files/UNEP_judicial.handbook.enviro.law_.pdf> accessed 13 March 2019.

¹³ CITES, ‘The CITES Species’ (CITES, 2019) <<https://www.cites.org/eng/disc/species.php>> accessed 12 October 2019.

¹⁴ Jiwen Chang, ‘China’s Legal Response to Trafficking in Wild Animals: The Relationship between International Treaties and Chinese Law’ (2017) 111 *AJIL Unbound* 411.

¹⁵ R Reeve, *Policing international trade in endangered species: the CITES treaty and compliance* (Routledge 2014) 250.

discrepancy between Thai and Chinese national criminalization policies. This paper demonstrates that China attempts to introduce and apply very strict measures to penalize crimes against protected plants and animals. In contrast, Thailand adopts a much more lenient approach.

2. THAILAND'S LEGISLATION ON ILLEGAL TRADE IN ENDANGERED SPECIES

Two acts of Thai legislation directly relate to the illegal trade in endangered species. The first piece of legislation enacted by Thailand is the Wild Animals Reservation and Protection Act (WARPA) (B.E. 2562, 2019) which replaced the previous legislation of 1992.¹⁶ Thailand established three different regimes of protection for conserved wildlife, protected wildlife, and controlled wildlife. The list of the first and second type of wildlife is established by Thai law. Section 4 of the WARPA (2019) directly refers to the Convention in its definition of the third regime. In accordance with the CITES, Section 22 of the new legislation provides that export and import of the conserved wildlife is prohibited with some limited exceptions. Section 29 prohibits its domestic trade. Section 23 and Section 30 limit international trade in protected and controlled wildlife by requiring traders to obtain licenses and certificates.

This legislation defines trade differently from CITES. Trade is defined in Article 1 of CITES as “export, re-export, import and introduction from the sea”. Thai legal definition is much broader. Section 4 of the WARPA 2019 defines trade as encompassing actions of “buying, selling, exchanging, disposing, distributing, giving away, or transferring rights for commercial purposes.” This term also includes the activities regarded as possession or display for the purpose of trade.

The new law has significantly increased penalties for illegal trade in wildlife. Section 47 of the 1992 legislation provided for rather weak penalties of up to four years imprisonment and/or a fine of Baht 40,000 for illegal hunting, possession, and trade in conserved and protected animals. In contrast, Section 89 of the 2019 legislation threatens illegal traders in the conserved wildlife “with imprisonment from three to fifteen years or a fine from three hundred thousand baht to one million five hundred thousand baht, or both.” If illegal trade involves protected animals or

¹⁶ Surasak Boonrueang, ‘Terrestrial Biodiversity Conservation Law in Thailand: A Preliminary Illustration of Applicable Laws and Their Limitations’ (2019) 12(1) Naresuan University Law Journal 23, 23-46.



products made from them, then the penalty is “imprisonment for not more than ten years or a fine not exceeding one million baht, or both.”¹⁷

The second legislation is the Plants Act (B.E. 2535, 1992). It mentions the Convention in Section 3 and Section 29.2. It also contains penal measures. Generally, the Plant Act has little coherence in its penal part. The Thai legislator attempted to provide different regimes for, first, controlled seeds (S. 14); second, reserved plants (S. 30); and, third, conserved plants (S. 29.2). There are also plants prohibited for importation (S. 32). Illegal trade in each of those plants is penalized by different sanctions (S. 56, 62.3, 63). Originally, the Act had only two objects of regulation: protected seeds and reserved plants. The seeds and the plants were protected because of their commercial value in order to prevent other countries from planting crops similar to those exported from Thailand. Which seeds must be considered protected and which plants must be considered reserved was, and still is, left to the decision of a relevant ministry. The concept of *conserved* plants was introduced later. These plants are identified with those protected by the Convention (S. 3 and S. 29.2). Thai law does not contain any material definition of the reserved and conserved plants. The first are designated by the relevant ministry and the latter are inscribed in the appendixes of the Convention. It is possible that they can be the same. The problem is that the law imposes very different legal penalties for their illicit trade.

Section 56 of the Plant Act penalizes gathering and sale of controlled seeds with a commercial purpose without a license by imposing a sanction of imprisonment of up to two years and a fine of up to Baht 4,000. ‘Seed’ is defined very broadly as anything which can be planted or replanted, including fruits (S. 3). The unauthorized trade in the reserved plants can be punished by up to three years of imprisonment and a fine of up to Baht 4,000 (S. 62). If compared with the sanction against unauthorized trading in the conserved plants protected by the Convention, the difference is striking. Section 61.2 penalizes international trading in conserved plants if done without license by a mere sanction of imprisonment of up to three months and a fine of up to Baht 3,000. No sanction is provided for unauthorized collecting of the conserved plants. If compared with the sanction for unauthorized trading in protected seeds and the reserved plants (such as durian), one can see that protection of endangered plant species does not receive even an equal protection to the plants which have a purely commercial value.

¹⁷ Wild Animals Reservation and Protection Act 2019 Sections 89 and 93.

In contrast, the Wild Animals Reservation and Protection Act 2019 contains very heavy penalties: imprisonment from three to fifteen years or a fine from three hundred thousand baht to one million five hundred thousand baht, or both (S. 89) for hunting or trading in conserved wildlife or products derived from it. If illegal trade involves *protected* animals or products made from them, the penalty remains very high: “imprisonment for not more than ten years or a fine not exceeding one million baht, or both.” (S. 89 and S. 93). A simple possession of conserved or protected animals or their carcasses is liable to imprisonment for not more than five years or a fine not exceeding five hundred thousand baht or both (S. 92). The penalties are much milder for unauthorized possession of bred animals or their carcasses without license. It is penalized with imprisonment for not more than one year or a fine not exceeding one hundred thousand baht or both (S. 90). The unauthorized trade in these propagated animals or their products is penalized more severely. Similarly to an unauthorized import of any conserved and protected animals (or products made from them), it is liable to imprisonment for not more than four years or a fine not exceeding four hundred thousand baht or both (S. 94).

The Wild Animals Reservation and Protection Act 2019 may also apply to plants in nature reservation areas which are defined either as wildlife sanctuaries or as the areas where hunting is prohibited.¹⁸ The most conspicuous is Section 100 of the law which states: “any person who takes away, does whatever is dangerous or causing the deterioration of wood, soil, gravel, sand, petroleum or other natural resources; or performs any other action affecting natural resources, environment, ecosystem or biological diversity in wildlife sanctuaries, which is a violation of Section 55 (5), shall be liable to imprisonment for not more than five years or a fine not exceeding five hundred thousand baht or both. In the event of an offense under paragraph one, if it is an act in relation to natural resources that can be renewed according to its season and have a total value of not more than two thousand baht, the offender shall be liable to a fine not exceeding five thousand baht.” The same section imposes very heavy penalty for cutting more than twenty trees, or the total volume of timber exceeding four cubic meters: an offender is liable to imprisonment from four to twenty years and a fine from four hundred thousand baht to two million baht.

¹⁸ *ibid* Section 48 and Section 62.



There appear to be no media reports available on convictions of people involved in illegal trade in endangered species, although the law has been used widely against illegal hunters and much more often against the violators of s. 54 of the Wild Animals Reservation and Protection Act 1992 which is significantly expanded in s. 100 of the 2019 Act.¹⁹ The seizures of wildlife or products derived from it are commonly reported,²⁰ but there are hardly any reports on court cases. However, in 2016, a Thai court²¹ ordered seizure of Thai bank accounts and other assets belonging to Chumlong Lemtongthai, a Thai national who received a 40-year prison sentence in South Africa for rhino poaching and rhino horn trafficking charges.²² In a related case in 2018, Boonchai Bach was arrested in Thailand in connection with the smuggling of rhino horns worth over US\$1-million from Africa into Thailand.²³

It is obvious that many legal provisions of the Wild Animals Reservation and Protection Act 2019 can be applied to suppress illegal trade in endangered species. This recent legislation, as well as other Thai laws, is too broad and will require an extensive discretion. For example, Section 100 can be easily discarded when the officials would not consider a single act of collecting an unknown flower as “dangerous or causing the deterioration of wood, soil, gravel, sand, petroleum or other natural resources.” More problematic is the enormous reliance on administrative regulations. For example, the penalties will largely depend upon whether an animal is classified as conserved, protected, or controlled. The list of conserved animals is attached to the

¹⁹ There is a significant number of cases decided by the Supreme Court involving its application: Supreme Court of Thailand. Decision 17282/2555 (2012); Supreme Court of Thailand. Decision 8332/2554 (2011); Supreme Court of Thailand. Decision 9471/2553 (2010); Supreme Court of Thailand. Decision 227/2551 (2008); Supreme Court of Thailand. Decision 227/2551 (2008); Many earlier cases involve the issue of illegal possession: Supreme Court of Thailand. Decision 4103/2547 (2004); Supreme Court of Thailand. Decision 1054/2535 (1993); Supreme Court of Thailand. Decision 1054/2535 (1993); Supreme Court of Thailand. Decision 1054/2535 (1993); Supreme Court of Thailand. Decision 199/2518 (1975).

²⁰ See, for example, ‘Thai airport authorities seize hundreds of animals in two separate seizures’ (TRAFFIC, 4 December 2012) <<http://www.traffic.org/home/2012/12/4/thai-airport-authorities-seize-hundreds-of-animals-in-two-se.html>> accessed 18 June 2018.

²¹ ‘Wildlife Trafficking Kingpin Arrested in Thailand’ (New York Times, 20 January 2018) <<https://www.nytimes.com/2018/01/20/world/asia/thailand-wildlife-trafficking-boonchai-bach.html>> accessed 12 April 2018.

²² The sentence was eventually reduced to 13 years on appeal in 2014, and the offender was granted an early release in September 2018; See Simon Bloch, ‘Fury at release of rhino ‘pseudo-hunt’ kingpin’ (Mail & Guardian, 28 September 2018) <<https://mg.co.za/article/2018-09-13-fury-at-release-of-rhino-pseudo-hunt-kingpin>> accessed 30 September 2018.

²³ (n 21).

Act, but according to Section 6, this list can be expanded by an administrative regulation. The new law contains a new principle reflected in Section 87 requiring an intentional or negligent offender to pay the cost of the destroyed natural resource in a protected area. It is certainly a positive development of Thai law. However, this rule depends on the administrative regulations that have to specify the valuation of natural resources.

From this brief analysis of Thai law, one can easily perceive the lack of comprehensiveness, clarity, accessibility, and foreseeability in the way criminal law can be applied to transboundary trafficking of endangered species and the products derived from it. Even though possession of specimens of endangered species is criminalized along with its trade, Thai law is heavily dependent on the system of administrative permits which are poorly defined, enforced, and are open to abuse. There are no legal sanctions specifically devised for the officials who issued trade or possession permits without due examination of their impact on the preservation of endangered species. As a result, there are no reports of an official being brought to justice for abusing his powers and failing to protect the endangered animals or plants.

3. THAILAND AND CHINA: DIFFERENCES IN COMBATING ILLEGAL TRADE IN ENDANGERED SPECIES

The Chinese approach to crimes against wildlife, including illegal trading, is different from Thailand in many aspects. The differences may in some cases hinder international cooperation between these two countries. Until the enactment of 2019 legislation in Thailand, the most obvious difference was in the amount of penalties. In the past, China's Criminal Law contained the death penalty for the smuggling of endangered species.²⁴ In one reported case, Bu Luxiao was sentenced to death in 1995 for illegal hunting, repeated speculation, and smuggling of rare and endangered animals in Xishuangbanna Wildlife Natural Reserve in Yunnan Province.²⁵ He and other defendants were caught smuggling 13 Asian elephants, wild buffalo, and two pairs of ivory tusks. The death penalty in relation to the offence has been abolished in the

²⁴ Deborah Cao, *Animals in China: Law and society* (Palgrave Macmillan 2015) 57.

²⁵ Charu Sharma, 'Chinese Endangered Species at the Brink of Extinction: A Critical Look at the Current Law and Policy in China' (2005) 11 *Animal Law* 215, 240 para 1.



reform of Criminal Law in 2011. However, the penalty remains severe: up to life imprisonment.

Considering the size of the country and its population, it is not surprising that there are more reports on successful prosecutions in China than in Thailand. In 2013, CITES reported that eight Chinese nationals had been convicted and sentenced to 3 to 15 years imprisonment in Anhui Province for smuggling a total of 3.2 tons of ivory between 2010 and 2012.²⁶ The principal offender was also fined Yuan 3-million. All the ivory was bought on the internet and imported into China by falsifying import declarations. It was then offered for sale online to Chinese buyers. In a similar case in Zhejiang Province, ten Chinese nationals were sentenced to prison for 6.5 to 15 years. Another three Chinese were sentenced to 7 to 15 years of imprisonment in Fujian Province for smuggling 7.7 tons of ivory from Africa. In Guangdong Province, two people are serving sentences for 12 and 14 years for smuggling 1.04 tons of ivory. Those who order ivory tusks are also subject to prosecution. One Chinese was sentenced to 10 years imprisonment in Beijing for ordering two whole ivory tusks and 168 small ivory carvings. The same report states that nearly 700 individuals were prosecuted in China for 10 years for the wildlife offences. The figures, however, may not be seen to be very impressive considering the size of China and the suspected volumes of the illegal trade. The reported case may be a part of an incidental prosecution since China is known for a lack of consistency in criminal law enforcement.²⁷

When compared to Thai law, Chinese law is more comprehensive and clearer, although it may not be very accessible and foreseeable. The poor accessibility, similarly to Thailand, is determined by the fact that the imposition of criminal sanctions depends much on the content of various administrative regulations. The poor foreseeability is caused by the enormous discretion in the choice of a penalty conferred on the Chinese judiciary. Article 151 of the Chinese Criminal Law (2011) states that whoever: “smuggles rare animals whose import and export are prohibited by the state or products made thereof shall be sentenced to imprisonment of not

²⁶ CITES, ‘China increases prosecutions in response to illegal trade in elephant ivory’ (CITES, 29 November 2013) <https://www.cites.org/eng/news/sundry/2013/20131128_china_ivory_prosecutions.php> accessed 12 April 2018.

²⁷ Xiumei Wang, Luyuan Bai and Zhijuan Chen, ‘Challenges in investigating and prosecuting environmental crimes in China’ in Jose Luis de la Cuesta, Ligeia Quackelbeen, Nina Persak, and Gert Vermeulen (eds) *The Protection of the Environment Through Criminal Law - (RIDP - International Review of Penal Law)* (Maklu 2017) 83-106, 105.

less than 5 years but not more than 10 years and a fine; if the circumstances are especially serious, shall be sentenced to imprisonment of not less than 10 years or life imprisonment and a forfeiture of property; or if the circumstances are minor, shall be sentenced to imprisonment of not more than 5 years and a fine.”²⁸

The same article penalizes smuggling rare plants or their products with imprisonment of not more than five years or criminal detention, and/or a fine. If the circumstances are serious, the sentence must be not less than five years and a fine. Criminal detention is different from imprisonment in China. According to Article 42 and 43 of the same law, it cannot be longer than 6 months, and the person is allowed to spend some time at home.

In 2014, the Supreme Court and the Supreme Procuratorate issued a binding interpretation in which the rare animals and plants mentioned in Article 151 are defined as those species which are listed in the Directory of Wild Animals Under Special State Protection and the species listed in Appendices I and II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).²⁹

The offence of smuggling endangered species is punished more severely by Chinese law than illegal hunting or killing: Article 341 of the Criminal Law penalizes anyone who ‘illegally catches or kills precious and endangered species of wildlife under special state protection or illegally purchases, transports or sells such species of wildlife as well as the products thereof’ with imprisonment of not more than 5 years and a fine. The punishment laid down in this provision is still more severe than the one in Thai law, but much lighter than sanctions in the case of smuggling. However, Chinese law may increase that punishment.

The Chinese Supreme Court issued a binding interpretation of Article 341 earlier in 2000, in which it defined “precious and endangered species of wildlife”, similarly to its later interpretation of Article 151, as species listed in the Directory of Wild Animals Under Special State Protection, and species listed in Appendices I and II to the Convention on International Trade in Endangered Species of Wild Fauna and

²⁸ Congressional-Executive Commission on China, ‘Criminal Law of the People’s Republic of China’ (Congressional-Executive Commission on China, 2015) <<https://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china>> accessed 12 April 2018.

²⁹ Supreme People’s Court, Supreme People’s Procuratorate, ‘Interpretations on Criminal Cases of Smuggling of Laws’ (Supreme People’s Court, Supreme People’s Procuratorate, 2014) sections 10 and 12 <<https://www.chinacourt.org/law/detail/2014/08/id/147937.shtml>> accessed 20 October 2018.



Flora (CITES) as well as a specimen in the first two categories that are artificially bred.³⁰ This interpretation is also important because it defined in financial terms the differences between ordinary, serious, and especially serious circumstances.

There is a greater contrast between Thai and Chinese law in relation to plants protected by the CITES Convention. The Chinese Criminal Law (Art. 344) states that “Whoever, in violation of the regulations of the State, illegally fells or destroys precious trees or other plants under special State protection, or illegally purchases, transports, processes or sells such trees or plants as well as the products thereof, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall, in addition, be fined; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall, in addition, be fined.” Even though Article 344 does not mention CITES, the precious trees and plants mentioned in it are on the lists of the CITES Annexes.

That is very different from the penalty of not more than three months of imprisonment foreseen by the Thai law for the same offence in the Plants Act (B.E. 2535, 1992) (S. 61.2). One must admit, however, that there are other Thai forest-related laws that provide serious criminal punishments comparable with those under Article 344 of the Chinese law. One is Section 100 of the WARPA (B.E. 2562, 2019) mentioned above. This section is limited to the wildlife sanctuaries only. The same can be said about other Thai laws which protect certain trees. For instance, Sections 69 and 73 of Forest Act B.E. 2484 punish those cutting down or possessing certain commercially valuable woods with the maximum imprisonment of twenty years. These laws, nevertheless, are of little help for the smaller endangered plants protected by the Plants Act (B.E. 2535, 1992). The lightness of the penalty in Thai law makes any extradition proceedings impossible, as the extradition treaty between China and Thailand³¹ applies only to offences punishable with more than one year of imprisonment.

Unlike Thailand, China distinguishes between criminal offences and administrative offences of illegal trade. It is common for the Chinese Supreme Court

³⁰ Chinese Supreme Court, ‘Resolution on Several Issues Concerning the Specific Application of Law in the Trial of Criminal Cases Destroying Wild Animal Resources’ (Chinese Supreme Court, November 17 2000) <<http://slga.forestry.gov.cn/slga/2569/46759/7.html>> accessed 20 October 2018.

³¹ Treaty between the Kingdom of Thailand and the People’s Republic of China on Extradition (1993) Article 2.

to stipulate that in order for criminal law sanctions to apply, a certain financial threshold of damage must be met. It is not so easy to do in relation to illegal trade in endangered species, although the Supreme Court still defines the level of criminal sanctions depending on the specific volume of the illegal trade.³² For the administrative sanctions against illegal wild animal trade, China applies recently amended the Wild Animals Protection Law.³³ Administrative sanctions for illegal sale, purchase, or use of wild animals or products obtained from them include confiscations and fines at an amount between two and ten times of their value.³⁴ In relation to illegal trade in wild plants, the same sanctions can be applied according to the Regulations on Wild Plants Protection, which were also recently amended.³⁵ Both the Wildlife Animals Protection Law and the Regulations on Wild Plants Protection are based on what Ed Couzens defined as, “the approach of ‘categorizing’ species.”³⁶ This approach, common for both China and Thailand, was originally endorsed by CITES, by listing each species required of protection in one of the three deferent appendices that require different administrative trade regulations.

Even though China used to apply more severe penalties for the illegal trade in endangered species than Thailand, it faces similar problems with the effective implementation of its legislation, particularly when the trade in propagated animals is allowed under certain administrative conditions. In one highly publicized case, judicial interpretations of Chinese courts were criticized for allowing prosecution and punishment of people breeding animals in captivity.³⁷ In this respect, the question

³² See, Chinese Supreme Court (n 29); Chinese Supreme Court, ‘Resolution on Several Issues Concerning the Trial of Cases Related to Territorial Sea Waters Under Chinese Jurisdiction’ (2 August 2016) Section 6 <<http://www.court.gov.cn/zixun-xiangqing-24271.html>> accessed 20 October 2018.

³³ Chinese Government, ‘Wildlife Protection Law of the People’s Republic of China’ <http://news.xinhuanet.com/legal/2016-07/03/c_129110499.htm> accessed 12 October 2018; <<http://extwprlegs1.fao.org/docs/pdf/chn173552.pdf>> accessed March 20, 2019.

³⁴ *ibid* Article 48.

³⁵ Chinese Government, ‘Regulations on the Protection of Wild Plants of the People’s Republic of China’ Sections 23-27 <<http://www.forestry.gov.cn/main/3950/20170314/459881.html>> accessed 12 October 2018.

³⁶ Ed Couzens, ‘CITES at forty: never too late to make lifestyle changes’ (2013) 22(3) *Review of European: Comparative & International Environmental Law* 311, 311-323.

³⁷ ‘Recording & Review Pt. 3: Are Parrots Bred in Captivity Still “Wild”?’ (NPC Observer, 2018) <<https://npcobserver.com/2018/08/21/recording-review-pt-3-are-parrots-bred-in-captivity-still-wild/>> accessed 20 October 2018.



arises whether a different formulation of CITES could assist the developing countries to meet the Convention's goals better.

A similar feature of both Thai and Chinese criminal laws concerning illegal trade in endangered species is that both countries uphold a rather narrow concept of the crime. They criminalize an unauthorized trade, leaving unattended the abuse of the administrative powers which authorize it. Even though the definitions of trade are broader in domestic laws than in CITES, the similarity is striking. What makes the trade illegal is not its harmful nature in itself, but the fact that it is not permitted by a governmental official. If the official permits a destructive and immoral transaction that destroys life, then the trade is legal. There is no specific criminal law penalty for the abuse of powers in authorizing the illegal trade in Thailand and China, although general rules against malfeasance can apply. For example, Article 397 of the Chinese Criminal Law can be applied against any abuse of administrative power. It penalizes "any functionary of a State organ who abuses his power or neglects his duty, thus causing heavy losses to public money or property or the interests of the State and the people." The penalty is mild comparing to the provisions against those who are involved in an unauthorized trade. Under circumstances imprecisely described above, the functionary shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. There are no official reports that Thai and Chinese criminal laws were ever used against the functionaries that abused the power to issue permits authorizing trade in endangered species.

4. THE WAY FORWARD TO BETTER COOPERATION BETWEEN THAILAND AND CHINA

The way to achieve better cooperation between the two countries lies in a significant legal reform. Both countries should reject the approach of 'categorizing' species which makes its enforcement problematic in China and Thailand. The move away "from the 'categorizing' of species toward an approach that affords protection to ecosystems and habitats rather than to selected species"³⁸ is certainly desirable. Criminalization of illegal trade and possession of endangered animals and plants should be based not on 'blacklisting' but 'whitelisting' approach.³⁹ As it has been

³⁸ (n 36) 311.

³⁹ (n 36) 320.

shown above, both countries use their criminal sanctions on the basis of specific lists of rare animals. The criminal law norms should be constructed in such a way as criminalizing trade and possession of any wild animals and plants that are not permitted explicitly by law. All hunting, gathering, or capture of animals and plants should be prohibited unless particular species are excluded by law from the general prohibition. It is true that a rule of criminal law penalizing trade and possession of any wild animals and plants can be perceived as too excessive and vague. Some wild animals can be domesticated and many wild plants can be easily replanted in someone's garden. However, to distinguish between wild and domesticated species in many cases is much easier for the enforcement officers and the public than to find out whether a specific species is prohibited in some obscure administrative regulations. A more serious problem will appear in relation to a species which can be both wild and domesticated. In those cases, a proof of origin of the specimen will be required. The same applies to all animals and plants whose origin is uncertain. It is possible to decriminalize the possession and trade of bred specimens although not the breeding itself if it involves the illegal acquisition of animals and plants for the purpose of breeding. The shift in criminal law towards a general prohibition of possession and trade of wildlife would allow better cooperation between Thailand and China, and make the rules of criminal law more accessible and foreseeable in conformity with the ideas of the rule of law and human rights.

Further, both countries should apply the concept of 'offences committed abroad against internationally protected interest'.⁴⁰ Certain acts committed in a foreign jurisdiction and against foreign law can be prosecuted in a third country where the defendant abides. In the past, these crimes were largely restricted to such core international crimes as genocide, crime against humanity, war crimes, and the crime of aggression in which environmental considerations are rather marginal.⁴¹ The list of these crimes is expanding and already includes drug offences, human trafficking, etc.⁴² It is arguably time to include in this list illegal international trade in endangered species in its broadest meaning, including the illegal possession of the species and the abuse of administrative powers authorizing illegal trade. The reason for this is obvious.

⁴⁰ 'German Criminal Code' (2013) Section 6 <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html> accessed 12 April 2018.

⁴¹ Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (OUP 2014) 32.

⁴² (n 40).



Illegal trade is detrimental to the interest of the international community. Certain species are protected internationally, and their direct destruction by means of hunting and trading violates the international interest in their preservation.⁴³ If an act of illegal trade is committed, let us say by a Chinese national for example, by breaking Chinese law, but who himself (or his assets) is present in Thailand, the Thai authorities should certainly have jurisdiction since the offence is committed not only against Chinese law but also against an internationally protected interest. Even though Thai and Chinese laws acknowledge this principle, providing that it is within international obligations according to an international treaty it agrees to perform,⁴⁴ CITES does not contain the relevant provision. As the result, Chinese law does not allow prosecution of a Chinese national who purchased illegally a derivative of an endangered species in Thailand unless he violates at the same time a Chinese law.

Apart from the global interest in the preservation of endangered species, there is also an international interest to suppress transnational organized crime. It has found its formal expression in the United Nations Convention against Transnational Organized Crime (2000) (UNTOC)⁴⁵ to which most countries of the world, including Thailand and China, are parties. The Convention mentions the need for the suppression of the illicit trade in endangered species in its preamble. In an important development in 2013, the United Nations Economic and Social Council (ECOSOC) issued Resolution 2013/40, which recommends that states: “to make illicit trafficking in protected species of wild fauna and flora involving organized criminal groups as a serious crime, as defined in article 2, paragraph (b), of the UNTOC, in order to ensure that adequate and effective means of international cooperation can be afforded under the Convention in the investigation and prosecution of those engaged in illicit trafficking in protected species of wild fauna and flora.”⁴⁶

⁴³ Wilhelm Wengler, ‘Tierschutz und internationales Strafrecht’ (1980) 12 Juristische Rundschau 487, 487-489.

⁴⁴ (n 28) Article 9.

⁴⁵ UNODC, ‘United Nations Convention against Transnational Organized Crime’ (UNODC, 2000) <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> accessed 12 October 2018.

⁴⁶ ‘Legal Framework to Address Wildlife and Timber Trafficking in the ASEAN region’ (United Nations Office on Drugs and Crime, 2015) <https://www.unodc.org/documents/southeastasiaandpacific/Publications/wildlife/Legal_Study_WTT_12_13June2015.pdf> accessed 12 April 2018.

There is a need to tie the existing anti-money laundering laws closely to the concept of a crime against an internationally protected interest. Thai law in this respect reflects the international tendency better than Chinese law. The Thai Anti-Money Laundering Act of B.E. 2542⁴⁷ was amended in 2013 and now covers the illegal proceeds from illegal exploitations of natural resources. The Anti-Money Laundering Law of the People's Republic of China⁴⁸ can cover proceeds obtained from the illicit trade in endangered species if there have been violations of customs-related laws. Only in this case can they be seized and transferred to the state.⁴⁹ Even though this law has been used to arrest the proceeds from illegal trade in some cases, research shows that: "there is a widespread lack of political will to fully prioritize and manage wildlife crime on par with the scale and urgency of the issue. The failure of many jurisdictions to recognize these crimes as transnational organized crimes and to employ the full range of law enforcement tools available – particularly financial investigations – is a short-sightedness for which we are paying a heavy price."⁵⁰

5. CONCLUSION

The biggest legal obstacle is that both countries define the offence of illegal trade in endangered species vary narrowly as an unauthorized trade. In other words, even if the trade is destructive to the species, it remains legal as long as the permission to trade is obtained. The same applies to the destruction of natural habitats brought about by an unsustainable use of the biological resources by humans has caused greater damage to wildlife. The dependence of criminal law on the content of administrative regulations makes it more difficult to create a unified law which is desirable for effective cooperation between the countries. Accordingly, the

⁴⁷ Anti-money Laundering Act of B.E. 2542 (1999) Section 3 (15).

⁴⁸ Chinese Government, 'Anti-Money Laundering Law of the People's Republic of China' (2006) Article 2 <http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388022.htm> accessed 10 March 2021.

⁴⁹ For a concise description of anti-laundering provisions in relation to other Thai legislative acts, see: Patricia Moore, Chanokporn Prompinchompoo and Claire A Beastall, 'CITES Implementation in Thailand' (TRAFFIC, 2016) <http://www.trafficj.org/publication/16_CITES_Implementation_in_Thailand.pdf> accessed 12 April 2018.

⁵⁰ 'Enhancing the Detection, Investigation and Disruption of Illicit Financial Flows from Wildlife Crime' (United Nations Office on Drugs and Crime, 2017) <https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/FINAL_-_UNODC_APG_Wildlife_Crime_report.pdf> accessed 10 March 2018.



circumstances found in such countries as Thailand and China favor a broader policy of criminalization in all aspects of environmental protection. Not only should unauthorized trade in endangered species be criminalized, but also any illegal possession of wild animals and plants; and what is more important: the abuse of administrative powers that authorize them. This measure alone will certainly not be enough.

By the time of writing, both countries have already introduced severe penalties. The Chinese experience indicates that the severity of punishment alone does not always serve as a sufficient deterrent. There is a need for a consistent law enforcement. In this aspect, there is a need for a greater cooperation between the countries affected by the illegal trade. This cooperation is difficult to achieve without law harmonization. There must be clear criminal law sanctions not only the trade itself but also the illegal possession of the relevant species and the abuse of administrative powers in permitting the trade.

In relation to the BRI generally speaking, one can conclude that neither China nor Thailand are sufficiently well prepared to meet the legal challenges in protecting endangered species. The increase of movements of goods, services, and people across national borders requires urgently an introduction of a more efficient and complex administrative control and the comprehensive system of law enforcement of not only international trade but also of the overall access and the use of biological resources. Considering the existing administrative, economic, educational, scientific capacities of the involved countries, it will be unlikely possible to achieve in the nearest future. A more complex system of administrative control may lead to increased corruption or other abuses of administrative powers. Without the fundamental shift of ethical values among the public towards environmental conservation in countries like China and Thailand, an increased administrative regulation will remain by far an insufficient remedy against the material greed that pushes for the increased sale and consumption of endangered biological resources.