

William & Mary Environmental Law and Policy Review

Volume 17 (1992-1993)
Issue 2 *William and Mary Journal of
Environmental Law*

Article 3

April 1993

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Jennifer Zoe Brooks, *A Survey of the Enforcement of International Wildlife Trade Regulation Under United States Law*, 17 Wm. & Mary Envtl. L. & Pol'y Rev. 145 (1993), <https://scholarship.law.wm.edu/wmelpr/vol17/iss2/3>

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A SURVEY OF THE COURT ENFORCEMENT OF INTERNATIONAL WILDLIFE TRADE REGULATIONS UNDER UNITED STATES LAW

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The world community recognizes international trade in wildlife as a major concern in the struggle to save threatened or endangered species. The wildlife trade, a large proportion of which is illegal, involves a wide variety of plants and animal products, including live fish, shellfish, mammals, reptiles, amphibians, birds, and plants; mammal and reptile hides; stuffed and mounted animals; and ivory products.¹ The declared annual value of the legal wildlife trade at the importing stage is at least five billion dollars.² International trade in wildlife is clearly a big business, especially considering that this figure should be adjusted to account for the value of illegal trade³ as well as a substantial markup in retail prices. This Article will survey the judicial enforcement of wildlife trade law against those violators who are actually caught by United States authorities and assessed civil or criminal penalties.

I. BACKGROUND: THE STRUCTURE OF THE REGULATION OF INTERNATIONAL TRADE IN ENDANGERED SPECIES

A. *At the international level: CITES*

In order to control the international trade in wildlife, the international community enacted the Convention on International Trade in Endangered Species of Wild Fauna and Flora⁴ ("CITES") in 1973. CITES

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1. Laura H. Kosloff and Mark C. Trexler, *The Convention on International Trade in Endangered Species: No Carrot, But Where's the Stick?*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10222, 10223 (July 1987); Meena Alagappan, Comment, *The United States' Enforcement of the Convention on International Trade in Endangered Species of Wild Flora and Fauna*, 10 NW. J. INT'L L. & BUS. 541, 545 n.22 (1990).

2. Kosloff and Trexler, *supra* note 1, at 10223.

3. Alagappan, *supra* note 1, at 545 (estimating that the value of illegal wildlife trade may exceed \$100 million annually).

4. Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087 (1976) [hereinafter CITES].

itself lists endangered species and divides them into three categories based on their vulnerability to extinction.⁵ It then establishes requirements for the import or export of those species.⁶ These requirements are intended to ensure that any trade, whether commercial, scientific, or otherwise, in an endangered species will not be detrimental to the survival of the species.⁷

CITES includes no provisions for enforcing its requirements against either individual violators or signatory nations. Instead, each nation is given the job of administering the requirements of CITES through appropriate legislation within its own legal system.⁸ This system of self-regulation, although necessary from the point of view of state sovereignty, inevitably has led to relaxed CITES enforcement in many nations and effectively has undermined the purpose of CITES. The purpose of this Article is not to examine the worldwide effectiveness of CITES,⁹ however, but rather to survey the enforcement in United States courts of the laws regulating wildlife trade against those violators who have been apprehended by United States authorities and face civil or criminal liability.

B. In the United States: ESA and the Lacey Act

The United States implements CITES primarily through the Endangered Species Act of 1973¹⁰ ("ESA"). In addition to implementing many other international conservation agreements, ESA prohibits trade in

5. *Id.* art. 2, 27 U.S.T. at 1092. These categories are: Appendix I, species threatened by extinction which are or may be affected by trade; Appendix II, species whose survival may be endangered unless trade is subject to strict regulation; and Appendix III, species that have been identified by any member country as subject to protective regulations within its jurisdiction for the purpose of preventing exploitation. *Id.* apps. 1-3, 27 U.S.T. at 1118-43.

6. *Id.* art. 3-7, 27 U.S.T. at 1093-1101.

7. *See id.*

8. *Id.* art. 8, 27 U.S.T. at 1090.

9. A number of articles have discussed the general effectiveness of CITES. *See, e.g.*, Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1 (1990) (concluding that CITES has proven ineffective in protecting the elephant; Kosloff and Trexler, *supra* note 1 (concluding that the United States has successfully created the infrastructure for implementation of CITES but that other countries with more limited resources may not be quick to follow).

10. 16 U.S.C. §§ 1531-1543 (1988).

violation of CITES and charges the United States Fish and Wildlife Service ("FWS") with administering and enforcing its provisions. Regulation by the United States of trade in wildlife is not limited to ESA. The Lacey Act,¹¹ which prohibits wildlife trade in violation of any foreign law or any treaty signed by the United States,¹² has significantly enhanced United States regulation of illegal wildlife trade. Although the Lacey Act actually predates CITES, Congress considerably expanded the Act in 1981.¹³ Federal statutes dealing with customs regulation have also been used to take action against illegal traders in wildlife.¹⁴

Relatively stringent penalties, both criminal and civil, for illegal trade in wildlife have been available under both ESA¹⁵ and the expanded Lacey Act¹⁶ for years. However, ever since the courts began looking at the penalties available under these statutes, the relatively light penalty of forfeiture of contraband wildlife has proved far more popular than the various fines and possible prison sentence also available. Of course, the standards of liability for these penalties also vary. The popularity of forfeiture may result from the ease with which one can prove its prerequisite. The penalty of forfeiture, under both ESA and the Lacey Act, requires only that the wildlife be contraband.¹⁷ The owner of the wildlife need not be aware of the illegality.¹⁸ As courts have interpreted this provision, the government does not even bear the burden of proof at trial.¹⁹ Rather, the government must demonstrate probable cause to believe the wildlife illegal.²⁰ The burden then shifts to the claimant to prove that the wildlife was, in fact, legal.²¹ Under the Lacey Act, the

11. *Id.* §§ 3371-3378.

12. *Id.* § 3372(a)(1).

13. Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073.

14. *See, e.g.*, *United States v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982) (allowing a forfeiture under the Tariff Act of 1930 § 527, 19 U.S.C. § 1527 (1988), which provides for the forfeiture of any mammal or bird unlawfully imported into the United States).

15. *See* 16 U.S.C. § 1540(a), (b), (e)(4)(A)-(B) (1988).

16. *See id.* §§ 3373(a), (d), 3374(a).

17. *Id.* §§ 1540(e)(4)(A) (ESA forfeiture provision), 3374(a)(1) (Lacey Act forfeiture provision).

18. *Id.*

19. *See, e.g.*, *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1113 (S.D. Fla. 1988)

20. *Id.*

21. *Id.*

only other civil penalty is a \$10,000 fine for negligent violation.²² A fine of up to \$20,000 and imprisonment for up to five years are available for criminal violations, and therefore require a higher state of knowledge.²³

ESA does include strict liability civil fines of up to \$10,000 per violation for a wildlife dealer and up to \$500 per violation for others.²⁴ One would imagine that these fines would be as popular with the courts as the strict liability forfeiture provisions. ESA, however, seems to be less widely used by courts than the Lacey Act in the prevention of illegal wildlife trade. It is not clear whether this apparent preference for the Lacey Act is merely an oversight on the part of the courts, and perhaps the government's attorneys in prosecuting these cases, or whether courts find it easier to determine violations of foreign law under the Lacey Act rather than violations of CITES under ESA.

II. APPLYING CUSTOMS LAW, ESA, AND THE LACEY ACT²⁵

A. *Civil actions*

1. *The rise of ESA and the Lacey Act*

Before the courts began using the Lacey Act or ESA to penalize traders of illegal wildlife, they predicated forfeitures and other remedies on violations of customs laws. In *United States v. Fifty-Three Eclectus Parrots*,²⁶ for instance, the government brought a forfeiture action under the Tariff Act of 1930.²⁷ The United States Court of Appeals for the Ninth Circuit, rejecting the "innocent owner" defense, found that forfeiture of illegally imported birds did not depend upon the presence or absence of culpability on the part of the owner.²⁸ It also noted that the owner had the affirmative burden of ensuring, through appropriate documentation, that

22. 16 U.S.C. § 3373(a) (1988).

23. *See id.* § 3373(d).

24. *Id.* § 1540(a).

25. The case law dealing with illegal wildlife trade covers both civil and criminal matters. Although the issues raised by the two types of cases sometimes overlap, they differ in large part and will therefore be discussed separately.

26. 685 F.2d 1131 (9th Cir. 1982).

27. 19 U.S.C. § 1527 (1988).

28. *Eclectus Parrots*, 685 F.2d at 1134.

foreign wildlife laws had not been violated.²⁹ The court's reasoning parallels that used in forfeiture actions under ESA and the Lacey Act.

In the mid-1980s, a pair of forfeiture cases from the United States District Court for the Southern District of Florida³⁰ found liability under ESA, CITES, and the Lacey Act. These two cases led the way to a nationwide increase in the use by courts of the Lacey Act, and to a lesser extent ESA, in enforcing the laws of wildlife trade. In articles dealing with CITES, authors have voluminously cited *United States v. 3,210 Crusted Sides of Caiman Crocodilus*³¹ and *United States v. 2,507 Live Canary Winged Parakeets*,³² because until recently these cases have been the only examples of United States court enforcement of the international agreement.³³ This broad exposure, particularly of the earlier case, *Crusted Sides of Caiman Crocodilus*, seems to have made other courts more aware of the laws regulating the international wildlife trade and more willing to use those laws in their own districts. The fact that almost every later decision involving forfeiture under the Lacey Act or ESA has cited these two cases, as well as *Eclectus Parrots*, indicates the influence that they have had.³⁴

That the district court in southern Florida initiated this trend is perhaps not surprising. Both *Crusted Sides of Caiman Crocodilus* and *Live Canary Winged Parakeets* dealt with interpretation of South American law³⁵ and forfeiture procedures. The southern Florida court's experience with forfeiture in the context of the drug trade, and perhaps the court's cultural proximity to South America, qualified that court particularly to take an important step in furthering the use and enforcement of ESA, CITES, and the Lacey Act.

In *Crusted Sides of Caiman Crocodilus* the government brought a forfeiture action under CITES, ESA, and the Lacey Act against crocodile hides found on a flight from Bolivia to Paris, which made an unscheduled

29. *Id.* at 1133-34.

30. *See infra* notes 36-51 and accompanying text.

31. 636 F. Supp. 1281 (S.D. Fla. 1986).

32. 689 F. Supp. 1106 (S.D. Fla. 1988).

33. *See, e.g.*, Kosloff and Trexler, *supra* note 1, at 10233-34 nn. 158-62.

34. *E.g.*, *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474 (5th Cir. 1992); *United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare*, No. CV-88-3476, 1991 WL 41774 (E.D.N.Y. Mar. 14, 1991).

35. *See Crusted Sides of Caiman Crocodilus*, 636 F. Supp. at 1286 (finding violation of Bolivian law); *Live Canary Winged Parakeets*, 689 F. Supp. at 1113-14 (interpreting a Peruvian Supreme Decree).

landing in Miami.³⁶ After finding that an unscheduled landing constituted an importation under United States customs law, the court found probable cause to believe that CITES, ESA, and the Lacey Act had all been violated.³⁷ Specifically, the court found probable cause to believe that the imported hides were actually *Caiman crocodilus yacare*, an endangered species, not *Caiman crocodilus crocodilus*, as the documentation claimed, and thus were subject to forfeiture under ESA.³⁸ Probable cause existed to believe that the hides were imported in violation of CITES because the permit accompanying the hides was not an original, as required, but an unendorsed photocopy.³⁹ Also, the permit only purported to cover 3,210 of the 7,665 hides.⁴⁰ As to the Lacey Act, the court found probable cause to believe that a Bolivian law prohibiting the hunting of undersized caiman had been violated, and thus that the Lacey Act had been violated.⁴¹ Rejecting the innocent owner defense, the court decided that the entire shipment of hides, not just the number of hides in excess of the permit, was subject to forfeiture.⁴²

Neither the court nor the government made any attempt in this case to apply penalties other than forfeiture of the contraband wildlife. The case is nevertheless remarkable for its boldness in delving into Bolivian law, an international convention, and herpetology⁴³ all at once. Thanks to the widespread mention of this decision in journals and then in later cases, courts that may have been nervous about both looking to foreign law and distinguishing between the remains of nearly identical species now had a precedent.

The same court in *United States v. 2,507 Live Canary Winged Parakeets*⁴⁴ again used CITES, ESA, and the Lacey Act together. In this case, the bird importer actually had a CITES permit signed by the Peruvian Director of the Department of Forest and Fauna.⁴⁵ However, the court found that Peruvian law prohibits exportation from anywhere in Peru of live wild animals native to forest or jungle regions, and that the species

36. *Crusted Sides of Caiman Crocodilus*, 636 F. Supp. at 1282-84.

37. *Id.*

38. *Id.* at 1284.

39. *Id.* at 1285.

40. *Id.*

41. *Id.* at 1285-86

42. *Id.* at 1286-87

43. Herpetology is a branch of zoology that focuses on reptiles and amphibians.

44. 689 F. Supp. 1106 (S.D. Fla. 1988).

45. *See id.* at 1109-10.

exported, *Brotogeris versicolorus*, inhabits those regions.⁴⁶ Therefore, the Director had no authority to sign the permit, and his doing so did not make the exportation legal.⁴⁷ Because the permit was invalid, and obtained in contravention of Peruvian law, the importer had violated the Lacey Act, ESA, and CITES.⁴⁸

Even though the owner of the birds had obtained an apparently valid permit, the court once again rejected the "innocent owner" defense.⁴⁹ It stated that an animal importer has a duty to investigate the legality of a shipment.⁵⁰ The importer thus cannot avoid the penalty for noncompliance by claiming that compliance was uneconomical or inconvenient.⁵¹

The court in *Live Canary Winged Parakeets* demanded a greater showing from the importer in order to sustain the legality of his international wildlife transaction than it did in *Crusted Sides of Caiman Crocodilus*. The court refused to accept the imprimatur of the very Peruvian official charged with determining the legality of exports of Peru. Instead, it looked further into the written Peruvian law to determine the legality of the official's decision. Although the court in this case once again did not assess a penalty beyond forfeiture, it did strengthen the precedent set by *Crusted Sides of Caiman Crocodilus* by closely analyzing foreign law in order to determine whether a violation had occurred under the Lacey Act, ESA, or CITES.

2. *Rebuffed constitutional challenges*

Claimants in Lacey Act and ESA cases have argued that the incorporation of foreign law is unconstitutional, either because it gives the government officials unlimited discretion in violation due process⁵² or it makes the law unconstitutionally vague.⁵³ However, these challenges

46. *Id.* at 1110.

47. *Id.*

48. *Id.* at 1113-15.

49. *Id.* at 1117-19.

50. *Id.* at 1119.

51. *Id.*

52. *E.g.*, *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829-30 (9th Cir. 1989).

53. *E.g.*, *United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare*, No. CV-88-3476, 1991 WL 41774, at *14-16 (E.D.N.Y. Mar. 14, 1991).

have not found favor in the courts.

The Ninth Circuit has held in *United States v. 594,464 Pounds of Salmon*⁵⁴ that the Lacey Act does not unconstitutionally permit government agents unfettered discretion due to its prohibition against importation of wildlife in violation of foreign law.⁵⁵ The court reasoned that the government official responsible for enforcing the Lacey Act merely looks to foreign law to determine whether the statutory provisions of the Act have been triggered.⁵⁶ Therefore the Act neither assimilates foreign law into federal law nor gives unlimited discretion in violation of due process.⁵⁷

In *United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare*,⁵⁸ a district court in New York considered whether ESA was unconstitutionally vague insofar as it incorporated CITES, because of the difficulty in distinguishing between the endangered *Caiman crocodilus yacare* and the legally importable *Caiman crocodilus crocodilus*.⁵⁹ The court found that the law was clear in banning trade in *Caiman crocodilus yacare*. The difficulty of making the correct factual determination did not excuse the claimant's alleged mistake of fact.⁶⁰

3. *The use of foreign law and CITES in applying the Lacey Act and ESA*

a. *The Lacey Act*

It was perhaps disingenuous of the court in *United States v. 594,464 Pounds of Salmon*⁶¹ to imply that the Lacey Act did not

54. 871 F.2d 824 (9th Cir. 1989).

55. *Id.* at 829-30.

56. *Id.* at 830.

57. *Id.*

58. No. CV-88-3476, 1991 WL 41774 (E.D.N.Y. Mar. 14, 1991).

59. *Id.* at *14.

60. *Id.* at *15. The court cited *Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1981) for the principle that a less strict vagueness test is to be applied to economic regulation, because businesses can be expected to consult relevant legislation, and make inquiries when a clarification of meaning is necessary. *Raw Skins of Caiman Crocodilus Yacare*, 1991 WL 41774, at *15-16. In this case, the court suggested that an importer who knows in advance that the import of certain skins is prohibited can make inquiries as to the nature of those skins. *Id.* at *16.

61. 871 F.2d 824 (9th Cir. 1989).

assimilate foreign law because it merely required a government enforcement official to mechanically check the importer's conduct against established foreign law. Characterization of this action as non-discretionary becomes suspect when one considers that in the very same opinion the court needed to engage in a discussion of the legislative history of the Lacey Act to determine if the Taiwanese regulation in question was captured by the phrase "any foreign law."⁶² This discussion indicates that the court itself did not see the foreign law as something not potentially subject to ambiguities.

Indeed, courts in other circuits have used a great deal of freedom in their interpretations of foreign law under the Lacey Act. *United States v. 2,507 Live Canary Winged Parakeets*⁶³ provides an example of a court using its own interpretation of Peruvian law to discredit the authorization of an export permit by the Peruvian official responsible for such authorization.⁶⁴ In a recent Fifth Circuit case, the court took a similar approach when it interpreted Pakistani law to uphold a forfeiture under the Lacey Act.⁶⁵ Citing *Live Canary Winged Parakeets*, the court found that an export permit issued by the Pakistani province of Baluchistan only allowed the defendant sheep to be removed from Baluchistan, not from Pakistan, because its removal from Pakistan would violate Pakistani law.⁶⁶ The district court for south Florida has even used a Bahamian law that arguably conflicted with a United States law to trigger the Lacey Act's criminal penalties.⁶⁷

62. 871 F.2d at 826-28. The court held that a Taiwanese regulation constitutes foreign law within the meaning of the statute. *Id.* at 828; see 16 U.S.C. § 3372(a)(2)(A) (1988).

63. 689 F. Supp. 1106 (S.D. Fla. 1988).

64. *Id.* at 1114.

65. *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474, 477-78 (5th Cir. 1992).

66. *Id.* at 477.

67. See *United States v. Shelhammer*, 681 F. Supp. 819 (S.D. Fla. 1988). The defendants, who had violated Bahamian law by fishing within the 200-mile Bahamian Exclusive Economic Zone ("EEZ") without a permit, argued that the United States did not recognize the Bahamian EEZ according to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1988). The relevant section of the Magnuson Act reads:

...

(e) Nonrecognition

b. ESA

Determining a violation of CITES, and thereby of ESA, tends to be a fairly straightforward procedure for courts. In *United States v. 1,000 Raw Skins of Caiman Crocodilus Yacare*,⁶⁸ for instance, skins of *Caiman crocodilus yacare* were listed on an accompanying CITES permit as *Caiman crocodilus crocodilus*. The permit also listed Colombia as the country of origin although the species was not found in Colombia.⁶⁹ Because a CITES permit must state the correct scientific name of the species and the correct country of origin, the facts clearly established a violation of CITES and thus of ESA.⁷⁰

4. *The popularity of forfeiture under the Lacey Act and ESA*

The foregoing cases illustrate that the forfeiture provisions of the Lacey Act and ESA have become popular remedies with courts around the

It is the sense of Congress that the United States shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation -- (1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States; (2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishing agreements, whether or not such nation is a party to any such agreement; or (3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.

16 U.S.C. § 1822(e) (1988).

The court held that the government was not prohibited by the Magnuson Act from enforcing Bahamian law because the Magnuson Act provided advice as to what factors should be considered by the government in evaluating a foreign nation's claim to an EEZ, rather than a congressional prohibition on governmental recognition of any foreign nation's EEZ. *Shelhammer*, 681 F. Supp. at 820. Although some portions of the Bahamian EEZ were contested by the United States, the government's assertion that the particular area in question was recognized by the United States was accepted by the court. *Id.*

68. No. CV-88-3476, 1991 WL 41774 (E.D.N.Y. Mar. 14, 1991).

69. *Id.* at *10.

70. *Id.* at *9-10.

nation. Failure to uphold a forfeiture by the government is a rarity.⁷¹ The popularity of forfeiture may reflect the relative unpopularity of the claimants. The cases discussed above have all involved import of wildlife or wildlife products by commercial importers, commercial fishermen, or, in one instance, a big game hunter. None of these activities was particularly beneficial to wildlife even when conducted legally, and the claimants in several of these cases appear to have gone through elaborate procedures to avoid the law.⁷² The courts may not have had much sympathy for these claimants.

5. *Enforcing CITES and ESA against a non-profit zoo*

Even one who trades in wildlife for conservationist purposes is not immune from any penalty for the violation of wildlife trade, however. In *World Wildlife Fund v. Hodel*⁷³ the United States District Court for the District of Columbia used ESA and CITES to prohibit a zoo from charging a fee to patrons for viewing its imported pandas. The Toledo Zoo had applied for, and been granted, a permit from FWS to import two giant pandas from the People's Republic of China for a temporary exhibition.⁷⁴ In exchange for the Chinese government's loan of the pandas, the zoo promised at least \$300,000 in equipment and vehicles and a future joint venture with a Chinese panda reserve.⁷⁵ The zoo expected to increase its profits during the panda exchange, through both increased attendance and the sale of panda souvenirs, and planned to use the extra money toward

71. In *United States v. One Bell Jet Ranger II Helicopter*, 943 F.2d 1121 (9th Cir. 1991), the occupants of a helicopter had harassed bighorn sheep in violation of the Airborne Hunting Act, *see* 16 U.S.C. § 742j-1(a)(2) (1988), and the Lacey Act Amendments of 1981, *see* 16 U.S.C. § 3372(a)(2)(A) (1988). The Ninth Circuit found that the district court had not abused its discretion in denying the forfeiture because of several procedural violations by the government. *Id.* at 1126-27. At most, this decision seems to imply that there is *some* limit to the use of forfeiture.

72. *See, e.g.*, *1,000 Raw Skins of Caiman Crocodilus Yacare*, No. CV-88-3476, 1991 WL 41774 (E.D.N.Y. Mar. 14, 1991) (wrong country of origin listed and species misidentified as a non-endangered species); *United States v. 3,210 Crusted Sides of Caiman Crocodilus*, 636 F. Supp. 1281 (S.D. Fla. 1986) (permit was unendorsed and purported to cover fewer than half the hides being shipped).

73. No. 88-1267, 1988 WL 66193 (D.D.C. 1988).

74. *Id.* at *1.

75. *Id.*

improvements in its primate display.⁷⁶ To advertise the exhibit, the zoo sent out mass mailings and participated in joint promotions with Pepsi and grocery store chains.⁷⁷

Giant pandas are listed in Appendix I of CITES and their international trade therefore is regulated strictly.⁷⁸ To meet the requirements for CITES, which must be met before a permit may be issued by FWS, the importer must establish that the import will not be for purposes detrimental to the survival of the species; that the recipient of the specimen is suitably prepared to house and care for the animals; and that the specimen will not be used for primarily commercial purposes.⁷⁹ The World Wildlife Fund ("WWF") brought suit seeking a preliminary injunction against the zoo to prevent the zoo from continuing the panda exhibition. WWF challenged FWS's findings that the import would not be detrimental to the survival of the species and that the pandas would not be used primarily for commercial purposes.⁸⁰

The two borrowed pandas came from a breeding program in China and the male was the only proven breeder in the program.⁸¹ FWS's stated reasons for finding that the loan would not endanger the success of the breeding program were that "one might conclude that the Chinese consider this animal as non-reproductive since that is the type of animal that the applicant requested. In addition, the female may be past the breeding period for this year and the short-term loan does not extend into the next breeding season."⁸² Despite FWS's tepid and speculative support for the harmlessness of the loan to the breeding program, and WWF's evidence as to the difficulty of breeding giant pandas in general and the breeding potential of the particular pandas at issue, the court decided that WWF had not shown a substantial likelihood of success in proving that FWS's finding regarding the detrimental effect was arbitrary and capricious.⁸³ The standard for granting a preliminary injunction, combined with the standard for reversing an agency action, severely

76. Kevin D. Hill, *The Convention on International Trade in Endangered Species: Fifteen Years Later*, 13 LOY. L.A. INT'L & COMP. L.J. 231, 251 (1990) (citing TOLEDO BLADE, May 24, 1988, at 7).

77. *Id.* at 254.

78. *World Wildlife Fund*, 1988 WL 66193, at *2.

79. *Id.* at *2 (citing CITES, *supra* note 3, art. 3, ¶ 3, 27 U.S.T. 1093-94).

80. *Id.* at *3.

81. Hill, *supra* note 76, at 252-53.

82. *World Wildlife Fund*, 1988 WL 66193, at *3.

83. *Id.*

handicapped the plaintiff's case.

On the issue of commercial purpose, however, the court did find that WWF had demonstrated a substantial likelihood of success in proving the agency action to be arbitrary and capricious.⁸⁴ In reaching this conclusion, the court relied on the lack of any FWS explanation for its finding as to commercial nature, the lack of any evidence that FWS ever considered the commercial nature of the zoo's exhibition, and the additional fee which the zoo was in fact charging to view the pandas.⁸⁵ The court went on to decide that WWF would not suffer irreparable harm if the injunction were not granted, but that the public interest supported the grant of the injunction.⁸⁶ The court enjoined the zoo from charging an extra fee to view the pandas, but permitted the exhibition itself to continue.⁸⁷

The limited remedy that the court actually granted should not obscure WWF's striking success in this case. Here, the court brought CITES regulations to bear against a non-profit zoo that had complied with the law in its import of the pandas, even when a stringent standard of review favored the zoo's position. As a result of this case, FWS revised its panda permit policy to incorporate WWF's objections,⁸⁸ and China announced that it would no longer loan giant pandas or endangered golden monkeys to the United States.⁸⁹ This panda controversy may also result in a greater awareness of the requirements of CITES on the part of zoos and other non-profit organizations that deal with imported wildlife. They should take note that they, too, may be challenged successfully for a less than strict compliance with the requirements of CITES, through ESA, and possibly also the Lacey Act or other conservation legislation.

B. Criminal Cases

1. Rebuffed constitutional challenges

Defendants in criminal prosecutions have argued that the Lacey Act

84. *Id.* at *4.

85. *Id.*

86. *Id.* at *4-5.

87. *Id.* at *5.

88. Hill, *supra* note 76, at 255-56 n.158.

89. *Id.* at 255 n.158.

violates constitutional principles. As with their civil counterparts, criminal defendants have been uniformly unsuccessful with this attack. In *United States v. Lee*,⁹⁰ the United States Court of Appeals for the Ninth Circuit held that the Lacey Act does not unconstitutionally delegate legislative power through reference to foreign law.⁹¹ The court also resolved a due process argument in favor of the government by finding that the Act was sufficiently clear to provide warning that it proscribed violations of a Taiwanese regulation regarding wildlife taking.⁹²

In *United States v. Stenberg*,⁹³ the Ninth Circuit was faced with a constitutional challenge based on vagueness. In response, the court stated: "The Lacey Act clearly notifies individuals that participation in prohibited transactions involving wildlife with a market value greater than \$350 subjects them to felony prosecution."⁹⁴ With this somewhat circular reasoning, the court concluded that the Act was not unconstitutionally vague.⁹⁵

2. Judicial interpretation of "knowing violation"

Even though the Lacey Act requires a knowing violation for criminal penalties to apply, the defendant cannot always escape liability by showing that she obtained the proper permits for a transfer of wildlife. In *United States v. Doyle*,⁹⁶ the defendant possessed a permit issued by the proper state agency authorizing him to transfer falcons.⁹⁷ The United States Court of Appeals for Ninth Circuit found the evidence sufficient to sustain a conviction because the defendant knew that the origin of the falcons had been misrepresented and he was aware that the transaction

90. 937 F.2d 1388 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 977 (1992).

91. *Id.* at 1393-94; *accord* *United States v. Rioseco*, 845 F.2d 299 (11th Cir. 1988) (holding that the Lacey Act does not unconstitutionally delegate legislative power).

92. *Id.* at 1395. The court pointed out that the Lacey Act requires that such a violation be knowing. Thus, "the culpable intent requirements [of the Lacey Act] eliminate the chance that criminal punishment will be imposed on one who violates the Act as a result of having no English translation [of the underlying foreign law]." *Id.*

93. 803 F.2d 422 (9th Cir. 1986).

94. *Id.* at 434.

95. *Id.*; *see also* *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (9th Cir. 1989) (stating generally that the *scienter* requirement of the Lacey Act tends to mitigate its potential vagueness).

96. 786 F.2d 1440 (9th Cir. 1986).

97. *Id.* at 1441, 1443.

violated Montana law.⁹⁸

The Ninth Circuit expanded criminal liability under the Lacey Act in *United States v. Lee*,⁹⁹ in which the court held fishermen who participated in the import of salmon liable under the Act.¹⁰⁰ Although some of the fishermen subject to criminal penalties did not actually violate the regulation in question, the court reasoned that they either knew or should have known that the salmon had been taken in violation of a Taiwanese regulation.¹⁰¹ The court clarified that the Lacey Act punishes the importing of wildlife taken in violation of foreign law and not necessarily the actual violation of the foreign law.¹⁰² Although the Taiwanese regulation itself did not provide for any criminal sanctions, the participating fishermen were held criminally liable under the Lacey Act.¹⁰³

For cases brought under ESA, similar constructions apply. For example, in *United States v. Ivey*¹⁰⁴ the Fifth Circuit concluded that knowledge of ESA's provisions is not an element of any criminal violation of ESA.¹⁰⁵

3. Using the Lacey Act to impose stricter penalties than allowable under other underlying United States statutes

Courts have used the Lacey Act to impose stricter penalties than those mandated by the underlying law that had been violated. *United States v. Cameron*¹⁰⁶ involved a violation of regulations promulgated by the International Pacific Halibut Commission pursuant to an international fishing treaty between the United States and Canada.¹⁰⁷ Because these regulations had been incorporated into United States law via the Northern

98. *Id.* at 1443.

99. 937 F.2d 1388 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 977 (1992).

100. *Id.* at 1390.

101. *Id.* at 1393.

102. *Id.*

103. *Id.* at 1392-93.

104. 949 F.2d 759 (5th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3256 (1992).

105. *Id.* at 766.

106. 888 F.2d 1279 (9th Cir. 1989).

107. *Id.* at 1280 (citing Protocol Amending the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, United States-Canada, Mar. 29, 1979, 32 U.S.T. 2483 (1981)).

Pacific Halibut Act of 1982,¹⁰⁸ the defendant argued that the Lacey Act and the Halibut Act governed the same conduct. The defendant urged that the Halibut Act should therefore take precedence over the Lacey Act.¹⁰⁹ The Halibut Act does not criminalize the shipment, transportation, or sale of halibut taken in violation of the Act or any regulation passed pursuant to it, but instead provides for civil penalties.¹¹⁰ From this, defendant argued that Congress intended the shipment, transportation, or sale of halibut to be free of criminal consequences.¹¹¹

The court rejected this argument on two grounds.¹¹² First, the court noted that the amended Lacey Act predated the Halibut Act, and therefore Congress could have exempted the Halibut Act from enforcement under the Lacey Act if that had been its intention.¹¹³ Second, the court pointed out that the penalties for taking halibut under the Halibut Act were based on strict liability, while the criminal penalties under the Lacey Act depended on *scienter* or knowledge.¹¹⁴ It would be reasonable to suppose that Congress had intended the less severe civil penalties of the Halibut Act to accompany the less culpable offense of taking halibut without knowledge.¹¹⁵ In rejecting the defendant's argument that the Lacey Act only comes into play when the underlying statute has weak enforcement provisions, the court also cited Congress' failure to exempt the Halibut Act from the Lacey Act's criminal penalties.¹¹⁶

The court also interpreted the disclaimer provision of the Lacey Act so as not to prevent Lacey Act prosecution based on an underlying federal statute.¹¹⁷ In doing so, the court looked at the congressional intent to strengthen and support existing wildlife laws which lay behind the Lacey Act.¹¹⁸ It decided that to fulfill that purpose the Act had to be applied to conduct that was already regulated by an existing treaty, state or federal

108. 16 U.S.C. §§ 773-773k (1988).

109. *Cameron*, 888 F.2d at 1282.

110. *Id.* (citing 16 U.S.C. § 773(e)(a)(5), (f)(a) (1988)).

111. *Id.* at 1282.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1282-83.

117. *Id.* at 1283-84. The disclaimer provision reads, "Nothing in this chapter shall be construed as . . . repealing, superceding, or modifying any provision of Federal law" 16 U.S.C. § 3378 (1988).

118. *Id.* at 1284.

law, regulation, or tribal law.¹¹⁹ This reading of the disclaimer provision, which applies only to federal laws and not to treaties or state laws, narrows the potential use of the disclaimer by defendants.

4. *Liability under amendments to CITES that occurred after implementation*

In *United States v. Ivey*,¹²⁰ the defendant argued that his conviction under ESA of conspiracy to buy illegally imported Mexican bobcat hides was invalid because amendments to CITES including bobcats within its protection were not added until after the implementation of CITES through ESA.¹²¹ The court agreed with the defendant that CITES is not self-executing,¹²² but held that once CITES had been implemented in the United States by ESA, amendments to CITES that added species to its protection were enforceable under ESA.¹²³

5. *Unique sentencing considerations*

The criminal Lacey Act cases discuss several factors that a court may need to consider in sentencing after a conviction has been obtained. Although many of these factors, of course, are universal to criminal cases,¹²⁴ some special considerations exist.

In *United States v. Asper*¹²⁵ the court looked at factors unique to the Lacey Act or ESA in examining the effect of the commercial context of illegal wildlife trade on sentencing. The defendant claimed that his for-profit museum, for which the contraband body parts of endangered

119. *Id.* at 1283-84 (citing COUNCIL ON ENVIRONMENTAL QUALITY, THE EVOLUTION OF NATIONAL WILDLIFE LAW, S. REP. NO. 123, 97th Cong., 1st Sess. 2, 4, reprinted in 1981 U.S.C.C.A.N. 1748, 1751). The court drew its reasoning by analogy from its earlier decision in *United States v. Sohapp*, 770 F.2d 816 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986) (Native American prosecuted under the Lacey Act for violations of tribal fishing laws).

120. 949 F.2d 759 (5th Cir. 1991), cert. denied, 61 U.S.L.W. 3256 (1992).

121. *Id.* at 763-64.

122. *Id.* at 764.

123. *Id.* at 764-65.

124. *E.g.*, *United States v. Brummett*, 947 F.2d 951 (9th Cir. 1991) opinion available on Westlaw, DCTR database (increasing defendant's offense level due to defendant's aggravating role in a conspiracy to traffic illegally in cactus plants).

125. 753 F. Supp. 1260 (M.D. Pa. 1990), aff'd, 941 F.2d 1203 (3rd Cir. 1991).

species had been intended, did not create a commercial purpose which would increase his offense level because the venture operated at a loss.¹²⁶ The court rejected the argument and found that a commercial purpose was involved.¹²⁷ The court then needed to determine whether the offense level was subject to further increase based on the value of the wildlife. Unfortunately, no market existed for the wildlife at issue.¹²⁸ The court decided that it could consider the appraisal of taxidermists because there was no fair market value available.¹²⁹ The court deemed the substantial nature of defendant's conduct an alternative ground for increasing his sentence.¹³⁰ Defendant had killed a large male Jentink's duiker, only one to two hundred of which existed at the time in the wild.¹³¹

III. CONCLUSION

In the past few years, the volume of both criminal and civil cases under the Lacey Act and ESA have increased dramatically. Courts have interpreted these laws to maximize the number of violators punished. This indicates that the courts of the United States are now aware of these laws and are willing to use them whenever FWS discovers a violation of CITES or the wildlife laws of the United States or any foreign country.

The United States represents a significant enough portion of the world wildlife trade¹³² that increasingly strict United States enforcement of CITES and other wildlife laws may have a noticeable effect on the illegal wildlife trade. Of course, the government, as represented by FWS, still falls very short of actually detecting enough wildlife violations to make a serious dent in the illegal trade. Even with a limited number of cases actually reaching the courts, though, the high visibility of a case such

126. *Id.* at 1280.

127. *Id.*

128. *Id.* at 1281.

129. *Id.*

130. *Id.* at 1282.

131. *Id.*

132. Of the at least five billion dollars declared value of worldwide plant and animal trade, the United States accounts for up to one third. Kosloff and Trexler, *supra* note 1, at 10223.

as the Toledo zoo panda exhibition¹³³ helps to create a climate of intolerance for infractions of the laws regulating wildlife trade. Increased enforcement by United States courts at least strengthens one link in the chain of wildlife law enforcement, even if other weak links remain.

133. *World Wildlife Fund v. Hodel*, No. 88-1267, 1988 WL 66193 (D.D.C. 1988); see also *supra* text accompanying notes 73-89 (elaborating on the facts, holding, and potential ramifications of *World Wildlife Fund*).