

**LEGAL SOLUTIONS TO HELP SAVE
THE VAQUITA FROM EXTINCTION**

MAY 2021



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FOREWORD

Harry Wright
CEO of The Conservation Project International

It has been a joy to work with the team at Kennedys Law and all the law participants from Vaquita Hacks in compiling this legal White Paper. The legal White Paper highlights new dynamic legal solutions to protect the critically endangered vaquita and to tackle the insidious criminal syndicates behind the illegal Totoaba trade.

Over the course of two days in December at Vaquita Hacks, lawyers and law students from around the world came together to draft five new legal solutions (encompassing criminal, civil and international law) for the Vaquita and all the marine life in the Sea of Cortez. The results were remarkable and by working together in a spirit of collaborative determination we have shown that lawyers from different sectors, jurisdictions and experience can play a vital role in developing new legal approaches to protect endangered wildlife.

I want to thank all the participants for their enthusiasm, creativity, and ingenuity and now look forward to working with Kennedys Law to implement the findings of this White Paper.



Andrea Crosta
Executive Director of the Earth League International

The vaquita is the rarest and most endangered marine mammal in the world, and the reasons are crime and greed. It is now a global symbol for environmental protection, a symbol of what we are doing to Earth. But the vaquita's story is also a case study that shows where wrong strategies and poor knowledge can lead us: to an epic failure of conservation. It is vital to find more effective legal solutions as soon as possible, not only to protect the vaquita, but all the marine life in the Sea of Cortez, threatened by the international criminal organizations trafficking totoaba.

On behalf of the vaquita and all the marine life of the Sea of Cortez, I would like to thank all the participants and especially Kennedys Law for all of their hard work in putting together this legal White Paper.



Shamini Jayanathan
Barrister-at-Law
Senior Prosecution Advisor, United Nations
Office of Drugs and Crime



A bitter twist of fate for many countries enjoying a rich diversity of wildlife is that they suffer with fundamentally weak rule of law. Numerous international conventions that demand commitment towards protecting the planet's biodiversity and addressing organised crime and corruption have yet to result in sustainable and long term impact in countries where the delivery of criminal justice is weak. Despite declarations and resolutions passed over the last 10 years that call for wildlife trafficking to be tackled with the same vigour as governments approach drugs, arms and human trafficking, we continue to watch the planet's biodiversity decline at a rate that suddenly places our own human existence into question.

In order to deter such crimes, criminal justice must deliver strong prosecutions, trial without delay and proportionate and consistent sentencing. Wildlife crime can provide a softer platform for initiatives that can be piloted in this narrow context whilst creating solutions that can bleed out to the entire criminal justice system for the benefit of all. The current unpredictability that exists in so many criminal courts around the world is exploited by criminal elements who corrupt, intimidate or simply -and without consequence – evade the system.

This white paper comes at a time when the planet has never been more alive to the damage caused by humankind's insatiable appetite for wildlife. Drawing on initiatives delivered across Africa – initiatives that have raised the implementation of criminal justice for all crimes, not just wildlife, this white paper offers surgical solutions that can be scaled up to deliver a stronger criminal justice system as a whole.

The Vaquita is in danger of joining the 160 species declared by IUCN as extinct in just the last decade. As Mexico rescinds so many of the protections afforded to the Vaquita, the urgency of this work cannot be overplayed. New ideas and innovative thinking are key to preventing the demise of this – and other species. It was a privilege to engage with such passionate and lively minds in designing the concepts outlined in this paper that identify practical and achievable interventions that have had demonstrable impact in other jurisdictions. For so many species, time has run out. We must not allow the Vaquita to fall victim to the same fate.

Lewis McAuley-Jones
Associate at Kennedys Law

The vaquita is now the most endangered marine mammal in the world. We cannot sit and watch. We must act now. Extinction of a species is irreversible. With thanks to Harry Wright and The Conservation Project International, the Vaquita Hacks event allowed like-minded lawyers and law students to come together, express their shared passion for wildlife, and put forward solutions to help save the Vaquita from extinction. Despite current estimates that only 5 to 10 Vaquita remain, genetic analysis has shown little sign of inbreeding. We have scientific evidence to show that it is possible for the Vaquita population to recover, however, appropriate human intervention must be taken for the Vaquita to stand a chance.

This White Paper and the proposed solutions contained herein focus on saving the Vaquita from extinction, however, it is also put forward in representation of what the Vaquita represent – the decline of one of the richest ecosystems on Earth in desperate need for immediate human intervention. With appropriate action, there is still time to save the Vaquita and the Gulf of California’s ecosystem. I hope that the contents of this White Paper and the success of the Vaquita Hacks event encourages others to step forward and engage in these important issues.



ACKNOWLEDGEMENTS

This paper was prepared following the Vaquita Hacks event held in December 2020. The hackathon, launched by The Conservation Project International, was the world's first hackathon dedicated to finding innovative, technological and artificial intelligence solutions to save the vaquita from extinction. The hackathon was delivered in partnership with global experts from Earth League International, Earth Hacks and the Countering Wildlife Trafficking Institute. Vaquita Hacks attracted over 100 participants including lawyers, students and early career conservationists from across the world.

The purpose of Vaquita Hacks was to work with students and early career conservationists to help develop new technological solutions to assist with Earth League International's investigatory work in disrupting the totoaba cartels' illicit supply chain and to help save the vaquita from extinction. The technological learnings from the hackathon are now being applied to other wildlife trafficking projects around the world.

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GLOSSARY

AML	Anti-Money Laundering
ARINSA	Asset Recovery Inter-Agency Network for Southern Africa
ARIN-AP	Asset Recovery Inter-Agency Network for Asia and the Pacific
CARIN	Camden Asset Recovery Inter-agency Network
CBD CoP15	Fifteenth meeting of the Conference of the Parties to the Convention on Biological Diversity
CDD	Customer Due Diligence
CIRVA	Comité Internacional para la Recuperación de la Vaquita (International Committee for the Recovery of the Vaquita).
CITES	The Convention on International Trade in Endangered Species of Wild Fauna and Flora
CNBV	Comisión Nacional Bancaria y de Valores
CONSAR	Comisión Nacional del Sistema de Ahorro para el Retiro
EIA	The Environmental Investigation Agency
ELI	Earth League International
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
GAFILAT	Financial Action Task Force of Latin America
HMRC	Her Majesty's Revenue and Customs

IATA	The International Air Transport Association
ICCWC	The International Consortium on Combating Wildlife Crime
IMO	International Maritime Organisation
IUCN	The International Union for Conservation of Nature
NPC	China's National People's Congress
PROFEPA	Attorney General's Office of Environmental Protection
SEMARNAT	The Ministry of Environment and Natural Resources
SHCP	Secretaría de Hacienda y Crédito Público
SME	Subject Matter Expert
TCM	Traditional Chinese Medicine
UN	The United Nations
UNODC	The United Nations Office on Drugs and Crime
WCO	The World Customs Organization

SUMMARY AND OVERVIEW

THE VAQUITA

The vaquita (*Phocoena sinus*) is a small porpoise that lives exclusively in the northern Gulf of California (Sea of Cortez) in Mexico.

The Gulf of California comprises 244 islands, islets and coastal areas and is located in north-eastern Mexico. The area is home to 695 vascular plant species and 891 different types of fish species, totalling 39% of the world's total number of species of marine mammals, as well as one third of the world's marine cetacean species.

Further, the 900 mile area is home to more than 170 seabirds and five species of marine turtles that feed or nest there. A number of endangered and vulnerable species are also present in the Gulf



Source – Google Maps

of California in addition to the critically endangered vaquita.

The vaquita is commonly called the 'sea panda' due to the striking dark rings around their eyes and is the only species of

porpoise found in warm waters. Vaquitas are known to be shy and elusive – something which has added to the complexities of the conservation projects that have been carried out to-date.



Source – Wildfor.life

The life expectancy of vaquitas is estimated to be around 20 years and the age of sexual maturity is thought to be between the ages of 3 and 6.¹

Unfortunately, the plight of cetaceans seen globally and the fragile ecosystem in the Gulf of California is exemplified by the rapid decline of the vaquita. Current estimations suggests that only 5-10 individuals remain. The International Union for Conservation of Nature (IUCN) listed the conservation status of the vaquita as Critically Endangered in 1996.

The population of the vaquita was estimated to be approximately 600 in 1997, 100 in 2014, 60 in 2015, 30 in 2016 and between 5 and 10 today. Since 1997, the vaquita has seen a 92% population decrease. The vaquita

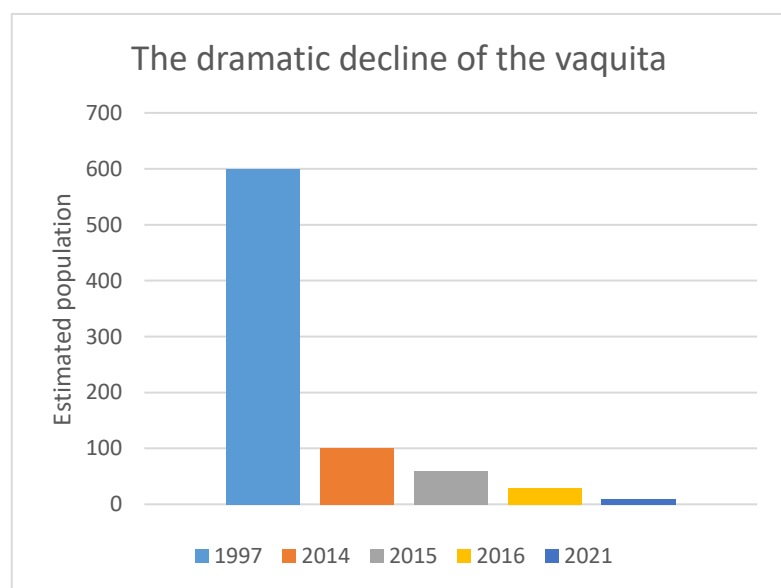
will soon be extinct unless action is taken.

Vaquita are important to the wider ecosystem in the Gulf of California, foraging on a variety of fish species, crustaceans and squids and are prey to members of the shark family. A healthy vaquita population supports the ecosystem by balancing the populations of other species in an interdependent food chain.

CAUSES OF THE VACQUITA'S DECLINE

The vaquita population has dramatically declined due to the use of gillnets. They are also indirectly threatened by illegal wildlife crime that involves the catching and international trade of another critically endangered species – the totoaba.

The totoaba (*Totoaba macdonaldi*) is a species of marine fish which is also endemic to the Gulf of California. It has been illegal to catch totoaba since 1975 - the



¹ "Life history of the vaquita, *Phocoena sinus* (Phocoenidae, Cetacea)". *Journal of Zoology*. 239

same year that it was placed on the Mexican Endangered Species List. Despite the laws against fishing for totoaba, they continue to be illegally caught and traded. Sadly, totoaba is considered a delicacy in Chinese cuisine and their meat and swim bladders are erroneously thought to have medicinal value by improving blood circulation, boosting fertility and curing arthritis. No studies have proven these claims to be true. Dried totoaba swim bladders are commonly referred to as the “cocaine of the sea” or “fake gold” due to their value in illegal markets, and are known to be valued at a price similar to or greater than gold per kilogram. For comparison, the value of gold per kilogram reached \$50,000 in 2020.

The drastic decline of the vaquita is also the result of the illegal use of gillnets. Gillnets dangle from the water’s surface and are either anchored in place or allowed to drift. As fish attempt to pass through, the netting gets caught in their gills and traps them. Gillnets are entirely nonselective – meaning that they often ensnare species other than those being targeted. Vaquita (and many other species native to the Gulf of California) are caught in gillnets. Once caught, most vaquita drown in the struggle to escape and die entangled in the gillnet. After being pulled to the surface, their corpses are discarded into the sea. Furthermore, gillnets are commonly lost or abandoned at sea, leading to ‘ghost fishing’ – a term used to describe discarded fishing equipment that

continues to catch animals for many years after the equipment has been abandoned.

Despite government regulations - including a partial gillnet ban in 2015, a gillnet exclusion zone in 2017 and a ban on night fishing, there continues to be illegal fishing in the vaquita’s habitat commonly involving the use of gillnets to target totoaba.

SAVING THE VAQUITA

Despite the small population and rapid decline of the vaquita, there is hope. In recent years, two vaquita calves have been spotted in the Gulf of California and genetic analysis of the vaquita has found little sign of inbreeding or other risks often associated with small populations.²

² Reference genome and demographic history of the most endangered marine mammal, the vaquita. *Molecular Ecology Resources*, 2020

UN ASSET RECOVERY AND INTER AGENCY PROGRAMME

INTRODUCTION

The creation of a UN Asset Recovery Inter-Agency Network in the Gulf of California that includes member states such as USA, Mexico, China, and countries that form part of the illegal totoaba trafficking routes between Mexico and China, will help tackle the issues threatening extinction of the vaquita.

Furthermore, strategies that encourage the exchange of information and model legislation in asset forfeiture, confiscation and money laundering between member states will help to reduce the financial incentives for and increase the risk to those who poach and traffic the totoaba fish.

OVERVIEW

The purpose of introducing an Inter-Agency Network (“the Network”) is to target international totoaba supply chains and eliminate illegal trafficking of the totoaba fish from the Gulf of California. The sharing of information between the Network will disrupt criminal activities and encourage the confiscation of the totoaba being trafficked, confiscate the proceeds of selling totoabas, and penalise companies or organisations who have engaged themselves directly or indirectly in the illegal wildlife trade.

Although there is existing legislation in these countries to protect wildlife, such as the General Wildlife Law in Mexico, the Lacey Act and the Pelly

Amendment in the US, and the Wildlife Protection Law 2018 in China, the legislation is inconsistent and has various loopholes. In addition, the legislation tends not to be enforced with sanctions that are significant enough to deter those involved in illegal wildlife trafficking. In some cases, the legislation is often not enforced at all. The Network will encourage member states to adopt a co-ordinated approach, leading to synchronisation of legislation and enforcement actions in relation to wildlife crime.

Additionally, member states would be encouraged to use the Network to make formal money laundering requests under Article 6 of the United Nations

Convention against Transnational Organized Crime.³ This may be particularly useful for states such as Mexico, where the Mexican Government are reluctant to take action due to local distrust and may therefore appreciate international assistance.

Considering the vital role that the Gulf of California plays as a habitat to a wealth of endangered and vulnerable wildlife, there is a strong argument for it be given additional protection in the form of a UN Asset Recovery and Inter Agency Programme.

HOW DO OTHER UN ASSET RECOVERY AND INTER AGENCY PROGRAMMES OPERATE?

The UN already has several Asset Recovery Networks in operation across the world, most prominently in Africa, where there are networks for West, East and South Africa. For example, the Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) works to establish the exchange of information and good practice, establish a network of contact points and act as an advisory group to appropriate authorities.⁴

Activities of ARINSA include holding annual general meetings, steering committee meetings and running

workshops (including training on tracking proceeds from wildlife and forestry crime, money laundering, exhibit handling and financial intelligence). ARINSA also runs a mentorship programme where experienced financial investigators work with member countries to help them establish their asset forfeiture regimes and other legal regimes to improve the law enforcement responses of members in relation to anti-money laundering regimes. In addition, ARINSA runs a Prosecutor Placement Programme which is designed to give prosecutors with limited experience a more developed understanding of asset confiscation practices by placing them in an experienced confiscation legal team

³ https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THEREO.pdf

⁴ United Nations Office on Drugs and Crime (UNODC) Asset Recovery Inter-Agency Network Southern Africa (ARINSA) - Fitz-Roy Drayton. <http://www.cicad.oas.org/apps/Document.aspx?Id=4038>

for a short time period (1 month). ARINSA are planning on running a similar placement programme for investigators.⁵

SUCCESSSES OF OTHER ASSET RECOVERY AND INTER AGENCY PROGRAMMES

ARINSA's 2019 report reveals that since the Network's inception in March 2009:

(i) A number of member countries had established asset forfeiture funds/management units;

(ii) The number of new money laundering cases being brought by member states had increased by 69% from 2016 to 2017;

(iii) The number of new asset forfeiture

cases increased by 35% in 2015 to 2017;

(iv) The number of new preservation order cases increased by 200% from 2015 to 2017;

(v) The number of new confiscation order cases increased by 500% from 2016 to 2017; and

(vi) The ARINSA Network has helped to target criminal activity including corruption, wildlife crime, illegal logging and forestry crime, extractive industries and illegal fishing as well as other criminal activities in Africa.⁶

It is hoped that a similar model protecting the Gulf of California could provide the same protection and help reduce the impact of wildlife crime such as

totoaba trafficking and help protect species, including the vaquita.

HOW CAN WE DRAW ON THE SUCCESSES OF ARINSA IN THE GULF OF MEXICO?

To draw on the successes of ARINSA and replicate them in the Gulf of Mexico, the Network should have three tenets:

(a) Upskilling - Upskilling should be provided through training, mentorship and placements – for investigators and relevant border and customs staff in countries where the relevant authorities are less experienced or effective. This may be particularly effective for countries like Mexico, which have struggled in the past to enforce compliance

⁵ <https://www.unodc.org/southernafrika/en/arinsa-members-sign-the-dar-es-salaam-declaration-on-strengthening-asset-forfeiture-for-development.html>

⁶ https://www.unodc.org/documents/southernafrika//Publications/TransnationalOrganisedCrime/ARINSA_Annual_Report_2020_Final.pdf

with its wildlife laws and the influence of cartels.⁷ In addition, the Network should help relevant countries set up effective asset recovery units to ensure assets are effectively seized, helping to remove the incentives for those who engage in wildlife trafficking.

Examples of how upskilling could be achieved include use of international workshops (to facilitate discussion and the general upskilling of investigators/prosecutors), national/regional workshops (to target specific issues in a country/region as identified in working groups and bringing on board subject matter experts (SMEs) to train/facilitate discussions of best practice), and mentorship and placement programmes similar those facilitated by ARINSA.

(b) Connecting - The Network should seek to enable more regular and more efficient exchange of information and best practice, and to identify specific areas of concern (both thematic and geographical) for further work. Given that the trafficking of illicit wildlife occurs across multiple borders, this proposal would seek to foster ongoing cooperation between multiple national authorities.

To help enable this, it would be useful to identify three key points of contact in each member state, to act as representatives and SMEs in various functions (as outlined below). This would involve having:

(i) Two practitioners (one prosecutor and one investigator) as well as a sponsoring senior within a relevant

government agency for each member state.

(ii) A Steering group, attended by key seniors to assist in the preparation of the annual conference agenda and identify areas to explore by separate working groups. This Steering group would select a president from its members to act as host and to be responsible for external communications on behalf of the group.

(iii) Working groups (set up by the Steering group) to be attended by relevant practitioners to examine and report on practical, legal, investigative issues and present recommendations.

(iv) An Annual General Meeting to be held between all points of contacts to foster relations.

⁷ Elephant Action League, Wildlife Crime Division - 'Operation Fake Gold'

(v) Engagement with other Asset Recovery and Inter Agency Networks such as ARINSA.⁸

(c) Influencing - Given the necessary concentration of SMEs in the Network, it should also be able to act as an advisory group to appropriate authorities seeking advice, as well as seeking to influence less amenable member state governments through the provision of relevant data and best practice arguments.

This could be put in place for the Gulf of Mexico by presenting recommendations to policy makers through sponsoring seniors in each member state.

Although Mutual Legal Assistance requests and informal assistance between agencies are

already possible, it is hoped that the Network described above will provide a framework to encourage and inform the wider uptake of such measures by member states.

FOCUS JURISDICTIONS

The supply chain of the totoaba begins in the Upper Gulf of California, where the totoabas are commonly taken to San Felipe in California, USA, or Puerto Peñasco in Sonora, Mexico, to be sold and moved to a drying location.⁹

One of the common routes for the illegal trafficking of totoaba is as follows:

(a) Baja California, Mexico - criminals working for cartels

provide Fishermen with gillnets;

(b) Sea of Cortez- Fishermen poach totoaba and remove the swim bladder (maw);

(c) San Felipe/Puerto Peñasco, Mexico- the swim bladder is sold to the first buyers, who prepare the bladder to be transported and sold to a second buyer;

(d) Mexico (Mexicali, Tijuana, Ensenada, Calexico, Mazatlán, Puerto Peñasco, Guaymas or La Paz) – after being purchased, the swim bladder is dried and moved. It is also common for the swim bladder to be sold to Chinese traffickers who organise international shipment.

Criminals and local fishermen in Mexico play a substantial part in the organisation, capture, selling, and

⁸ <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1803851e.pdf>

⁹ Wildlife Crime Division EAL Operation Fake Gold July 2018

transportation of the totoaba and therefore Mexico would be a crucial member of the Network.

In addition, multiple other countries are also present in the trafficking routes of the totoaba swim bladder and as such would also be valuable members of the Network.

For example, Investigations by the Environmental Investigation Agency (EIA) between 2015-2018 uncovered that Taishan city in Guangdong's Jiangmen plays a central role in the trafficking of the totoaba, with connections to many criminals based in Mexico.¹⁰

Further, totoaba swim bladders are commonly smuggled into China via air routes. Along these air routes, often

multiple stops are taken by traffickers to avoid airport controls, including in the USA, Hong Kong, Japan, Beijing or Vietnam.

There is also evidence of attempted smuggling of the totoaba to South Korea, Venezuela, and Puerto Rico. Hong Kong in particular appears to be a vital point in the supply chain for the purchase of large quantities of the totoaba swim bladder¹¹.

Moreover, information regarding trafficking routes was published following an investigation conducted by EIA in June 2017, when the EIA looked into the operation, trading and transportation of totoaba. The investigation identified that a cartel in Sinaloa State dominated the totoaba trade via a

shipping agent located in Hong Kong, through whom trafficked goods are transported to Guangdong, China. Other investigations identified that totoaba swim bladders were transported via small packages in luggage, through countries such as Japan, Malaysia, Vietnam and South Korea.

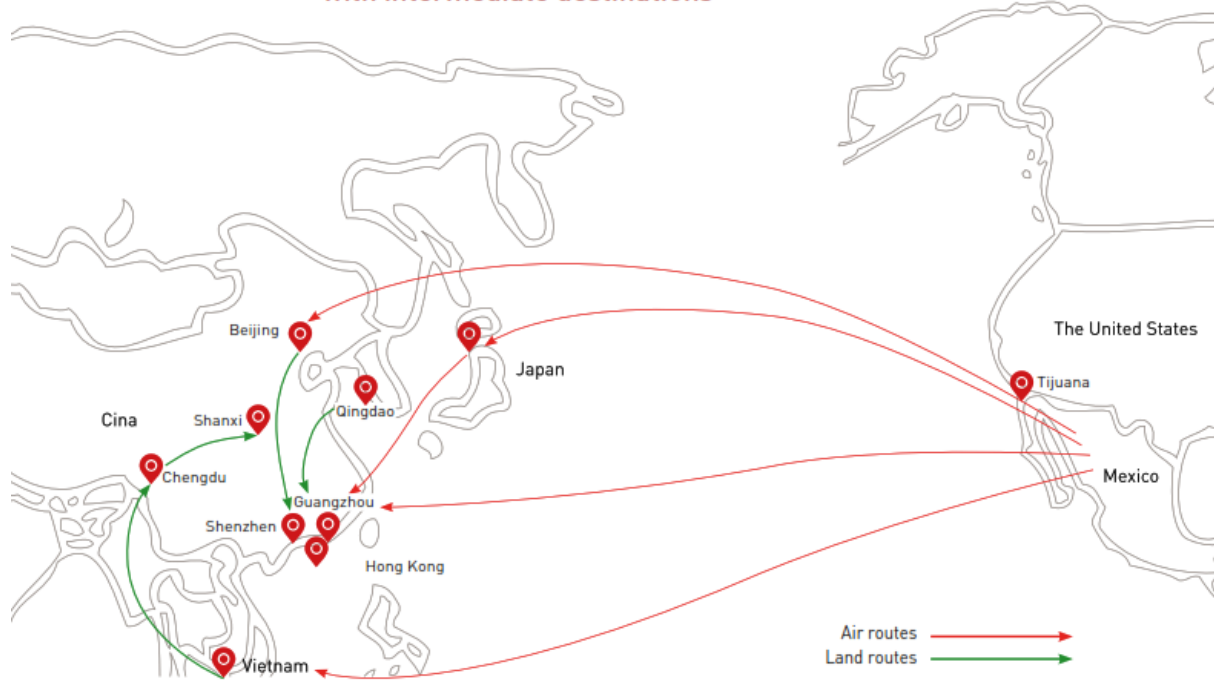
Additionally, the EIA found that the USA also has strong links to the illicit totoaba trade. Not only is there an important trafficking hub on the US border (Baja California State), but there are also investors in the trade of totoaba swim bladders located near San Diego.

¹⁰ CITES's Last Chance: Stop the Illegal Totoaba Trade to Save the Vaquita August 2019 <https://eia-international.org/wp-content/uploads/EIA-report-cites-last-chance-single-pages-for-print.pdf>

¹¹ Wildlife Crime Division EAL Operation Fake Gold July 2018

<https://earthleagueinternational.org/wp-content/uploads/2018/07/EAL-Operation-Fake-Gold-Final.pdf>

Totoaba smuggling routes from Mexico to China with intermediate destinations



Source – ELI
(Operation Fake Gold,
Crosta et al. 2018)

In order for the Network to be effective, then, those countries discussed above and which are otherwise present on totoaba trafficking routes should form part of it. However, criminals have developed multiple trafficking routes and are known to bribe those at border control

to ensure that they are able to transport the bladders. For example, evidence has shown that the Chinese authorities often warn traffickers before checks are undertaken at borders, which allows the traffickers time to hide the totoaba swim bladders to pass them through customs.¹² In order to

best prepare for criminals establishing further or alternative routes, other surrounding countries can form part of the Network, including the Philippines, Colombia, Indonesia and Thailand.

The suggested list of countries to be invited to join the Network is therefore as follows;

¹² <https://www.theguardian.com/environment/2017/may/16/chinese-appetite-totoaba-fish-bladder-threatens-rare-vaquita>

Mexico, China, the USA, Hong Kong, Japan, Vietnam, South Korea, Venezuela, Malaysia, the Philippines, Colombia, Indonesia and Thailand.

KEY STAKEHOLDERS

It is imperative that key organisations that already contribute to the assistance of protection of wildlife and asset recovery are part of the Network, as their assistance and expertise will be highly valuable. We have therefore identified the following organisations that should be invited to be members of the Network:

(a) The International Consortium on Combating Wildlife Crime (ICCWC), comprising The Convention on International Trade in Endangered Species of

Wild Fauna and Flora (CITES), INTERPOL/StAR Global Focal Point Network, the United Nations Office on Drugs and Crime (UNODC), the World Bank and the World Customs Organization (WCO);

(b) Camden Asset Recovery Inter-agency Network, known as (CARIN);

(c) Asset Recovery Inter-Agency Network for Asia and the Pacific (ARIN-AP);

(d) Financial Action Task Force (FATF)

(e) Financial Action Task Force of Latin America (GAFILAT);

(f) Red de Recuperación de Activos de GAFILAT; and

(g) International Anti-Corruption Coordination Centre.

Government officials from the suggested member countries and their UN representatives should also be considered key stakeholders.

In addition, it would be beneficial to have assistance from organisations that have already established Asset Recovery Inter-Agency Networks.

As previously mentioned, the UN has several successful Asset Recovery Networks already in operation. CARIN is a reputable example of this and has existing knowledge which may assist in helping develop protection for the vaquita.¹³

Engaging with the ICCWC would also be valuable due to their

¹³ Directory of Asset Recovery Networks Stolen Asset Recovery Initiative 4 June 2018 <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1803851e.pdf>

experience in facilitating the organisation and cooperation between their stakeholders that have helped to combat crime.¹⁴

It may also be useful for the Network to work with INTERPOL/StAR

Global Focal Point Networks to look at how they have established a secure communication network for law enforcement officers known as Focal Points.¹⁵ Focal Points works by allowing stakeholders to form, share and exchange information related to wildlife crimes and asset recovery.

Further, as the international trade of the totoaba is governed

by Article III of the CITES Convention, CITES would be a useful member to have on board due to their extensive knowledge on this issue.¹⁶

UPTAKE BY PROPOSED MEMBER COUNTRIES

While most of the proposed member countries have an existing interest in combating wildlife crime, mainland China has not formed part any other Asset Recovery Inter-Agency Networks (unlike the other proposed member countries) and given this, it is unclear whether China would choose to join the Network.

Despite this, China has been a party of CITES

since 1981 and in 2018 issued its own wildlife protection laws. Additionally, CITES CoP18 Briefing Document from August 2019 noted in relation to the vaquita that “[a]t SC69 information from Mexico, China and the USA was considered and the countries were encouraged to continue collaboration and implement measures agreed at August 2017 Trilateral meeting.”¹⁷.

In addition, recent EIA reports show that China is strengthening enforcement efforts in response to wildlife crime, including making further seizures of assets and making further arrests which in turn is leading to more prosecutions of those engaged in wildlife crime. The EIA reports also reveal that China is

¹⁴ ICCWC Strategic Programme 2016-2020

https://cites.org/sites/default/files/eng/prog/iccwc/ICCWC_Strategic_Programme_2016-2020_final.pdf

¹⁵ Directory of Asset Recovery Networks Stolen Asset Recovery Initiative 4 June 2018

<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/V1803851e.pdf>

¹⁶ <https://cites.org/eng/disc/species.php>

¹⁷ EIA Briefing Document: CITES CoP18 <https://eia-international.org/wp-content/uploads/EIA-Briefing-Documents-CITES-CoP18.pdf>

looking at its sentencing.¹⁸

Further, in light of recent events due to the COVID-19 pandemic, China is reviewing its wildlife protection legislation in the hope of strengthening its current laws.¹⁹ As such, these activities suggest that China may be willing to join the Network if invited.

While it is desirable that all invited member countries would join the Network, some of these countries may choose not to. Even in this instance we would hope that the Network would have a positive impact by disincentivising participation in the illicit totoaba trade at several points along the supply chain.

¹⁸ CITES's Last Chance: Stop the Illegal Totoaba Trade to Save the Vaquita August 2019 <https://eia-international.org/wp-content/uploads/EIA-report-citess-last-chance-single-pages-for-print.pdf>

¹⁹ <https://globalinitiative.net/analysis/china-wildlife-covid/>

SENTENCING GUIDELINES AND JUDICIAL EXCHANGE

INTRODUCTION

The judicial framework that currently operates in Mexico provides a basis for wildlife protection yet the judicial system has a low number of prosecutions and fails to deter those involved in the illegal totoaba fishing trade.

Mexican enforcement efforts have been ineffective in addressing illegal fishing. Incredibly, the latest CIRVA report noted a “clear increase in illegal fishing for totoaba”, based on the number of illegal gillnets removed from the area.²⁰ In 2018, 659 pieces of fishing gear were removed, 67% of which was active illegal totoaba gear. A high correlation was shown

between the locations where the illegal gear was found and vaquita habitat.²¹ Net removal teams are facing violent attacks from illegal fishers, further curtailing their success.

Despite there being a basis for wildlife protection in Mexico, it has proved difficult to secure nature conservation outcomes in Mexico. Mexico’s geographic and geopolitical position makes it an ideal country of transit for those seeking to profit from trade in endangered species. 18.9% of illegal wildlife shipments intercepted at U.S. ports between 2005 and 2014 were exported from Mexico.²²

The suggested solutions put forward in this section are twofold:

1. Introduce a judicial exchange programme between the UK and Mexico whereby members of the UK judiciary, such as Judges and Prosecutors, are able to train their Mexican counterparts to better deal with wildlife crime offenders; and
2. Implement a series of sentencing guidelines for Mexican judges to implement, following consultation with international judges and industry experts to ensure proportionate and consistent sentencing of wildlife criminals.

²⁰ Totoaba macdonaldi. CITES Appendix 1

²¹ Report of the Eleventh meeting of the Comité Internacional para la Recuperación de la Vaquita (CIRVA), 2019.

²² Alejandra Goyenechea, Trends in Wildlife Imports from Latin America Denied Entry to the U.S (Washington D.C.: Defenders of Wildlife, May 2016).

CURRENT LEGAL FRAMEWORK IN MEXICO

In 2008, Mexico adopted an adversarial criminal justice system however, the reform to this system from a 'mixed inquisitorial' system was only complete in 2016. There have been numerous critics of this change. According to the Mexican Ministry of the Interior's 2012 survey of the Criminal Justice System, only 6% of Mexicans surveyed expressed confidence in the system and responders said the main problems were that criminals are not held accountable, the system is corrupt, the judicial process is slow and the service from public servants is poor.²³ Furthermore, corruption in Mexican federal agencies, state Governments and local authorities render law

enforcement ineffective²⁴ with a survey in 2017 finding that only 7% of Mexicans expressed a high level of trust in the police.²⁵

Enforcement of general wildlife crime law falls under the jurisdiction of the Federal Agency of Environmental Protection. These crimes are handled either through a judicial process or an administrative review. The judicial process means that the crime would be investigated by the police and then reported to a public prosecutor to take to Court. The administrative process goes directly through its Judicial Area Sub-Delegation. The main federal administrative tribunal is the Federal Tribunal for Administrative Justice, which has a specialised

chamber for environmental matters; however, definitive rulings from administrative tribunals can be challenged in the judiciary.

Unfortunately, wildlife crime is not pursued with the same vigour as drug-related crimes, so much so that it is very rare for wildlife crimes to be prosecuted at all. Cases are not reaching the prosecution stage, leaving sentencing guidelines somewhat redundant. A study conducted in the Selva Maya tropical forest revealed that the local Attorney General's Office of Environmental Protection (PROFEPA) only transferred 2% of illegal wildlife harvest and trade cases to public prosecutors - an incredibly low rate.²⁶

²³ <https://nccriminallaw.sog.unc.edu/comparing-criminal-justice-system-mexicos/>

²⁴ Crosta et al 2018

²⁵ <https://www.visionofhumanity.org/failing-justice-mexicos-institutional-weaknesses/>

²⁶ Akella & Cannon (2004)

The main statutes which govern environmental crime in Mexico include The General Wildlife Act; The General Law of Ecological Equilibrium and Environmental Protection; The Mexican Official Standard NOM-059-SEMARNAT-2010; and The Regulations of the General Wildlife Act. In November 2020, thanks to the Earth League International's Confidential Intelligence briefs, Mexican authorities arrested six suspected totoaba traffickers under the Mexico

Federal Organised Crime Act 2003.²⁷ This is the first time charges of this nature have been applied in relation to this piece of legislation, with authorities identifying the charges as falling under the category of 'Crimes Against the Environment'. In addition to legislation, there are a number of administration and enforcement bodies including The Ministry of Environment and Natural Resources (SEMARNAT); Directorate General for Wildlife; and The Attorney General's Office of

Environmental Protection.

When a defendant is sentenced for an environmental offence, Mexico's Federal Penal Code stipulates a range of sentences, however, they are usually short, and in most cases are no longer than seven years' imprisonment. Additionally, the actual time of incarceration is usually three-fifths of the sentence – assuming good behaviour. Furthermore, those sentenced for under five years' imprisonment may avoid further time in jail by a payment of a bond. This is of particular concern when considering the substantial amounts of money involved in environmental crimes. Article 417 imposes a penalty of one to nine years' imprisonment and a fine. This can be increased by an extra three years if the



Source –
Dreamstime.com

²⁷ <https://earthleagueinternational.org/2020/11/27/vaquita-mexico-arrests/>

offence was committed in a protected natural area. Additionally, there are specific sentencing for sea animals equating to nine years imprisonment. There are options outlined in Article 70, where it becomes possible to substitute sentences with fines or work within the community if the sentencing guidelines are under four years. It should be noted this could be used to assist tackling the implications of arresting fishermen and the trouble this causes in terms of turning communities against the efforts to stop trafficking.

CHINESE TRADERS

Mexico saw two major Chinese immigration waves in the 1880s and in the 1940s. The first one was fostered by the Chinese Immigration Act of 1882, which prohibited the entrance

of Chinese labourers in the United States. Chinese people settled mostly in Mexicali and Tijuana. Chinatowns in both cities have developed, forming an important cultural and economic hub for Chinese residents. Today, an estimated 5,000 Chinese people live in Mexicali and 15,000 in Tijuana. In 2008, direct flights from Tijuana to Shanghai were launched, resulting in an increase of the Chinese population in Tijuana.

Chinese traders are commonly wholesale buyers of totoaba swim bladders within the totoaba cartels. Chinese traders are also responsible for the preparation of the swim bladders for transit (both to China and the USA). The USA is both a transit and a demand country, although it is thought that the majority of the demand is from China.

As with Mexican traders, the Chinese traders use corruption as a means to smuggle totoaba swim bladders. The swim bladders' transfer between the Mexican traders and the Chinese traders occurs mostly in Mexicali and Tijuana, though it also occurs in Ensenada, Calexico, Mazatlan, Puerto Peñasco, Guaymas, La Paz, and Mexico City.

The Chinese totoaba network is well established and organised. They use smugglers to transport the totoaba swim bladders to China via air routes, taking indirect flights to avoid customs controls in China. ELI's investigation reveals that the Chinese traffickers are also involved in human smuggling and money laundering. The Chinese traffickers keep a relatively low profile compared to Mexican traffickers.

Although criminal gangs in Mexico that form part of the totoaba supply chain have responded to police efforts with violence, it appears less likely that the Chinese residents of Mexican cities will respond with violence due to the legitimate businesses that they own (and would face losing).

ANALYSIS

On the face of it, Mexico's General Wildlife Law may be considered "*the most comprehensive wildlife legislation ever enacted in Mexico*".²⁸ However, it is not enough. With only 2% of cases being passed to public prosecutors in 2004²⁹ and similar findings of "*prosecutions for these crimes rarely ensue*" in 2010 and in 2017.^{30 31} Simply enacting a piece of legislation to outlaw the totoaba swim

bladder is not enough. Instead, there must be greater assistance in providing support to prosecutors and judges to interpret the law and to know when it is appropriate to take these matters to court. Mexico is recorded as having significantly fewer judges per 100,000 inhabitants than the average nation and therefore needs solutions that will not just affect Mexico's approach to wildlife crime, but approach to crime as a whole. Solutions include an increased and effectively distributed judicial budget and severe penalties enforced upon those who fail to uphold the rule of the law or maintain their judicial independence.

JUDICIAL EXCHANGE PROGRAMMES

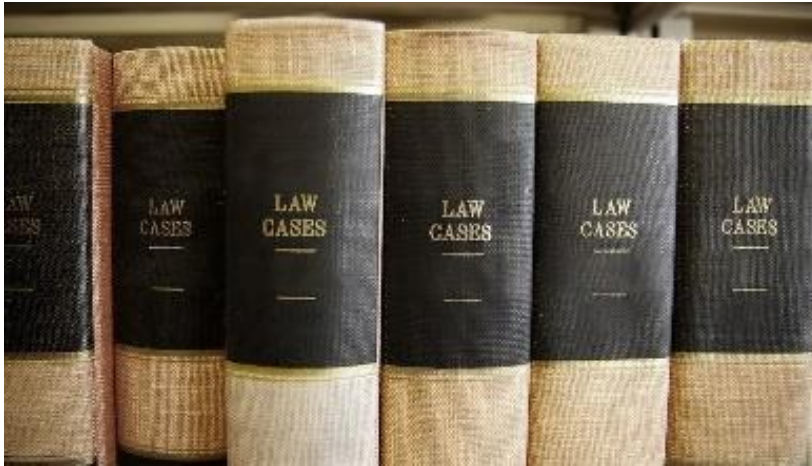
There is a problem with wildlife crime and the criminal justice pathway in Mexico; the current system does not effectively deter wildlife crime. Cooperation between the defendant, prosecutor and judiciary is poor and contributes to delaying the criminal justice pathway. Risks are currently low for those involved with wildlife crime; they know they are probably not going to get caught. The prosecutors (often evidence collectors like the police) might not understand the significance of the crime or have access to laws relevant to wildlife crime, leading to the prioritisation of other legal cases. This results in wildlife crime being put to the back of the

²⁸ Valdez et al (2010)

²⁹ Akella & Cannon (2004)

³⁰ Valdez et al (2010)

³¹ C4ADS 2017



Source – FindLaw.com

prosecution queue despite conservation and wildlife issues being recognised as a global concern.

The progression of trials is plagued with adjournments, leading to the loss of important exhibits, witness fatigue, and allows time for corruption and intimidation from those prosecuted to influence those involved in the criminal justice trial.

Building Mexico's prosecutorial capacity through a UK-Mexico judicial exchange training program and recognition of wildlife

trafficking's serious criminal convergence with other organised crime could drastically improve prosecution rates, conviction rates and sentence lengths in the Mexican judicial system. Combined with improved sentencing guidelines, this will deter wildlife criminals and disrupt the criminal pipeline at the source of the criminal supply chain. The incentive to fish totoaba and use gillnets will decline and hopefully give the vaquita a fighting chance of survival. With an amended legislative framework in wildlife crime and Mexican judicial

training, the Mexican Government will be better equipped to fight the existing and future wildlife trafficking issues.

The exchange will increase Mexico's legal reputation globally and improve and consolidate international relations through a collaborative judicial exchange platform. This will aid in helping to achieve global conservation objectives by addressing prevalent wildlife trafficking issues in Mexico, such as the totoaba.

It is proposed that visits would be reciprocal of Mexican judiciary to UK or UK judiciary to Mexico, to provide recommendations. The UK delegation should be made up of senior prosecutors, judges and judicial trainers from the judicial college with significant experience of criminal justice and

wildlife crime. If the exchange programme occurred in the UK, the visiting Mexican delegation should go through a selection procedure similar to the one highlighted in the European Judicial Training Network exchange guide that is organised by an established National Contact Point, particularly if Mexico has several institutions that are responsible for the training of judges.

Further, with the recent developments in virtual communications, it would be possible for meetings to take place remotely, in the form of video calls or conferences. This will allow meetings to take place more frequently and enable more regular contact between the parties involved.

The UK has neither the number nor severity of wildlife crime cases of Mexico. To encourage

an exchange programme that takes place in the UK, the UK will have to demonstrate its experience and high level of expertise in the wildlife crime legal area. Similarly, to encourage a UK delegation visit to Mexico, (a potentially contentious task) the UK will have to be able to provide evidence of high-quality legal consultancy and demonstrate achievable benefits for Mexico. Furthermore, the scheme should recognise the mutual benefits to both countries and should be carried out in a way that respects Mexico's culture, systems and judicial knowledge. A UK based exchange could run through a number of different formats and will depend on the jurisdictional needs of Mexico. For example:

(a) General two-week or one-week exchanges

would enable participants to familiarise themselves with a judicial system other than their own;

(b) Specialised exchanges would allow specialised judges and prosecutors to extend their expertise on a specific area of law (wildlife crime);

(c) Exchanges for court presidents and chief prosecutors would allow judicial leaders to shape their leadership and management skills;

(d) Exchanges for judicial trainers would allow participants to become familiar with the training methodologies and any training initiatives which apply in the host country;

(e) Long-term training periods would allow participants to become acquainted with the work, procedures and

decisions of the hosting bodies; and/or

(d) Remote meetings would allow for more regular contact and can be used as catch-up meetings between those taking place in person.

During the Programme, the two delegations can work together in a series of workshops, covering prescriptive case studies, sharing criminal court experiences relating to trials on the environment and wildlife trafficking. Workshops and seminars will be centred around the criminal justice pathway, wildlife crime and the wildlife crime sentencing guidelines used in the UK judiciary system.

It would be beneficial in Mexico for members of the public to be able to register to attend the

event on the UK Mexico Judicial Exchange programme through a website (designed similarly to the google document on the EU Taiwan Judiciary Exchange website ³²). The programme could seek to organise specialist communication with the Mexican public in Baja California to gain further insight into the wildlife trafficking issues surrounding the totoaba. It would also be beneficial for the UK delegation to have a series of meetings with elected and appointed officials from relevant Government departments and other key stakeholders including, for example, the secretary of states for the Environment and Security.

Participants of the judicial exchange would be able to, observe, compare and learn about:

(a) The judicial environment and requirements of judicial systems of the host country;

(b) The in-country technical assistance to the Mexican judiciary, including review on laws; development of judicial training methodologies and curriculums; and the recommendations on specific subject-matter areas (totoaba and wildlife trade); and

(c) The implementation of judicial cooperation tools and instruments.

The UK and Taiwan held a judicial exchange meeting 4 years after the EU Taiwan judicial exchange in 2014. The 2018 exchange worked to further promote bilateral judicial exchanges and gain a deeper understanding of Britain's sentencing system. Whether this was a continuation of the EU Taiwan deal or

³² <https://www.gov.uk/government/news/2014-eu-taiwan-judicial-exchange-programme>

a separate exchange programme is unclear. However, one would assume that the meetings were successful, as during the visit, the Taiwan delegation met with the sentencing council and the criminal case review system to exchange views on the UK's sentencing system, judicial reform and enhancing bilateral judicial ties for the future.

Given Mexico's history of corruption, one might expect the agreement of a judiciary exchange programme with the UK to be a contentious task. In 2018, Mexico witnessed a historical moment in politics whereby the Institutional Revolutionary Party (PRI) that had governed Mexico for 70 years was removed. Pena Neto, the former president of Mexico, was replaced by Andrés Manuel López

Obrador, leader of the National Regeneration Movement. He promised to help the poor and eradicate corruption at all levels. With Mexico's new leadership, one could expect Mexico to agree to a judicial exchange programme with the UK.

It is hoped that following a successful judicial exchange program an effective link would have been created between Mexican and UK judges which would lead to further communication. There are several endangered species in Mexico which would also benefit from a strengthened criminal justice system. If a precedent could be established to help save the vaquita, then this can be repeated for similar success in other wildlife issues.

It is paramount that prosecutors taking part

in the exchange programme have a sufficient understanding of wildlife crime so that they are able to direct investigations and understand when a case should be brought to Court. There is a clear risk of corruption within the prosecuting officials considering the amounts of money that are involved in the illegal trade of wildlife, however, this should only motivate the training of Mexican prosecutors further. If we are unable to convince prosecutors to charge an offence and take it to Court, there is no use in training judges or implementing sentencing guidelines. A well-informed prosecutor will be able to ensure that judges are well-aware of their powers, ensure that the investigations are effective and be familiar with the appropriate punishments to

members of the judiciary that accept bribes.

As an alternative, if Mexico were unwilling to partake in a judicial exchange program, it could be proposed that a judicial committee is established purely for the communication of wildlife crime issues amongst judicial figures. Despite the amount of money and effort that the Mexican Government has assigned to solving the issue of declining numbers of vaquita, they have been unsuccessful.

Therefore, they may welcome input from international experts in the judiciary to help tackle the issues.

IMPLEMENTING SENTENCING GUIDELINES

As set out in the Legal Framework section above, there is no definitive answer for what sentence will be

given to fishermen who catch totoaba, a facilitator in possession of a totoaba swim bladder or a trafficker attempting to cross a land border. This creates an air of uncertainty and confusion which is easy to exploit for criminals.

Sentencing guidelines provide consistency and clarity among convictions in a jurisdiction. It is impossible to deter a potential offender if it is not guaranteed that they shall be punished accordingly. It also can demotivate police and prosecutors if they see an investigation that has taken significant work lead to a derisory sentence. Similarly, inconsistent sentences can lead to resentment to laws and prosecutions which are already unpopular among local Mexican communities.

Sentencing guidelines should identify the

aggravating and mitigating factors as well as circumstances which indicate higher culpability which sentencing judges or magistrates must look out for in order to reach their final decisions. These factors are extremely important and it is imperative that experts on the topic of wildlife crime are consulted when these are drafted. For example, as with drug and trafficking crimes, offenders who appear higher up in the organisation of the crime receive larger sentences. Often, the factors which distinguish between the people at the bottom of the criminal ladder and those higher up are determined by culpability factors.

Sentencing guidelines are not a new concept in Mexico. In 2014, Mexico implemented rigid guidelines relating to kidnapping offences due to a drastic rise in

the number of reported cases. This shows that Mexico was able to identify that sufficient guidelines are paramount to tackle growing issues.

It is not the intention of this proposal to create the new definitive sentencing guidelines. It is appreciated that it is likely to be ill-received if judges in the Mexican criminal justice system are told what sentences they must impose by individuals who are not similarly qualified. It is proposed that a collaborative approach can be achieved whereby Mexican judges can create the guidelines that they believe are appropriate following discussions with industry experts and following a review of similar jurisdiction's sentencing approaches. It is also not the intention of this proposal to state that Mexican judges must set a high minimum

custodial sentence for offenders. If a defendant knows that they face a high minimum sentence then there is no motivation for them to plead guilty or cooperate with officials in investigations. It is also possible that if judges believe that the guidelines are too onerous on the offenders, they simply will choose not to follow them.

CONCLUSION

This proposal seeks to target and deter the beginning of the totoaba criminal supply chain that attracts many innocent and vulnerable Mexican civilians into dangerous crime organisations. It is accepted that work remains to target the demand for totoaba bladders which shall be unaffected by these proposals and that revolutionising the attitudes of judicial figures in Mexico will

not be a quick process. However, by supporting and improving the Mexican judicial system, the groundwork is being laid to prevent future catastrophic loss of species. An international link shall be created between judges to talk about the significance and the difficulties involved in serious and organised wildlife crime globally, which will encourage other nations to do the same. The potential benefits to the Mexican judicial system as a whole could be huge. Whilst the focus of this proposal is to improve the country's response to wildlife crime, Mexican judges and prosecutors can only improve with a sharing of knowledge from well-established criminal justice systems. This will also build the prosecutorial capacity to deal with other organised crime units including narco trafficking, recognising

that wildlife crime and other areas of crime share many convergence points.

DEVELOPING DUE DILIGENCE LAWS

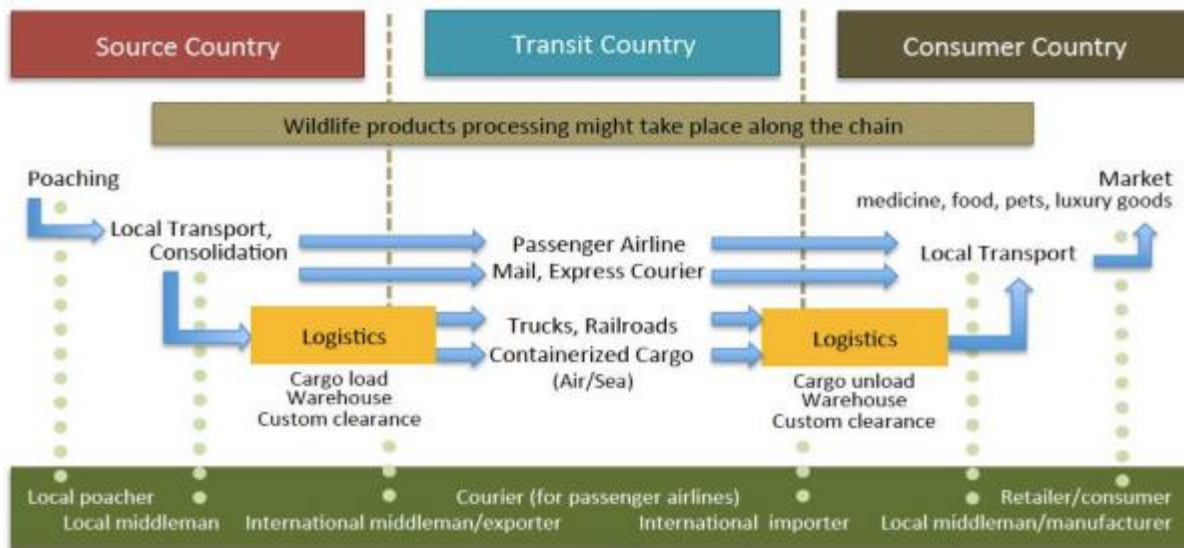


Figure 1. Generic international illegal wildlife trade chain and methods of transportation. © M. Zavagli

Source – Traffic.org

DUE DILIGENCE

Imposing due diligence obligations upon import-export agents, shippers and brokers would ensure that illegal consignments of totoaba would be identified at the earliest opportunity in the supply chain and thus more easily tracked to the source. Increased confiscation of illegally sourced totoaba and an enhanced tracing network could also deter wildlife traffickers from

engaging in the illegal wildlife supply chain through fear of prosecution.

A key challenge in the design of due diligence and ‘know your customer’ laws is that totoaba consignments can travel along supply chains in various ways. Totoaba is trafficked by both human mules (someone who personally smuggles contraband across a border) or packaged away for shipment and hidden alongside other (legitimate) products.

Totoaba fish bladder is sold alongside legal seafood shipments as well as other illegal products. Other illegal products may include shark fins or illegal drugs. Totoaba is also trafficked across the land border between Mexico and the USA via motor vehicles such as cars and trucks. Front companies (an entity with the characteristics of a legitimate business, serving to disguise and obscure illegal activity) may be used by traffickers for larger

shipments of totoaba bladders and other illicit wildlife trade. Training those involved with identifying illegal shipments to have a better understanding of, and to be able to identify totoaba is therefore essential.

KNOW YOUR CUSTOMER (KYC) LAWS

KYC laws are essentially legislature concerning due diligence. Due diligence can be defined as the investigation a business is expected to take before entering into an agreement or contract with another party.

The KYC guidelines in place in the financial sector ensure that entities are open and transparent when maintaining a business relationship. They allow organisations to verify the identity of

stakeholders and the risks involved in any potential dealings. These laws were initially introduced to form part of the broader goal of tackling money laundering in the sector, however, they are increasingly being adopted across a growing number of industries.

KYC laws compel banks and other financial institutions to identify who they are dealing with, and to assess the risk that their services might be used for illegal purposes.

The guidelines aim to prevent businesses from being used by criminal networks for money laundering purposes, as well as getting a further understanding of their customers.

The policies are based on 4 key elements:

- (1) Customer acceptance policy;
- (2) Customer identification procedures;
- (3) Monitoring of transactions; and
- (4) Risk management.³³

It is hoped that wildlife trafficking can be significantly disrupted by adopting KYC policies in the aviation and shipping transport industry.

By engaging and developing an understanding of their customers (and ideally their customer's customer) the transportation industry will effectively reduce the scope of activities carried out by criminal networks.

A combination of corruption at various points along the trade chain, regulatory

³³ https://www.iiflwealth.com/sites/default/files/investor-relations/KYC-POLICY1_0.pdf

loopholes, and under-resourced law enforcement and customs controls has meant that at present wildlife trafficking is low risk and high reward.³⁴

By adopting global KYC laws the shipping and aviation industries will be able to make a sizeable contribution to the wildlife trafficking threat. According to TRAFFIC, the wildlife trade monitoring network, *“Transportation is the backbone of global trade, and traffickers in wild animals and wildlife products rely heavily on logistics, land, air and sea carriers to smuggle illicit goods. Companies from the transportation and logistics sector can therefore play a critical role in identifying and strengthening key risk points in the supply chain.”* Transportation and logistics businesses, such as passenger and cargo airlines, shipping companies, express

couriers and freight forwarding companies, are becoming increasingly vulnerable to exploitation by illegal wildlife traffickers.³⁵

The KYC legislation, funded by the United Nations Development Programme, would ensure responsibility is given to ports, borders, customs authorities, brokers and agents to collect, check and confirm the identity of each of their clients and where their container is heading.

In conjunction with the KYC laws it is crucial that the aviation and shipping industries work to build a robust customs system that is equipped to handle the illegal wildlife trade that operates through its business. This involves training employees to recognise suspicious packaging, creating a whistle-blower system

to highlight corruption and bribery, informing passengers of the risks associated with smuggling contraband and creating a network of information sharing.

Looking specifically at the trade in totoaba swim bladder it is critical that the shipping and airline companies have these systems in place and are aware of what cargo they are carrying, who it belongs to, and who it is intended for. Incorporating these measures will ensure that the illegal consignments of totoaba are identified at the earliest possible opportunity in the supply chain, therefore making it easier to trace back to its original source.

³⁴ https://www.traffic.org/site/assets/files/8832/w_traps-transportation-discussion-document.pdf

³⁵ <https://www.savetherhino.org/thorny-issues/the-transportation-industry-and-the-illegal-wildlife-trade/>

REQUIREMENTS FROM THE AIRLINE AND SHIPPING INDUSTRIES

Naturally, the aviation and shipping companies will play a key role in establishing the KYC laws on an industry wide scale. Their participation and support will inevitably determine the impact that these laws will have in curbing the illegal wildlife trade.

There are encouraging signs that the airline industry considers the illegal trade to be something worth campaigning against. This is evidenced by the Buckingham Palace Declaration.

The International Air Transport Association (IATA) and leading airline companies have signed the Buckingham Palace Declaration to reduce the illegal

trafficking of wildlife. The commitments agreed upon by the signatories aim to help support the private sector in fighting the illegal wildlife trade and focus on:

(a) Securing information sharing systems for the transport industry to receive credible information about high risk routes and methods of transportation;

(b) Developing a secure system for passing information about suspected illegal wildlife trade from the transport sector to relevant customs and law enforcement authorities; and

(c) Notifying relevant law enforcement authorities of cargoes suspected of containing illegal wildlife and their products and, where

able, refuse to accept or ship such cargoes.³⁶

In the aviation industry the problem was initially perceived to be linked mainly with air cargo, however, recent reports indicate that there has been a sizeable shift towards passenger smuggling. This highlights the need to raise passenger awareness about wildlife trafficking and in training staff to recognise and report suspicious packages and behaviour.³⁷

³⁶ <https://unitedforwildlife.org/the-buckingham-palace-declaration/>

³⁷ <https://routespartnership.org/industry-resources/publications/flying-under-the-radar-final.pdf/view>

The image at the right of this page provides a list of airline companies who signed the memorandum.

This declaration has since been broadened in its scope to include a similar commitment by shipping companies around the world. In relation to the totoaba, efforts should be made to include all airlines and ships travelling between Mexico/US and China.

Mexico in particular presents a significant threat. Between 2003-2013, nearly 2,000 (48%) of all the illicit wildlife shipments from Latin America seized by US authorities originated in Mexico³⁸ meaning that KYC laws are vital in stopping not only the trade of totoaba but other illicit wildlife products too.

Airline Signatories of the Buckingham Palace Declaration*

Aer Lingus	Finnair Oyj
Aerovías de México S.A. de C.V	Hi Fly Transportes Aéreos, S.A.
Aircalin	Iberia
Air Berlin	Icelandair
Air Calédonie	Japan Airlines Co., Ltd.
Air China Cargo Co. Ltd.	Jet Airways
Air France	Kenya Airways
Air India	KLM Royal Dutch Airlines
Air Mauritius Limited	Lao Airlines State Enterprise
Air New Zealand	Luxair
Air Niugini	Malaysia Airlines Berhad
Air Serbia	Malindo Airways
Air Seychelles Limited	Myanmar Airlines
Air Tahiti Nui	Philippine Airlines, Inc.
Air Transat A.T. Inc.	Qantas
Air Vanuatu (Operations) Limited	Qatar Airways
Alitalia - Società Aerea Italiana S.p.A.	Royal Brunei Airlines Sdn Bhd
All Nippon Airways	SA Air Tahiti
Bangkok Airways	SF Airlines
Biman Bangladesh Airlines	SilkAir
British Airways	Singapore Airlines Limited
Bulgaria Air	South African Airways
Cathay Pacific Airways Limited	SriLankan Airlines Limited
Cargolux Airlines International	TAAG Angola
China Airlines Ltd.	Thai Airways
China Southern Airlines	Thai Lion Mentari Co., Ltd.
EgyptAir	Transportes Aereos Portugeses SA
Emirates Airline	Turkish Airlines
Etihad	Virgin Australia International Airlines Pty Ltd.
Fiji Airways (Air Pacific Limited)	Vueling

*As of May 10, 2019 (61 IATA members)

Source – IATA.org

The issue of illegal wildlife smuggling requires a global commitment and support from the transportation industries which can help tackle the threat posed by these advanced criminal networks.³⁹

IMPLEMENTING KYC LAWS

Kenya is an example where KYC laws have been previously suggested to manage wildlife trafficking, particularly in relation to the ivory trade.

It has been proposed by Space for Giants that KYC laws need to be urgently implemented for the

³⁸ Alejandra Goyenechea and Rosa A. Indenbaum, Combating Wildlife Trafficking from Latin America to the United States: The Illegal Trade from Mexico, the Caribbean, Central America and South America and What We Can do to Address It (Washington, D.C.: Defenders of Wildlife, 2015),

³⁹ <https://www.iata.org/en/pressroom/pr/2016-06-02-05/>

import and export of products globally as well as alongside those that deal with international movements of money. The proposal has the back of the Director of Public Prosecutions, Noordin Haji, but to date progress has been slow.

According to studies, criminal prosecutions in relation to wildlife trafficking are increasing⁴⁰, however, it is evident that the majority of those being convicted are poachers and low-level middlemen rather than the key stakeholders in the criminal networks.⁴¹

The main reason as to why the heads of these criminal organisations do not end up in court is due to the paucity of information that allows

investigators to trace the seized consignments back to the source. It is difficult to identify the original source and track precisely where they were heading. Part of the issue lies with the transportation companies failing to carry out effective due diligence on their customer's consignments. As a result, there have been calls for Kenya to implement legislature that compels companies to carry out comprehensive due diligence checks in an attempt to make illegal trading far more complicated for organised crime.⁴²

Currently US firms are strongly advised to conduct due diligence on a Mexican firm or individual before entering into any type

of agreement. In Mexico's larger cities, it is possible to hire a local consulting or law firm to obtain information about a company or individual. In addition, local chambers and associations can assist U.S. firms in locating economic reports on a particular firm. There are only a few private firms that conduct due diligence countrywide.⁴³

If adopted by the Mexican, US and Chinese governments the KYC laws would contribute to the conservation effort of the vaquita and totoaba by frustrating the criminal activities on either side of the trade chain.

This would prove particularly useful against the Asian

⁴⁰ <https://www.spaceforgiants.org/s/2018-Impact-Report>.

⁴¹ Bradley Anderson and Johan Jooste, *Wildlife Poaching: Africa's Surging Trafficking Threat* (Washington, D.C.: Africa Center for Strategic Studies, May 2014)

⁴² <https://www.independent.co.uk/voices/campaigns/giantsclub/kenya/adapt-money-laundering-laws-african-trade-slow-poaching-a8509801.html>

⁴³ <https://www.export.gov/apex/article2?id=Mexico-Due-Diligence>

criminal syndicates which comprises an extensive list of middlemen such as truck drivers, customs control, shipping agents and many more. Increasingly, the Asian criminal networks appear to be expanding along both ends of the chain, meaning they are moving closer to controlling all aspects of the business, from the actual sourcing of the animals to the final sale at markets.⁴⁴

With the increasing power these organisations hold, it becomes ever more apparent for the need for an independent Taskforce to be established between the three governments. This Taskforce would work on introducing the KYC laws following the precedent set by the financial sector and would operate alongside the UN Asset Recovery Agency (also

mentioned in this report) and other authorities that deal with trade and customs. Only a multi-lateral effort would be able to combat the criminal organisations that operate on such broad scale in each country.

MEXICO'S ANTI MONEY LAUNDERING LAWS

Mexico's official Anti Money Laundering Law came into force on 17 July 2013. The official name of the Law is Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita.

Mexico is not currently on the Financial Action task Force (FATF) List of countries that have been identified as having AML deficiencies.

The Attorney General Office (Fiscalía General de la República) is in charge of prosecuting money laundering activities with the support of the Ministry of Finance and Public Credit through the Financial Intelligence Unit (FIU).

The primary legislation governing each type of institution within the financial sector and accompanying regulations grants a broad range of powers to supervise licensed and registered institutions for compliance with AML requirements. The three financial supervisors have statutory powers to conduct inspections, request any relevant information from the institutions that they supervise and apply sanctions for noncompliance with the preventive measures but the CNBV does not have

⁴⁴ Varun Vira, Thomas Ewing, and Jackson Miller, *Out of Africa: Mapping the Global Trade in Illicit*

explicit power to revoke a banking license for breaches of AML failings.

In Mexico's banking supervision, the law foresees exchange of information, including confidential information, between the SHCP, Banco de México, the CONSAR, the Institute for the Protection of Bank Savings, the National Commission for the Protection of Financial Service Users and the CNBV. Where appropriate, the authorities have entered into agreements in order to facilitate exchanges.

The Mexican authorities, especially Procuraduría General de la República (PGR) and law enforcement agencies (LEAs) have access to financial intelligence and other relevant information. However, they do not often use this information in financial

investigations in order to develop evidence and trace criminal proceeds related to money laundering.

The multiplicity of organisations responsible for the investigation of ML gives rise to difficulties in coordination, and ensuring proper sharing of evidence and information.

Under the Mexican legal framework, the reporting obligations that relate to suspicious transactions comprise two components:

(1) Unusual transactions - Financial Institutions (FI) are required to consider a set of criteria separately or jointly: suspicion of money laundering (ML) or terrorist financing (TF), scenarios that are deemed unusual (unusually high amounts, the complexity and unusual modalities or involvement of high-

risk countries) or factors that entities should consider when determining whether a transaction is unusual or not such as transactional behaviour of other clients who have a similar background.

(2) 24-hour reports-when a FI has information based on evidence or concrete facts that the transaction may be related to ML or TF, it should file a report with FIU within 24 hours from the moment it becomes aware of such information.

The Financial Action Task Force (FATF) and The Financial Action Task Force of Latin America (GAFILAT) prepared a report in January 2018 on the AML and counter-terrorist financing measures that

were in place in Mexico in 2017.⁴⁵

The key findings were that Mexico had a mature AML regime with a well-developed legal and institutional framework. There was however significant risk of money laundering stemming from activities associated with organised crime such as drug trafficking extortion, corruption and tax evasion.

The report found that most of the key authorities have a good understanding of ML and TF risks, and there was generally good policy cooperation and coordination. The financial sector demonstrated a good understanding of the primary ML threats from organised crime groups and associated criminal activities as well as tax crimes, but the recognition of corruption as a main threat was uneven. ML was not investigated

and prosecuted in a proactive and systematic fashion, but rather on a reactive, case-by-case basis. The report found from analysis of the convictions on ML that most fell within the lower end of the penalty scale.

The report also found that the level of corruption affecting law enforcement agencies (LEAs), in particular at the state level, undermines their capacity to investigate and prosecute serious offences.

Overall, Mexico has a solid institutional and legal framework in place to investigate and prosecute TF and impose targeted financial sanctions. However, Mexico could do more to ensure that the relevant authorities are better equipped with the right tools in terms of training, expertise, and

priority setting to be able to effectively detect and disrupt TF. In the same way, authorities must receive consistent training to identify Totoaba trafficking and proceeds from this.

Financial Institutions (FI) and most Designated Non-Financial Businesses and Professions (DNFBPs) generally understand their AML obligations including customer due diligence, record keeping, and reporting. However, as FIs were not required to update non-high-risk customers' files unless a change in behaviour was detected, the extent to which customer profiles are up-to-date is uncertain. Mexico has a solid legal and institutional framework in place to seek and provide information. Mexico cooperates with many countries, especially the U.S. Thus it would

⁴⁵ <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Mexico-2018.pdf>

appear that there are sufficient processes in place to track those involved in the illegal trafficking of the totoaba.

C4ADS,⁴⁶ a non-profit organisation dedicated to providing data-driven analysis and evidence-based reporting on global conflict and transnational security issues reported on totoaba trade in 2017.⁴⁷

The report found that prosecutions were almost non-existent. In some cases, fishermen were living in large, luxurious houses, especially compared to the modest accommodations of their neighbours. For example, one suspected totoaba fishing family lived behind “cinderblock wall” in a house with two floors, painted white and

complete with columns flanking the door.⁴⁸

C4ADS’ also noted that the investigation following seizures involving Anthony Sanchez Bueno on 30 March 2013 revealed links between a higher-level trafficker, Jason Xie, and a recycling company. C4ADS’ analysis of this company revealed only limited business activity; although the company claimed to be engaged in recycling activities. In addition, the company did not appear to have maintained a public presence at its registered address during its five-year period of operation. During the same period, Xie received about \$4 million in payments originating in China, up to \$2.1 million of which remained unaccounted for at the time of his

restitution hearing in 2014.

In order for Mexico’s existing framework to be successful those carrying out any type of work that includes due diligence need consistent training to be able to identify unusual and suspicious behaviours.

Guidelines should include ‘Red flags’ of suspicious behaviour such as companies with a registered address but no storefront or online presence only, mismatching shipment content descriptions and inaccurate customs HS codes, inaccurate or unavailable shipper and consignee information, and inaccurate or inconsistent weight and estimated value declarations.

C4ADS identified, when trafficked, totoaba have been hidden amongst other

⁴⁶ www.c4ads.org

⁴⁷ ‘Hooked: How Demand for a Protected Fish Lined the Pockets of Mexican Cartels & Sunk the Future of an Endangered Porpoise Species’ (C4ADS 2017)

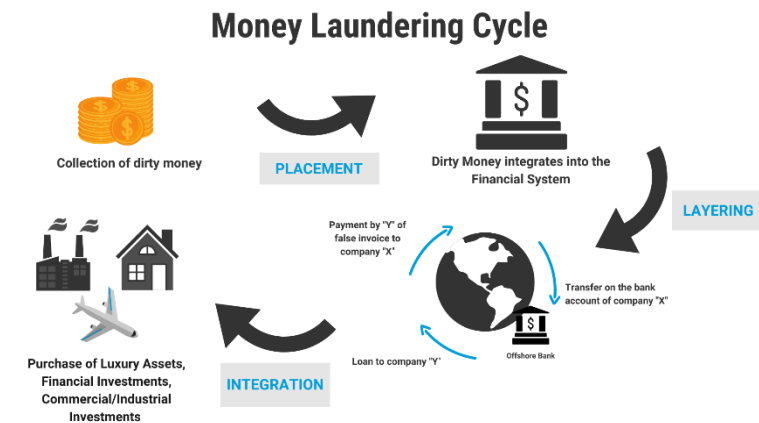
⁴⁸ Sergio Haro. “Pesca Ilegal de Totoaba: Corrupción y Simulación.”

fish products during transit or incorrectly declared as other fish species and even declared as completely unrelated products, such as cornflakes.

Some Business owners confirmed that it is easy to get merchandise across the border without export fees, paperwork, or even an inspection, simply by bribing border officials, who reportedly wave through Chinese textiles and appliances every day.⁴⁹

Consistency in due diligence obligations and training in these sectors is required to ensure that the same standards are being followed.

The need for appropriate supervision and training coupled with serious sanctions for non-compliance will



Source —
UNODC.com

assist in reducing bribery and identifying totoaba that is being trafficked.

UK ANTI-MONEY LAUNDERING (AML) REGULATIONS

Money Laundering is the concealment of the origins of illegally obtained money. The UK has a robust approach to monitoring money laundering. It is possible for these laws to be easily adapted in other countries.

The UK has various frameworks to regulate anti-money laundering, especially relating to criminal proceeds. Banks are regulated in the UK by the Financial Conduct Authority. For the non-financial sector, Her Majesty's Revenue and Customs (HMRC) oversees high value transactions. The UK's customer due diligence requirements, under the Proceeds of Crime Act (2002) and the Money Laundering and Terrorist Financing (amendment) Regulations 2019, are

⁴⁹ Testimony of Robert Dreher, Associate Director, U.S. Fish and Wildlife Service, Department of the Interior, before the U.S. House of Representatives, Committee on Foreign Affairs, Subcommittee on Terrorism, Nonproliferation, and Trade. Poaching and Terrorism: A National Security Challenge. 22 April 2015

broadly aimed at taking steps to identify customers and checking they are who they say they are. If banks or those involved in high value transactions do not comply, they can be sentenced to prison, though the most likely punishment will be high value fines and further monitoring of the organisation or individual's compliance to due diligence laws.

Money laundering is considered a crime under section 328 (1) of the Proceeds of Crime Act when a person commits an offence if they enter into or become concerned in an arrangement which they know or suspect facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person. Money laundering under the Proceeds of Crime Act

can lead to a sentence of up to 14 years in jail, or a large fine. The severity of the sentence or fine depends on the amount of money involved.

Due diligence can be defined as risk assessing your business by finding out more about your customers. This would be performed when you establish a business relationship with a customer, when money laundering is suspected, or for any occasional transactions of €15,000 or more.⁵⁰ This includes both single or linked transactions. Good examples of businesses carrying out due diligence checks include asking for the customer's name, obtaining official documents and residential addresses and obtaining dates of birth of individuals involved in high value transactions.

Under these regulations, companies are also required to carry out enhanced due diligence when the customer is not physically present when carrying out identification checks. Enhanced due diligence is also required if the customer is from or residing in a high-risk country, as identified by the EU. Countries considered high risk are those where there are considered to be deficiencies in the anti-money laundering regulations. Enhanced due diligence is also required if multiple payments have been made by the same customer in a short period of time or a number of customers have sent money transfers to the same person.

No evidence has been found of totoaba being trafficked via the UK. The UK's laws can be

⁵⁰ <https://www.gov.uk/guidance/money-laundering-regulations-your-responsibilities>

used as a model framework in other jurisdictions that form the supply chain of the totoaba. There have been recent shifts in UK policy to ensure that due diligence and anti-money laundering checks consider links between companies and their supply chain if they are located far away.

Regulation 14 of The Money Laundering, Terrorist Financing and Transfer of Funds (information on the Payer) Regulations 2017, added participants in the fine art market who deal in sales, purchases, and storage of works of art with a value of €10,000 to the list of persons and firms subject to customer due diligence requirements.

A due diligence framework such as the UK's could easily be adapted to include a regulation for high value transactions

involving wildlife trade. Totoaba bladder is frequently found in bulk and is worth more than or similar to the price of gold on the black market and therefore the sale of the totoaba parts would commonly be greater than €15,000. Highly threatened species, such as the totoaba could be considered as high risk under regulation 33, in the same way as oil, arms, and precious metals are listed. Species threatened with extinction can easily be argued as high risk.

One possible pathway to help reduce illegal totoaba trafficking could be to establish a regulatory body for import-export agents, analogous to the role of the Financial Control Authority in the UK, which monitors the compliance of bank's adherence to customer due diligence laws. Organisations such as the IMO could act as

the regulatory body for shipping companies.

CHINA'S MONEY LAUNDERING LAWS

China has an understanding of money laundering and terrorist financing risks and is not on the Financial Action Task Force (FATF) Country List identified as having AML deficiencies.

All financial institutions must comply with these obligations, and the country's current regulators check whether these obligations are met.

If a customer entrusts an agent to deal with the transaction on their behalf, the relevant financial institution will verify and register the identity certificate of the principal.

The main controlling body against money laundering in China is

the People's Bank of China (PBOC) and the Anti-Money Laundering Bureau which is the investigative body of the PBOC.

The AML Law requires financial institutions to report large and suspicious transactions.

In August 2007, China adopted the Administrative Rules for Financial Institutions on Customer Identification and Record Keeping of Customer Identity and Transaction Information, requiring all financial institutions to identify and verify their customers, including the beneficial owner.

Cash transactions however, are not included in the money laundering schemes and therefore bear potential opportunities for money launderers.

It would seem that China has a sufficiently comprehensive AML regulatory regime in place. The problem therefore appears to be the enforcement of the law.

A White Paper on Identifying Anti-Money Laundering Issues in Chinese Banks found a major challenge in China, as stated by a foreign bank, is the verification of IDs, because there are so many people in China with the same name. Moreover, there are a lot of people in bigger cities who use counterfeit ID documents.⁵¹

The White Paper also noted predominant feedback of commercial banks in China was that they regard AML *“as a waste of time and resources, or as a major cost driver. Some even perceive it as negatively affecting profits as it scares*

away customers due to more complicated and comprehensive KYC procedures. Moreover, rigid AML specifications have the potential to limit business opportunities. Thus AML remains a non-issue for most Chinese banks, unless they go international.”

Asian banks have been targeted by US enforcement authorities for trading with undesirable partners: Banco Delta Asia from Macau has been censured for trading with North Korea, and Malaysian First East Export Bank has been specifically identified as a subsidiary of Iranian Bank Mellat by the US Department of Treasury. Information sharing among banks and regulators has to be improved along with more stringent guidelines to comply with due diligence

⁵¹ [https://www.theasianbanker.com/assets/media/dl/whitepaper/Asian%20Banker%20White%20Paper%20-%20China%20Anti-Money%20Laundry%20\(English\).pdf](https://www.theasianbanker.com/assets/media/dl/whitepaper/Asian%20Banker%20White%20Paper%20-%20China%20Anti-Money%20Laundry%20(English).pdf)

procedures and harsher penalties for non-compliance.

US - CUSTOMER IDENTIFICATION PROGRAM (CIP) AND CUSTOMER DUE DILIGENCE (CDD) REGULATIONS

The U.S. is considered to have the strictest KYC regulations of any country and has a long history of combating financial crimes stemming from the Bank Secrecy Act (BSA) established in 1970. Since then, numerous other laws have enhanced and amended the BSA to provide more robust guidelines and the most effective tools to combat illegal transactions, one of the most important being the US Patriot Act of 2001.

The Patriot Act expanded to include the criminalization of terrorism financing and strengthened the

existing BSA framework for customer identification procedures.

Title III of the Patriot Act referred to as the International Money Laundering Abatement and Financial Anti-Terrorism Act requires that financial institutions deliver on two requirements to comply with the strict KYC regulations: the Customer Identification Program (CIP) and Customer Due Diligence (CDD).

To comply with CIP, a bank asks the customer for identifying information. Each bank conducts its own CIP process, so a customer may be asked for different information depending on the institution. An individual is generally asked for a driver's license or a passport.

Information requested from a company might include certified articles

of incorporation, a Government-issued business license, a Partnership agreement or a Trust instrument.

For either a business or an individual, further verifying information requested may include financial references, information from a consumer reporting agency or public database or a financial statement.

Every bank is required to verify their customers' identity and make sure a person or business is real.

With regard to CDD, the Patriot Act does not directly specify a CDD requirement, but rather specifies that a bank is required to report suspicious customer behaviours.

As a result of due diligence, a bank may flag certain risk indicators such as frequent wire transfers and international transactions. A 'high-risk' account is then

monitored more frequently, and the customer is required to explain their transactions or provide other information.

When corporate company members open new accounts, members of the company will have to provide Social Security numbers and copies of a photo ID and passports for their employees, board members, and shareholders. This applied to those countries involved in the supply chain of totoaba will enable organisations to trace those involved as this will provide transparency.

Therefore those in the background and higher up the supply chain will not be able to hide behind an individual that is at the lower end of the supply chain. This may also act as a deterrent.

The Specially Designated Nationals and Blocked Persons List, also known as the SDN List, is a U.S. government sanctions list and embargo measure targeting U.S.-designated terrorists, officials and beneficiaries of certain authoritarian regimes, and international criminals (e.g. drug traffickers).⁵²

The list is managed by the Office of Foreign Assets Control and contains tens of thousands of companies, organizations, and individuals who have been identified as posing a threat to U.S. national security and foreign and economic policy. All persons and businesses within the U.S. are prohibited from doing business with blacklisted individuals or are subject to sanctions for violating the law.

Financial sanctions include a ban on investment in the stock of the blacklisted individuals and companies in which the blacklisted individuals have a controlling interest, and a ban on new debt (including all securities such as bonds, credits, bills of exchange, etc.) with a maturity of more than 90 days.

Since the beginning of 2019, dozens of non-U.S. vessels, owners, and operators have been designated on the SDN List due either to their role in the evasion of sanctions or their dealings with SDNs, sometimes unwittingly. Such crippling sanctions have been applied to companies ranging from small European vessel owners to shipping behemoths like COSCO Shipping Tanker (Dalian).

⁵² <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>

Those caught involved in the illegal trafficking of totoaba can be added to the list. This would reduce, if not stop, the number of persons and businesses traffickers would be able to deal with. Harsher sanctions would also act as a deterrent especially if it can be seen that sanctions are being applied.

CONCLUSION

Failing to recognize the connection between totoaba trafficking and organized crime is stalling the development and implementation of strategies needed to tackle the sophisticated networks that direct the totoaba trade.

Traffickers moving totoaba bladders by air freight or by sea must declare the products they are shipping in customs paperwork. Many totoaba shipments are declared

as various fish products, which untrained enforcement officials will not be able to tell the difference.

Front companies may be used by traffickers for larger shipments of totoaba bladders allowing traffickers to hide behind the name of a registered company. This enables them to avoid using a person's name on the paperwork associated with air cargo or containerised maritime shipments. A front company will have opportunity to smuggle small quantities of illicit products within larger legal shipments.

The relevant authorities in each country along the supply chain need to be better equipped with the right tools in terms of training, expertise, and priority setting to be able to effectively detect and disrupt totoaba trafficking. Authorities in each

country must receive consistent training to identify totoaba trafficking and proceeds from this. A platform to share ideas will allow members from each county to exchange information in relation to suspicious persons or businesses which will help to reduce, if not eliminate, the illegal trafficking of totoaba.

CLOSING CHINA'S WILDLIFE TRAFFICKING LOOPHOLES

CITES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was signed in Washington D.C. on 3 March 1973 and entered into force on 1 July 1975. It is one of the world's most useful tools in aiding wildlife conservation through the regulation of the species trade. CITES has 183 Signatory Parties, including China and Mexico, and regulates international trade in over 35,000 species of plants and animals, including their products and derivatives. The CITES system seeks to ensure that international trade in listed species is legal, sustainable and traceable.⁵³

CITES has three appendices, which include lists of species afforded different levels of protection from over-exploitation.

Appendix I incorporates the most endangered among CITES-listed species, (commonly plants or animals threatened with extinction). CITES prohibits international trade of these species except when the

purpose of the import is not commercial, for instance for scientific research, as established by Article III of CITES. In these exceptional cases, for the trade to take place, an import permit and an export permit (or re-export certificate), has to be obtained from a relevant authority. Moreover, Article III of CITES regulates the trade of species included in Appendix I.⁵⁴



Source - CITES

⁵³ CITES Secretary-General in Mexico to address the Vaquita and Totoaba crisis fueled by illegal international trade: [https://cites.org/eng/CITES_Secretary-](https://cites.org/eng/CITES_Secretary-General_in_Mexico_to_address_Vaquita_and_Totoaba_crisis_fueled_by_illegal_international_trade_31052019)

[General_in_Mexico_to_address_Vaquita_and_Totoaba_crisis_fueled_by_illegal_international_trade_31052019](https://cites.org/eng/CITES_Secretary-General_in_Mexico_to_address_Vaquita_and_Totoaba_crisis_fueled_by_illegal_international_trade_31052019)

⁵⁴ The CITES Appendices <https://cites.org/eng/app/index.php>

The totoaba is one of the 16 fish species listed in the Appendix I under CITES, meaning that international commercial trade, purchase and transport of this fish, as a general rule and with some exceptions, is prohibited.⁵⁵ The totoaba was added to CITES Appendix I in 1976 and was also deemed “critically endangered” by the red list of the International Union for Conservation of Nature (IUCN) in 1996.⁵⁶

CHINA’S WILDLIFE PROTECTION LAW

China has been a party to the CITES since 1981 and has a legal framework in place to regulate international trade in wildlife. In 1988, China issued the

Wildlife Protection Law as the primary legislation governing the country's efforts to fight wildlife trafficking. The Wildlife Protection Law’s main purpose, as stated in Article 1, is “*to protect and rescue rare and endangered wildlife, to preserve biodiversity and ecological balance, to prevent risks to public health and to promote the construction of an ecological civilization*”.⁵⁷

According to Article 10 of China’s Wildlife Protection Law the wildlife under the government’s protection is divided into two categories, ‘Grade 1’ and ‘Grade 2’. Grade 1 animals are rarer and are considered more endangered compared to Grade 2 animals, and more stringent protection rules apply. For example, the

punishment for hunting Grade 1 animals illegally is more severe than the punishments for hunting Grade 2 animals illegally. Also, obtaining approvals for special license hunting is more difficult for Grade 1. A scientific assessment of the List of Wildlife under Special State Protection, a species categorisation, is usually reviewed every 5 years, with the first review made in 2017.

Prior to 2017, China’s Wildlife Protection Law did not specify how often the List of Wildlife under Special State Protection had to be updated or revised. Since 1988, The List of Wildlife under Special State Protection has been changed only twice, in two specific points, in 2003 the Grade 2 musk deer was

⁵⁵ The CITES species. <https://cites.org/eng/disc/species.php>

⁵⁶ CITES, at Appendix I; Findley, L. 2010. Totoaba macdonaldi. The IUCN Red List of Threatened Species. <https://www.iucnredlist.org/species/22003/9346099>

⁵⁷ Wildlife Protection Law (Draft Revisions) for Solicitation of Comments <https://www.chinalawtranslate.com/en/wildlife-protection-law-draft-revisions>

upgraded to stricter Grade 1 protection. Also, in June of 2020, the pangolin was moved from Grade 2 to Grade 1.⁵⁸

In 2018, two members of the Chinese People's Political Consultative Conference, Zhang Endi and Ma Jin proposed to contrast China's List of Wildlife under Special State Protection with the annually updated IUCN Red List of Threatened Species. They said that China was failing to protect 405 species classified as critically endangered by the IUCN Red List and included for protection 197 species that the IUCN deemed at no risk.

On February 2021, The National Forestry and Grassland

Administration and the Ministry of Agriculture and Rural Affairs of China jointly published a list adding 517 new species to the old List of Wildlife under Special State Protection, doubling the species under protection.⁵⁹

Neither in the old version of the List of Wildlife under Special State Protection nor in the new version are the vaquita or totoaba included.⁶⁰

Moreover, according to Article 21 of China's Wildlife Protection Law the hunting or killing of wildlife under the government's protection is prohibited. However, it allows hunting and/or killing, even for wildlife under Grade 1 national conservation, for the

purpose of scientific research, population control, epidemiology and disease monitoring, or for other special reasons, with a special license.⁶¹

Although China's main body of legislation sets out to protect rare and endangered wildlife, it permits hunting and/or killing of wildlife if granted for special reasons by the government. Articles 1 and 4 of the Wildlife Protection Law as originally drafted are worded in a way that could be seen to encourage domestication and breeding of wildlife for various purposes, including human utilization (which

⁵⁸ China's list of protected animals to be updated after 32 years <https://chinadialogue.net/en/nature/chinas-list-of-protected-animals-to-be-updated-after-32-years/>

⁵⁹ After 30 Years, China Revises Its Protected Wild Animals List <https://www.sixthtone.com/news/1006814/after-30-years%2C-china-revises-its-protected-wild-animals-list>

⁶⁰ China updates list of species with special protection <https://birdingbeijing.com/2021/02/08/china-updates-list-of-species-with-special-protection/>

⁶¹ Wildlife Protection Law (Draft Revisions) for Solicitation of Comments <https://www.chinalawtranslate.com/en/wildlife-protection-law-draft-revisions/>

includes consumption).⁶²

AMENDMENTS TO THE WILDLIFE PROTECTION LAW

On 2 July, 2016, the first substantial revision of the Wildlife Protection Law, was made by the Standing Committee of the National People's Congress of the People's Republic of China.

The amendments to the Wildlife Protection Law took effect on 1 January, 2017, and as per the previous laws, prohibit the sale, purchase, or use of rare or near-extinction wild animals protected by the government. The amendments deleted passages from the Wildlife Protection

Law that encouraged domestication and breeding of wildlife other than breeding programs carried out by scientific research institutes for preservation purposes. However, Article 28 of the Wildlife Protection Laws still allows for the sale, purchase or use of protected wildlife species and their products for the purpose of scientific research, captive breeding and public exhibitions or performances with a special permission.

The Environmental Investigation Agency (EIA) made a report in October 2020 regarding permissions for the sale, purchase or use of protected wildlife species stating that permits have been issued to companies previously involved in

protected species. It also stated “EIA has collated, translated and made available public data on 531 government permits issued to companies or government entities to buy, sell or utilise key protected species, including 45 issued to pharmaceutical companies”.⁶³

The 2016 amendment was strongly criticized for expanding loopholes and allowing wildlife trade to continue in China. Xie Yan, a researcher at the China Central Academy of Zoology wrote “The language legitimizes the use of wildlife for commercial purposes and encourages a consumptive attitude that stimulates demand for wildlife products”.⁶⁴

Although China is a signatory party to CITES, it is clear that the local laws in China

⁶² Library of Congress. China: New Wildlife Protection Law <https://www.loc.gov/law/foreign-news/article/china-new-wildlife-protection-law/>

⁶³ Behind Closed Doors: lack of transparency in ongoing permitted use of threatened wild animal species in China. <https://eia-international.org/wp-content/uploads/Behind-Closed-Doors-Lack-of-transparency-in-permitted-trade-of-threatened-species-in-China.pdf>

⁶⁴ Rachael Bale “Five Ways China’s Wildlife Protection Law Will Harm Wildlife” National Geographic, February 1, 2016. <https://www.nationalgeographic.com/news/2016/02/160201-China-wildlife-protection-law-conservation/>

are conflicted with the CITES framework and are vague, flexible, have loopholes, and even include language that both legitimates and encourages the wildlife trade.

Although the current Wildlife Protection Law does not explicitly permit illegal activities concerning protected wildlife, wording of the current rules does not go far enough to explicitly forbid activities that will likely result in the extinction of endangered species. Also, current laws permitting the trade of wild animals where permission has been granted by the government has led Chinese society to legitimize the trade, use or consumption of species which should be protected against such acts. The way in which the current laws

are worded legitimizes the trade of endangered species and encourages consumption, which has led, and will continue to lead, the Chinese community to consider such acts as ‘common practice’, which will continue to drive demand.

TRAFFICKING ROUTES

The EIA made a report on January 2016 regarding the illegal trade and consumption of the totoaba swim bladder and the collateral damage to the vaquita population, which established:

“In Guangzhou, EIA found golden coin [totoaba] maw openly on sale in six shops. Generally, traders were aware that totoaba sale is illegal, knew the fish are only found in Mexico and claimed that smuggling the contraband between Hong Kong and

*mainland China is easy, with customs agencies not routinely inspecting fish maw consignments (...). EIA’s online research identified numerous platforms for fish maw trade, and significant consumer interest in totoaba maws. Some of these platforms were actively offering fish maw, including totoaba for sale”.*⁶⁵

Investigations have shown that totoaba swim bladders are commonly smuggled through transit countries including Hong Kong, South Korea, Japan and Taiwan, and shipped using couriers of other products like seafood. The same routes are commonly used for drug trafficking.⁶⁶

There are large totoaba importers in Hong Kong – another jurisdiction where laws are too flexible,

⁶⁵ Environmental Investigation Agency. January 2016. DUAL EXTINCTION: The illegal trade in the endangered totoaba and its impact on the critically endangered vaquita. <https://eia-international.org/wp-content/uploads/EIA-Dual-Extinction-mr.pdf>

⁶⁶ OPERATION FAKE GOLD. The Totoaba Supply Chain – From Mexico’s Totoaba Cartels to China’s Totoaba Maw Wholesalers. An Illegal Trade Killing the Vaquita <https://earthleagueinternational.org/operation-fake-gold/>

enforcement is too little and fines and punishments are not sufficient to discourage the profits that come from selling totoaba. For example, on 28 January 2018, at the Hong Kong International Airport, authorities seized 28 kilograms of totoaba bladders (about 95 swim bladders). However, the two individuals involved, received 10 and 14 weeks of imprisonment each.⁶⁷

Also, traders state that smuggling totoaba bladders from Hong Kong to mainland China is easy since custom authorities do not make routine inspections.⁶⁸ Despite being illegal, the trade of totoaba bladders often crosses several countries until its arrival to China in an

open manner and traders are reported to be ‘warned’ before checks by Chinese authorities, allowing them to hide the swim bladders.⁶⁹

TRADITIONAL CHINESE MEDICINE

Trade of endangered and protected animals is not clearly described as an illegal practice under the Wildlife Protection Law when applied to the use of animals for their alleged (and unfounded) benefits branded under ‘traditional Chinese medicine’ (TCM). That does not mean that the totoaba used in TCM is legal, but the wording (which does not currently ban the trade of endangered animals for use in TCM

explicitly) provides some support for those trading totoaba under the branding of TCM, providing an excuse to those who continue to exploit the loopholes and continue to trade and consume endangered wildlife.

The use of animal bladders has been a Chinese cultural practice since 500AD, with demand previously met by the critically endangered Chinese bahaba (*Bahaba taipingensis*). The Chinese bahaba is of the same taxonomic family as the totoaba. As the population of Chinese bahaba numbers declined, trade shifted towards totoaba bladders in its place to meet demand. TCM claims that swim bladders from the fish family, Sciaenidae

⁶⁷ The totoaba supply chain- From Mexico’s totoaba cartels to China’s totoaba maw wholesalers – an illegal trade killing the vaquita <https://earthleagueinternational.org/wp-content/uploads/2018/07/EAL-Operation-Fake-Gold-Final.pdf>

⁶⁸ COLATERAL DAMAGE: How illegal trade in totoaba swim bladders is driving the vaquita to extinction <https://eia-international.org/wp-content/uploads/EIA-Collateral-Damage-FINAL-mr.pdf>

⁶⁹ Chinese appetite for totoaba fish bladder kills off rare porpoise <https://www.theguardian.com/environment/2017/may/16/chinese-appetite-totoaba-fish-bladder-threatens-rare-vaquita>

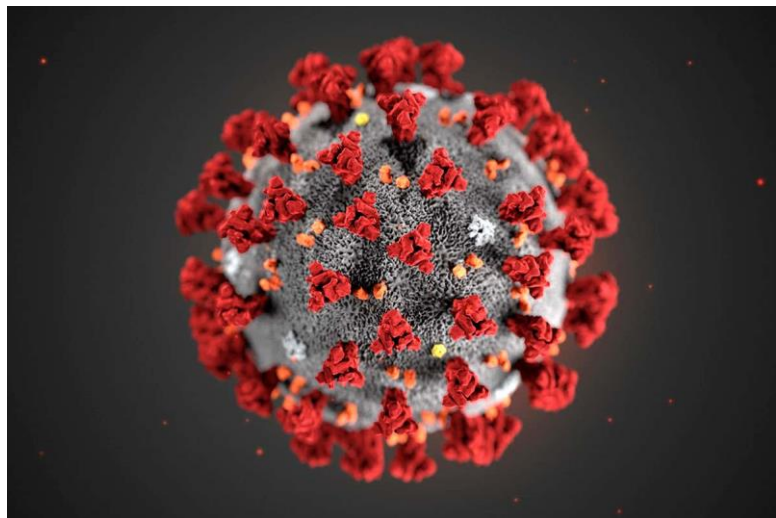
(including totoaba), are curatives for several ailments. However scientific research has not proven any of the alleged health benefits.⁷⁰ A publication from the China Briefing (a Chinese news outlet), published an article dated 1 April 2020 that stated; *“Chinese traditional medicine (TCM) is a multi-billion dollar industry in China, yet it is partially responsible for upholding discredited beliefs and quackery. It needs to be far better regulated”*.⁷¹

COVID-19

With the arrival of Covid-19, with initial reports linking Covid-19 with wet markets in China where wild animals were sold⁷², the

discussion regarding the consumption of wildlife has reopened. For this reason, in February 2020, China’s Standing Committee of the National People’s Congress (NPC), China’s top legislature banned wildlife trade and consumption, first temporarily on 12 February 2020⁷³ and then permanently on 24 February 2020.⁷⁴

The decision made by the NPC will help fast-track the ban by amending the Wildlife of Protection law. This brings hope to those wanting to see a ban in the trade of endangered animals, however, the permanent ban on wildlife trade has not yet been enshrined in the Wildlife Protection Law.



Source – New Scientist

⁷⁰ China's craze for 'aquatic cocaine' is pushing two species into oblivion
<https://www.theguardian.com/environment/radical-conservation/2016/jan/11/china-aquatic-cocaine-vaquita-totoaba-mexico-endangered-extinct>

⁷¹ Covid-19 Carriers: What Do China’s Wildlife Protection Laws Say about Pangolins?
<https://www.china-briefing.com/news/covid-19-carriers-chinas-wildlife-protection-laws-pangolins/>

⁷² China's new wildlife law doesn't go far enough to stop another pandemic,
<https://edition.cnn.com/2020/11/17/opinions/china-wildlife-law-coronavirus-intl-hnk/index.html>

⁷³ China Focus: Stay Away From Wild Animals, China Takes Sustained Action Against Illegal Wildlife Trade
http://www.xinhuanet.com/english/2020-02/12/c_138777165.htm

⁷⁴ China's Legislature Adopts Decision On Banning Illegal Trade, Consumption Of Wildlife
http://www.xinhuanet.com/english/2020-02/24/c_138814328.htm

CRITIQUE OF THE CURRENT WILDLIFE PROTECTION LAW

There was a publication of the draft amendments to the legislation on 21 October 2020.⁷⁵ There was a consultation after the draft was published to critique the amendments, which ended on 19 November 2020.⁷⁶ One crucial issue with the amendments is that they would still permit commercial breeding and trade of threatened and protected wild animal species for non-food purposes such as traditional medicine and ornamental items. There are particular concerns that a loophole permitting

commercial breeding, trade and consumption of wild animals for traditional medicine and other purposes, while strictly prohibiting consumption as food, could undermine the commendable policy changes aimed at reducing disease risk from wildlife trade.

Another major concern with the Wildlife Protection Law is how it contradicts other legislation. In particular, Article 25 of the TCM Law encourages and supports wildlife breeding for medicinal purposes.⁷⁷ Therefore, in order to ban the trade of endangered wildlife for the purposes of TCM, parts of the TCM Law

would need to be repealed. This would cause further difficulty for the harmonisation of the laws, and would depend heavily on the decision of the NPC to determine whether TCM or wildlife protection prevails. It could be argued that whilst TCM has centuries of culture and history, the modern approach and the general population are gravitating towards wildlife protection, including cities such as Guangzhou, Zhuhai and Shenzhen that has higher levels of economic development adopting local legislation to prohibit the consumption of wildlife.⁷⁸

⁷⁵ Proposed Amendments to the Wildlife Protection Law of the People's Republic of China, https://ddd.uab.cat/pub/da/da_a2020v11n4/da_a2020v11n4p214.pdf

⁷⁶ China's revised law paves the way for wildlife to become farm animals <https://www.actasia.org/news/chinas-revised-law-paves-the-way-for-wildlife-to-become-farm-animals/>

⁷⁷ Law of the People's Republic of China on Traditional Chinese Medicine, <http://en.tmbos.xtow.net/index/article/view/id/14008.html>

⁷⁸ See Guangzhou Regulations on Prohibition of Unbridled Consumption of Wild Animals (2020.6.1), Zhuhai Special Economic Zone Regulations on Prohibition of Unbridled Consumption of Wild Animals (2020.5.1), Shenzhen Special Economic Zone Comprehensive Wildlife Prohibition Regulations (2020.5.1) etc <http://sz.people.com.cn/n2/2020/0402/c202846-33921287.html>

CBD CoP15

In May 2021, China is due to host the Conference of the Parties to the Convention on Biological Diversity (CBD CoP15), a major environmental summit for the first time.⁷⁹ As the host, China must demonstrate and provide working examples of effective policy changes in order for other countries to also take further action. Without any improvements, the prevention of further protection of wildlife animals would be in grave danger and a stagnation in further protection in a global context. As China's wildlife legislation currently stands, it is acting in direct opposition to prevent the exploitation of all wildlife.

PROPOSED CHANGES

The NPC should prohibit the trade and consumption of wild animals as food to other forms of consumption, including TCM. This would be a two-step process. Firstly, it would need to repeal relevant provisions of the TCM Law that allows for breeding of wildlife animals for medicinal purposes. Secondly, the Wildlife Protection Law should incorporate the current local legislation that has already been adopted in cities preventing the consumption of wildlife animals. This would allow the harmonisation of all laws regarding the consumption of wildlife in the country and would prevent further loopholes particularly with TCM.

The NPC should also make further amendments to the Wildlife Protection Law to completely prohibit the domestic commercial trade of not only threatened but all wildlife animal species, including animals in captivity. Furthermore, if wild animals are still included for scientific research purposes, there must be stringent regulations in order to provide licences such as the prevention of breeding. If the licence holder does not comply with the regulations, a heavy financial penalty would be applied.

CONCLUSION

As China is now one of the global leading economies in the world, a failure to adopt these suggested amendments would represent a grave missed opportunity to take much-needed

⁷⁹ China's new wildlife law doesn't go far enough to stop another pandemic, <https://edition.cnn.com/2020/11/17/opinions/china-wildlife-law-coronavirus-intl-hnk/index.html>

action to reduce illegal and unsustainable wildlife trade. This would undermine China's determination to be a leading example on biodiversity conservation whilst being the host of CBD CoP15 and the recommended revisions of the Wildlife Protection Law.