

## REGULATING INTERNATIONAL TRADE IN ENDANGERED SPECIES—TRANSHIPMENTS OF *CITES*-LISTED SPECIES VIA SINGAPORE

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A Singapore District Court recently considered certain key provisions of the *Endangered Species (Import and Export) Act*, before acquitting a local trading company charged with importing approximately 30,000 rosewood logs into Singapore. This article examines the decision, and argues for a purposive construction of these provisions that furthers Singapore's implementation of its obligations as a Party to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*. This is particularly pertinent considering Singapore's role as a significant transshipment hub for endangered species in combatting the illegal wildlife trade. The article also argues for greater international cooperation and coordination between *CITES* Parties in the design and implementation of their respective national legal frameworks.

### I. INTRODUCTION

Madagascan rosewood is a red-hued timber species that is highly prized by the furniture and guitar-making industries. It is also a heavily over-exploited natural resource favoured by criminal syndicates engaged in illegal logging and transboundary smuggling activities.<sup>1</sup> In response to the large-scale destruction of Madagascar's rosewood forests, the Madagascan government announced an export ban on 24 March 2010 on all rosewood exports from the African state.<sup>2</sup> In recognition of the *Dalbergia*'s status as a highly endangered species, Madagascar populations of the species were added to Appendix III of the *Convention on International Trade in Endangered Species*

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<sup>1</sup> Environmental Investigation Agency, *The Ongoing Illegal Logging Crisis in Madagascar: An EIA Briefing for CITES SC65*, online: EIA <[http://eia-global.org/images/uploads/EIA\\_Madagascar\\_Report\\_2014\\_SC65\\_low\\_res.pdf](http://eia-global.org/images/uploads/EIA_Madagascar_Report_2014_SC65_low_res.pdf)>.

<sup>2</sup> Madagascar *Décret* 2010-141, online: Centre d'échange d'information de Madagascar <[http://mg.chm-cbd.net/implementation/Documents\\_nationaux/textes-legislatifs-nationaux/decrets/decret-2010-141-de-la-24-03-10-portante-interdiction-de-coupe-d-exploitation-et/download/fr/1/Decret%202010-141.pdf](http://mg.chm-cbd.net/implementation/Documents_nationaux/textes-legislatifs-nationaux/decrets/decret-2010-141-de-la-24-03-10-portante-interdiction-de-coupe-d-exploitation-et/download/fr/1/Decret%202010-141.pdf)>, referred to in Rhett A Butler, "Madagascar bans rainforest timber exports following global outcry" *Mongabay* (25 March 2010), online: Mongabay <<http://news.mongabay.com/2010/03/madagascar-bans-rainforest-timber-exports-following-global-outcry/>>. *Décret* 2010-141 is also referred to in David Maxwell Braun, "Conservationists Applaud Renewed Ban on Madagascar Rosewood", *National Geographic* (29 March 2010), online: National Geographic <[http://voices.nationalgeographic.com/2010/03/29/madagascar\\_rosewood\\_ban\\_reaction/](http://voices.nationalgeographic.com/2010/03/29/madagascar_rosewood_ban_reaction/)>.

of *Wild Fauna and Flora*<sup>3</sup> by Madagascar with effect from December 2011<sup>4</sup> and subsequently uplisted to Appendix II by the Conference of the Parties with effect from June 2013.<sup>5</sup> States that have become *CITES* Parties, including Singapore and 180 other countries, are obliged to implement national laws which give effect to the treaty's provisions. In Singapore's case, this was achieved through the enactment of the *Endangered Species (Import and Export) Act*<sup>6</sup> which regulates trade in scheduled species, a dynamic list of endangered species drawn from the contents of the *CITES* appendices.

Recently, a Singapore District Court had an opportunity to consider the statutory provisions of the *ESA* that regulate trade in endangered species when a local trading company was prosecuted for importing approximately 30,000 rosewood logs into Singapore.<sup>7</sup> While the District Court acquitted the defendants of the charge of unlawfully importing specimens of an endangered species into Singapore, this case is significant for a number of reasons and merits closer scrutiny. First, it illustrates the importance of adopting a purposive approach towards statutory interpretation when analysing the scope of legislative provisions that purport to implement an international treaty. Secondly, this case highlights the potentially significant role which a small island state can play in combatting international wildlife crimes when it is an international hub for the transshipment of endangered species. Thirdly, the case demonstrates the need for greater international cooperation, coordination and convergence between *CITES* Parties in the design and implementation of their respective national legal frameworks.

## II. THE CASE BROUGHT BEFORE THE COURT: *WONG WEE KEONG* (DC)

### A. *International and National Legal Framework: CITES and ESA*

Since 1975, the international community has sought to promote sustainability in international wildlife trade through *CITES*. The Convention lists, in its appendices, species of wild fauna and flora whose conservation status is endangered by trade. Appendix I lists species that are the most endangered—those that are threatened with extinction.<sup>8</sup> *CITES* permits international trade in specimens of these species only when the specimens will not be used for primarily commercial purposes,<sup>9</sup> such as for scientific research. In these exceptional cases, trade may take place provided

<sup>3</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243, 12 ILM 1085, online: *CITES* <<https://www.cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf>> [*CITES*].

<sup>4</sup> *CITES Notification to the Parties No 2011/039* (23 September 2011), online: *CITES* <<https://cites.org/eng/notif/2011/E039.pdf>>. Singapore amended the Schedule to the *ESA*, *infra* note 6 via the *Endangered Species (Import and Export) Act (Amendment of Schedule) (No. 2) Notification 2011* (No S 666/2011) which came into operation on 22 December 2011.

<sup>5</sup> *CITES Notification to the Parties No 2013/012* (19 April 2013), online: *CITES* <<https://www.cites.org/sites/default/files/eng/notif/2013/E-Notif-2013-012.pdf>>.

<sup>6</sup> Cap 92A, 2008 Rev Ed Sing [*ESA*].

<sup>7</sup> *Public Prosecutor v Wong Wee Keong* [2015] SGDC 300 [*Wong Wee Keong* (DC)]. *Wong Wee Keong* refers to the cases of *Wong Wee Keong* (DC), *ibid*, and *Wong Wee Keong* (HC), *infra* note 121 collectively.

<sup>8</sup> *CITES*, *supra* note 3, Article II, para 1.

<sup>9</sup> *CITES*, *ibid*, Article III.

it is authorised by the issuance of both an import permit and an export permit (or re-export certificate) by the importing and exporting Parties.<sup>10</sup>

Appendix II lists species that are not necessarily now threatened with extinction but that may become so unless trade is closely controlled. It also includes so-called “look-alike species”, *ie* species whose specimens in trade look like those of species listed for conservation reasons.<sup>11</sup> International trade in specimens of Appendix II species may be authorised by the granting of an export permit or re-export certificate. No import permit is necessary under the *CITES* framework for these species (though some countries may adopt stricter measures than required under *CITES*). Permits or certificates should only be granted by the relevant authorities if certain conditions are met, the central consideration being whether or not allowing trade in the *CITES*-listed species will be detrimental to the survival of the species in the wild.<sup>12</sup> Appendix III is a list of species included at the request of a party that needs the cooperation of other countries to prevent unsustainable or illegal exploitation.<sup>13</sup> International trade in specimens of species listed in this appendix is allowed only on presentation of *CITES*-compliant permits or certificates.<sup>14</sup>

Thus, depending on the appendix in which a species is listed, the export, import and re-export of specimens of a listed species require traders to obtain special permits issued by the relevant states of export, import, and re-export.

As a party to *CITES*, Singapore is obliged to implement national laws which give effect to the treaty’s provisions. In the case of an Appendix II-listed species, the export and import of such species is only permitted if such acts are accompanied by a *CITES*-compliant export permit issued by the State of export, and a re-export must be accompanied by a *CITES* re-export permit issued by the State of re-export.<sup>15</sup>

When Singapore acceded to *CITES* on 30 November 1986,<sup>16</sup> the Convention was initially implemented via existing legislation at the time, such as the *Wild Animals and Birds Act*,<sup>17</sup> *Animals and Birds Act*,<sup>18</sup> and *Fisheries Act*.<sup>19</sup> However these statutes were not enacted for the purpose of controlling *international trade* in endangered species, and fell short for that purpose.<sup>20</sup> In 1989, Singapore enacted

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<sup>10</sup> Article VII of *CITES*, *ibid* provides for a number of exemptions to this general prohibition.

<sup>11</sup> *CITES*, *ibid*, Article II, para 2.

<sup>12</sup> *CITES*, *ibid*, Article IV.

<sup>13</sup> *CITES*, *ibid*, Article II, para 3.

<sup>14</sup> *CITES*, *ibid*, Article V.

<sup>15</sup> *CITES*, *ibid*, Article IV.

<sup>16</sup> It appears that a primary motivation for doing so may have been unilateral sanctions imposed by the United States. On 25 September 1986, the United States Fish and Wildlife Service banned all wildlife imports from Singapore, citing its inability to provide documentation comparable to what was required under *CITES*. See Rosalind Reeve, *Policing International Trade in Endangered Species—The CITES Treaty and Compliance* (London: Earthscan Publications Ltd, 2002) at 129, 130; William C Burns, “*CITES* and the Regulation of International Trade in Endangered Species of Flora: A Critical Appraisal” (1990) 8:2 *Dick J Int’l L* 203 at 216; and Peter H Sand, “Wither *CITES*? The Evolution of a Treaty Regime in the Borderland of Trade and Environment” (1997) 1 *EJIL* 29 at 39.

<sup>17</sup> No 5 of 1965, Sing.

<sup>18</sup> No 3 of 1965, Sing.

<sup>19</sup> No 14 of 1966, Sing.

<sup>20</sup> *Parliamentary Debates Singapore: Official Report*, vol 73 at col 562 (26 January 1989) (Lee Boon Yang, Senior Minister of State for National Development).

the *Endangered Species (Import and Export) Act*,<sup>21</sup> its first piece of legislation specifically for implementing *CITES*.

Meanwhile, the nations of Southeast Asia were increasingly concerned about the rise in wildlife crime and international trade in endangered species. All members of the Association of South East Asian Nations (“ASEAN”) are signatories to *CITES*. On 11 October 2004, an ASEAN Statement on *CITES* was made by the ASEAN Ministers responsible for the implementation of *CITES*, expressing the commitment of ASEAN Member Countries to cooperate on improved implementation of the Convention, including law enforcement. On 3 May 2005, the *ASEAN Regional Action Plan on Trade in Wild Fauna and Flora (2005-2010)* was developed and adopted by the Special Meeting of the ASEAN Experts Group on *CITES* in Jakarta.<sup>22</sup> Specifically, it addresses common issues of law enforcement networking, inter-agency cooperation, strengthening national legislation, and increasing the availability of scientific information to guide wildlife trade management by *CITES* authorities. The Regional Action Plan also prioritises engagement with civil society to raise awareness of legality and sustainability issues with industry groups, traders and local communities involved in wildlife trade.

In December 2005, ASEAN’s Wildlife Enforcement Network (“ASEAN-WEN”) was established. It aims to address illegal exploitation and trade in *CITES*-listed species within the ASEAN region by “forming an integrated network among law enforcement agencies, involving the *CITES* authorities, customs, police, prosecutors, specialised governmental wildlife law enforcement organisations and other relevant national law enforcement agencies.”<sup>23</sup> ASEAN Member Countries with existing *CITES* legislation found it necessary to re-examine their laws to support their obligations to *CITES*. Thus, Singapore and Malaysia revised their laws to better implement their international obligations under *CITES*. Malaysia passed its *International Trade in Endangered Species Act*<sup>24</sup> in 2007.

Singapore’s 1989 *ESA* proved to be inadequate. In particular, penalties were extremely low (maximum fine of \$5,000, doubling to \$10,000 for a subsequent offence), and the offences were on a per species basis, instead of on a per specimen basis.<sup>25</sup> In 2006, the 1989 *ESA* was repealed and re-enacted with amendments, to “update and realign the *ESA* to the changes in the *CITES*, and to enhance the deterrence against any illegal trade in wildlife through Singapore”.<sup>26</sup> Over the years, Singapore has updated the list of scheduled species regulated under the *ESA* to reflect changes made to the *CITES* appendices as new endangered species are added or reclassified. Following the listing of Madagascan rosewood in Appendix II of *CITES*,

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<sup>21</sup> No. 4 of 1989 (repealed 2006) [1989 *ESA*].

<sup>22</sup> ASEAN, *ASEAN Regional Action Plan on Trade in Wild Fauna and Flora, 2005-2010* (3 May 2005), online: ASEAN <<http://www.asean.org/storage/images/archive/17753.pdf>> [Regional Action Plan].

<sup>23</sup> ASEAN-WEN, *What is ASEAN-WEN?*, online: ASEAN-WEN <<http://www.asean-wen.org/index.php/about-us/what-is-asean-wen>>.

<sup>24</sup> No 686 of 2008, Malaysia.

<sup>25</sup> See also Lye Lin-Heng, “The Implementation of the Convention on International Trade in Endangered Species in Singapore” (1999) 2:1 *J Int’l Wildlife L & Pol’y* 46 for a description of the other weaknesses of the 1989 *ESA*.

<sup>26</sup> *Parliamentary Debates Singapore: Official Report* (17 January 2006) vol 80 at cols 2185, 2186 (Heng Chee How, Minister of State for National Development).

Singapore amended the Schedule of the *ESA* on 11 June 2013 to include the species,<sup>27</sup> and informed Singapore-based traders on 17 May 2013 about these changes to the law that would come into effect on 12 June 2013.<sup>28</sup> Singapore enhanced its penalties and also added provisions to allow the authorities to seize scheduled species that are in transit. The Agri-food and Veterinary Authority (“AVA”) is the *CITES* management authority for Singapore and is also in charge of implementing and enforcing the *ESA*.

#### B. Statutory Controls Imposed on “Imports” of Scheduled Species versus Scheduled Species “In Transit”

Under the *ESA*, international trade in *CITES*-listed endangered species is regulated via two key provisions. Section 4 regulates imports, exports and re-exports of scheduled species, while s 5 regulates the movement of scheduled species “in transit in Singapore”.

Section 4(1) of the *ESA* provides that “[a]ny person who imports, exports or introduces from the sea any scheduled species without a permit shall be guilty of an offence and shall be liable on conviction to a fine. . .”.

The “permit” referred to above is defined in s 2(1) of the *ESA* as a permit issued by the Singapore authorities,<sup>29</sup> *ie* the AVA. This is the key regulatory difference between “imports” of scheduled species into Singapore and transshipment scenarios where the scheduled species are merely “in transit”; “imports” require an import licence issued by the AVA, whereas goods “in transit” only require the AVA to be satisfied that “a valid *CITES* export or re-export permit, licence, certificate or written permission” has been obtained from the country of export or re-export, and, similarly when these permits *etc* are required by the country of import or final destination.<sup>30</sup>

Under s 2(1) of the *ESA*, an “import” is defined as “to bring, or cause to be brought into Singapore by land, sea or air any scheduled species other than any scheduled species in transit in Singapore”, with s 2(2) of the *ESA* elaborating that:

[A] scheduled species shall be *considered* to be in transit *if, and only if*, it is brought into Singapore solely for the purpose of taking it out of Singapore and—

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<sup>27</sup> *Endangered Species (Import and Export) Act (Amendment of Schedule) Notification 2013* (S 349/2013 Sing) came into operation on 12 June 2013.

<sup>28</sup> Agri-food and Veterinary Authority of Singapore, *Inclusion of New Wildlife and Timber Species on CITES*, online: AVA <[http://www.customs.gov.sg/~media/cus/files/circulars/ca/2013/ava\\_circular20130517.pdf](http://www.customs.gov.sg/~media/cus/files/circulars/ca/2013/ava_circular20130517.pdf)>.

<sup>29</sup> “Permit” is defined in the *ESA*, *supra* note 6, s 2, as “a permit, licence, certificate or written permission issued by the Director-General under section 7(2) or deemed to be issued under section 31”.

<sup>30</sup> Section 5(1) of the *ESA*, *ibid*, provides that:

Every scheduled species in transit in Singapore shall be accompanied by—

(a) a valid *CITES* export or re-export permit, licence, certificate or written permission issued by the competent authority of the country of export or re-export, as the case may be, of the scheduled species; and

(b) where required by the country of import or final destination of the scheduled species, a valid *CITES* import permit, licence, certificate or written permission issued by the competent authority of that country or destination.

- (a) remains at all times in or on the conveyance in or on which it is brought into Singapore;
- (b) is removed from the conveyance in or on which it was brought into Singapore and either returned to the same conveyance or transferred directly to another conveyance before being despatched to a place outside Singapore, and is kept under the control of the Director-General<sup>[31]</sup> or an authorised officer while being so removed, returned or transferred; or
- (c) is removed from the conveyance in or on which it was brought into Singapore and kept under the control of the Director-General or an authorised officer for a period not exceeding 14 days or such longer period as the Director-General may permit pending despatch to a place outside Singapore.<sup>32</sup>

The rationale for imposing different regulatory requirements upon imports of scheduled species into Singapore, as opposed to when they are merely in transit to another final port of call, is probably explicable along the following lines. “Imports” into Singapore trigger the state’s territorial jurisdiction, making it justifiable for the AVA to exercise greater control over movements of the regulated subject matter through its import licensing framework. In contrast, when the regulated subject matter is merely “in transit” through Singapore, en route to some other territory, the state’s territorial interest in regulating such conduct is diminished, and the justification for imposing legal regulation lies in its international obligations such as those set out in the *CITES* framework. In transit cases, the AVA plays a lesser role—rather than evaluating applications for permits to import a scheduled species, the agency must simply be satisfied that the appropriate export and import permits have been obtained from the exporting and importing States.

### C. *The District Court’s Decision—No “Import” of Scheduled Species into Singapore*

In *Wong Wee Keong*, a shipment of 29,434 pieces of rosewood logs left Madagascar in February 2014 and entered Singapore on 11 March 2014. The vessel carrying these logs berthed in Jurong Port, and the logs were unloaded between 12 and 14 March 2014. The manifest named Singapore as the port of discharge, and the second defendant was named as the consignee. Based on a tip-off, that the shipment may be illegal, the AVA inspected and the shipment was seized by its officers. These logs were derived from a scheduled species listed in Appendix II of the Schedule of the *ESA*, which corresponds with Appendix II of *CITES*. The second defendant was charged with importing the logs without the requisite import permit from the AVA, thereby committing an offence under s 4(1) of the *ESA*. The first defendant, the managing director of the second defendant, was charged with the same offence as it was alleged that the second defendant’s had committed the offence with the first defendant’s consent and connivance. Both defendants pleaded not guilty.

<sup>31</sup> The “Director-General” is defined in s 2 of the *ESA*, *ibid*, as the Director-General of the AVA.

<sup>32</sup> *ESA*, *ibid*, s 2(2) [emphasis added].

The prosecution argued that the specimens had been imported into Singapore because the specimens had been brought into Singapore and they were not in transit in Singapore. On the purpose of bringing the specimens into Singapore, the prosecution submitted that this was not “solely for the purpose of taking it out of Singapore”.<sup>33</sup> The shipment was consigned to a local consignee, the second defendant. The first defendant had informed the AVA that the shipment was brought into Singapore as freestanding logs and intended to be re-packaged into containers for shipping to Hong Kong. He had, however, declined to disclose to the AVA the identity of the buyer in Hong Kong.<sup>34</sup> The second defendant had engaged a logistics company to offload the specimens from the vessel after it arrived at Jurong Port, pack the timber into containers, and move the containers to the Port of Singapore Authority International’s Port (“PSA Port”) thereafter to await shipment to Hong Kong. The specimens were in the midst of being offloaded when they were seized by the AVA officers. The logistics company and the second defendant had also provided a quotation for freight charges from Singapore to Hong Kong, which the first defendant had purportedly “accepted” on behalf of the second defendant.<sup>35</sup> The prosecution argued that these merely represented preliminary negotiations and tentative bookings for vessels departing for Hong Kong, but the judge seemed to regard them as tantamount to a binding contract.

The prosecution further argued that the specimens were also not in transit in Singapore because none of subsections (a), (b) or (c) of s 2(2) of the *ESA* applied to the facts in the case. In particular, given that the specimens had been removed from and not returned to the vessel in which they were brought into Singapore, the specimens could only be said to be in transit in Singapore if they had been “under the control of the Director-General or an authorised officer. . . pending the dispatch to a place outside Singapore”. This was not the case because the Director-General had not specifically delegated his power to a customs officer as he was empowered to do so under s 3(3) of the *ESA*.<sup>36</sup>

The trial judge granted both defendants a discharge amounting to an acquittal, reaching the conclusion that there was no evidence to establish that the logs were imported into Singapore because the conduct of the defendants fell within the scope of s 2(2) of the *ESA*. The timber they had brought into Singapore was “in transit” because it had been “brought into Singapore solely for the purpose of taking it out of Singapore” and “kept under the control of. . . an authorised officer for a period not exceeding 14 days. . . pending despatch to a place outside Singapore.”<sup>37</sup> She also held that since an authorised officer is defined in s 2 of the *ESA* to include “an officer of Customs within the meaning of the Customs Act”; and since the logs were during the relevant period, deposited in a free trade zone (as defined in the *Customs Act*<sup>38</sup>),

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<sup>33</sup> *ESA*, *ibid*, s 2(2).

<sup>34</sup> *Wong Wee Keong* (DC), *supra* note 7 at para 33.

<sup>35</sup> *Wong Wee Keong* (DC), *ibid* at paras 36, 51. The quotation from the logistic company to move the goods from Jurong Port to PSA Port was dated 9 January 2014, but it is unclear from the judgement exactly when this was “accepted”—bearing in mind that the alleged importation of the specimens took place on or about 14 March 2014—and whether there were confirmed arrangements for the containers to be loaded on another Hong Kong bound vessel at PSA port.

<sup>36</sup> *Wong Wee Keong* (DC), *ibid* at para 66.

<sup>37</sup> *Wong Wee Keong* (DC), *ibid* at para 61.

<sup>38</sup> Cap 70, 2004 Rev Ed Sing.

the logs were by definition in s 2(2) of the *Customs Act* under “customs control”, and therefore under the control of an authorised officer.<sup>39</sup> Consequently, the logs were in transit in Singapore, and not imported into Singapore. The court further declined to exercise its jurisdiction to allow the charge against the defendants to be amended to one based on s 5 of the *ESA*, which regulates *CITES*-listed species that are “in transit” in Singapore.

### III. WHEN DOES AN “IMPORT” OF A SCHEDULED SPECIES TAKE PLACE UNDER S 4 OF THE *ESA*?

The logic behind the scope of the two principal provisions of the *ESA*—ss 4 and 5—is readily apparent if they are viewed in tandem. Both provisions aim to comprehensively regulate the movement of endangered species into and out of Singapore. Whenever a *CITES*-listed endangered species arrives at Singapore’s ports, such conduct *must* fall within the scope of *either* s 4(1) (as an “import”) *or* s 5(1) (as a scheduled species “in transit”) of the *ESA*. The two sections are inextricably intertwined. Given how “import” is defined in s 2(1) of the *ESA* to include bringing any scheduled species into Singapore by any mode of conveyance except when such items are “in transit”, the broader the scope of meaning assigned to the phrase “in transit”, the narrower the range of conduct that will amount to an “import” for the purposes of s 4. The question is, should the “import” provision be given a broader scope of application, thereby triggering the AVA’s statutory power to determine if a *CITES*-import permit ought to be issued? Or should the “in transit” category be defined more broadly, encompassing all transshipment cases where Singapore is used as a port of call, thereby relegating the AVA to simply checking that the appropriate permits have been issued by the countries of export and import? It might be worth looking at how “import” is legally defined elsewhere in Singapore’s written laws before considering whether the same approach ought to be adopted when interpreting the scope of the “import” provision in s 4(1) of the *ESA*.

#### A. *The Statutory Definition of “Import” under Singapore’s Customs Laws*

The movement of goods in and out of Singapore is regulated under the *Regulation of Imports and Exports Act*.<sup>40</sup> For the purpose of the *RIEA*, “import” is defined in s 2(1) as:

[T]o bring or cause to be brought into Singapore by land, water or air from any place which is outside Singapore but does not include the bringing into Singapore of goods which are to be taken out of Singapore on the same conveyance on which they were brought into Singapore without any landing or transshipment within Singapore.

In other words, for the purposes of the *RIEA*, an “import” includes all movement of goods into Singapore *except* where the goods *enter and leave Singapore on the*

<sup>39</sup> *Wong Wee Keong* (DC), *supra* note 7 at paras 59, 60.

<sup>40</sup> Cap 272A, 1996 Rev Ed Sing [*RIEA*].

*same conveyance without landing or transhipment.* For the purpose of the *RIEA*, s 2(1) defines “tranship” to mean “to remove goods from one conveyance to another for the purpose of export”. As such, under Singapore’s customs laws, an “import” occurs the moment the goods are unloaded from the vessel which brought them to Singapore, even if they have only been unloaded for the purposes of transhipment to a subsequent destination. To avoid coming within the scope of “import” under the *RIEA*, and being regulated as such, goods have to remain on the same vessel they arrived in and be transported away from Singapore on that same vessel.

This broader statutory definition of “import” in the *RIEA* ensures that the Singapore Customs and other authorities are given a broad regulatory oversight over the movement of goods into and out of Singapore.

B. “Import” versus “In Transit” under the *ESA*—the Potential for Abuse and the Recommendations of the *CITES Conference of Parties*

At first glance, the statutory definition of “import” under the *ESA* appears to be less expansive because of the exception given to scheduled species “in transit”, and the different alternative criteria set out in s 2(2) of the *ESA* before a scheduled species can be considered as being in transit. Indeed, it was because the court in *Wong Wee Keong* (DC) had found that the only evidence before it pointed exclusively to the first defendant’s intention to ship the timber to Hong Kong—and therefore “the rosewood logs were brought into Singapore solely for the purposes of containerisation to ship to Hong Kong”<sup>41</sup>—that the prosecution failed to make its case under s 4(1) of the *ESA* for importing the scheduled species without a *CITES*-import permit from the AVA.

However, there are at least two legal arguments in favour of adopting a broader interpretation of what constitutes an “import” under the *ESA*, which means confining the category of when scheduled species are regarded as “in transit” to a narrower range of circumstances. First, the plain language of the statute itself indicates that the court is not compelled to characterise the conduct in question as falling within the “in transit” category just because the statutory criteria set out in s 2(2) of the *ESA* have been satisfied. Section 2(2) of the *ESA* is not a ‘deeming provision’. It does not contain a prescriptive definition of the term “in transit”—all it does is instruct the court to *consider* a movement of scheduled species to be “in transit” if, and only if, the alternative criteria set out in that provision are met. If none of these criteria are satisfied, then the court cannot consider the shipment in question to be “in transit”. Conversely, even if the criteria in s 2(2) are established, the court is still free to consider all the surrounding circumstances before deciding if the conduct in question should be characterised as falling into either the “import” or “in transit” category. This interpretation of s 2(2) of the *ESA* is bolstered by the fact that the legislation was amended to replace the presumptive language found in the 1989 *ESA*.<sup>42</sup> This was a

<sup>41</sup> *Wong Wee Keong* (DC), *supra* note 7 at para 53.

<sup>42</sup> Section 2(2) of the 1989 *ESA* provided that [emphasis added]:

Scheduled species shall be *deemed* to be in transit *if* it is brought into Singapore solely for the purpose of taking it out of Singapore and—

- (a) remains at all times in or on the conveyance in or on which it is brought into Singapore;
- (b) is removed from the conveyance in or on which it was brought into Singapore and either returned to the same conveyance or transferred directly to another conveyance before being despatched

true “deeming provision” found in the repealed Act that constrained the courts’ ability to evaluate the wider range of circumstances surrounding the carriage of endangered species before determining if it amounted to an act of importation.

Secondly, a narrower reading of the scope of the “in transit” category of conduct under the *ESA* framework would be entirely consonant with the recommendations of the *CITES* Conference of Parties, the governing body for the Convention that the *ESA* seeks to implement. At the Fourth Meeting of the Conference of the Parties in 1983, the *CITES* Parties explicitly recognised that “Article VII,<sup>[43]</sup> paragraph 1, of the Convention allows the transit and transshipment of specimens through or in the territory of a Party without the need for application of Articles III,<sup>[44]</sup> IV<sup>[45]</sup> and V<sup>[46]</sup>” and “that there is potential for the abuse of this provision by the keeping of specimens in the territory of a Party while seeking a buyer in another country”, prompting them to pass a resolution in 1983 recommending:

- (a) for the purpose of Article VII, paragraph 1, of the Convention:
  - (i) that the phrase “transit or trans-shipment of specimens” refer only to those situations in which a specimen is, in fact, *in the process of shipment to a named consignee* and that any interruption in the movement arises only from the arrangements *necessitated by this form of traffic*; [and]
  - (ii) that valid export documentation as required under the Convention or satisfactory proof of its existence be available for inspection by the authorities of the country of transit or trans-shipment *and that it clearly show the ultimate destination of the shipment*;
- ....
- (c) that Parties re-examine their procedures while bearing in mind that to qualify for the special arrangement implicit in Article VII, paragraph 1, of the Convention for specimens in transit or trans-shipment, *they must be moving through the state and remain under customs control while doing so*.<sup>47</sup>

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to a place outside Singapore, and is kept under the control of the Director or an authorized officer while being so removed, returned or transferred; or

- (c) is removed from the conveyance in or on which it was brought into Singapore and kept under the control of the Director or an authorised officer for a period not exceeding 14 days or such longer period as the Director may permit pending despatch to a place outside Singapore.

<sup>43</sup> Article VII relates to the “Exemptions and Other Special Provisions Relating to Trade”.

<sup>44</sup> Article III relates to the “Regulation of Trade in Specimens of Species Included in Appendix I”.

<sup>45</sup> Article IV relates to the “Regulation of Trade in Specimens of Species Included in Appendix II”.

<sup>46</sup> Article V relates to the “Regulation of Trade in Specimens of Species Included in Appendix III”.

<sup>47</sup> *CITES Resolution Conf 4.10*, para (a) (repealed), online: Center for International Earth Science Information Network <[http://www.ciesin.columbia.edu/repository/entri/docs/cop/CITES\\_COP004\\_res010.pdf](http://www.ciesin.columbia.edu/repository/entri/docs/cop/CITES_COP004_res010.pdf)> [emphasis added]. Presumably the “named consignee” must be a party outside the State of transit.

This recommendation was subsequently repealed and substantively re-adopted with modification during the Ninth Conference of the Parties in 1994.<sup>48</sup> Adopting a narrow definition of when *CITES*-listed specimens are “in transit”—by limiting its application to situations where there is a named consignee and a final destination in another jurisdiction—would consequently result in an enlargement of the “import” category, giving *CITES* Parties more control over the movement of endangered species through their respective territories. As de Klemm noted:

Resolution Conf. 4.10 contains a definition of transit and trans-shipment which makes it clear that these terms “refer only to those situations in which a specimen is in fact in the process of shipment to a named consignee and that any interruption in the movement arises only from the arrangements necessitated by this form of traffic”. The Resolution states that to qualify for the exemption provided in Article VII.1, specimens must be moving through the State of transit and must remain under Customs control while doing so. *It follows that shipments that do not meet this definition, in particular shipments to no named consignee or to a consignee in the country where the goods are supposed to be in transit, should not be considered as in transit but as imports and therefore subject to the controls in the Convention.*<sup>49</sup>

If a purposive construction of “import” and “in transit” in s 2 of the *ESA* had been carried out, the scope of “import” would have been broader than its interpretation by the District Court. Section 9A(1) of the *Interpretation Act*<sup>50</sup> provides that:

In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.<sup>51</sup>

Sections 9A(2) and (3) of the *IA* permit consideration of “any treaty or other international agreement that is referred to in the written law” to confirm that the meaning of a statutory provision is the “ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying

<sup>48</sup> *CITES Resolution Conf 9.7* (Rev CoP15), online: *CITES* <<https://cites.org/sites/default/files/document/E-Res-09-07R15C16.pdf>> as follows [emphasis added]:

- (a) for the purpose of Article VII, paragraph 1, of the Convention, the phrase ‘transit or transshipment of specimens’ be interpreted to refer only to:
  - (i) specimens that *remain in Customs control* and are in the process of shipment to a *named consignee* when any interruption in the movement arises only from the arrangements necessitated by this form of traffic;
  - ...
  - (c) to be considered as valid, any such permit or certificate must clearly show *the ultimate destination of the shipment*. . .

<sup>49</sup> Cyrille de Klemm, *Guidelines for Legislation to Implement CITES* (Gland: IUCN, 1993) 18, online: IUCN <<https://portals.iucn.org/library/efiles/edocs/EPLP-026.pdf>> [emphasis added].

<sup>50</sup> Cap 1, 2002 Rev Ed Sing [IA].

<sup>51</sup> *Ibid*, s 9A(1).

*the written law*".<sup>52</sup> Recommendations issued by the *CITES* Conference of Parties, while not strictly binding on Singapore, and not formally a part of Singapore law, are clearly capable of providing valuable assistance in purposively interpreting the provisions of the *ESA*.

Considering that the international organisations responsible for administering *CITES* are in favour of limiting the scope of the "in transit" category of conduct—effectively giving "import" a broader meaning—it would have made sense for the same approach to have been taken when interpreting ss 2(2) and 4(1) of the *ESA*. In other words, if a shipment of *CITES*-listed specimens arrives in Singapore's ports with a Singapore entity as the named consignee, then it should *not* be regarded as having been brought into Singapore "*solely* for the purpose of taking it out of Singapore" (one of the criteria for when the scheduled species is considered "in transit" in s 2(2)) even if there was an intention that the specimens would ultimately find their way to another market outside of Singapore. This is all the more pertinent where there is no named consignee outside Singapore, the defendant declining to disclose to the AVA the identity of the buyer in Hong Kong.<sup>53</sup>

Adopting a narrow interpretation of the "in transit" category of conduct, with a correspondingly broader definition of the "import" category of conduct, would thus be consistent with the regulatory goals of the *CITES* international framework by denying rogue wildlife traders the option of conveying *CITES*-listed species to Singapore while shopping around for buyers from other states which may not have any, or as rigorously-enforced, *CITES*-implementation laws.

### C. Policy Reasons for Adopting a Broader Definition of "Import" under the *ESA*

While the term "import" could plausibly be defined to refer only to the act of bringing specimens into Singapore that will be distributed, stored or sold within the territory of Singapore, it is submitted that such a narrow interpretation would unduly stifle the regulatory efficacy of the *ESA*. A broader definition of "import" under the *ESA* would ensure that the AVA, Singapore's *CITES* management authority, maintains a firm regulatory grip on the movement of *CITES*-listed species through Singapore's ports. Given the small size of Singapore's domestic market and its status as the world's busiest transshipment hub, the vast quantities of specimens of endangered species that arrive at her ports will be transhipped to other destinations. If all transshipments are characterised as instances where the scheduled species are "in transit", this will thwart the efforts of *CITES* Parties to effectively regulate wildlife traders who may seek to exploit the "in transit" exemption to store specimens of endangered species in the States of transit while looking for buyers for such specimens. Furthermore, the AVA's regulatory role will be limited to ascertaining the 'validity' of *CITES* documentation accompanying the specimens produced by the shippers. This would diminish the enforcement agency's role, with less time spent making substantive evaluations on whether to issue import or re-export permits to wildlife traders, and more time spent on compliance-determination matters—whether, in particular, the documents accompanying *CITES*-listed species en route to another destination are

<sup>52</sup> *Ibid*, s 9A(2). See also *The "Sahand"* [2011] 2 SLR 1093 at para 34 (HC).

<sup>53</sup> *Wong Wee Keong* (DC), *supra* note 7 at para 33.

authentic and satisfy the requirements of *CITES*. This is not always a clear-cut task.<sup>54</sup> On the other hand, if the “import” category of cases extends to some transshipment scenarios—such as where the named consignee is a Singapore entity—then such transactions can be scrutinised as “import and re-export” dealings which would allow the AVA to make considered decisions in individual cases about whether or not it should issue import and re-export permits.

#### IV. REGULATORY CONTROL OVER SCHEDULED SPECIES “IN TRANSIT”—AN ALTERNATIVE CHARGE UNDER S 5 OF THE *ESA*?

When the District Court decided that the conduct of the defendants in *Wong Wee Keong* did not satisfy the “import” element of s 4(1) of the *ESA*, it could have allowed the prosecution’s alternative submission to amend the charge to one under s 5(1) of the *ESA*, a separate offence for conveying *CITES*-listed species in transit in Singapore without the appropriate *CITES* export and import permits. However, the court chose not to allow the charge to be amended because the charge against the defendants had originally been framed under s 5(1) of the *ESA* and was amended by the prosecution to s 4(1) before the trial commenced.<sup>55</sup> Furthermore, the judge noted that the prosecution had conducted the trial in a way which did not directly consider questions which were relevant to the elements of the s 5(1) offence. We submit that, even if the interpretation given by the District Court to the term “import” in s 4(1) of the *ESA* was correct, the application to amend the charge ought to have been permitted to implement the panoptic scope of the regulatory framework envisaged under the *ESA*. Taking both ss 4 and 5 of the *ESA* collectively, any endangered species specimens brought into Singapore must *either* be regulated as imports *or* scheduled species in transit.

##### A. *Prosecution under s 5 of the ESA: The District Court’s Discretion to Amend the Charge*

It is not in dispute that the court in this case had the power to amend the charge to s 5(1) of the *ESA*. Singapore’s *Criminal Procedure Code*<sup>56</sup> clearly allows the courts to amend the charge against the defendants at the close of the prosecution’s case. Sections 230(1)(f) and (g) of the *CPC* provide that:

230.—(1) The following procedure must be complied with at the trial in all courts:

...

<sup>54</sup> For example, *CITES* Parties have adopted the use of export quotas as a management tool to ensure that exports of specimens of a certain species are maintained at a level that has no detrimental effect on the population of the species, but the use and implementation of export quotas is not set out in *CITES*, and was only subsequently provided for in a Conference of the Parties resolution. It is not clear whether *CITES* export permits issued in breach of such quotas are ‘valid’. See *CITES Resolution Conf 14.7* (Rev CoP15), online: *CITES* <<https://cites.org/sites/default/files/document/E-Res-14-07R15C16.pdf>>. See also the discussion below in Section IV.C.

<sup>55</sup> *Wong Wee Keong* (DC), *supra* note 7 at paras 67, 68.

<sup>56</sup> Cap 68, 2012 Rev Ed Sing [*CPC*].

- (f) after the prosecutor has concluded his case, the defence may invite the court to dismiss the case on the ground that there is no case to answer and the prosecutor may reply to the submission;
- (g) the court may alter the charge or frame a new charge before calling on the accused to give his defence and if the court does so, the court must follow the procedure set out in sections 128 to 131. .<sup>57</sup>

Section 128(1) of the *CPC* provides that the “court may alter a charge or frame a new charge, whether in substitution for or in addition to the existing charge, at any time before judgment is given”, while s 131 goes on to say that:

If a charge is altered or a new charge is framed by the court after the start of a trial, the prosecutor and the accused must, on application to the court by either party, be allowed to recall or re-summon and examine any witness who may have been examined, with reference to the altered or newly framed charge only, unless the court thinks that the application is frivolous or vexatious or is meant to cause delay or to frustrate justice.<sup>58</sup>

So it was clearly within the court’s power to amend the charge against the defendants to one under s 5(1) of the *ESA* for having scheduled species in transit without the necessary accompanying documents specified in that statutory provision. As the judge noted, “[s]uch a charge involving the allegation that there was no valid ‘CITES export permit, licence, certificate or written permission’ involved a wholly different query and required the evidence of an official from the Madagascan management authority”.<sup>59</sup> Amending the charge would have delayed the proceedings to the extent that fresh evidence would have to be adduced, but that would have been a small price to pay for giving the *ESA* the full scope it was intended to have.<sup>60</sup> Indeed, it should be reiterated that the s 5 offence was introduced into the re-enacted *ESA* in 2006 to *enhance* the powers of the authorities and provide for a more robust implementation of the Convention, particularly as Singapore was and continues to be a major transit point for this trade.

#### B. *The Repeal and Re-enactment of the ESA in 2006—and the Introduction of a Regulatory Control over Scheduled Species in Transit*

The 1989 *ESA* did not regulate scheduled species in transit through Singapore. This was notwithstanding the fact that Singapore was mindful of the role it played in international wildlife smuggling as a major centre for international trade. When

<sup>57</sup> These provisions mirror the case law on the same point—*Public Prosecutor v Tan Khee Wan Iris* [1994] 3 SLR (R) 168 (HC) [*Tan Khee Wan Iris*], which was cited by the District Court. See *Wong Wee Keong* (DC), *supra* note 7 at para 69.

<sup>58</sup> *CPC*, *supra* note 56, s 131.

<sup>59</sup> *Wong Wee Keong* (DC), *supra* note 7 at para 69.

<sup>60</sup> Any possibility of prejudice to the defendants in *Wong Wee Keong* could be answered by allowing the defendant an adjournment to re-evaluate his defence.

moving the Second Reading of the *Endangered Species (Import and Export) Bill*<sup>61</sup> in 1989, the Minister explained why Singapore had acceded to *CITES* and was passing a revised law to implement its obligations under the Convention:

Although Singapore has no indigenous wildlife to protect, being an important port of call and a major trading centre, we are conscious of Singapore's role in helping to control international trade in endangered species. Singapore has, therefore, acceded to *CITES*.<sup>62</sup>

*CITES* was adopted for signature in 1973. The seizure of species and specimens in transit was not contemplated then.<sup>63</sup> But by 1989, at the Seventh Conference of the Parties, it was found necessary to pass *CITES Resolution Conf 7.4*, reaffirmed in paragraph (b) of *CITES Resolution Conf 9.7* (Rev CoP15), that "the Parties inspect, to the extent possible under their national legislation, transit shipments including the presence of valid export documentation as required under the Convention or satisfactory proof of its existence".<sup>64</sup>

It is thus laudable that Singapore has, in its 2006 revision of the *ESA*, expressly empowered its *CITES* authority in s 5(1)(a) to ensure that:

Every scheduled species in transit in Singapore shall be accompanied by a valid *CITES* export or re-export permit, licence, certificate or written permission issued by the competent authority of the country of export or re-export, as the case may be, of the scheduled species.<sup>65</sup>

Speaking to move the Second Reading of the *Endangered Species (Import and Export) Bill*<sup>66</sup> in 2006, the then-Minister of State for National Development explained that:

Singapore is one of the busiest ports in the world and is an attractive transshipment hub. Currently, while the *ESA* empowers AVA to take action against illegal imports and exports of *CITES*-protected species, it is not specific about AVA's powers with regard to transshipments.

The Bill will empower AVA to investigate illegal transshipment or transit cases, and search, inspect, detain, seize or confiscate any illegal *CITES*-protected species.

This provision will be applicable to both travellers and cargoes passing through Singapore. It will enable AVA to act decisively upon receiving strong intelligence and evidence and tip-offs of illegal *CITES*-protected species being transhipped through Singapore and prevent Singapore from being used as a conduit for the smuggling of *CITES*-protected species.<sup>67</sup>

<sup>61</sup> No 4 of 1989.

<sup>62</sup> *Parliamentary Debates Singapore: Official Report*, vol 52 at col 561 (26 January 1989) (Lee Boon Yang, Senior Minister of State for National Development).

<sup>63</sup> *CITES*, *supra* note 3, Article VII.1.

<sup>64</sup> Paragraph (a). This recommendation was repealed and re-adopted during the Ninth Conference of the Parties in 1994 as para (b) of *CITES Resolution Conf 9.7* (Rev CoP15), *supra* note 48.

<sup>65</sup> *ESA*, *supra* note 6, s 5(1)(a).

<sup>66</sup> No 43 of 2005 [2006 Bill].

<sup>67</sup> *Parliamentary Debates Singapore: Official Report*, vol 80 at cols 2185, 2186 (17 January 2006) (Heng Chee How, Minister of State for National Development).

Later on in the debate, the Minister reiterated that:

[O]n the need to safeguard Singapore's reputation as an international centre for trade and as an international transshipment hub, I cannot agree more... We want to remain a global centre for trade, commerce and transshipment, and we will do everything possible to promote this status. But, at the same time, we will not want this role of ours to be abused by those engaged in illegal activities, whether it is narcotics or illegal wildlife trade, because that damages us in a serious way. This Bill will go some way towards addressing this particular danger that we may face.<sup>68</sup>

Clearly, one of the key objectives of the revised *ESA* is to prevent the transit or transshipment of *CITES*-protected species through Singapore without valid *CITES* export permits by criminalising such acts and authorising the seizure of the species/specimens in transit. Indeed, shortly after the *2006 Bill* was passed, Singapore was named as one of the world's top 10 illegal wildlife smuggling hubs.<sup>69</sup>

Given the conscious legislative efforts that went into enlarging the scope of the *ESA*, by introducing the s 5 offence to empower the AVA to regulate the conveyance of *CITES*-listed species "in transit" through Singapore, we submit that it would have been entirely appropriate for the court to permit the amendment of the charge and allow the prosecution of the defendants under s 5(1) as an alternative to s 4(1).

### C. What Documents have to Accompany "Scheduled Species in Transit" through Singapore? (*CITES-Export and CITES-Import Permits*)

The accompanying documents set out in s 5(1) of the *ESA* which have to be produced by the shipper to the AVA are:

- (a) a valid *CITES* export or re-export permit, licence, certificate or written permission issued by the competent authority of the country of export or re-export. . . of the scheduled species; and
- (b) where required by the country of import or final destination of the scheduled species, a valid *CITES* import permit, licence, certificate or written permission issued by the competent authority of that country or destination.<sup>70</sup>

Unfortunately, the District Court in *Wong Wee Keong* (DC) did not get a chance to examine this aspect of s 5(1) of the *ESA* in detail when it declined to amend the charge against the defendants. This would have been an interesting and important exercise because while the defendants had produced a substantial collection of paperwork from Madagascar, some doubts had been cast on the veracity of some of

<sup>68</sup> *Ibid* at cols 2194, 2195.

<sup>69</sup> World Wide Fund for Nature (Singapore), *Stop Illegal Wildlife Trade*, online: WWF <[http://www.wwf.sg/our\\_work/stop\\_illegal\\_wildlife\\_trade/](http://www.wwf.sg/our_work/stop_illegal_wildlife_trade/)>; Philip Lim, "Singapore a Key Transit Hub for Wildlife Smuggling" *AsiaOne News* (30 March 2010), online: AsiaOne <<http://news.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20100330-207562.html>>.

<sup>70</sup> *ESA*, *supra* note 6, s 5(1).

these documents, and it was not clear if any of these documents actually satisfied the prescribed formal and substantive requirements for a *CITES* export permit or certificate.<sup>71</sup> In addition, there is the important question of what “licence, certificate or written permission issued by the competent authority” actually means—does this encompass documents that fall short of the “valid *CITES* export. . . permit”? There is also a tricky conflicts of law issue here that could arise, *viz* by whose laws do we evaluate whether there is a “valid” permit, Singaporean or Madagascan? Does the governing law vary depending on whether one is concerned with an export authorisation document issued by a foreign competent authority or an import permit issued by the Singapore authority, or whether a “valid” export authorisation document is even necessary? Such problems may arise when Singapore updates its statutory appendices with *CITES*-listed species before the country of export updates its *CITES* laws.

It is submitted that, given the importance of having a clear and transparent regulatory framework in place to promote the objectives of *CITES*, there should be detailed legislative or policy guidance to indicate precisely the kind of documentary evidence shippers are expected to produce when they bring *CITES*-listed species “in transit” via Singapore.<sup>72</sup>

The judge had declined to allow the charge to be amended to one of contravention of s 5(1) of the *ESA* notwithstanding her conclusion that the shipment of logs was in transit in Singapore. In doing so, she referred to *Tan Khee Wan Iris*.<sup>73</sup> In that case, the then-Chief Justice allowed the prosecution’s appeal against acquittal, *inter alia* on the ground that the trial judge had refused to amend the charge. The Chief Justice held that:

The fact remains that even though the Prosecution in this case did not request an appropriate amendment of the charge, the district judge herself possessed the discretion to effect such amendment once she noted the strong possibility of another offence arising on the facts (an observation which, moreover, she articulated in her written grounds). Indeed, given that the evidence available pointed so obviously to the offence of providing public entertainment without a licence, she should have exercised her discretion so as to amend the charge accordingly, unless the proposed amendment prejudiced the respondent.<sup>74</sup>

The Chief Justice went on to find that an amendment of the charge would not have prejudiced the defendant even though the offence arose partly due to the clerical error of the licensing officer.<sup>75</sup> He also dismissed the argument that the defendant would have been prejudiced by the amendment of the charge given that she had already

<sup>71</sup> See *CITES*, *supra* note 3, Article VI; and *CITES Resolution Conf 12.3* (Rev CoP16), online: *CITES* <<https://cites.org/sites/default/files/document/E-Res-12-03R16.pdf>>. The judge appears to have accepted the testimony of the AVA that the specimens were not accompanied by a valid *CITES* export permit. See *Wong Wee Keong* (DC), *supra* note 7 at para 34.

<sup>72</sup> Eg, US Fish and Wildlife Service, *CITES Document Requirements Guidance for U.S. Importers and Exporters*, online: Fish and Wildlife Service <[https://www.fws.gov/le/pdf/CITES\\_Document\\_Requirements11142007.pdf](https://www.fws.gov/le/pdf/CITES_Document_Requirements11142007.pdf)>.

<sup>73</sup> *Supra* note 57.

<sup>74</sup> *Ibid* at para 7.

<sup>75</sup> *Ibid* at paras 9, 10.

prepared her defence for the original charge preferred, noting that any possibility of prejudice could be answered by allowing the defendant an adjournment.

The judge in *Wong Wee Keong* did not hold that the defendants would have been prejudiced had she allowed the amendment of the charge, although she found it “odd” that the prosecution should make an alternative submission to revert to the original charge under s 5(1) after abandoning it.<sup>76</sup> In any case, it does not appear that amending the charge in *Wong Wee Keong* would have prejudiced the defendants any more than doing so in *Tan Khee Wan Iris* would have prejudiced the defendant in that case. While the original and amended charges were mutually exclusive, they were certainly not based on mutually exclusive facts. Both charges are concerned with adjacent forms of regulatory control over variants of the same type of misconduct—a failure to comply with the legislatively prescribed requirements for using Singapore as a transshipment channel for *CITES*-listed endangered species.

It could have been that the judge declined to allow the charge to be amended because she considered that unlike *Tan Khee Wan Iris*, there was not a “strong possibility of another offence arising on the facts” in the case before her.<sup>77</sup> She was of the opinion that the amended charge would have involved “the allegation that there was no valid ‘*CITES* export permit, licence, certificate or written permission’ . . . and required the evidence of an official from the Madagascar management authority”. In this context, she also noted that the evidence showed that the export documents, namely a letter of authorisation, various authorisations and various permits, had been confirmed “on 9 January 2015, [by] the Minister of Environment, Ecology and Forests of Madagascar. . . [to be] authentic”.<sup>78</sup>

The facts of the case, as set out in the judgement, are not sufficiently clear to show conclusively whether there was a strong possibility that s 5(1)(a) of the *ESA* may have been contravened. Apart from the lack of factual clarity in the judgement surrounding the nature and sufficiency of the documents accompanying the defendant’s shipment of logs, there is also some legal uncertainty about the statutory criteria that constitute the s 5 offence. The provision requires that:

Every scheduled species in transit in Singapore shall be accompanied by . . . a valid *CITES* export or re-export permit, licence, certificate or written permission issued by the competent authority of the country of export or re-export, as the case may be, of the scheduled species[.]<sup>79</sup>

1. *All documents relied upon to satisfy the requirements of s 5(1) ESA should be CITES-compliant*

The *ESA* does not define what constitutes a valid *CITES* permit or certificate, though *CITES* is defined as the “Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington, D. C., on 3rd March 1973, and any amendment to, or substitution of, the Convention that is binding on Singapore”.<sup>80</sup>

<sup>76</sup> *Wong Wee Keong* (DC), *supra* note 7 at para 68.

<sup>77</sup> *Tan Khee Wan Iris*, *supra* note 57 at para 7.

<sup>78</sup> *Wong Wee Keong* (DC), *supra* note 7 at paras 27, 66-69.

<sup>79</sup> *ESA*, *supra* note 6, s 5(1)(a).

<sup>80</sup> *ESA*, *ibid*, s 2.

Reference could be made to the *CITES* Secretariat's *Model Law on International Trade in Wild Fauna and Flora*,<sup>81</sup> a template that forms part of "a set of legislative guidance materials prepared by the Secretariat to assist Parties in the development of effective and enforceable legislation".<sup>82</sup> Section 2 of the *CITES Model Law* defines "Permit or Certificate" as:

[T]he official document used to authorize import, export, re-export, or introduction from the sea of specimens of species listed in any of the Appendices of *CITES*. It shall conform to the requirements of *CITES and Resolutions of the Conference of the Parties* or otherwise shall be considered invalid.<sup>83</sup>

This necessarily requires a dynamic interpretation of what constitutes a valid *CITES* permit or certificate. For example, it is our understanding that the AVA will *prima facie* regard a document in respect of trade with a *CITES* Party to be a valid *CITES* permit or certificate if it complies with the generic template adopted by the *CITES* Conference of Parties.<sup>84</sup> For trade with non-Parties, the AVA verifies the permits and certificates with the relevant competent authority (as recorded in the *CITES*'s online directory). Permits and certificates must also *prima facie* comply with the requirements of *CITES Resolution Conf 9.5* (Rev CoP16).<sup>85</sup>

The export of the 29,434 pieces of rosewood in the shipment weighing approximately 3,235 metric tonnes<sup>86</sup> was purportedly authorised by a number of documents produced by the defendants, including a letter dated 10 March 2010 from the Ministry of Environment and Forests of Madagascar authorising the export of 5,000 tonnes of rosewood logs ("2010 Letter").<sup>87</sup> The logs authorised for export under the 2010 Letter would have been excluded from the requirements of *CITES* had they been accompanied by a *CITES*-compliant certificate certifying that they had been acquired<sup>88</sup> before the provisions of *CITES* applied to these specimens.<sup>89</sup> It was not stated in the judgement whether such a certificate had been produced. It was also

<sup>81</sup> *CITES* Secretariat, *Model Law on International Trade in Wild Fauna and Flora*, online: *CITES* <<https://cites.org/sites/default/files/eng/prog/Legislation/E-Model%20law-updated-clean.pdf>> [*CITES Model Law*].

<sup>82</sup> *Ibid* at 3.

<sup>83</sup> *Ibid* at 3 [emphasis added].

<sup>84</sup> The current sample "standard *CITES* form" can be found in Annex 2 of *CITES Resolution Conf 12.3* (Rev CoP16), *supra* note 71.

<sup>85</sup> *CITES Resolution Conf. 9.5* (Rev. CoP16), online: *CITES* <<https://cites.org/sites/default/files/eng/res/09/E-Res-09-05R16.pdf>>.

<sup>86</sup> *Wong Wee Keong* (DC), *supra* note 7 at para 9.

<sup>87</sup> *Ibid* at para 27.

<sup>88</sup> It was recommended in *CITES Resolution Conf 13.6* (Rev CoP16) that, for the purposes of Article VII para 2, the date on which a specimen is acquired be considered as the date on which the animal or plant or, in the case of parts or derivatives, the animal or plant from which they were taken, was known to be removed from the wild; or born in captivity or artificially propagated in a controlled environment; or if such date is unknown or cannot be proved, the date on which the specimen was acquired shall be the earliest provable date on which it was first possessed by any person: *CITES Resolution Conf 13.6* (Rev CoP16), online: *CITES* <<https://cites.org/sites/default/files/eng/res/13/E-Res-13-06R16.pdf>>.

<sup>89</sup> *Wong Wee Keong* (DC), *supra* note 7 at para 34; and *CITES*, *supra* note 3, Article VII.2. The relevant listing of rosewood was listed in Appendix III of *CITES* in 2011: see *CITES Notification to the Parties No 2011/039*, *supra* note 4; and in Appendix II in 2013: see *CITES Notification to the Parties No 2013/012*, *supra* note 5.

not stated in the judgement whether the 2010 Letter had in fact actually purported to specifically authorise the export of any or all of the logs seized by the AVA. There were two other “authorisation[s] for the exportation of forest products for commercial purposes” from the Regional Director of the Environment and Forests of Madagascar dated 17 February 2014 and 18 February 2014 respectively (“2014 Authorisations”). It was also not stated in the judgement whether any of these authorisations was in fact specifically related to any or all of the logs seized. Thus, the relationship between the 2010 Letter, the 2014 Authorisations and the entire shipment is not clear at all from the judgement. It does not appear from the judgement that any of the documents were *CITES*-compliant.<sup>90</sup>

On a plain reading of s 5(1)(a), one might argue that as long as the specimens were accompanied by a *valid* licence, certificate or written permission issued by the competent authority of Madagascar, s 5(1)(a) had not been contravened even if a *CITES export permit* is not produced. In other words, the documents referred to in the latter part of s 5(1)(a) may be “valid” even if they do not possess the same details as a “valid *CITES* export or re-export permit”. However, such a construction would defeat the purpose of s 5(1), taking into consideration Singapore’s obligations under *CITES*, and should not be adopted unless the plain words admit no other interpretation. The provision must therefore be understood to mean that since Madagascar is a *CITES* Party, the export of the shipment of rosewood logs other than those acquired before their species were listed in *CITES* must be accompanied by the permits, licences, certificates or written permissions that meet the requirements prescribed by *CITES*.<sup>91</sup>

2. *Documents issued which contradict an exporting state’s national regulations (eg zero-export quotas) should be invalid for the purposes of s 5(1) of the ESA*

A further argument can be made that the documents that accompanied the rosewood specimens that were seized may be invalid, for the purposes of s 5(1) of the *ESA*, for another reason. The validity of the documents relied upon by a wildlife trader should be called into question when they are inconsistent with the prevailing laws or regulations of the exporting state. In *Wong Wee Keong*, despite having received e-mails from persons purporting to confirm the authenticity of the documents supposedly issued by the Madagascan authorities, the AVA was mindful that, by the time the shipment arrived in Singapore, there was a zero export quota unilaterally established

<sup>90</sup> *Wong Wee Keong* (DC), *ibid* at para 4.

<sup>91</sup> In contrast, for example, s 13(1) of Malaysia’s *International Trade in Endangered Species Act 1968* provides more clearly that [emphasis added]:

[e]very scheduled species in transit in Malaysia shall be accompanied by –

- (a) a valid export or re-export permit, licence, certificate or written permission, in accordance with the Convention, issued by the competent authority of the country of export or re-export, as the case may be, of the scheduled species; and
- (b) where required by the country of import or final destination of the scheduled species, a valid import permit, licence, certificate or written permission, *in accordance with the Convention*, issued by the competent authority of that country or destination.

This text clarifies that all permits, licences, certificates or written permissions (and not only permits) must be valid in accordance with *CITES*.

by the Madagascar authorities in force, as communicated to *CITES* Parties through the *Notification of the Parties 2013/039* dated 4 September 2013.<sup>92</sup> This quota had been established by Madagascar for the period of 13 August 2013 to 13 February 2014, pursuant to its Action Plan adopted in the *Conference of the Parties' Decision 16.152*.<sup>93</sup> Paragraph 4 of that plan called for Madagascar to:

Put in place an embargo on export of stocks of these timbers *until* the *CITES* Standing Committee has approved the results of a stockpile audit and use plan to determine what component of the stockpile have been legally accumulated and can be legally exported.<sup>94</sup>

It is unclear from the facts of the case if the export of the rosewood logs actually contravened any Madagascan laws, given the absence of credible testimony from the authors of the documents relied upon to confirm the authenticity of these authorisations relied upon. Evaluating the legality of such conduct would require further details not discussed in the judgement, including the dates on which the logs were harvested and when exactly the vessel they were loaded onto departed Madagascar.

To further complicate matters in *Wong Wee Keong*, Madagascar's zero export quota period (which was supposed to expire on 13 February 2014) was subsequently "extended" to 14 April 2014, and the extension was communicated to *CITES* Parties through the *Notification of the Parties 2014/010* dated 26 February 2014.<sup>95</sup> The judge seemed to take the view that because some of the documents purportedly issued by the Madagascar authorities were dated between 14 February 2014 and 26 February 2014, the authorisations were not subject to the quota.

From the *Notification of the Parties 2014/010*, it appears that Madagascar had extended the zero export quota period to 14 April 2014 after referring to paragraph 4 of the Action Plan adopted in Decision 16.152, suggesting that the intention of the extension was to take effect immediately from the end of the zero export quota for the past period, with no lapse in between. This would be consistent with the natural meaning of the word "extend", *ie* to cause to be made longer. However, it is not clear on the facts if this extension of the zero export quota was initiated *before* the expiry of the original quota period but only communicated to the *CITES* administrators *after* the expiry of that period. Alternatively, the decision could have been taken by the Madagascan government after the expiry of the original zero export quota period, with the intention that its decision should apply retrospectively to commence from that expiry date. A belated notification to the *CITES* Secretariat of a national export quota period is not, in itself, a problem, as Paragraph 15 of the Annex of

<sup>92</sup> *CITES Notification to the Parties No. 2013/039*, online: CITES <<https://cites.org/sites/default/files/notif/E-Notif-2013-039.pdf>>.

<sup>93</sup> *CITES Conference of the Parties' Decision 16.152*, online: CITES <<https://www.cites.org/eng/dec/valid16/234>>.

<sup>94</sup> *Ibid* at para 4 [emphasis added].

<sup>95</sup> *CITES Notification to the Parties No. 2014/010*, online: CITES <<https://cites.org/sites/default/files/notif/E-Notif-2014-010.pdf>>. Madagascar has further extended its zero export quota for rosewood on multiple occasions, with the latest extension till 15 January 2016. See *CITES Notification to the Parties No. 2015/029*, online: CITES <<https://cites.org/sites/default/files/notif/E-Notif-2015-029.pdf>>.

*CITES Resolution Conf 14.7*<sup>96</sup> states that:

In accordance with Resolution Conf. 12.3 (Rev. CoP15), Parties should inform the CITES Secretariat of their nationally established export quotas and of revisions of such quotas. Such information *can be provided at any time* but, *as far as possible*, should be communicated at least 30 days before the start of the period to which the export quota relates.<sup>97</sup>

It should be noted that the preamble of the Resolution states that “exporting and importing countries share a responsibility to ensure that export quotas are respected”, with no reference made explicitly to transit countries. As such, one could argue that there may not be any duty or requirement on the part of a transit country to scrutinise whether an otherwise validly issued *CITES* export is in breach of the export quota for the relevant species. However, we submit that since it is the obligation of *all CITES* Parties to “take appropriate measures to enforce the provisions of the . . . Convention and to prohibit trade in specimens in violation thereof”,<sup>98</sup> transit countries should consider a *CITES* export permit, or any document relied upon by the wildlife trader, which purportedly authorises the export of a *CITES*-listed species to be invalid when there is a zero export quota in force.

The facts of *Wong Wee Keong* highlight some of the practical difficulties encountered when a *CITES* national authority attempts to discharge its compliance-monitoring functions. These arise partly due to a lack of clarity and stationarity in the legislative criteria for exactly the documentation needed to be produced when a scheduled species is in transit in Singapore, and partly due to the dynamic character of the *CITES* international legal framework itself and the national implementing legal framework of the exporting country. The adoption of electronic mechanisms<sup>99</sup> to facilitate the exchange of near real-time information on the validity of permits and certificates under the respective international and legal frameworks can mitigate such difficulties, but a question of fairness remains. If the earlier ban on rosewood exports from Madagascar had expired, but was retroactively extended subsequently after the initial expiry date, would it be fair for a *CITES* national authority to take action against a trader whose authorisation documents were valid at the time they were issued but subsequently tainted by the enactment of retrospective laws? In addition, tricky conflicts of law issues may be encountered when the laws of the export, import and transit countries differ on what makes a permit “valid” for the purposes of their respective national *CITES*-implementing legislation. Add to the above the problem of establishing the authenticity of the documents relied upon by the trader and it should be apparent how challenging the compliance-monitoring

<sup>96</sup> *CITES Conf. 14.7 (Rev. CoP15)*, online: CITES <<https://cites.org/sites/default/files/document/E-Res-14-07R15C16.pdf>>.

<sup>97</sup> *CITES Resolution Conf 14.7*, *ibid*, para 15 [emphasis added].

<sup>98</sup> *CITES*, *supra* note 3, Article VII.1.

<sup>99</sup> *Eg.*, the Electronic Permit Information eXchange (“EPIX”), see UNEP-WCMC, *Wildlife Trade EPIX*, online: EPIX <<http://epix.unep-wcmc.org/Home/About>>. See also Nirmal Ghosh, “Tackling Timber and Wildlife Trafficking” *The Straits Times* (30 July 2015), online: *The Straits Times* <<http://www.straitstimes.com/asia/se-asia/tackling-timber-and-wildlife-trafficking>>.

role of the *CITES* national authority can be when its authority is limited because the *CITES*-listed species is merely “in transit” within their jurisdictions.

V. POLICY IMPLICATIONS OF THE DISTRICT COURT’S DECISION ON THE SCOPE OF THE TRADE REGULATION PROVISIONS OF THE *ESA*

A. *Curtailing the Regulatory Role of the AVA as a CITES Management Authority*

The Singapore District Court’s decision in *Wong Wee Keong* has worrying implications for the future of the AVA as Singapore’s *CITES* management authority. The narrow ambit given to the “import” offence in s 4(1) of the *ESA* sterilises the AVA’s ability to regulate transshipments of *CITES*-listed endangered species as “import and re-export” cases, limiting its substantive role as a scientific regulatory body. Even though the AVA will continue to have some regulatory powers under s 5(1) of the *ESA* over scheduled species in transit, these are far more administrative in nature and could give rise to intractable operational enforcement difficulties. For example, if the shipper has a *CITES* export permit which identifies a Singapore-based consignee as the buyer, but the goods are actually intended for onward transshipment to another non-*CITES* state, how would the AVA decide if there is a “valid *CITES* export permit” in such a situation? Furthermore, since such shipments are to be considered “in transit” scheduled species, no *CITES* re-export permit will be required; indeed the AVA will not have any power to issue such a re-export permit if one is requested from them. This puts the onward sectors of the shipments from Singapore to their final destinations outside the regulatory reach of *CITES*, especially if these final destinations are not *CITES* Parties.<sup>100</sup> This can only benefit rogue wildlife traders who can mislead an exporting *CITES* Party into believing that Singapore is the importing state by naming a Singapore-based consignee, when their real intention is to dispose of these shipments in a non-*CITES* country for which approval may not have been granted by the *CITES* management authority of the exporting state in the first place.

Even where the final destinations are *CITES* Parties, the States of import would not be able to allow the entry of these shipments for the reason that these shipments are not accompanied by valid *CITES* export or re-export permits because the original export permit names a Singapore consignee (making it an export to Singapore, even though the shipment is intended to be conveyed to another final destination), while Singapore, the “transit” country (if the trial judge in *Wong Wee Keong* (DC) is correct), cannot issue a valid re-export permit. In short, the trial judge’s interpretation of the “import” and “transit” provisions of the *ESA* 2006 could have potentially far-reaching disruptive effects on the international regulatory framework for trade in endangered species that the international community has sought to implement through *CITES*.

<sup>100</sup> For example, exporters and re-exporters of living specimens have to satisfy the State of export and State of re-export respectively that such specimens “will be so handled as to minimize the risk of injury, damage to health or cruel treatment” (*CITES*, *supra* note 3, Article III, paras (2)(c), 4(b); Article IV, paras 2(c), 5(b)). If the export permit states that the import destination is Singapore, when in fact the actual final destination is not Singapore, there will effectively be no regulatory oversight of the condition of the shipment for the sector between Singapore and the actual final destination if Singapore considers itself merely the State of transit (and not the State of re-export) in such circumstances. This creates a lacuna in the enforcement of the Convention regulatory framework.

### B. Singapore's Ports as a Transshipment Hub for Illegal Wildlife Trade?

Singapore's international reputation as a law-abiding transshipment hub and as a leader in other areas of environmental management<sup>101</sup> is at stake if its efforts at combatting illegal wildlife trade are not backed up with a robust enforcement of its *CITES*-implementing legislation and alleged offenders are acquitted on the basis of an incorrect framing of the charge or a lenient interpretation of its provisions.<sup>102</sup> When asked to comment on the court's decision to acquit the defendants, the Secretary General of *CITES* declined to comment on the specific case, but was reported to have made the following general comments:

We do have deep concerns about the illegal trade in Malagasy rosewood, which we will report on to the 66th meeting of the *CITES* Standing Committee in January 2016. . . We are not only concerned about the role of the source State, but transit and destination States as well, and we are working closely with States right across the illegal supply chain in this regard.

Speaking more generally, we are conscious that there is more work to do in raising awareness and sharing experience amongst everyone involved in the enforcement and judicial process, including prosecutors and judges, *inter alia*, about the multifaceted economic, social and environmental impacts of crimes against wild fauna and flora that involve organised criminal groups, and of the need to treat them as serious crimes.<sup>103</sup>

In the last three years, there have been ten cases of illegal transshipments of wildlife parts.<sup>104</sup> In 2015 alone, Singapore seized 1,783 pieces of raw ivory tusks weighing 3.7 tonnes, four pieces of rhino horn, and 22 canine teeth believed to be from African big cats, with a total estimated value of S\$8 million, in May;<sup>105</sup> 206 endangered turtles, with an estimated value of S\$90,000, in October;<sup>106</sup> and 255 pieces of raw elephant tusks weighing 505 kg and 324 kg of pangolin scales, with a total estimated value of S\$1.3 million, in December.<sup>107</sup> These reported cases are probably only the tip of the iceberg, suggesting that the magnitude of the problem is one which

<sup>101</sup> Audrey Tan, "Stop Wildlife Trafficking in its Tracks" *The Straits Times* (17 December 2015), online: [The Straits Times <http://www.straitstimes.com/opinion/stop-wildlife-trafficking-in-its-tracks>](http://www.straitstimes.com/opinion/stop-wildlife-trafficking-in-its-tracks).

<sup>102</sup> See Rhett A Butler, "Singapore Court: Illicit Timber Trafficking Through Our Ports Not Our Problem" *Mongabay* (13 November 2015), online: [Mongabay <http://news.mongabay.com/2015/11/singapore-court-illicit-timber-trafficking-through-our-ports-not-our-problem/>](http://news.mongabay.com/2015/11/singapore-court-illicit-timber-trafficking-through-our-ports-not-our-problem/) [Butler, "Singapore Court"]; Environmental Investigation Agency, "Singapore Releases 30,000 Logs of Illegal Malagasy Rosewood" (16 November 2015), online: [EIA <http://eia-global.org/blog/singapore-releases-30000-logs-of-illegal-malagasy-rosewood>](http://eia-global.org/blog/singapore-releases-30000-logs-of-illegal-malagasy-rosewood).

<sup>103</sup> Butler, "Singapore Court", *ibid*.

<sup>104</sup> *Ibid*.

<sup>105</sup> "Second-largest Illegal Ivory Shipment Since 2002 Seized" *Channel News Asia* (19 May 2015), online: [Channel News Asia <http://www.channelnewsasia.com/news/singapore/second-largest-illegal/1856208.html>](http://www.channelnewsasia.com/news/singapore/second-largest-illegal/1856208.html).

<sup>106</sup> Aw Cheng Wei, "2 Russian Nationals Jailed for Smuggling 206 Turtles" *The Straits Times* (16 October 2015), online: [The Straits Times <http://www.straitstimes.com/singapore/2-russian-nationals-jailed-for-smuggling-206-turtles>](http://www.straitstimes.com/singapore/2-russian-nationals-jailed-for-smuggling-206-turtles).

<sup>107</sup> Janice Heng, "Ivory, Pangolin Scales Worth \$1.3m Seized" *The Straits Times* (18 December 2015), online: [The Straits Times <http://www.straitstimes.com/singapore/ivory-pangolin-scales-worth-13m-seized>](http://www.straitstimes.com/singapore/ivory-pangolin-scales-worth-13m-seized).

deserves a more robust legal response to discourage the use of Singapore's ports as a hub for illicit trade in endangered species. As a responsible global citizen, it is clear that Singapore can and should play a major role in regulating international trade in *CITES*-listed species.

International organisations have also observed the linkage between environmental crimes such as the illegal wildlife trade and with other serious crimes including terrorist activities, human trafficking, firearms trafficking, illegal immigration, drugs, counterfeit goods, cyber-crime, corruption, financial crime, and money laundering.<sup>108</sup> As Interpol explained:

Today, organised crime groups transcend conventional categories of crime, influenced by the globalisation of trade and travel, as well as advancements in technology and information sharing. In the context of environmental crime, criminals operate beyond the streams of illegal harvesting, poaching and trafficking. They exploit other opportunities in pursuit of their objective, whether it be financial or otherwise, and in doing so draw on other crime types such as corruption, fraud and money laundering to facilitate their primary activity. Whilst these are often regarded as enabling crimes, they may be serious crimes in themselves. Criminals also exploit the established trade routes and modus operandi used to traffic environmental products such as wildlife to smuggle other illicit products. Consequently, drugs and firearms are also uncovered as part of environmental crime operations.<sup>109</sup>

The proceeds of environmental crime—with an estimated total value of S\$31 billion in Southeast Asia alone<sup>110</sup>—also contribute significantly to the financing of organised crime, and non-state armed groups, including terrorist groups.<sup>111</sup> ASEAN, of which Singapore is a member country, has recognised wildlife and timber trafficking as serious transnational crimes—on par with drug trafficking, human trafficking, terrorism and arms smuggling—that threaten the security of the region and require urgent action to combat these crimes.<sup>112</sup> Taking a stricter approach towards combatting the illegal international trade in endangered species would therefore be consistent

<sup>108</sup> See Interpol, *Environmental Crime and its Convergence with other Serious Crimes* (2015/999/OEC/ENS/SLO, 30 October 2015), online: Interpol <<http://www.interpol.int/content/download/30447/395898/version/2/file/INTERPOL%20Strategic%20Report%20-%20Environmental%20Crime%20and%20its%20Convergence%20with%20other%20Serious%20Crimes.pdf>>; Onkuri Majumdar & Chanadda Thanikulapat, "ASEAN-WEN and Crime Convergence", online: Colombo Plan <[http://www.colombo-plan.org/?wpfb\\_dl=108](http://www.colombo-plan.org/?wpfb_dl=108)>; and The Organisation for Economic Cooperation and Development (OECD), *Illicit Trade: Converging Criminal Networks* (Paris: OECD Publishing, 2016), online: OECD <<http://www.oecd.org/gov/risk/charting-illicit-trade-9789264251847-en.htm>>.

<sup>109</sup> See Interpol, *ibid* at 8.

<sup>110</sup> Nirmal Ghosh, *supra* note 99.

<sup>111</sup> See Christian Nelleman *et al.*, eds, *The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources* (Nairobi: United Nations Environment Programme (UNEP), 2014), online: UNEP <<http://www.unep.org/unea/docs/RRAcimecrisis.pdf>>.

<sup>112</sup> See ASEAN, *ASEAN Ministers' Kuala Lumpur Declaration in Combatting Transnational Crime* (30 September 2015), online: ASEAN <<http://www.asean.org/images/2015/October/ammtc/KL%20DECLARATION%20IN%20COMBATING%20TNC.PDF>>. See also Jolene Lin, "Tackling Southeast Asia's Wildlife Trade" (2005) 9 SYBIL 191 at para 4.

with Singapore's acknowledgement of the seriousness of such criminal activities and its uncompromising stance against them.

*C. The Need for Greater International Coordination in the Implementation of CITES Provisions into National Laws*

If the court's interpretation of the term "in transit" from the *ESA* is correct, then a lot more transshipments of *CITES*-listed endangered species will be classified in this category. Discharging its regulatory role over "scheduled species in transit" under s 5(1) of the *ESA* will require the *AVA* to determine if the shipper has a valid *CITES* export and import licence, where necessary, to accompany the goods being transhipped. This form of regulation necessarily requires the *AVA* to work closely with its *CITES*-management authority counterparts from exporting and importing countries, though the experience from the case of *Wong Wee Keong* illustrates how positive outcomes may be elusive on this front. Doubts were raised, in the course of the *AVA*'s investigations, as to the authenticity of the documents accompanying the rosewood specimens because of conflicting responses from different Madagascar government officials on different occasions.

The rosewood logs had been exported from Madagascar notwithstanding that the government had unilaterally put in place a zero export quota. Before 19 March 2014, the *AVA* had received separate e-mail messages that were purportedly from the Director-General of the Ministry of the Environment and Forests of Madagascar and one official from the Ministry that the documents accompanying the export were not authentic. However, on 28 March 2014, an e-mail purportedly from the same official subsequently asserted that the documents accompanying the export were authentic and that the export had been officially authorised. On 4 November 2014, a support and enforcement officer from the *CITES* Secretariat wrote to the Madagascar management authority and received confirmation that a government investigation into the rosewood stockpile (the reason for the imposition of a zero export quota) was ongoing (and therefore the quota was still in place). Following a visit to Singapore by the Madagascar government to "deal with the issue", the Minister for Environment, Ecology and Forests confirmed by email on 20 January 2015 that the documents were authentic.<sup>113</sup> After the trial in *Wong Wee Keong* concluded in late 2015, Madagascar's new Minister of Environment, Ecology, Sea and Forests, who took office on 27 January 2015 under a new government, expressed the hope of meeting Singapore's Attorney-General's Chambers' officials, who were appealing the District Court's decision. The Minister was reported to have said that "I do not think that Madagascar can approve this sort of export", and that "we may need to coordinate and exchange information among ourselves to get a positive result for the outcome of the appeal".<sup>114</sup>

On one level, the confusion points to a lack of an up-to-date clearing house system where Parties can know in real-time when a zero export quota is in place, and whether

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<sup>113</sup> *Wong Wee Keong* (DC), *supra* note 7 at paras 25, 29-32.

<sup>114</sup> See K C Vijayan, "Madagascar Minister Seeks AGC Meet-Up" *The Straits Times* (1 December 2015), online: <http://www.straitstimes.com/singapore/courts-crime/madagascar-minister-seeks-agc-meet-up>.

*CITES* permits issued are authentic. In this respect, Parties have been encouraged, and in some cases given assistance in capacity development,<sup>115</sup> to develop and update their own electronic permitting systems to assist in coordinating their compliance and enforcement efforts, but the electronic format, while currently in use, is not mandatory, and has not fully replaced the current paper format of the permits and certificates.<sup>116</sup> At a more fundamental level however, the problem may go beyond inadequate coordination. Primary reliance is placed on Parties to perform their regulatory functions in accordance with their Convention obligations, and on self-assessment and monitoring, particularly in the issuance of permits and certificates. The *CITES* Secretariat and Standing Committee can exercise some oversight over the system, but is severely under-resourced for this purpose. For example, the Standing Committee recently met from 11 to 15 January 2016 to consider the continuing issue of illegal shipments of rosewood from Madagascar, and to deliberate whether to recommend that all Parties suspend commercial trade in the rosewood specimens from Madagascar until Madagascar has demonstrated satisfactory enforcement action at the national level and enforcement cooperation at the international level;<sup>117</sup> however it only had precious little time to do so given the number of other issues it needed to address in the short span of time.<sup>118</sup> Thus, relying on collective enforcement action alone may be inadequate. What is still needed, as the *CITES* Secretariat has noted, may be for other Parties in the supply chain of the illegal trade, including the State of import and State of transit to step up and play more pro-active roles in regulating such transnational movements of *CITES*-listed species.<sup>119</sup>

While national *CITES* enforcement authorities and other executive branches of government will remain at the regulatory frontlines, national courts should be reminded that they also play an important supporting role in ensuring that *CITES*-implementing national laws are understood, interpreted and applied in a purposive manner to ensure the effective regulation of international trade in endangered species.

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<sup>115</sup> See *eg.* ACTO Permanent Secretariat, *CITES Electronic Permitting in the Member Countries of the Amazon Cooperation Treaty Organization (ACTO)* (2012), online: <[http://www.otca.info/portal/admin/\\_upload/editais/453-E-permit-IMPLEMENT-PLAN-ENG.pdf](http://www.otca.info/portal/admin/_upload/editais/453-E-permit-IMPLEMENT-PLAN-ENG.pdf)>.

<sup>116</sup> See *CITES Resolution Conf 12.3* (Rev CoP16), *supra* note 71. The Conference of the Parties first broached the subject of the use of an electronic permitting system in 2004, and the Secretariat was directed to prepare an electronic permitting toolkit to provide technical advice for Parties, such as the use on common formats, protocols and standards; and the use of electronic signatures. This toolkit was presented to the 15<sup>th</sup> Conference of the Parties in 2010, at which it was recommended that Parties consider developing and using electronic permits and certificates: see Recommendation I(k); and that Parties using electronic permits of certificates adopt the standards recommended in the toolkit: see Recommendation I(c). The toolkit continues to be updated with new developments and to incorporate data standards and protocols that are harmonised with trade facilitation initiatives such as the World Customs Organisation Data Model and the United Nations Centre for Trade Facilitation and Electronic Business and support national 'Single Window' facilities for streamlining customs processing. See *CITES* Secretariat, *CITES Electronic Permitting Toolkit Version 2.0* at 4, online: *CITES* <[https://www.cites.org/sites/default/files/eng/prog/e/cites\\_e-toolkit\\_v2.pdf](https://www.cites.org/sites/default/files/eng/prog/e/cites_e-toolkit_v2.pdf)>.

<sup>117</sup> See item 46 of the 66th Meeting of the Standing Committee - Agenda and Documents, online: *CITES* <<https://cites.org/eng/com/sc/66/index.php>>. The Committee subsequently recommended to suspend the trade: see *CITES Notification to the Parties No. 2016/019*, online: *CITES* <<https://cites.org/sites/default/files/notif/E-Notif-2016-019.pdf>>.

<sup>118</sup> See John M Sellar, "How Long Before *CITES* Crashes?" *Annamiticus* (11 December 2015), online: *Annamiticus* <<http://annamiticus.com/2015/12/11/how-long-before-cites-crashes/>>.

<sup>119</sup> Butler, "Singapore Court", *supra* note 102.

This is all the more pertinent in the context of ASEAN member states, which as a regional body, established the world's largest wildlife law enforcement network, ASEAN-WEN, in 2005 to combat the illegal wildlife trade.<sup>120</sup> This highly laudable initiative must therefore be complemented by an equally robust enforcement of its laws on wildlife trade, particularly when these laws were revised and strengthened thereafter, as was the case in Singapore.

VI. POST SCRIPT: APPEAL AGAINST THE ACQUITTAL, RESUMPTION OF HEARING,  
AND RE-AFFIRMATION OF ACQUITTAL

Since the completion of this article, the prosecution successfully appealed against the decision of the District Judge in *Wong Wee Keong* (DC) to acquit the defendants without calling for their defence, and the matter was remitted to the District Judge for the defence to be called. The trial ended with the trial judge once again acquitting the defendants.

At the first appeal (*Public Prosecutor v Wong Wee Keong*),<sup>121</sup> the learned Judicial Commissioner (See Kee Oon JC) considered two aspects of the definition of "transit" in s 2(2)(c) of the *ESA*: whether (1) the specimens were brought into Singapore solely for the purpose of taking it out of Singapore; and (2) the specimens were under the control of the Director-General or an authorised officer. He concluded that:

First, the evidence did not point irresistibly to the one conclusion found by the District Judge—*ie*, that the Rosewood had been brought into Singapore solely for the containerisation to ship to Hong Kong. Second, I was not persuaded that it was incontrovertible that the Rosewood was within the control of an authorised officer at all material times.<sup>122</sup>

On the 'purpose' requirement, the Judicial Commissioner took into consideration the fact that all the documents that the respondents had presented were national export documents issued by the Madagacan management authority and had listed the respondent Kong Hoo Pte Ltd as the consignee of the shipment. Under the *CITES* procedure, the fact that a Singapore company was listed in these documents as the consignee suggested that Singapore was to be the destination country of the shipment.<sup>123</sup> This suggestion was reinforced by the fact that the respondent Wong Wee Keong had refused to disclose the name of the Hong Kong buyer when he was interviewed by the AVA and asked to do so.<sup>124</sup> It would therefore seem that the specimens had been brought into Singapore in the hope that it might be shipped to Hong Kong if a buyer could subsequently be found there, while the specimens were, in the meantime, kept in Singapore.<sup>125</sup> The judge considered that while the recommendations of *CITES Resolution Conf 9.7*<sup>126</sup> were not legally binding or dispositive

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<sup>120</sup> See *supra* note 23.

<sup>121</sup> [2016] SGHC 84 [*Wong Wee Keong* (HC)].

<sup>122</sup> *Ibid* at para 52.

<sup>123</sup> *Ibid* at para 59.

<sup>124</sup> *Ibid* at para 60.

<sup>125</sup> *Ibid* at para 63.

<sup>126</sup> *Supra* note 48.

of the definition of “transit”, they were relevant considerations to take into account in determining whether the “sole purpose” test had been satisfied.<sup>127</sup>

On the issue of ‘control’, the Judicial Commissioner held that the purpose of this requirement was to prevent smugglers from circumventing the *CITES* controls by fraudulently claiming the goods are only meant to be in transit when in fact they are intended to be imported.<sup>128</sup> Thus, even if the specimens were under “customs control” within the meaning of the *Customs Act*, this did not mean *ipso facto* that they were under the control of an authorised officer<sup>129</sup> for the purpose of s 2(2)(c) of the *ESA*.<sup>130</sup> Instead, there must be “active control in the sense that the person in question both knows of the existence of the goods and is in a position to determine how these goods should be used or moved”. In practical terms, this means that the mere placement of scheduled species in a free trade zone will not amount to control over it.<sup>131</sup> Neither will it be sufficient to constitute control even if the Director-General or an authorised officer knows of the presence of scheduled species in a shipment. To constitute control for the purpose of the subsection, the scheduled species must be in the actual physical custody of the Director-General or the authorised officer, or it must usually be shown that the Director-General or authorised officer has taken steps to secure the integrity of the scheduled species.<sup>132</sup>

With the appeal allowed, the case was remitted back to the District Court for the defence to be called. The defendants chose to remain silent and not lead any evidence. The trial ended with the District Judge acquitting the defendants on the s 4 charge. In her Grounds of Decision, she held that the shipment should be regarded as a transshipment, rather than an import, because the requirements of s 2(2)(c) had been satisfied. On the ‘sole purpose’ condition, she reached the “inexorable conclusion” that the rosewood logs were in transit based on the fact that the containers were to be conveyed from Jurong Port to PSA Port, where they would have been loaded onto another vessel to be shipped out of Singapore.<sup>133</sup> As for the ‘control’ condition, the District Judge found that the shipment was under the control of an authorised officer while it was in the free trade zone because it is a “secured area for the temporary storage of goods and where controls are in place to supervise the unstuffing and stuffing of containers”<sup>134</sup>—even though the customs officers were unaware of the precise nature of the goods in question. Cargo manifests submitted by the defendants to Singapore Customs, and shared with the AVA, had merely declared that the cargo contained “pieces logs”;<sup>135</sup> there was no indication of the status of these logs as a scheduled species.<sup>136</sup> Thus, for the second time, the District Court characterised

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<sup>127</sup> *Wong Wee Keong* (HC), *supra* note 121 at para 71.

<sup>128</sup> *Ibid* at para 92.

<sup>129</sup> An “authorised officer”, by definition in s 2 of the *ESA*, includes an “officer of customs within the meaning of the Customs Act”.

<sup>130</sup> *Wong Wee Keong* (HC), *supra* note 121 at para 72.

<sup>131</sup> *Ibid* at para 98.

<sup>132</sup> *Ibid* at paras 94, 95.

<sup>133</sup> *Public Prosecutor v Wong Wee Keong and Kong Hoo Pte Ltd* [2016] SGDC 222 at para 22 [*Wong Wee Keong* (DC2)].

<sup>134</sup> *Wong Wee Keong* (DC2), *ibid* at para 36.

<sup>135</sup> *Ibid* at para 34.

<sup>136</sup> This would have clarified the degree of specificity of knowledge of the existence of a shipment required of an authorised officer in order to constitute an active control over it on his part.

this shipment as goods that were merely “in transit” (and hence not subject to the more stringent requirements applicable to import cases). Reiterating her earlier decision not to allow the prosecution to amend the charge to one under s 5 of the *ESA*, the judge found that this transshipment of logs was in fact accompanied by a valid export authorisation from the Madagascan authorities that predated the inclusion of the rosewood as a scheduled species, thus making it unnecessary to comply with the *CITES* requirements.<sup>137</sup> However, this conclusion was reached without considering whether the shipment was also accompanied by a *CITES*-compliant certificate from the Madagascar authorities, certifying that *this particular shipment* of logs (as opposed to the export authorisation) predated the inclusion of the rosewood as a *CITES* scheduled species, as required under Article VII.2 of *CITES*.

A number of critical legal questions concerning the application of the *ESA* remain unanswered at the end of full trial before the District Court, potentially presenting the High Court an invaluable opportunity to clarify this area of law should the prosecution appeal against the District Court’s decision.

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<sup>137</sup> *Wong Wee Keong* (DC2), *supra* note 133 at para 43.