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Environment

While the underlying goal of the 2008 Amendments to the Lacey Act—a halt to illegal logging—enjoys universal support, the requirement of detailed filings regarding imported plants and plant products has been criticized as unduly demanding, according to attorneys Marcus Asner and Katherine Ghilain of Arnold and Porter. In this Bloomberg/BNA insights piece, the authors, experts in environmental litigation, address concerns about the amendments and conclude that the benefits outweigh the burdens.

The 2008 Lacey Act Amendments and the Fight Against Illegal Logging

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The worldwide fight against illegal logging gained a powerful new weapon in 2008 when the century-old Lacey Act was added to law enforcement's arsenal. The Lacey Act now prohibits, among other things, trade in plants and plant products that have been taken, transported, or sold in violation of law, including the law of other countries.¹ The 2008 Amendments to the Lacey Act also added a new requirement that importers must file a declaration detailing certain information about plants and plant products being imported, including the appropriate scientific name and country of origin.²

While the underlying goal of the 2008 Amendments—stopping illegal logging—enjoys almost universal support, some have voiced legitimate concerns that the Amendments may end up imposing burdensome re-

¹ 16 U.S.C. § 3372(a) (emphasis added).

² *Id.* § 3372(f).

quirements or leading to unintended and unfair consequences. A House subcommittee recently held a hearing to discuss the impact of the Amendments and to explore whether any legislative fixes are needed.³ To be sure, the Amendments do present challenges to newly regulated companies and underfunded government agencies. That said, we believe that the Amendments, on balance, are helping reduce the international trade in illegal timber, which in turn protects U.S. interests and helps the environment. Industry and the relevant agencies no doubt will have to continue working together to iron out some of the kinks, but we believe the challenges involved in implementing the Amendments can and should be handled by the relevant agencies, and do not warrant further congressional action.

Brief Overview of the Lacey Act Passed in 1900, the Lacey Act is the United States' oldest wildlife protection law. Its original goals were to address issues including the interstate shipment of unlawfully killed game, the introduction of harmful invasive species, and the killing of birds for the feather trade. The Act has been amended several times and broadened to combat trafficking in illegal wildlife, fish, and—as of 2008—plants and plant products.

Under the 2008 Amendments, the Lacey Act now prohibits, among other things, the importation or sale of wood that was logged in violation of the law of other countries. The penalty depends on mental state: a defendant is guilty of a felony only if she knew the wood was illegal; she is guilty of a misdemeanor if, in the exercise of due care, she should have known that wood she imported was illegal. A person who innocently trades in illegal wood faces no liability under the Act, although the wood still is considered illegal and may be subject to forfeiture.

The Upsides of the 2008 Amendments The Lacey Act is a powerful tool in the ongoing fight against the illegal wood trade. The Act helps (1) dismantle criminal operations and deter illegal activities; (2) protect U.S. interests, including legitimate businesses and U.S. consumers; and (3) protect victims of environmental crimes.

Dismantle Criminal Operations and Deter Illegal Activities

The Lacey Act helps cut off the U.S. market to criminal organizations engaged in the trade of illegally harvested trees, wildlife or fish. In one case recently in the news,⁴ for example, the Act was used to dismantle a massive scheme to smuggle into the U.S. rock lobster that was illegally harvested in South Africa. The decade-long scheme involved (among other things) violations of South African fishing and customs laws, bribery of fisheries inspectors, smuggling of contraband

into the U.S., and circumvention of U.S. immigration laws. In the U.S., five co-conspirators were arrested; all pleaded guilty and the main players were sentenced to prison. The defendants also forfeited \$7.4 million to the U.S. and were ordered to pay South Africa approximately \$22.5 million in restitution.⁵

The Lacey Act also provides companies with strong incentives to evaluate, understand, and police their own supply chains. As noted, illegal wood can be forfeited, regardless of the mental state of the person who imports or buys it. Moreover, where a person, in the exercise of due care, should have known the wood she imported was illegal, that person will be guilty of misdemeanor. While misdemeanor prosecutions are rare, the due care standard encourages legitimate businesses to ensure that they are buying legal goods. This helps reinforce lawful behavior, deter illegal activity, and level the playing field between diligent companies and those that are indifferent to the legality of the goods they are supplying to the American consumer.

In our experience, the Amendments increasingly are leading companies to focus on monitoring their own supply chains and to adopt compliance programs to help ensure that their plant products come from legal sources. As one music industry spokesman recently testified before Congress, the 2008 Amendments have helped promote “integrity and commitment to legal and responsible procurement.”⁶ In circumstances where companies want additional protections, they are demanding and obtaining warranties from their suppliers. These developments are transforming a market in which honest, legitimate companies previously were at a competitive disadvantage to companies that could ignore the legality of their supply.

Protect U.S. Interests and Reduce Corruption

According to a 2012 report, “illegal logging accounts for 50-90 per cent of the volume of all forestry in key producer tropical countries and 15-30 per cent globally. Meanwhile, the economic value of global illegal logging, including processing, is estimated to be worth between US \$30 and US \$100 billion, or 10-30 per cent of global wood trade.”⁷ Not only is the U.S. one of the world's leading producers of products like wood flooring and hardwood plywood, but it also is one of the largest consumers.⁸

The presence of illegal wood in the marketplace affects the competitiveness of legitimate U.S. producers. According to a 2004 report, illegal logging depresses U.S. prices by about 2-4% which translates to about \$1 billion in annual losses from lower prices and reduced

³ Oversight Hearing on “The 2008 Lacey Act Amendments”: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2013), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=332895> (“Congressional Hearing”). This article is based in part on the testimony Marcus Asner submitted in connection with that hearing.

⁴ United States Attorney's Office, Southern District of New York, *Officers of Fishing and Seafood Corporations Ordered to Pay Nearly \$22.5 Million to South Africa for Illegally Harvesting Rock Lobster and Smuggling It into the United States*, June 14, 2013, available at <http://www.justice.gov/usao/nys/pressreleases/June13/BengisArnoldetalRestitutionPR.php?print=1>.

⁵ Memorandum Opinion, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. Jun. 14, 2013), ECF No. 250

⁶ Hearing, *supra* note 3 (Statement of Steve McCreary, on behalf of Nat'l Ass'n of Music Merchants at 2), available at <http://naturalresources.house.gov/uploadedfiles/mccrearytestimony05-16-13.pdf>.

⁷ UNEP and INTERPOL, *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests* (2012), available at http://www.unep.org/pdf/RRALogging_english_scr.pdf.

⁸ USITC, *Wood Flooring and Hardwood Plywood: Competitive Conditions Affecting the U.S. Industries* at 1-1 (Aug. 2008), available at <http://www.usitc.gov/publications/332/pub4032.pdf>.

market share.⁹ Illegal operations are able to sell larger quantities of goods at lower prices.¹⁰ However, any price reduction from illegal goods is short-lived, and prices will increase in the long term as supply is depleted due to unsustainable harvesting practices. By reducing the supply of illegally harvested wood, the Lacey Act benefits U.S. companies and consumers. And by reducing the demand for illegal and unsustainably harvested goods, the Act also helps to protect the global supply of natural resources.

The Act also helps reduce corruption and promote the rule of law in foreign countries, which in turn helps to level the playing field for U.S. companies and enhances national security. There is a close link between corruption and natural resources crime. In his 2012 “Threat Assessment,” the Director of National Intelligence explained how natural resources crime threatens U.S. national interests:

Illicit trade in wildlife, timber, and marine resources constitutes a multi-billion dollar industry annually, endangers the environment, and threatens to disrupt the rule of law in important countries around the world. These criminal activities are often part of larger illicit trade networks linking disparate actors—from government and military personnel to members of insurgent groups and transnational organized crime organizations.¹¹

A 2010 report by the U.N. Office on Drugs and Crime makes a similar point:

Environmental crime, such as this illegal logging in Indonesia, is becoming increasingly organized and transnational in nature and can be seen, just as drug and firearm trafficking, as one of the most significant areas of transborder criminal activity, threatening to disrupt societies and hinder sustainable development.¹²

By providing an enforcement tool on the one hand, and encouraging companies to police their own supply chains on the other, the Lacey Act helps to reduce the specter of corruption, and ultimately fosters an environment favorable to legitimate American businesses.

Protect Victims of Environmental Crimes

The Lacey Act also serves to protect victims. As an initial matter, the penalties themselves serve to deter crime. The Lacey Act also helps ensure that victims receive compensation. If someone snuck onto your land

in Virginia, cut down your trees, and then sold them to an unwitting, innocent buyer in Pennsylvania, you would want your trees back. The Lacey Act helps ensure that the trees get returned and the thieves get prosecuted. When coupled with a charge of conspiracy under Title 18, for example, the Lacey Act supports compensation to victims in the form of restitution.¹³ As Preet Bharara, the U.S. Attorney for the Southern District of New York, explained recently:

[T]hose who violate the environmental laws of another country by illegally taking fish, wildlife, or plants and then import these items into the U.S. will be required to pay back the victims of their offenses. This Office remains committed to ensuring, no matter how long it takes, that those who would damage another country’s environment and seek to profit in the U.S. market will have to remedy their violations of law and repay those foreign governments.¹⁴

Concerns About the 2008 Amendments A number of concerns have been voiced about the 2008 Amendments, and some have suggested making certain changes: altering the Act’s forfeiture provision to include an “innocent owner” defense, removing or limiting some of the Act’s provisions for pre-2008 imports, narrowing the categories of foreign laws that trigger violations, and modifying the declaration requirements. We will address each in turn.

Forfeiture and the Proposed ‘Innocent Owner’ Defense

Following the well-publicized seizures at Gibson Guitar’s facilities, a common complaint was that Gibson’s wood was seized and held even though Gibson purportedly had not “had its day in court to defend itself.”¹⁵ Proponents of an “innocent owner” defense point to the Gibson case as a prime example for why such a defense is warranted. Regrettably, much of the rhetoric about the Gibson case was ill-informed. As we explain elsewhere,¹⁶ upon a closer look, it becomes clear that Gibson in fact did have its day in court, exactly as contemplated in the law.

Gibson aside, a more fundamental point is that enacting an innocent owner defense would be inconsistent with widely-used federal forfeiture procedures, would undermine the deterrent effect of the provisions, and potentially would defeat the property rights of the victims of environmental crimes.

It is well settled that law enforcement may seize property upon a showing of probable cause that the property is illegal. Someone who believes her property has been wrongfully seized may ask a court to determine whether the property is contraband or should be

⁹ Seneca Creek Associates, LLC and Wood Resources International, LLC, “Illegal” Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry at ES-2, 26 (Nov. 2004), available at <http://www.illegal-logging.info/uploads/afandpa.pdf>; Pervaze A. Sheikh, Cong. Research Serv., R42119, *The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products* 12 (2012), available at <http://www.fas.org/sgp/crs/misc/R42119.pdf>.

¹⁰ See Government’s Memorandum of Law in Opposition to Defendants’ Joint Motion for a Departure from the Applicable Sentencing Guidelines Range at 15-17, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. May 26, 2004).

¹¹ *Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community, Before the S. Select Comm. On Intelligence*, 113th Cong. 5-6 (2013) (statement of James R. Clapper, Director of National Intelligence), available at <http://www.intelligence.senate.gov/130312/clapper.pdf>.

¹² U.N. Office on Drugs and Crime, *Illegal Logging in Indonesia: The Link Between Forest Crime and Corruption* (2010), available at <http://www.unodc.org/unodc/en/frontpage/2010/June/illegallogging-in-indonesia-the-link-between-forest-crime-and-corruption.html>.

¹³ 18 U.S.C. §§ 3663, 3663A.

¹⁴ SDNY, *supra* note 4.

¹⁵ E.g., Tina Korbe, *Video: The Great Gibson Guitar Raid . . . Months later, still no charges*, Hot Air (Feb. 23, 2012, 3:40 PM), <http://hotair.com/archives/2012/02/23/video-the-great-gibson-guitar-raid-months-later-still-no-charges/>.

¹⁶ Marcus A. Asner, Maxwell C. Preston and Katherine E. Ghilain, *Gibson Guitar, Forfeiture, and the Lacey Act Strike a Dissonant Chord*, Bloomberg BNA’s Daily Environment Report (also published in the Daily Report for Executives, White Collar Crime Report, and the International Environment Reporter) (Sept. 4, 2012), available at http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP.BloombergBNA%27sDailyEnvironmentReport_090412.pdf.

returned.¹⁷ And the government must follow a formal process in order to keep seized goods—the same Civil Asset Forfeiture Reform Act (CAFRA) process that governs forfeiture actions under a wide variety of laws.¹⁸

Proponents of an “innocent owner” defense to forfeiture argue that companies that unknowingly possess illegally harvested wood should be able to recover that wood because they were unaware, despite exercising due care, that the wood was illegal. While the truly innocent owner presents a sympathetic case, an “innocent owner” defense ignores basic U.S. property principles and, we believe, would undermine the effectiveness of the Lacey Act.

Allowing an innocent owner defense could work to deprive lawful owners of their right to have their property returned. If a thief steals your autographed baseball and sells it to an innocent collector, it is still your baseball and you have a right to get it back. The innocent collector’s recourse is to seek compensation from the thief. The same concept applies to goods imported in violation of the Lacey Act. The individuals, states, or countries whose resources have been obtained illegally have a right to the return of their property or to monetary compensation. The intervening illegal activity does not extinguish those property rights. It is the importer’s responsibility to know its suppliers and take measures to ensure that its goods are legal.

An innocent owner defense also decreases companies’ incentives to police their own supply chains. Rather than encouraging importers to use due care, introducing an innocent owner provision would encourage companies to know as little as possible about their supply chains, which undercuts a key component of the Lacey Act.¹⁹

Nor is the regulatory framework as harsh as it may seem. In cases where a rightful owner cannot be identified, a truly innocent possessor still can petition for “remission” to the agency that seized the property, arguing that she should get to keep the otherwise illegal wood.²⁰ The federal departments charged with enforcing the Lacey Act all have regulations permitting remission, allowing persons to seek the return of goods that otherwise would be illegal to possess under the Lacey Act.²¹ The petitioner sets forth the reasons why the goods should be returned and the agency determines whether, in light of the particular circumstances, mitigation is warranted or the goods should be returned.²²

¹⁷ The person may file a motion in federal court pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. See *United States v. 144,744 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (holding that goods seized under the Lacey Act are contraband).

¹⁸ 18 U.S.C. § 983.

¹⁹ If any change is warranted, we think the Act’s protections of property rights could be bolstered, perhaps by adding the Lacey Act explicitly to the crimes covered by the restitution statutes, or by creating a rebuttable presumption that, once articles are shown to violate the Lacey Act and are forfeitable, they will be deemed to be the property of the state or country of origin, absent a showing of superior title. The state or country where the articles were taken illegally would be presumed to be the “victim” entitled to restitution.

²⁰ See 18 U.S.C. § 983(a).

²¹ See 50 C.F.R. § 12.24 (FWS, Department of Interior); 7 C.F.R. § 356.7 (Department of Agriculture); 15 C.F.R. § 904.506 (NOAA); 28 C.F.R. § 9.4 (DOJ).

²² See, e.g., 50 C.F.R. § 12.24(e).

Pre-2008 Plants and Plant Products

Some argue that, because the Lacey Act covers plant products that were harvested or imported before the 2008 Amendments, innocent owners of antique musical instruments technically may face exposure. However, truly innocent owners of pre-2008 wood cannot be prosecuted, and government agencies have clarified that “individual consumers and musicians *are not* the focus of . . . law enforcement investigations pertaining to the Lacey Act, and have no need for concern about confiscation of their instruments.”²³ More fundamentally, as with the “innocent owner” proposal, any exception for pre-2008 articles will be hard to square with the government’s obligation to protect the rights of property owners. Such a change also could have the unintended effect of excusing illegal activity and perpetuating the presence of illegal goods in the market, to the detriment of American interests. Moreover, because of difficulties in dating wood, constructing a “pre-2008” exception could inadvertently help criminals launder “post-2008” wood.

Scope of Foreign Laws

Some have expressed concern about the scope of foreign laws that could trigger a Lacey Act violation. However, the categories of foreign laws are clear, and this requirement is neither new nor unique to the Lacey Act. Legitimate companies in a variety of industries routinely must navigate local and foreign laws. Seafood companies complying with the Lacey Act have been doing so for decades. Moreover, that a particular foreign law may be unclear or difficult to discern bears on the due care analysis and would lend support to a finding that a company did not knowingly import illegal goods (which is what happened with some of the wood at issue in Gibson). At bottom, however, legitimate businesses that work with foreign suppliers are in the best position to ask the relevant questions and require that their suppliers make sure the goods are legal.

Declaration Requirement

Finally, some wish to change the declaration requirement, questioning the value of the declarations, and arguing that the requirement is burdensome. The declaration requirement is important because it forces importers to examine their supply chains, ask questions, and obtain information to ensure that everything is legal. The declarations are also important in investigations and enforcement. APHIS has been working with industries to phase in enforcement and providing resources to help companies comply.²⁴ Fully funding government agencies so they can effectively implement and enforce the Lacey Act would help ensure that the declaration requirement is less burdensome and achieves the goals of curbing illegal trade.

Conclusion The Lacey Act works by incentivizing companies to monitor their own supply chains and to eliminate risky suppliers so they can better ensure that

²³ U.S. Fish & Wildlife Service, *Where We Stand: The Lacey Act and our Law Enforcement Work* (Sept. 22, 2011) (available at <http://www.fws.gov/news/blog/index.cfm/2011/9/22/Where-We-Stand-The-Lacey-Act-and-our-Law-Enforcement-Work>).

²⁴ See Elinor Colbourn & Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, STO36 ALI-ABA 365, 373-77 (Apr. 26, 2012).

their suppliers are legitimate and their products are legal. Like any new regulatory regime, it takes time and effort to set up the proper compliance framework, and industry and the agencies will need to continue to work together to improve the regulatory framework. But in our experience, companies have been able to comply with the 2008 Amendments without an undue burden.

The potential benefits from the 2008 Amendments are promising. As companies eliminate risky suppliers,

fewer illegal goods will enter the U.S. This protects U.S. interests and decreases illegal logging by reducing demand. The 2008 Amendments also help level the playing field, making sure that responsible American companies that care about the legitimacy of their wood supply are not undercut by companies who cheat, cut corners, or are indifferent about the legality of their supply.