

Oversight Hearing on the 2008 Lacey Act Amendments
Thursday, May 16, 2013 10:00 AM
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs
Natural Resources Committee
1324 Longworth House Office Building, Washington, D.C. 20515
Submitted June 21, 2013

QUESTIONS BY THE HONORABLE GREGORIO KILILI SABLAN

Mr. Asner:

- 1. In your testimony, you stated that you have assisted clients in complying with the 2008 Lacey Act amendments. In your experience, has compliance been achievable for these clients without an undue burden? Have efforts to comply reduced the chance that illegal wood gets into your clients' supply chains?**

In my experience, companies have been able to comply with the 2008 Amendments without an undue burden. Like any new regulatory regime, it takes time and effort to set up the proper compliance framework. However, these burdens have not been particularly onerous and, I believe, will be short-lived. Ultimately, as Steve McCreary of Collings Guitars said in his May 16, 2013 testimony before this Subcommittee, the 2008 Amendments to the Lacey Act have helped promote “integrity and commitment to legal and responsible procurement.”¹ The 2008 Amendments 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 that cheat, cut corners, or are indifferent about the legality of their supply.

I believe that efforts to comply with the 2008 Amendments have reduced the chance that illegal wood enters supply chains. As Mr. McCreary noted, Collings Guitar ceased working with particular suppliers in order to ensure the integrity and legality of its supply chain.² This comports with my own experience. Companies that are complying with the Lacey Act's 2008 Amendments are now paying closer attention to where their supplies are coming from and are making sure that their suppliers are using legal sources.

¹ Oversight Hearing on “The 2008 Lacey Act Amendments”: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2013) (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>.

² *Id.*

2. **During your time as an Assistant U.S. Attorney, you successfully prosecuted one of the most important Lacey Act cases in history involving a sophisticated organized crime operation. Numerous reports have noted that criminal and terrorist organizations from the Taliban in Afghanistan to the Lord's Resistance Army in Central Africa are using illegal timber harvest to fund their operations. Do the 2008 Lacey Act amendments give us a chance to cut off a source of funds for groups like these?**

I believe the 2008 Lacey Act Amendments do provide a tool in the fight against criminal organizations with ties to terrorism, narcotrafficking, and other illegal activities that threaten our national security. As you mentioned, there are numerous reports that illegal timber harvesting provides a funding source for criminal and terrorist organizations.³ Criminal organizations are often quite adept at constructing elaborate, sophisticated systems to conceal the proceeds of criminal schemes, just like the Bengis organization appears to have done.⁴ As companies continue to beef up their compliance with the Act, they increasingly will ensure that their suppliers are legitimate companies and that the wood they buy is legal. This will help drive out of business suppliers who continue to supply wood that is illegal or of questionable legality. As the demand for illegal goods decreases, the profits associated with these illegal activities also will decrease. This, in turn, will decrease the money available to fund related criminal and terrorist organizations.

Illegal timber harvesting supports criminal and terrorist activities in indirect ways as well. According to a 2012 World Bank report, "the extensive corruption associated with illegal logging weakens broader structures of governance and the rule of law."⁵ As discussed further in question 5 below, this creates national security concerns.

3. **In your opinion, what would be the consequences to conservation if Congress amended the law to exempt wood products which were imported or manufactured prior to 2008? Can a truly innocent owner of pre-2008 wood or wood products be prosecuted under the Lacey Act?**

There are several consequences that could arise if a pre-2008 exemption were added to the Lacey Act. First, a pre-2008 exemption would provide a means for wood that had been illegally harvested before 2008 to enter the stream of commerce with impunity, perpetuating the supply of illegal wood in the market and the demand for such wood. The presence of illegal wood in the

³ *Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community, Before the S. Select Comm. On Intelligence*, 113th Cong. at 5-6 (2013) (statement of James R. Clapper, Director of National Intelligence), available at <http://www.intelligence.senate.gov/130312/clapper.pdf>.

⁴ See Memorandum of Law in Further Support of the Government's Application for Writ Under 28 U.S.C. § 1651(a) and in Support of the Government's Motion for Order to Show Cause, *United States v. Bengis*, No. 1:03-cr-00308-LAK, (S.D.N.Y. Apr. 22, 2013), ECF No. 232.

⁵ The World Bank, *Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging* at 2 (2012), available at http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal_Logging.pdf; Marcus Asner, Samuel Witten, and Jacklyn DeMar, *The Foreign Corrupt Practices Act and Overseas Environmental Crimes: How Did We Get Here and What Happens Next?*, Bloomberg BNA Daily Environment Report (2012), available at http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP.BloombergBNA%27sDailyEnvironmentReport_071212.pdf.

market depresses the price of legal wood, to the detriment of legitimate competitors. The increased demand creates incentives for the continued procurement of illegal wood.

Second, creating an exemption for wood harvested before 2008 would create a huge loophole that would undermine the goals of the Lacey Act. Because it is difficult to determine whether wood or wood products were imported or manufactured before 2008, creating an exemption would provide an opportunity for companies to launder post-2008 wood. I know that concerns have been raised about the implications of the 2008 Amendments for musicians traveling with older musical instruments, but DOJ, FWS and APHIS have made clear that they are focused on traffickers in illegal wood, and that citizens traveling with musical instruments have nothing to be concerned about.⁶

Third, whether imported before or after 2008, illegally procured wood or wood products still have rightful owners who may be the victims of illegal harvesting. Creating a pre-2008 exemption can effectively undercut the property rights of the legal owners, whether in the United States or abroad.

Finally, the answer to your second question is “no”—a truly innocent owner of pre-2008 Amendment wood or wood products cannot be prosecuted for a criminal violation under the Lacey Act. Prosecution under the Lacey Act occurs only when there is a knowing violation (a felony) or when the person failed to exercise due care (a misdemeanor). A truly innocent owner is not guilty of either and therefore cannot be prosecuted for a criminal violation of the Lacey Act. That said, any stolen goods may be seized and forfeited, regardless whether or not the owner was innocent.⁷ A truly innocent owner may always file a petition for remission in order to ask the agency to review the particular circumstances and seek return of the property,⁸ just like Gibson Guitar Corp. did for certain shipments of Indian wood that had been seized, where the legality of that wood turned out to be unclear under Indian law.⁹

4. Other witnesses at this hearing complained about the requirement to comply with foreign laws when sourcing wood products. Should U.S. companies operating in or procuring materials from other countries have a responsibility to follow the laws of those countries? How does this requirement, along with strict forfeiture standards, help promote property rights?

Companies operating in or procuring materials from other countries absolutely have a responsibility to follow the laws of those countries. As a consumer, I expect companies to do so. Indeed, it is hard for me to imagine that any responsible, law-abiding American would want to

⁶ Animal and Plant Health Inspection Service (APHIS) and U.S. Department of Agriculture (USDA), *Report to Congress Senate Committee on Agriculture, Nutrition, and Forestry, Senate Committee on Environment and Public Works, House Committee on Agriculture, and the House Committee on Natural Resources With Respect To Implementation of the 2008 Amendments to the Lacey Act* at 22 (May 2013), available at <http://iwpawood.org/associations/8276/files/Lacey%20Report%20to%20Congress%205.30.13.pdf>.

⁷ 16 U.S.C. § 3374(a).

⁸ See, e.g., 50 C.F.R. § 12.24 (FWS remission regulations).

⁹ Criminal Enforcement Agreement Between U.S. Dep’t of Justice and Gibson Guitar Corp. at 3 (July 27, 2012), available at <http://www.fws.gov/home/feature/2012/USvGibsonGuitarAgreement.pdf> (providing that Gibson would file a petition for remission of certain Indian wood and the government would not oppose that petition).

buy goods that were stolen from someone in another country or otherwise obtained in violation of another country's laws.

Despite misguided rhetoric to the contrary, the Lacey Act does *not* involve the U.S. government enforcing other countries' laws.¹⁰ The Lacey Act does, however, impose requirements on U.S. companies that are dealing in illegal wood and wood products. To be sure, under the Lacey Act, the illegality of the wood or wood products is sometimes determined by looking at another country's law. However, the concept that American law in some circumstances must look to the laws of other countries is not new or unique to the Lacey Act. The fish and seafood industries, as well as the pet trade, have been subject to this requirement under the Lacey Act for decades. In *United States v. Bengis*, for example, the Court of Appeals for the Second Circuit looked to South African law to determine South Africa's property rights in lobster poached from its waters, ultimately concluding that South Africa had a property right in poached lobster, and was entitled to restitution for defendants' illegal poaching scheme.¹¹ Many U.S. companies have to comply with Committee on Foreign Investment in the United States (CFIUS) regulations and the Foreign Corrupt Practices Act. And importers of any type of goods long have had to make sure that the goods they were importing were not considered stolen property under the laws of foreign countries, at the risk of violating the National Stolen Property Act¹² and similar statutes.¹³ Indeed, the fact that foreign law at times may be relevant in the United States is so well established that the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure contain explicit rules on how U.S. courts are to determine issues of foreign law.¹⁴

During the hearing on May 16, 2013, there was a suggestion that the government should create a list or database of all of the foreign laws that could trigger Lacey Act violations, and that only laws on that list could support a prosecution under the Lacey Act. I think this is a terrible idea. The companies doing business in other countries are in the best position to make sure that their suppliers are following the law. It would not be in their best interest to have someone in the government create a list of laws that could trigger the Lacey Act; such a list could be over- or under-inclusive, and it would not provide any meaningful protection, either for the company in court or for consumers wanting comfort that they are purchasing legal wood or plant products. In an enforcement action, it is up to the judge or jury to determine whether a particular good or activity is illegal under a particular law.

The requirement that companies comply with the laws of the countries in which they operate or from which they procure wood or wood products, combined with the strict liability standard for forfeiture, deters companies from using suppliers that procure wood in an illegal or unsustainable manner. It also helps ensure that, when possible, the illegally taken wood and wood products are returned to their rightful owners. The requirement therefore protects the property rights of the victims of illegal logging, whether the victims are landowners in the U.S. or foreign countries.

¹⁰ See, e.g., Memorandum Opinion, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. Jun. 14, 2013), ECF No. 250 (awarding restitution to South Africa only for illegally harvested lobster imported into the United States or intended for shipment to the United States).

¹¹ *United States v. Bengis*, 631 F.3d 33, 39-41 (2d Cir. 2011).

¹² 18 U.S.C. §§ 2314-15.

¹³ See, e.g., 18 U.S.C. § 667 (theft of livestock), § 670 (theft of medical products); *United States v. Portrait of Wally*, 663 F. Supp.2d 232 (S.D.N.Y. 2009) (looking to local law to establish property rights and theft).

¹⁴ See Fed. R. Civ. P. 44.1; Fed. R. Crim. P. 26.1.

5. **At the hearing, Chairman Fleming stated that it was “news to him” that illegal logging was a national security issue, yet the latest U.S. Threat Assessment released in March 2013 states that “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.” Do you agree with the U.S. intelligence community that natural resources crime threatens U.S. national security?**

The conclusions of the U.S. intelligence community both make sense and comport with my understanding and observations. While I obviously do not have access to all of the information available to the intelligence community, the *Threat Assessment* does reinforce the conclusion that natural resources crime threatens U.S. national security. I am aware of published reports like the *Threat Assessment* and anecdotal evidence that illegal logging operations in other countries have ties to other criminal activities such as narcotrafficking. During my involvement in the *Bengis* matter, I saw how criminals engaged in the trade in illegal goods are often also engaging in other illegal activities, which in that case included bribing foreign governmental officials and laundering money, as well as violations of U.S. immigration laws.

As I mentioned earlier, and as is described in the *Threat Assessment*, in general, illegal activity undermines the rule of law, which in turn compromises our national security: “[t]ransnational organized crime (TOC) networks erode good governance, cripple the rule of law through corruption, hinder economic competitiveness, steal vast amounts of money, and traffic millions of people around the globe . . . TOC threatens U.S. national interests in a number of ways.”¹⁵ International environmental crime is one of the specific threats listed in the *Threat Assessment*. By reducing the demand for illegal goods and enabling the prosecution of international criminal networks, the Lacey Act helps promote the rule of law in the international community.

Thank you again for the opportunity to share my views on this important subject. Please do not hesitate to contact me if any additional questions arise.

¹⁵ *Threat Assessment*, *supra* note 3 at 5-6.