

TESTIMONY OF

MARCUS ASNER

Before the U.S. House of Representatives Committee on Natural Resources
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs

Oversight Hearing on

Why Should Americans Have to Comply with the Laws of Foreign Nations?

Longworth House Office Building, Room 1324

July 17, 2013

2:00pm

Submitted By:

Marcus Asner

399 Park Avenue, 34th Floor

New York, NY 10022

Phone: (212) 715-1789

Email: marcus.asner@aporter.com

Testimony of Marcus Asner
Before the
U.S. House of Representatives Committee on Natural Resources
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs

Oversight Hearing on

Why Should Americans Have to Comply with the Laws of Foreign Nations?

July 17, 2013

Introduction

Mr. Chairman, Ranking Member, and members of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, thank you for inviting me to appear before the Subcommittee today to address the topic of “Why Should Americans Have to Comply with the Laws of Foreign Nations?”

I am a partner in the New York office of Arnold & Porter LLP where I routinely advise companies on Lacey Act and other environmental and criminal matters. Although I am advising several clients on legal matters relating to the Lacey Act, I am appearing today in my personal capacity and not on behalf of Arnold & Porter or any client.

For nine years (2000-2009), I served as an Assistant United States Attorney (AUSA) in the Southern District of New York where I was Chief of the Major Crimes unit from 2007 to 2009. When I was an AUSA, I led the investigation and prosecution of *United States v. Bengis*, one of the largest Lacey Act cases in history, involving the smuggling of massive quantities of illegally harvested rock lobster from South Africa. Since I joined Arnold & Porter in 2009, I have counseled clients on a wide variety of Lacey Act issues, including assisting clients in complying with the 2008 Amendments. I have written extensively on the Lacey Act, and I have been invited to speak at numerous domestic and international meetings concerning environmental crime. In the past year or so, for example, I have spoken on Lacey Act issues at the World Fisheries Conference, the Forest Legality Alliance, INTERPOL, and the Boston Seafood Show. In May, I testified before this Subcommittee regarding “The 2008 Lacey Act Amendments.”

Today, I will explain my thoughts on how the Lacey Act’s requirement that individuals and companies ensure that the wildlife, fish, and plants in which they are trading are legal under both U.S. and foreign law is a constitutional and effective way of furthering the goals of the Lacey Act and protecting U.S. interests. I also will address some concerns that have been raised about the foreign laws provision of the Lacey Act.

Discussion

The Lacey Act is designed to further U.S. interests by keeping illegal fish, wildlife, plants and plant products from flooding the U.S. market, and by protecting our supplies of sustainable natural resources. The Act helps disrupt criminal organizations and fight corruption in foreign countries, which in turn helps level the playing field for legitimate businesses and improves our

national security. By making it illegal to “import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation” of the United States or foreign countries, the Lacey Act furthers these goals and protects the victims of environmental crime, both in the U.S. and abroad.

The United States is very much the leader in this area. Other countries, including Australia and Canada, are now using the Lacey Act as a model for their own laws. That other countries are adopting their own versions of the Lacey Act is good for America; if someone pillages our resources and then flees beyond the reach of American law enforcement, we certainly would insist that they be held responsible for their crimes.

This oversight hearing asks: “Why should Americans have to comply with the laws of foreign nations?” To be clear, the Lacey Act does *not* in fact require U.S. citizens to comply with foreign law, nor does it require the U.S. to enforce other countries’ laws. The Act requires only that people in the U.S. comply with a U.S. law (the Lacey Act), which in turn prohibits trade *in the United States* in illegal fish, wildlife, plants, and plant products. American consumers have a right to buy legal goods, and the Lacey Act provides a proper (and constitutional) means to help enforce that right.

Frequently, determining whether particular goods are legal necessarily will turn on the law of a state or a foreign country. The Lacey Act’s “assimilation of [foreign] laws is designed to reduce demand in the United States for species poached in foreign countries and to encourage international cooperation and mutual reciprocal enforcement efforts.”¹ U.S. courts routinely address issues of foreign law, and are well-equipped to do so.² In cases where a foreign law is ambiguous or difficult to understand, the Lacey Act’s state of mind (*mens rea* or *scienter*) requirement—that importers act “knowingly” for a felony conviction or with “due care” for a misdemeanor—protects people who unwittingly find themselves dealing in illegal goods.³ In the context of forfeiture, the remission procedures provided by the agencies charged with enforcing the Lacey Act help protect innocent importers who exercise due care, by giving them an opportunity to argue for the return of seized goods. The case of Gibson Guitar is a prime example; while the wood from Madagascar was clearly illegal and had to be forfeited (as Gibson ultimately conceded), there was some ambiguity in the Indian law, so Gibson was permitted to submit an unopposed petition for remission⁴ and obtain the return of the Indian wood.⁵

¹ *Legal Timber Protection Act: Hearing before the House of Representatives Committee on Natural Resources, Subcommittee on Fisheries, Wildlife and Oceans on H.R. 1497*, 110th Cong. 7 (2007) (statement of Eileen Sobeck, Deputy Assistant Att’y Gen., Env’t & Natural Res. Div., U.S. Dep’t of Justice).

² See, e.g., *United States v. Bengis*, 631 F.3d 33, 39-41 (2d Cir. 2011) (looking to South African law to determine property rights); see also Fed. R. Civ. P. 44.1 and Fed. R. Crim. P. 26.1 (rules on how courts interpret foreign law).

³ See *United States v. Lee*, 937 F.2d 1388, 1394-95 (9th Cir. 1991) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)).

⁴ Criminal Enforcement Agreement Between U.S. Dep’t of Justice and Gibson Guitar Corp. at 3 (July 27, 2012) [hereinafter Gibson CEA], available at <http://www.fws.gov/home/feature/2012/USvGibsonGuitarAgreement.pdf>.

⁵ See Gibson USA - Electric Guitars, <http://www.gibson.com/press/usa/> (last visited July 15, 2013) (advertising the sale of “Government Series” guitars made from wood reclaimed from

Footnote continued on next page

The Lacey Act's approach to protecting the legality of U.S. commerce is constitutional. In fact, the approach of referencing state or foreign law is employed in a wide variety of circumstances. Allowing importers to ignore the provenance of products would thwart the laudable goals of the Act and encourage trade in illegal goods, which in turn would put legitimate U.S. businesses at a disadvantage, threaten the sustainable supply of resources upon which American consumers rely, undermine the rule of law in other countries, and threaten our national security.

History 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. It has been amended several times since 1900. The 1935 amendment expanded the scope of predicate laws to include federal and foreign laws. This amendment was necessary to address the evolution of international commerce stemming from the invention of the automobile and the airplane.⁶ While not the subject of much discussion in the 1935 record, the purpose of the foreign laws provision was elaborated upon in the Senate Report issued in connection with the 1969 Amendments:

On the international level . . . [b]y prohibiting the sale in the United States of wildlife protected by a foreign government, the demand [in the U.S.] for poached wildlife from that country will be sharply reduced. In addition, however, such a law is also designed to promote reciprocity. If we assist a foreign country in enforcing its conservation laws by closing our market to wildlife taken illegally in that country, they may in turn help to enforce conservation laws of the United States by prohibiting the sale within their borders of wildlife taken illegally within the United States.⁷

The Lacey Act was overhauled in 1969, when Congress extended it to cover additional species, increased the maximum penalty, imposed a "knowingly and willfully" standard for criminal violations, and beefed up civil penalties to apply to negligent violations (for violating the "due

Footnote continued from previous page

FWS in the remissions process); Musician's Friend, *Gibson Les Paul Government Series Electric Guitar*, <http://www.musiciansfriend.com/guitars/gibson-les-paul-government-series-electric-guitar> (last visited Jun. 20, 2013) (describing the commemorative Les Paul guitars and noting that "[i]nterspersed among the general production run of the Government Series, the confiscated and returned components will be 'golden tickets' of a sort, rendering these particular guitars instantly collectible").

⁶ H.R. Rep. No. 74-886, at 2 (1935). "The Lacey Act of 1900 (31 Stat. 188) was in large part designed to aid the States by prohibiting shipment in interstate commerce of game and other wildlife killed or shipped in violation of their laws. The customary and ordinary means of transportation of game at the time the act was passed were common carriers by rail and water, and the act was limited to shipment by such carriers. Advent of the automobile, and now the airplane, has introduced means of conveyance of game from State to State that have almost completely supplanted the railroads and water carriers. It is proposed to amend the Lacey Act so that it will apply to the present-day vehicles and methods of transportation." *Id.*

⁷ S. Rep. No. 91-526, at 12 (1969).

care” standard). In the 1981 amendments, Congress sought to strengthen the Lacey Act in light of the discovery that the “massive illegal trade in fish and wildlife . . . handled by well organized large volume operations run by professional criminals” was causing “grim environmental consequences” and “severe” economic consequences.⁸ The 1981 amendments were designed to bolster enforcement under the Act. Those amendments combined the Lacey Act with the Black Bass Act to create a “single comprehensive law addressing illegal trade in fish, wildlife and rare plants,”⁹ making the culpability standard less stringent (“knowingly” instead of “knowing and willfully”), increasing the civil penalties, adding a felony punishment scheme to encourage the DOJ to prioritize Lacey Act cases, and adding the strict liability forfeiture provision.¹⁰ The 2008 amendments adding plants and plant products grew out of the same concerns leading to the strengthening of the Lacey Act in 1981—the “global problem of illegal logging and timber trafficking and the need for stronger enforcement tools to address it.”¹¹

Judicial Review of the “Foreign Laws” Provision of the Lacey Act

The Chairman has asked whether the Supreme Court has ever addressed section 3 of the Lacey Act—the section prohibiting the trade in fish, wildlife, plants or plant products that are illegal according to U.S. or foreign laws or regulations.¹² The Supreme Court has not directly addressed whether the Lacey Act’s use of foreign laws violates Article I of the Constitution. However, every circuit court to consider the issue has upheld the Lacey Act against constitutional challenge.¹³ The argument that the Lacey Act’s reliance on foreign laws is unconstitutional has been described as “patently frivolous,”¹⁴ “without merit,”¹⁵ and “neither original nor meritorious.”¹⁶ As the United States Court of Appeals for the Third Circuit explained:

⁸ S. Rep. No. 97-123, at 1 (1981): “The illegal wildlife trade has grim environmental consequences. It threatens the survival of many species of wildlife particularly those which we value because of their aesthetic or commercial values. The economic consequences of this trade are also severe. It directly threatens America’s agriculture and pet industries and indirectly burdens individual taxpayers. Imported wildlife carry diseases that can affect poultry, livestock, fish and pets.”

⁹ H.R. Rep. 97-276, at 30 (1981).

¹⁰ S. Rep. No. 97-123, at 2-3. “Providing for a felony penalty scheme for unlawful importations of wildlife is consistent with existing customs law . . . By specifying in this Act that such importations are felonies, notice is given to all wildlife importers who are unaware of the fact that the customs felony law applies to their activities [and] that their illegal activities may subject them to a felony punishment scheme.” *Id.* at 11; H.R. Rep. 97-276 at 20.

¹¹ Sobeck Statement, *supra* note 1.

¹² 16 U.S.C. § 3372(a).

¹³ See, e.g., *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (Lacey Act is not an unconstitutional delegation of legislative power); *United States v. Bryant*, 716 F.2d 1091, 1094-95 (6th Cir. 1983) (same); *United States v. Molt*, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979) (same); *Rupert v. United States*, 181 F. 87, 90 (8th Cir. 1910) (Lacey Act is a proper exercise of Congress’ power under the Commerce Clause); cf. *United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998) (federal regulation, which was the basis for a Lacey Act conviction, did not unconstitutionally delegate legislative power by basing a federal offense on violations of state law).

¹⁴ *Bryant*, 716 F.2d at 1094; *Molt*, 599 F.2d at 1219 n.1.

¹⁵ *Senchenko*, 133 F.3d at 1158.

¹⁶ *Rioseco*, 845 F.2d at 302.

The Act does not delegate legislative power to foreign governments, but simply limits the exclusion from the stream of foreign commerce to wildlife unlawfully taken abroad. The illegal taking is simply a fact entering into the description of the contraband article, just as if importations of wine or automobiles were restricted to bottles bearing an official foreign designation of Appellation controllee or cars bearing indicia of a foreign safety inspection. Congress could obviously exercise its plenary power over foreign commerce in such a manner if it so chose.¹⁷

Prohibiting the flow of illegally obtained goods in interstate commerce is well within the scope of Congress' power under the Commerce Clause. As the Supreme Court explained long ago:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.¹⁸

Accordingly, the Lacey Act's restrictions on the flow of illegal goods in interstate commerce are well within the scope of Congress' commerce power.¹⁹

Courts similarly have rejected arguments that the "foreign law" provision of the Lacey Act is unconstitutionally vague.²⁰ Any concern about the vagueness of a local or foreign law is handled by the Act's scienter or mental state requirements.²¹ Put simply, people who unwittingly and reasonably find themselves in possession of illegal goods are not guilty under the Lacey Act. The argument that the foreign law provision of the Lacey Act is unconstitutionally vague—like the commerce power argument—is meritless.

A Wide Range Of United States Laws Involve Foreign Law Predicates

The Chairman also asked about other U.S. laws that reference foreign laws. The concept that American law in some circumstances must look to the laws of other countries is neither new nor unique to the Lacey Act. The fish and seafood industries, as well as the pet trade, have been

¹⁷ *Molt*, 599 F.2d at 1219 n.1 (citing *United States v. Sharpnack*, 355 U.S. 286, 294 (1958); *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*, 299 U.S. 334, 347-49 (1937); *Gibbons v. Ogden*, 22 U.S. 1, 207 (1824)); accord *Lee*, 937 F.2d at 1393 ("Although the Act does depend upon violations of foreign law, . . . 'the [United States] government is not applying the foreign law *per se*, but rather it is looking to the foreign law to determine if the Act's provisions are triggered; if so, then it will apply the Act, and not the foreign law.' Read in this manner, the Act delegates no power to foreign governments, and therefore does not violate article I.").

¹⁸ *Kentucky Whip*, 299 U.S. at 346-47 (quoting *Brooks v. United States*, 267 U.S. 432, 436-37 (1925)).

¹⁹ See, e.g., *Rupert*, 181 F. at 90; *United States v. Romano*, 929 F. Supp. 502, 507-09 (D. Mass. 1996).

²⁰ *Lee*, 937 F.2d at 1394-95; see also *Bryant*, 716 F.2d at 1095.

²¹ See *Lee*, 937 F.2d at 1394-95 (citing *Village of Hoffman Estate*, 455 U.S. at 499).

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 and trafficking scheme.²² Importers of all sorts 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 Act²³ and similar statutes.²⁴ 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.²⁵

Many U.S. statutes look to foreign laws to determine legality.²⁶ The Tariff Act of 1930, for example, prohibits the importation of any wild mammal or bird, or any part thereof, if "the laws or regulations of [the exporting] country . . . restrict the taking, killing, possession, or exportation to the United States[] of any wild mammal or bird, alive or dead, or restrict the exportation to the United States of any part or product of a wild mammal or bird."²⁷ Similarly, it is illegal to export "a listed chemical in violation of the laws of the country to which the chemical is exported,"²⁸ as well as to export or serve as a broker or trader in an international transaction involving a listed chemical while knowing or having reasonable cause to believe "that the chemical will be used to manufacture a controlled substance in violation of the laws of the country to which the chemical is exported."²⁹ Another statute prohibits interstate commerce in certain hazardous substances, with an exception for shipments that are being exported to a foreign country and comply with the laws of the importing country.³⁰

²² *Bengis*, 631 F.3d at 39-41.

²³ 18 U.S.C. §§ 2314-15; *see United States v. Portrait of Wally*, 663 F. Supp.2d 232 (S.D.N.Y. 2009) (local law determines property rights)

²⁴ *See, e.g.*, 18 U.S.C. § 667 (theft of livestock), § 670 (theft of medical products).

²⁵ *See* Fed. R. Civ. P. 44.1; Fed. R. Crim. P. 26.1.

²⁶ *See, e.g.*, 19 U.S.C. § 1527 (criminalizing importation of wild mammals and birds in violation of foreign law); 18 U.S.C. § 546 (prohibiting smuggling of goods into foreign countries in violation of that country's law); 21 U.S.C. § 960(d)(2) (prohibiting exportation of listed chemicals in violation of foreign laws); 15 U.S.C. §§ 1263-64 (exemptions from restrictions on commerce and trade in hazardous substances where the substances are being exported to a foreign country and meet that country's legal requirements); 21 U.S.C. § 606(a) (exemption from food safety requirements food products for exportation where the product is legal under the foreign country's laws); 46 U.S.C. § 30306 (creating liability in the U.S. for deaths at sea where, under the law of a foreign country, a cause of action exists for death by wrongful act, neglect, or default). U.S. laws also look to foreign laws for other purposes. *See, e.g.*, 20 C.F.R. § 404.356 (regulation providing that Social Security Administration will look to adoption laws of foreign country where adoption took place to determine whether the person is the insured's legally adopted child); 18 U.S.C. § 1956(b)(2) (service of process on a foreign person is effective if it accords with the law of the country in which the person is found).

²⁷ 19 U.S.C. § 1527(a).

²⁸ 21 U.S.C. § 960(d)(2). Liability extends to anyone who "serves as a broker or trader for an international transaction involving a listed chemical, if the transaction is in violation of the laws of the country to which the chemical is exported." *Id.*

²⁹ 21 U.S.C. § 960(d)(4).

³⁰ 15 U.S.C. § 1264(b)(3).

Businesses Should Comply with the Lacey Act

The Lacey Act helps deter companies from using suppliers that procure goods in an illegal or unsustainable manner. This in turn protects U.S. interests by ensuring a level playing field for legitimate businesses, helping in the fight against foreign corruption that threatens our national security, and protecting our supply of sustainable natural resources. It also helps protect victims, by ensuring that, when possible, the rightful owners obtain either the return of their stolen goods or appropriate compensation.

Compliance Protects U.S. Interests and Reduces Corruption

The evils targeted by the Lacey Act affect the United States' economic, social, environmental, and national security interests. As noted in the President's July 1, 2013 Executive Order:

The poaching of protected species and the illegal trade in wildlife and their derivative parts and products (together known as "wildlife trafficking") represent an international crisis that continues to escalate. Poaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates. The survival of protected wildlife species such as elephants, rhinos, great apes, tigers, sharks, tuna, and turtles has beneficial economic, social, and environmental impacts that are important to all nations. Wildlife trafficking reduces those benefits while generating billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability, and undermining security. Also, the prevention of trafficking of live animals helps us control the spread of emerging infectious diseases. For these reasons, it is in the national interest of the United States to combat wildlife trafficking.³¹

The Lacey Act 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 our national security. There is a close link between corruption and natural resources crime. In his *Statement for the Record on the 2012 Worldwide Threat Assessment of the US Intelligence Community*, the Director of National Intelligence included "environmental crime" in the list of ways in which transnational organized 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.³²

³¹ Exec. Order No. 13,648 (2013), 78 Fed. Reg. 40,621-23 (July 5, 2013).

³² *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

Footnote continued on next page

Corruption related to environmental crimes presents a threat to the United States' interests generally, and to U.S. companies specifically. Companies that turn a blind eye to their supply chains enjoy a competitive advantage that in turn adversely affects legitimate companies' business and customer relations. Meanwhile, overharvesting seriously affects the worldwide and U.S. market's supply. As a result, any reduction in market price in the short-term due to the influx of illegal goods is short-lived, and prices will increase in the long-term as supply is depleted due to illegal and often unsustainable practices. By reducing the supply of illegal goods in the marketplace, the Lacey Act benefits U.S. companies and consumers. The Act reduces the demand for illegal and unsustainably harvested goods, which also helps to protect the global supply of natural resources upon which American consumers depend. By providing a powerful enforcement tool on the one hand and encouraging the creation of compliance programs that help identify supply chain issues on the other, the Lacey Act helps to reduce the specter of corruption, and ultimately fosters an environment favorable to legitimate American businesses.

Compliance Protects the Victims of Crime

Penalties under the Lacey Act protect victims by deterring the theft of fish, wildlife, and plants and plant products. Moreover, just as property laws protect owners' rights by requiring the return of stolen livestock or furniture stolen from your home, the Lacey Act protects the rights of victims of illegal harvesting and trade, whether such victims are in the U.S. or abroad.

Victims of environmental crime might be individuals, states, or countries. Individuals from whom fish, wildlife, or plants or plant products are taken are victims who have a right to the return of their goods or compensation in the form of restitution. The intervening illegal activity does not extinguish those property rights. In addition, the states or countries in which the illegal takings occur have a right to enforce their laws, which includes the right to seize illegal property. This right was recognized in *Bengis*, where the Second Circuit Court of Appeals ruled that South Africa should be awarded compensation for the lobster stolen as part of the scheme.³³ 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.³⁴

Footnote continued from previous page

<http://www.intelligence.senate.gov/130312/clapper.pdf>. The Statement also noted that “[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.” *Id.* at 5.

³³ See, e.g., Memorandum Opinion, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. Jun. 14, 2013), ECF No. 249 (awarding restitution to South Africa for illegally harvested lobster imported into the United States or intended for shipment to the United States).

³⁴ Press Release, 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*

Footnote continued on next page

By protecting the property rights of victims, the Lacey Act provides justice to victims and deters future criminal activity. It is the importer's responsibility to know its suppliers and put measures in place to ensure that its goods are legal. Just as a legitimate art gallery requires evidence of provenance before purchasing paintings or artifacts, or a seller of name-brand shoes needs comfort that it is not buying counterfeits, companies that are dealing in goods covered by the Lacey Act are responsible for understanding and controlling their supply chains and, if appropriate, demanding contractual warranties to protect themselves.

Responses to Concerns

Scope of Foreign Laws

Some have argued that the scope of foreign laws triggering a violation of the Lacey Act is too broad. In fact, the categories of foreign laws implicated by the Lacey Act are clear and well-defined. Legitimate seafood companies have been complying with the Lacey Act for decades.

Critics of the Lacey Act frequently point to the case of *United States v. McNab* as an example, claiming that the defendants in that case somehow were convicted unjustly of Lacey Act violations and sent to jail for technical violations. That argument disingenuously misconstrues the *McNab* case. A closer look reveals that law enforcement, relying in part on the Lacey Act, in fact put an end to a large, sophisticated, and destructive international criminal organization engaged in a massive scheme that involved more than 40 shipments of illegal spiny lobster tails from Honduras, adding up to more than 1.6 million pounds of illegal spiny lobster with a retail value of over \$17 million.³⁵

As a part of the scheme, Honduran national David McNab and his co-conspirators (among other things) illegally harvested massive quantities of undersized and egg-bearing lobster, misreported their catch to Honduran authorities, packaged the illegal goods in ways that helped them avoid detection, and smuggled their illegal contraband into the United States, where it was were sold to unwitting American consumers for significant profit. The co-conspirators intentionally falsified import documents by using a secret code to disguise the true size of illegal, undersized lobster. With at least one shipment, a co-conspirator falsely relabeled cases of Honduran lobster as a product of the United States. After law enforcement intercepted one illegal shipment on its way to Alabama, the co-conspirators tried to evade law enforcement and continue their scheme by shipping illegal lobster tails from Honduras to Los Angeles via airplane. After one of those shipments was caught and seized in Los Angeles, the co-conspirators continued with their illegal smuggling by trying to ship the illegal lobster through Canada.

Footnote continued from previous page

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>.

³⁵ Press Release, NOAA, *McNab to Continue Serving Federal Prison Sentence for Lobster Smuggling* (Mar. 22, 2004), available at

<http://www.publicaffairs.noaa.gov/releases2004/mar04/noaa04-r119.html>.

A jury in Alabama found each of the four defendants in *McNab* guilty of knowingly violating the law by committing one or more of the following crimes: conspiracy, smuggling, money laundering, Lacey Act violations, and false labeling.³⁶ The defendants' criminal scheme had a devastating impact on lobster populations in Honduras.³⁷ The scheme impacted the United States' supplies as well; the offspring of lobster populations in areas like Honduras and Nicaragua are, given the current flows in the Gulf, the primary parental source for replenishing lobster stocks in the southeastern United States.³⁸ Florida's lobster harvests dramatically declined in part because of the illegal harvest of small lobsters and female egg-bearing lobsters in the source fisheries off Central America.³⁹ The *McNab* defendants were guilty, they were found guilty by a jury, and their convictions were upheld on appeal. The United States Supreme Court denied McNab's petition for a writ of certiorari.

Critics frequently claim that the *McNab* defendants went to jail for violating a Honduran "cardboard box" regulation. That is simply false, as explained above. Moreover, critics' protestations notwithstanding, the Honduran inspection and processing requirements played an important role in Honduras' efforts to combat the illegal lobster trade. By packaging lobster in seventy-pound frozen, unsorted clumps, McNab made it virtually impossible for authorities to inspect for illegal undersized or egg-bearing lobster, which in turn helped the co-conspirators better hide the illegal lobsters from authorities and continue their criminal scheme, all to the detriment of the species, the legitimate fishermen relying on the harvest for their livelihood, and the consumers (including American consumers) of the lobsters. In that regard, the Honduran processing regulations—while seemingly technical—are quite similar to the technical labeling and packaging requirements the United States commonly uses in areas such as food safety, drug safety, and environmental protection. Such requirements provide a common and useful tool in the battle against illegal poaching and logging. Indeed, a wide range of legal regimes employ similar technical processing, declaration, or permitting requirements because such requirements often provide the best way to prevent the abuse and degradation of the environment. The Clean Water Act, which requires that dischargers apply for a permit to release pollutants into the waters of the United States,⁴⁰ provides one example; the permitting requirements help regulators ensure that the water bodies are adequately protected from excessive pollution. The Lacey Act's foreign laws provision acknowledges the importance of the laws and regulations designed to promote resource conservation through these vitally important, indirect measures.

Database of Foreign Laws

Some have suggested that the government should create a list or database of the foreign statutes that could trigger Lacey Act violations, and that only laws on that list could support a prosecution under the Lacey Act. However, creating such a database would be both inefficient and unproductive. Companies selling goods in the United States should know where the goods

³⁶ *United States v. McNab*, 331 F.3d 1228, 1234 n.10 (11th Cir. 2003).

³⁷ Press Release, NOAA, *supra* note 35.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 33 U.S.C. § 1342.

come from, and 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 inevitably would be over- or under-inclusive, and it would not provide any meaningful protection for the company in court, for consumers seeking comfort that they are purchasing legal goods, or for the victims who had their resources stolen. In an enforcement action, companies should have the right to argue their understanding of the predicate law at issue, and it is up to the judge or jury to determine whether a particular good or activity is illegal under a particular law.

Alleged Ambiguity of Foreign Laws

Some have raised concerns that an ambiguous foreign law could result in a criminal conviction and/or the forfeiture of goods. That argument misunderstands the Lacey Act.

Mens rea/scienter. For an importer to be found guilty of a felony under the Lacey Act, the government must show that she imported fish, wildlife, plants, or plant products that she *knew* were illegal. In cases where a person, in the exercise of due care, *should have known* that wood she imported had been stolen, she is guilty of a misdemeanor.⁴¹ Where a foreign law is ambiguous or indecipherable, the government will be hard pressed to prove either knowledge or the absence of due care, and most likely would never bring such a case. As the Ninth Circuit Court of Appeals explained in *Lee*:

[The Lacey Act] scienter element prevents the Act from criminally punishing those who violate the Act's provisions but are reasonably unaware that they are doing so. The protections inserted by Congress prevent the Act from "trap[ping] the innocent by not providing fair warning," and therefore mitigate any potential vagueness of the Act.⁴²

CAFRA and Remission. The Civil Asset Forfeiture Reform Act ("CAFRA"), incorporated by reference in the Lacey Act, explicitly contemplates a process under which a person may file a claim for the return of seized property. After the seizure, the government must provide notice to the person from whom the property was seized. That person may either: (1) file a claim in court contesting forfeiture; or (2) submit a petition straight to the agency that seized the property.⁴³ The second option commonly is referred to as "remission." The federal departments charged with enforcing the Lacey Act, including the Departments of Justice, Interior, and Agriculture, and the National Oceanic and Atmospheric Administration, all have regulations permitting

⁴¹ The "due care" standard serves an important role in reinforcing lawful behavior and in leveling the playing field between legitimate companies that strive to ensure the legality of their operations and those companies that are indifferent as to the legality of the goods they are importing and supplying to the American consumer. The "due care" standard's fact-specific and flexible nature helps protect companies that are taking measures to ensure their goods are legal. Not only does the due care standard allow companies to tailor their compliance programs to their own supply chains, but it also takes into account the foreign laws under which the companies are operating so that ambiguous laws do not subject innocent, diligent companies to unfair liability.

⁴² *Lee*, 937 F.2d at 1395 (internal citations omitted).

⁴³ See 18 U.S.C. § 983(a).

people to petition for remission and seek the return of goods that otherwise would be illegal to possess under the Lacey Act.⁴⁴ 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.⁴⁵ In fact, that is what happened in Gibson. Gibson conceded that the Madagascar wood was illegal and that wood was forfeited. However, as noted above, because the Indian law was ambiguous with respect to whether the Indian wood Gibson had imported was legally exported “finished” wood or illegally exported “unfinished” wood, the government allowed Gibson to file an unopposed petition for remission to seek the return of that wood.⁴⁶ Gibson filed the remission petition and that Indian wood was in fact returned.⁴⁷

Conclusion

The Lacey Act provides an important tool that helps enforcement officials fight crime, corruption, and the theft of fish, wildlife, and plants and plant products. The foreign law provision of the Lacey Act is neither unique nor unconstitutional. It is a perfectly legitimate means of furthering the goals of the Act and ensuring that only legal goods are imported into the United States. Companies operating in or procuring materials from other countries have a responsibility to ensure that the materials they bring into the United States are legal. As a consumer, I expect companies to do so and it is hard to imagine that any responsible, law-abiding American would want to buy goods that were stolen in another country or otherwise obtained in violation of another country’s laws. Without the foreign law provision of the Lacey Act, the problems of wildlife poaching, fish overharvesting, and illegal logging would proliferate, to the detriment of American businesses and consumers of present and future generations.

Thank you again for inviting me to appear today. I would be happy to answer any questions.

⁴⁴ 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).

⁴⁵ See, e.g., 50 C.F.R. § 12.24(e).

⁴⁶ Gibson CEA, *supra* note 4 at 3.

⁴⁷ See note 5, *supra*.