

STATEMENT FOR THE RECORD

BY

MARCUS ASNER & KATHERINE GHILAIN

U.S. House of Representatives Committee on the Judiciary  
Over-Criminalization Task Force

*Regulatory Crime: Solutions*

November 14, 2013

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**Introduction**

*Marcus Asner*

Marcus Asner is a partner in the New York office of Arnold & Porter LLP where he routinely advises companies on Lacey Act compliance and other environmental and criminal matters. Although he is advising several clients on legal matters relating to the Lacey Act, he is submitting this statement in his personal capacity and not on behalf of Arnold & Porter LLP or any client.

For nine years (2000-2009), Asner served as an Assistant United States Attorney (AUSA) in the Southern District of New York where he was Chief of the Major Crimes unit from 2007 to 2009. When Asner was an AUSA, he 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 he joined Arnold & Porter in 2009, he has counseled clients on a wide variety of Lacey Act issues, including assisting clients in complying with the 2008 Amendments. He has written extensively on the Lacey Act and has been invited to speak at numerous domestic and international meetings concerning environmental crime. In the past year or so, for example, Asner has spoken on Lacey Act issues at the World Fisheries Conference, the Forest Legality Alliance, INTERPOL, and the Boston Seafood Show. Asner testified before the U.S. House of Representatives Committee on Natural Resources Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs in May and July regarding “The 2008 Lacey Act Amendments” and “Why Should Americans Have to Comply with the Laws of Foreign Nations?,” respectively. Asner recently was appointed to serve with the President’s Advisory Council on Wildlife Trafficking.

*Katherine Ghilain*

Katherine Ghilain is an associate in the New York office of Arnold & Porter LLP where she routinely advises companies on Lacey Act compliance and other environmental matters. Ghilain has written extensively on the Lacey Act and has given several presentations on this and related subjects. Although she is advising several clients on legal matters relating to the Lacey Act, she is submitting this statement in her personal capacity and not on behalf of Arnold & Porter LLP or any client.

## Overview

In this statement, we will explain our thoughts on the importance of the Lacey Act and how it has contributed to reducing the international trade in illegal fish, wildlife, and plants and plant products, and in the process has served American interests and helped the environment. We also will address some concerns that have been raised during the October 30, 2013 and November 14, 2013 hearings about purported “over-criminalization” and 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.

Some have argued that the Lacey Act is an “exemplar of over-criminalization,” which Mr. Reed Rubinstein defined as a Congressional enactment having the following flaws: strict liability offenses that lack culpable mental states, vicarious liability without evidence of personal advertence, grossly disproportionate penalties, and “the broad delegation of criminal enforcement authority to bureaucrats.”<sup>1</sup> As we will discuss further below, any argument that the Lacey Act provides an example of “over-criminalization” appears to be based on a deep misunderstanding of the Lacey Act and criminal law.

### The Nation’s Interest in 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.

The Lacey Act helps deter companies from using suppliers that procure goods in an illegal 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.

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<sup>1</sup> *Why Should U.S. Citizens Have to Comply with Foreign Laws?: Hearing before the H. Comm. on Natural Resources, Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2013) (statement of Reed D. Rubinstein, at 7), available at <http://naturalresources.house.gov/uploadedfiles/rubinsteintestimony07-17-13.pdf>.*

### *Dismantle Criminal Operations and Deter Illegal Activities*

Asner first became involved with the Lacey Act around 2002 when he started working on the investigation of the Bengis international criminal organization. The Bengis organization engaged in a massive scheme to smuggle into the United States and sell to U.S. consumers (at a significant profit) rock lobster that had been illegally harvested in South Africa. The scheme, which spanned over a decade, had a devastating impact on the South African rock lobster population. The Bengis scheme involved (among other things) numerous violations of South African fishing and customs laws, bribery of South African fisheries inspectors, submission of false shipping documentation, smuggling of contraband into the United States, sale of illegal seafood to U.S. consumers, circumvention of U.S. immigration laws, spoliation of evidence, and the use of United States banks to transfer criminal proceeds. The United States and South Africa worked together closely on the investigation and prosecutions, which ultimately led to the dismantling of the Bengis organization. In the United States, five members of the organization were arrested; all ultimately pleaded guilty and the main players were sentenced to prison. The defendants also forfeited \$7.4 million to the U.S. In 2011, the Court of Appeals for the Second Circuit ruled that South Africa was a victim entitled to restitution for the defendants' crimes, and in 2013, a judge in the Southern District of New York ordered the defendants to pay approximately \$22.5 million in restitution to the Republic of South Africa.

The *Bengis* case provides just one example of how the Lacey Act can serve as a powerful enforcement tool in the fight against criminal activity. It is important to remember, however, that the Lacey Act also protects innocent actors, contrary to some of the rhetoric offered in support of the “over-criminalization” argument. A person who innocently imports illegally harvested fish, wildlife, or plants or plant products is innocent under the Lacey Act.<sup>2</sup> She only would be guilty of a felony if she actually *knew* the goods were illegal.

In cases where a person, in the exercise of due care, *should have known* that goods she imported had been stolen, the Lacey Act establishes a middle ground—a misdemeanor. Misdemeanor prosecutions under the Lacey Act are rare. Prosecutors typically focus their limited resources on more serious felony investigations and prosecutions. In this, as in any other lawful industry, legitimate businesses and law-abiding citizens understandably take pains to ensure that they are buying legal goods, whether those goods are wood, seafood, wildlife, or some other commodity such as food, diamonds, or electronics. It is in this respect that the due care standard in the Lacey Act serves an important role in reinforcing lawful behavior, and in leveling the playing field between legitimate companies that invest resources to try hard to do the right thing, and companies that are utterly indifferent to whether the goods they are importing and supplying to the American consumer are legal or illegal. Supply chain due diligence increasingly has become a priority for companies in all sectors.

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<sup>2</sup> Of course, the fact that the person is innocent in this example does not change the fact that the wood in fact was stolen. Under well-established U.S. property law, stolen property ordinarily will be returned to the rightful owner, even if the person possessing the wood is innocent.

### ***Compliance Protects U.S. Interests and Reduces Corruption***

According to a 2012 UNEP and INTERPOL 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.”<sup>3</sup> Not only is the U.S. one of the world’s leading producers of products like wood flooring and hardwood plywood, but it is also one of the largest consumers.<sup>4</sup>

The mere presence of illegally procured fish, wildlife, and plants and plant products in the international marketplace affects the competitiveness of legitimate U.S. producers. The United States’ GDP of timber-related manufacturing was valued at \$77 billion in 2009.<sup>5</sup> According to a 2004 report, illegal logging depresses U.S. prices by about 2-4%, which translates to about \$1 billion in annual losses to the U.S. market from lower prices and reduced market share.<sup>6</sup> Evidence presented in the *Bengis* case revealed that illegal operations are able to sell larger quantities of goods at lower prices than their legitimate competitors.<sup>7</sup> This illegal advantage in turn adversely affects competitors’ business and customer relations. Meanwhile, overharvesting activities seriously affect 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 unsustainable practices. By reducing the amount of illegally harvested goods in the international marketplace, the Lacey Act benefits U.S. companies and consumers. By reducing the demand for illegal and unsustainably harvested goods, the Act also helps to protect the global supply of natural resources upon which American consumers depend.

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:

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<sup>3</sup> 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](http://www.unep.org/pdf/RRALogging_english_scr.pdf).

<sup>4</sup> 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>.

<sup>5</sup> U.S. Census Bureau, *Statistical Abstract of the United States* at 563 (2012) (Table 883), available at <http://www.census.gov/compendia/statab/2012edition.html>.

<sup>6</sup> 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>.

<sup>7</sup> 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).

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.<sup>8</sup>

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.<sup>9</sup>

Corruption related to environmental crimes presents a threat to the United States’ interests generally, and to U.S. companies specifically. 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.

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<sup>8</sup> Exec. Order No. 13,648 (2013), 78 Fed. Reg. 40,621-23 (July 5, 2013).

<sup>9</sup> *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>). 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.

### ***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.<sup>10</sup> As Preet Bharara, the U.S. Attorney for the Southern District of New York, explained:

[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.<sup>11</sup>

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.

### **The Lacey Act is Not an “Exemplar of Over-Criminalization”**

In his July 2013 testimony before the House Committee on Natural Resources Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, Mr. Rubinstein argued:

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<sup>10</sup> 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).

<sup>11</sup> 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 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>.

The Lacey Act . . . holds Americans vicariously liable for the violation of even the most technical foreign law, rule or local ordinance without evidence of personal advertence or intent. It penalizes without relation to the harm done by the “violator” to fish, wildlife or plant populations. It criminalizes obscure foreign requirements, including civil customs, transportation, and packaging rules and even local tax or royalty ordinances, and then delegates unlimited prosecutorial power to federal regulators. Perversely, the Lacey Act unleashes the coercive power of the federal government not against the corrupt and lawless foreign individuals, companies and governments that allow, encourage or conduct poaching, clear-cutting and environmental degradation, but rather against Americans who are innocent of wrong-doing, by any reasonable measure.<sup>12</sup>

This argument is flat wrong and deeply misunderstands both the Lacey Act and the basic principles of criminal law.

First, the Lacey Act is not a strict liability statute. A person who innocently imports illegally harvested fish, wildlife, or plants or plant products is innocent under the Lacey Act.<sup>13</sup> A person is guilty of a felony only if he or she *knew* that the fish, wildlife or wood she was dealing with was illegal. In cases where a person, in the exercise of due care, *should have known* that the goods were illegal, he or she is guilty of a misdemeanor.<sup>14</sup> The *mens rea* requirement for Lacey Act criminal convictions therefore prevents simple “vicarious liability for the acts of others” and ensures that the Lacey Act does not punish “Americans who are innocent of wrong-doing by any reasonable measure.”

Some have suggested that the *mens rea* requirement be changed to a higher “willfully” culpability standard. Prior to 1981, the Lacey Act in fact did require that a person act “knowingly and willfully” in order to face criminal liability. Congress amended the Lacey Act in 1981 to change the culpability standard to just a “knowingly” standard, after finding the earlier standard to be “too stringent” such that it was “limit[ing] the[] effectiveness [of the Lacey Act and the Black Bass Act] as wildlife enforcement tools.”<sup>15</sup> Congress’s 1981 amendment makes sense; if a person knows that certain goods are illegal under a state or foreign law, she easily can

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<sup>12</sup> *Supra* note 1.

<sup>13</sup> The illegal goods would still be subject to seizure and forfeiture. However, there are procedures in place for contesting the forfeiture and seeking return of the goods via remission, as discussed below.

<sup>14</sup> 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.

<sup>15</sup> S. Rep. No. 123 at 2, 11, *reprinted in* 1981 U.S.C.C.A.N. at 1749, 1758; *see also* H.R. Rep. No. 276 at 32 (letter of Donald Paul Hodel, Undersecretary of the Interior).



avoid criminal liability under the Lacey Act by simply declining to trade in those goods. Imposing a higher “willfulness” standard accordingly would serve no legitimate purpose. Rather, it simply would make enforcement more difficult, while allowing morally culpable people to avoid liability for knowingly trading in illegal goods.

Second, the Lacey Act does not “criminalize[] obscure foreign requirements” or “delegate[] unlimited prosecutorial power to federal regulators.” Rather, the Lacey Act prohibits a person from *trading in the United States* in certain categories of goods, provided that the person *knew or in the exercise of due care should have known* that the goods were taken, possessed, transported, or sold in violation of federal, state, tribal, or foreign law.<sup>16</sup> This prohibition is similar to the National Stolen Property Act’s prohibition on importing goods considered stolen under the laws of a state or a foreign country.<sup>17</sup> By necessity, illegality is determined by looking to the laws of the countries or states from which those goods originate. The Lacey Act is not the only law that relies on foreign laws to determine whether particular goods or actions are legal; in fact, many U.S. statutes look to foreign laws to determine legality.<sup>18</sup> 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.”<sup>19</sup> Moreover, only certain types of underlying laws may serve as predicates to Lacey Act liability, and those types of laws are spelled out in the statute. For example, the only categories of laws that may serve as predicate laws under the 2008 amendments dealing with plants and plant products are those that:

1. protect plants;
2. regulate the theft of plants;

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<sup>16</sup> 16 U.S.C.A. § 3372(a)(1)-(2) (making it unlawful “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce” any plant, fish, or wildlife taken in violation of federal, state, tribal, or foreign law where the requisite culpability requirements are met).

<sup>17</sup> 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).

<sup>18</sup> *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).

<sup>19</sup> 19 U.S.C. § 1527(a).

3. regulate the taking of plants from a park, forest reserve, or other officially protected area;
4. regulate the taking of plants from an officially designated area;
5. regulate the taking of plants without, or contrary to, required authorization;
6. require payment of appropriate royalties, taxes, or stumpage fees for the plant; or
7. govern the export or transshipment of plants.<sup>20</sup>

Thus, a company trading in the United States in goods that were sourced from foreign countries only needs to be wary of the relevant plant-based laws in those countries, something that prudent, law-abiding companies do in any event. Further, if a foreign law is ambiguous or difficult to understand, the *mens rea* requirement protects people who unwittingly find themselves dealing in illegal goods. As the Ninth Circuit Court of Appeals explained:

[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.<sup>21</sup>

To be plain: someone who unwittingly and innocently deals in goods that happen to be illegal under a foreign law is *innocent* under the Lacey Act.

While the illegal goods may nevertheless be seized, 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.<sup>22</sup> 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 people to petition for remission and seek the return of goods that otherwise would be illegal to possess under the Lacey Act.<sup>23</sup> The petitioner sets forth the reasons why the goods should be returned and the agency determines whether, in light of the particular

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<sup>20</sup> Kristina Alexander, Congressional Research Service, *The Lacey Act: Protecting the Environment by Restricting Trade* 6-8 (2013) (citing § 3372(a)(2)(B)); see also Elinor Colbourn & Thomas Swegle, Dep't of Justice, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, ST036 ALI-ABA 365, 369 (2012) ("The foreign laws that serve as the underlying predicate must be plant-related laws.").

<sup>21</sup> *United States v. Lee*, 937 F.2d 1388, 1395 (9th Cir. 1991) (internal citations omitted).

<sup>22</sup> See 18 U.S.C. § 983(a).

<sup>23</sup> 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).

circumstances, mitigation is warranted or the goods should be returned.<sup>24</sup> In fact, that is what happened in Gibson. Gibson conceded that the Madagascar wood was illegal and that wood was forfeited. However, 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.<sup>25</sup> Gibson filed the remission petition and that Indian wood was in fact returned.<sup>26</sup>

Third, Mr. Rubinstein points to the “corrupt and lawless foreign individuals, companies and governments that allow, encourage or conduct poaching, clear-cutting and environmental degradation” as being the problem, suggesting that American businesses have no role in or connection to what is going on abroad and therefore should not be asked to pay attention to it. This argument focuses solely on the “supply” side of the equation, and fails to appreciate that the market also is driven by the “demand” for illegal goods. Mr. Rubinstein’s argument fails to appreciate that companies that intentionally ignore illegal behavior in fact condone that behavior, create a demand for it, and therefore encourage it. By supporting these practices, those companies are promoting environmental degradation and supporting transnational organized crime. That in turn threatens U.S. interests, as discussed above.

## Conclusion

The Lacey Act strikes an appropriate balance between holding importers accountable for the legality of their supply chains and protecting innocent, conscientious American importers from liability. By deterring companies from using suppliers that procure goods in an illegal and unsustainable manner, the Lacey Act protects U.S. consumers, who have a right to know that the goods they are purchasing are illegal. It also 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.

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<sup>24</sup> See, e.g., 50 C.F.R. § 12.24(e).

<sup>25</sup> 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>.

<sup>26</sup> 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 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”).