# A NEW CRIME: POSSESSION OF WOOD—REMEDYING THE DUE CARE DOUBLE STANDARD OF THE REVISED LACEY ACT

*Francis G. Tanczos**

## I. INTRODUCTION

In May of 2008, the United States became the first country in the world to ban the import and sale of illegally-sourced timber and other plant products.[1] In passing the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill"),[2] Congress amended the Lacey Act, breathing new life into a century-old piece of legislation originally designed to be the United States government's "premier weapon" in fighting wildlife trafficking at the turn of the Twentieth Century.[3] The Act's new *raison d'être*: targeting an

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* J.D. Candidate, Rutgers University School of Law–Camden, May 2011; M.A., International Economics and Development, Seton Hall University, 2008; B.S., Seton Hall University, 2007. I am eternally grateful to my parents for their unconditional love and selfless support. This Note is dedicated to my late father, George P. Tanczos, who showed me the courage to conquer life's brick walls.

1. Jonathan Lash, *When A Tree Falls Illegally In The Forest*, HUFFINGTON POST (Jan. 12, 2009, 10:10 AM), http://www.huffingtonpost.com/jonathan-lash/when-a-tree-falls-illegal_b_156647.html.

2. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234, 122 Stat. 923 (2008). The bill, H.R. 6124, was vetoed by President George W. Bush but Congress voted to override the veto and the bill became law on June 18, 2008. Section 8204 of the bill pertained to the new provisions of the Lacey Act.

3. 16 U.S.C. §§ 3371–3378 (2006 & Supp. III 2009). The Lacey Act was initially enacted in 1900 and is the United States' oldest wildlife protection statute. *See* H.R. REP. NO. 97-276, at 7 (1981) (discussing the enactment of the Lacey Act). The Act was amended in 1981 as Congress recognized the need to strengthen the Lacey Act in response to "the massive illegal trade in fish, wildlife and plants." 127 CONG. REC. 17,327 (1981) (statement of Sen. Lincoln Chafee). Congress amended it in 1981 "to correct . . . insufficiencies" in the Act and "to simplify administration and enforcement." S. Rep. No. 97-123, at 2 (1981), *reprinted in*

alleged $15 billion black market fueled by illegal logging across the globe.[4] The recent amendments dramatically expand the reach of the Act affecting thousands of different imported products under a broad definition of the term "plant."[5] Even more noteworthy, the revised Lacey Act extends the reach of a seemingly infinite number of foreign laws and regulations making it unlawful to "import, export, transport, sell, receive, acquire or purchase . . . any plant taken, possessed, transported, or sold" in violation of any federal, Native American tribal, or foreign laws or regulations.[6] The new provisions require, *inter alia*, that importers declare detailed information about the plant products they import. They also impose tough civil and criminal penalties for violations, ranging from strict liability forfeiture of goods and vessels to imprisonment for up to five years for each offense.[7]

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1981 U.S.C.C.A.N. 1748, 1749. *See generally* Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND. L. REV. 27 (1995).

4. This figure was cited by the American Forest and Paper Association-sponsored report compiled by Seneca Creek Associates and, while this figure's accuracy is indeterminable, it is an often-cited figure in describing the extent of illegal logging worldwide. *See* SENECA CREEK ASSOCS. & WOOD RES. INT'L, AM. FOREST & PAPER ASS'N, ILLEGAL LOGGING AND GLOBAL WOOD MARKETS: THE COMPETITIVE IMPACTS ON THE U.S. WOOD PRODUCTS INDUSTRY 12–14, 19 (2004) [hereinafter AF&PA REPORT], *available at* http://www.illegal-logging.info/uploads/afandpa.pdf; *see also* WORLD BANK, REPORT NO. 36638-GLB, STRENGTHENING FOREST LAW ENFORCEMENT AND GOVERNANCE: ADDRESSING A SYSTEMIC CONSTRAINT TO SUSTAINABLE DEVELOPMENT 2 (2006), *available at* http://siteresources.worldbank.org/INTFORESTS/Resources/ForestLawFINAL_HI_RES_9_27_06_FINAL_web.pdf.

5. The Act now states in relevant part: "The terms 'plant' and 'plants' mean *any wild member of the plant kingdom*, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands." § 3371(f)(1) (Supp. III 2009) (emphasis added). The revised Act also provides for certain exclusions:

> The terms "plant" and "plants" exclude--
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> (A) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof);
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> (B) a scientific specimen of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that is to be used only for laboratory or field research; and
>
> (C) any plant that is to remain planted or to be planted or replanted.

§ 3371(f)(2) (Supp. III 2009).

6. § 3372 (a)(2) (Supp. III 2009).

7. *See* ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., LACEY ACT AMENDMENT: ENFORCEMENT OF THE DECLARATION REQUIREMENTS 3 (Mar. 27, 2009) [hereinafter APHIS FAQS], *available at* http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faqs/enforcement.pdf. It is important to note that by virtue of the statutory language in the revised Act, prosecutors do not have to prove that a person necessarily knew that a shipment or portion of the shipment was illegally harvested. *Id*. at 3–4.

On its face, the revised Lacey Act undoubtedly seems to take a bold step in attempting to reverse the negative economic and environmental effects of illegal logging, which have been linked to problems ranging from the destruction of natural habitats in developing countries to the depression of timber prices in U.S. markets.[8] Upon its introduction in the Senate, Senator Ron Wyden stated that, "[f]rom the Amazon to the Congo Basin, from Sulawesi to Siberia, illegal logging is destroying ecosystems. It is gutting local economies. It is annihilating ways of life . . . [and this] bill can help curb illegal logging and its devastating consequences."[9] Not surprisingly, the bill garnered strong support from environmental protection organizations since the law was intended to not only control U.S. imports, but to indirectly regulate production in foreign countries, thereby putting an end to illegal logging practices across the globe. Suffice to say, it is an ambitious piece of legislation.

Yet, despite the applause it received from some groups, the new amendments also brought about widespread concern among U.S. importers over ambiguities in the declaration requirements and the extent to which the provisions would be enforced.[10] Some also worried about the potential of these amendments to impose substantial costs in terms of reducing international trade flows, while proving to have little or no effect on illegal logging practices.[11] The Animal and Plant Health Inspection Service (APHIS), an enforcing arm of the United States Department of Agriculture (USDA), received dozens of official comments from industry importers asking for clarifications of regulations and warning that the immediate imposition of these regulations would have a devastating effect on imports

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For misdemeanor criminal penalties, at least, they must merely show that the importer or owner *should have known* that it originated from an illegitimate source or, alternatively, in violation of "any foreign law." *Id*. at 3.

8. *Legal Timber Protection Act: Hearing on H.R. 1497 Before the Subcomm. on Fisheries, Wildlife and Oceans of the H. Comm. on Natural Resources*, 110th Cong. 3–4 (2007) [hereinafter *House Hearings*] (statement of Rep. Earl Blumenauer).

9. 153 CONG. REC. 10,622 (daily ed. Aug. 1, 2007) (statement of Sen. Ron Wyden), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2007-08-01/pdf/CREC-2007-08-01-pt1-PgS10606.pdf.

10. Press Release, Int'l Wood Prods. Ass'n, IWPA Praises Compromise on Illegal Logging Legislation in House; Urges Senate to Follow Same Path (Nov. 7, 2007), http://www.iwpawood.org/displaycommon.cfm?an=1&subarticlenbr=91.

11. *See* Julius Melnitzer, *Canada-U.S. Border Route 'Thickening,'* FINANCIAL POST, Feb. 17, 2010, *available at* http://www2.canada.com/components/print.aspx?id=2573704&sponsor=.

and the many industries that rely on these imports.[12] In fact, in an open letter dated October 10, 2008, the two Congressmen who had sponsored the bills—Senator Ron Wyden and Representative Earl Blumenauer—warned APHIS and other federal government agencies that the amendments should be implemented in a "commonsense practical manner" and "without disrupting legitimate commerce."[13]

The USDA responded to some of these concerns by employing a "phase-in" approach for implementing the various regulations, thus giving importers advance warning of the items that would be covered under the Act.[14] APHIS, however, provided far less guidance on ways to ensure avoiding prosecution. While the U.S. government bears the burden of showing a violation, there is no specific act or verification scheme to ensure that an importer will not be prosecuted under the revised Lacey Act.[15] This undoubtedly vests tremendous power in the hands of the U.S. government and, considering the intricate nature of timber supply chains, puts importers at the complete mercy of government officials enforcing these broad regulations.

This Note will first address the history and primary policy motivations behind the 2008 Amendments to the Lacey Act. Special attention is given to the role of constituents who, in this case, reflect a peculiar coalition between U.S. industry lobbyists and environmental lobbyists. Parts III and IV of this Note consider the breadth of the revised Act and some of its overarching problems that must be addressed. In the process, some potential remedies are discussed which are designed to offset the negative implications of these new provisions on international trade. For example, it is argued that, despite the government's decision to implement the regulations gradually, in some cases declaration requirements may be impossible to comply with. Congress must either repeal or rework the requirements; at the very least, it must establish a

12. *See* Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415 (Sept. 2, 2009) [hereinafter Implementation of Revised Provisions], *available at* http://www.aphis.usda.gov/plant_health/lacey_act/downloads/2008-0119.pdf.

13. Letter from Congressman Earl Blumenauer, Senator Ron Wyden, and Chairmen Nick Rahall, Tom Harkin, Charles Rangel and Max Baucus to Cindy Smith, Adm'r of APHIS, Ralph Basham, Comm'r of U.S. Customs & Border Prot., Ronald Tenpas, Assistant Attorney Gen., Envtl. & Natural Res. Div., and H. Dale Hall, Dir. of U.S. Fish & Wildlife Serv. (Oct. 10, 2008).

14. As of 2010, APHIS had decided to use four phases to implement the necessary regulations. *See* Implementation of Revised Provisions, *supra* note 12, at 45,415–16. After soliciting comments, APHIS's revised phase-in schedule covered the period from December 15, 2008 to August 31, 2010, giving six months notice for any product that would be added to the phase-in schedule. *Id*. at 45,416.

15. *See* APHIS FAQs, *supra* note 7, at 1.

*de minimis* standard for declarations and also re-adopt an "innocent owner defense." Finally, in Part V, the claim as to whether the revised Lacey Act constitutes a thinly veiled non-tariff trade barrier is examined. It is argued that less burdensome and trade-restrictive alternatives for targeting illegal logging exist, particularly through the building of international partnerships. Despite its ambitious policy objectives, the revised Lacey Act is ultimately inefficient in achieving its desired effects and carries the enormous cost of substantially curtailing the flow of international trade.

## II. BACKGROUND: THE ROAD TO AMENDING LACEY

For the international trade community, the far-reaching implications of the revised Lacey Act are without precedent. At the time the 2008 Farm Bill was passed, the Lacey Act amendments had the potential to affect approximately eight thousand provisions and eighty of the ninety-seven Chapters of the *Harmonized Tariff Schedule of the United States* (HTSUS), translating into as much as half of all U.S. imports.[16] Everything from toys and furniture to particleboard, pulp and scrap wood would be covered under the Act's new provisions. Needless to say, there was and still remains considerable uncertainty as to how these new amendments will be enforced. In order to understand the positive and negative implications of this 'new' law, it is first necessary to consider the circumstances and the various interest groups that played a major role in the Act's revision.

### *A. Legislative History, Statistics and the Role of Constituents*

The popular movement that gave rise to the amendment of the Lacey Act in 2008 has been called an "unprecedented coalition of industry, labor and environmental groups."[17] Senator Ron Wyden (D-Ore.) requested that the

16. *Enforcement of the Lacey Act*, GATEWAY (BDP Int'l, Philadelphia, PA), no. 6, 2008, at 17, http://www.bdpinternational.com/news/documents/Gateway_Issue6_2008.pdf.

17. Press Release, Senator Ron Wyden, "Combat Illegal Logging Act" Levels the Playing Field for American Business, Protects American Jobs and the Environment (Aug. 1, 2007), *available at* http://wyden.senate.gov/newsroom/press/release/?id=efd967f0-91d7-45b4-b4ed-1114d118df56. Supporters of amending the Lacey Act included: American Forest & Paper Association; American Home Furnishings Alliance; Center for International Environmental Law; Conservation International; Defenders of Wildlife; Dogwood Alliance; Environmental Investigation Agency; ForestEthics; Friends of the Earth; Global Witness; Greenpeace; Hardwood Federation; International Association of Machinists and Aerospace Workers; International Brotherhood of Carpenters and Joiners of America; International Brotherhood of Teamsters; International Wood Products Association; Lowe's Home

2008 Farm Bill include a ban on illegally-harvested wood by incorporating the language and provisions of both the Legal Timber Protection Act of 2007,[18] previously sponsored by Representative Earl Blumenauer (D-Ore.), and the Combat Illegal Logging Act of 2007,[19] previously sponsored by Wyden himself.

When the Lacey Act (named after Iowa Congressman John Lacey) was originally signed into law in 1900, it was primarily designed as a measure to preserve wild game and to make poaching a federal crime.[20] Prior to its most recent amendment in 2008, the Lacey Act did not apply to most plants and, perhaps most notably, it did not cover timber or associated wood products. The Lacey Act had only covered plants native to the United States that are either listed in one of the three appendices of the Convention on the International Trade of Endangered Species (CITES),[21] or are protected by the law of a U.S. state which conserves species threatened with extinction.[22] The 2008 Amendments to the Lacey Act extend the statute's reach to "encompass products, including timber, that derive from plants illegally harvested in the country of origin and brought into the United States," either directly (in raw or unprocessed form) or indirectly in the form of finished manufactured

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Improvement; National Association of Home Builders; National Lumber and Building Material Dealers Association; National Marine Manufacturers Association; National Wildlife Federation; Natural Resources Defense Council; Rainforest Action Network; Rainforest Alliance; Sierra Club; Society of American Foresters; Sustainable Furniture Council; The Nature Conservancy; Tropical Forest Trust; United Steelworkers; Wildlife Conservation Society; and the World Wildlife Fund. *See* Press Release, Senator Ron Wyden, Combat Illegal Logging Legislation Passes Senate (Dec. 14, 2007) [hereinafter Wyden Press Release], *available at* http://wyden.senate.gov/newsroom/press/release/?id=45d5ffcc-f5b8-4674-8006-0a6df782a251.

18. Legal Timber Protection Act, H.R. 1497, 110th Cong. (2007).

19. Combat Illegal Logging Act, S. 1930, 110th Cong. (2007).

20. *See* Press Release, United States Forest Serv., Recent Amendments to the Lacey Act—Public Summary (Aug. 7, 2008) [hereinafter Forest Service Summary], *available at* http://www.fs.fed.us/global/aboutus/policy/tt/illegal_logging/Lacey_Act_amendments_public_summary.doc.

21. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]. For example, Article V of CITES governs "trade in specimens of species" included in Appendix III and provides in pertinent part that export of any specimen listed in this Appendix "shall require the prior grant and presentation of an export permit" which is to be granted only when a "Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of [its] laws" and shall be admitted to import only upon the "prior presentation of a certification of origin . . . and an export permit." *Id*. art. V (2)–(3).

22. Forest Service Summary, *supra* note 20, at 2.

products.[23] This also includes "products manufactured in countries other than the country where the illegal harvesting took place."[24] It is important to understand that the terms "illegal logging" and "illegally-harvested" in this context are largely governed by foreign norms and can refer to various situations, such as wood taken without the proper permits; wood that is overharvested; wood that is taken when it is classified as endangered; or, more generally, wood that is cut in violation of any foreign regulation.[25]

Many of the issues raised before Congress in favor of amending the Lacey Act pertained to the environmental harms caused by illegal logging. The Environmental Investigation Agency (EIA), a UK-based non-governmental environmental organization, was one of the principal lobbyists for amending the Lacey Act and presented a lengthy report entitled "No Questions Asked" to Congress.[26] The report points to illegal logging as one of the principal causes of global deforestation and climate change.[27] The report places the U.S. at the epicenter of the problem and advocates a largely demand-side solution.[28] Other environmental organizations that supported the bill, such as Greenpeace, have been known to oppose all types of commercial logging in general, whether or not they are illegal.[29] According to Greenpeace, the worst problem associated with illegal logging is that it "contributes to global warming by producing massive amounts of carbon emissions."[30]

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23. *Id.*

24. *Id*.

25. Attempting to determine what "illegal" means may not be entirely clear in some instances. *See* discussion *infra* Part III.C.

26. ENVTL. INVESTIGATION AGENCY, NO QUESTIONS ASKED: THE IMPACTS OF U.S. MARKET DEMAND FOR ILLEGAL TIMBER — AND THE POTENTIAL FOR CHANGE (2007) [hereinafter EIA REPORT], *available at* http://www.eia-international.org/files/reports154-1.pdf.

27. *Id*. at 19–20.

28. *Id*. at 4.

29. Jim Snyder, '*Strange Bedfellows' Timber Industry, Greenpeace Link Up*, THE HILL, Aug. 8, 2007, http://thehill.com/business-a-lobbying/3236-strange-bedfellows-timber-industry-greenpeace-link-up. In August 2004, 22 Greenpeace members had to be removed from a scheduled timber sale on Kupreanof Island in Alaska. *Id*. That same year, four activists attached themselves to a three-ton cargo container in the middle of a logging operation in Oregon's Umpqua National Forest. *Id.*

30. *See* Press Release, Greenpeace, Farm Bill is a Diamond in the Rough: Lacey Act Amendment is a Powerful New Tool to Stop Illegal Logging (May 24, 2008), *available at* http://www.greenpeace.org/usa/news/farm-bill-is-a-diamond-in-the. According to Greenpeace's U.S. Deputy Director for Campaigns, Carroll Muffett, illegal logging is a substantial global problem and in places like Peru and Indonesia, as much as 80 to 90 percent of logging is illegal. Snyder, *supra* note 29.

Despite these concerns and the general environmental overtones associated with the legislation, it is important to recognize that the primary impetus to introduce legislation prohibiting illegally-sourced timber came from U.S. wood producers in response to competition from Chinese exports.[31] In fact, in August 2007, when Senator Wyden introduced on the floor of the Senate the Combat Illegal Logging Act of 2007, the precursor to the 2008 Amendments, Wyden had stated that:

> [A]bout a year ago, a group of hardwood plywood manufacturers came to me with a problem, Chinese hardwood plywood imports were threatening their businesses. They raised a whole host of issues, from tariff misclassification to subsidies to fraudulent labeling to illegal logging. These unfair and illegal practices were lowering the costs of the Chinese hardwood plywood imports, giving them an unfair advantage over U.S. hardwood plywood and putting American companies in jeopardy of going out of business and the folks that they employ out of work.[32]

Undoubtedly, the U.S. timber industry has had much to fear from China since it often does not play by the same rules,[33] and certainly this is not the first time U.S. stakeholders have sought protection from Chinese competition. But, notwithstanding the fact that it may be difficult to compete with foreign timber imports (as with many products from China), the relationship between illegal logging and international trade should first be ascertained in order to understand what kind of response is warranted.

The American Forest & Paper Association (AF&PA),[34] the national trade association for U.S. timber producers, sponsored what was to be perhaps the

31. CONG. REC., *supra* note 9, at 10,621–22 (statement of Sen. Ron Wyden).

32. *Id*.

33. Such sentiments are evident in several other U.S. industries, which is one of the reasons that the U.S. has initiated several anti-dumping investigations against China. *See, e.g.*, Patricia H. Piskorski, Note, *A Dangerous Discretionary "Duty": U.S. Antidumping Policy Toward China*, 34 HOFSTRA L. REV. 595, 621–22 (2005).

34. The American Forest & Paper Association (AF&PA) is the national trade association for the U.S. wood products and paper industry comprised of 120 companies, whose members manufacture over 75 percent of the paper, pulp, wood and forest products produced in the United States. *About AF&PA*, AF&PA, http://www.afandpa.org/about.aspx?id=59 (last visited April 4, 2011). The paper and forest products industry accounts for approximately 6 percent of total U.S. manufacturing output, and is estimated to top $230 billion in annual sales. *See id.*; *House Hearings*, *supra* note 8, at 16 (statement of Ann Wrobleski).

most influential report on illegal logging presented to Congress.[35] In its own words, "[i]n 2004, AF&PA commissioned what is widely considered to be the one of the most credible and informative reports on illegal logging and which has been separately submitted for the record."[36] The report, compiled by Seneca Creek Associates, estimated that illegal logging results in a $10 to 15 billion yearly loss in tax revenue for developing countries.[37] This report also states that illegal logging depresses world timber prices anywhere from 7 percent to 16 percent and leads to about a $460 million loss in revenue for U.S. exporters.[38] The report then goes on to list the percentage of suspicious timber by country, ranging from *de minimis* levels to as much as 90 percent of total volume.[39] However telling these figures may seem, it is necessary to account for the difficulties associated with black market statistics. Precisely because such black market behavior is performed "under the radar," there are few firm statistics that exist on illegal logging; by one account, most of these compiled figures derive from reports prepared by anti-forestry NGOs advocating against commercial forestry and, as such, they are "highly questionable."[40]

Nevertheless, the AF&PA report itself recognized the difficultly of monitoring illegal forest activities, mentioning that "[n]o matter how . . . [illegal logging might] be interpreted, its extent is impossible to know with any degree of certainty."[41] The report also conceded that "many of the reported estimates [about illegal logging in general] are likely exaggerated."[42] While propagated estimates and figures seem compelling to support the case for taking strong measures to combat illegal logging *vis-à-vis* the *de facto* taxing of U.S. importers, they remain inherently unreliable and offer little help in gauging the true extent of the problem (or how it can be solved, for that matter). In fact, there is also some indication that illegal logging may actually have less of an adverse effect on the international timber trade than has been alleged. According to the same AF&PA report, for example, "[m]ost illegally produced timber is used domestically and does

35. *See generally* AF&PA REPORT, *supra* note 4.

36. *House Hearings*, *supra* note 8, at 17 (statement of Ann Wrobleski).

37. AF&PA REPORT, *supra* note 4, at 19.

38. *Id.* at ES-2.

39. *Id.* at 11–18.

40. *Deforestation and Illegal Logging Exaggerated - Situation Improving*, FORESTRY & POVERTY PROJECT NEWSLETTER, UNFF no. 1 (World Growth Inst., Washington, D.C.), Mar. 3, 2009, *available at* http://www.worldgrowth.org/forestry/index.cfm?sec=10&subSec=47&id=306.

41. AF&PA REPORT, *supra* note 4, at ES-3.

42. *Id.*

not enter international trade."[43] The report goes on to state that the "suspicious volume of roundwood[44] that enters international trade represents on the order of just 1 percent of global production for both softwood and hardwood combined."[45] These illegal logging reports, therefore, have painted very conflicting pictures about the extent and magnitude of the problem and its connection with international trade.[46]

Much like any criminal activity, though, illegal logging necessitates some sort of affirmative action from private actors and governments—on this there seems to be general consensus. However, although there is little doubt that some problem exists, determining what kind of action to take remains the biggest question and it is where most of the contentions lie. In our environmentally conscious society, governments must take action against activities that are shown to substantially harm the environment. At the same time, governments walk a fine line whenever they pass broad legislation which aims to combat an uncertain environmental harm at the cost of placing significant economic and administrative burdens on businesses. In other words, adopting measures that would unfairly advantage certain groups and, at the same time, possess only a tenuous relation to solving the actual environmental problem, is asking for trouble. Despite these considerations, the U.S. timber industry and the environmental organizations were able to persuade Congress (through the expansion of the Lacey Act) to subject a substantial percentage of U.S. imports to increased scrutiny and to impose burdensome requirements on importers and foreign goods.

The key aspect to note about the new measures is that they target *foreign* commercial forestry, primarily because illegal logging is generally a foreign problem. Though the successful amending of the Lacey Act won much praise from international environmental organizations for targeting illegal logging, the 2008 Farm Bill, as a whole, had received considerable criticism from other members of the World Trade Organization (WTO).[47] Several nations characterized it as a piece of legislation filled with protectionist measures and altogether another step back from international free trade talks in the

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43. *Id*. at ES-4.

44. The term "roundwood" generally refers to all rough-cut wood prior to being processed in a sawmill.

45. AF&PA REPORT, *supra* note 4, at ES-4, 14.

46. *Compare* EIA REPORT, *supra* note 26 *with* AF&PA REPORT, *supra* note 4.

47. Jeremy Smith, *U.S. Farm Bill Proposals Come Under Fire in Europe*, WASH. POST, Feb. 1, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020100375.html?nav=rss_business/international.

Doha Round.[48] The possibility that the Lacey Act amendments may already be or may potentially become a non-tariff trade barrier under the World Trade Organization rules is discussed in Part IV of this Note.

*B. A Baptist-Bootlegger Coalition?*

"Strange bedfellows" was a term used to describe the unorthodox coalition and confluence of interests between environmentalists and the U.S. timber industry in lobbying to beef up the Lacey Act in 2008.[49] Greenpeace, for example, which has been widely known as "one of the harshest critics of the timber and paper industry," found itself working side-by-side with some of the biggest timber industry lobby organizations in the country.[50] Indeed, the support that the expansion of the Lacey Act received can best be explained through economist Bruce Yandle's "Baptist-bootlegger coalition" paradigm.[51] While in most other situations these two groups represent opposing viewpoints, in this context both groups stand to benefit from the ban on illegally logged imports and the simultaneous protection that the Act offers from "unfair" competition from foreign goods in general. Hence, both groups supported the amending of the Lacey Act, albeit for very different reasons.[52] Essentially, the industry actors wanted their competitors to either observe costly environmental standards or be locked out of the U.S. market. Not surprisingly, the ban best serves "U.S. manufacturers because they're in a better position than importers to satisfy Congress' mandate."[53] In light of

48. *Id.*

49. *See* Snyder, *supra* note 29.

50. *Id.*

51. This term was popularized by former director of the Foreign Trade Commission, Bruce Yandle. *See* Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REGULATION, May–June 1983, at 12–13. The term was originally used to describe the mutually beneficial interests between Baptists and bootleggers in having "Blue Laws" enacted in the early Twentieth Century, banning the sale of liquor on Sundays. *Id*. at 13. In this scenario, Baptists want to outlaw alcohol because, in their view, drinking promoted sinful behavior. *Id*. Bootleggers, on the other hand, favor them because they cut out their legal competitors and increase their profits. *Id*.

52. For an extended discussion of these motivations, *see* ELIZABETH R. DESOMBRE, DOMESTIC SOURCES OF INTERNATIONAL ENVIRONMENTAL POLICY: INDUSTRY, ENVIRONMENTALISTS, AND U.S. POWER 78–80, 245–257 (2000).

53. Featured Article, *U.S. Bans Illegal Wood Imports*, FLOOR COVERING WEEKLY, May 19-26, 2008, at 2, *available at* http://fcw1.com/ME2/dirmod.asp?sid=E8BB079C64B042958E6764D7B3CE8058&nm=Archives&type=Publishing&mod=Publications%3A%3AArticle&mid=8F3A7027421841978F18BE895F87F791&tier=4&id=93DB8D3881E342B1AED9074A68C24E0F.

the burdensome requirements that the 2008 Amendments impose on importers, the result here works to advantage domestic producers by slowing down traffic at the border.[54] Senator Wyden himself had stated that his purpose in proposing such legislation was to "level the playing field" between domestic producers and importers.[55]

However, it is important to note that the fact that a regulation confers a competitive advantage on a domestic producer does not by itself demonstrate the regulation is illegitimate.[56] Such measures may "nonetheless serve a legitimate public purpose."[57] On the other hand, while these scenarios are not inappropriate *per se*, they tend to raise pressing questions about the actual intended purposes of a piece of legislation, especially those that may have discriminatory or unnecessarily burdensome effects.

Putting together coalitions to enact major environmental legislation in the U.S. also requires considerable skill, luck and, perhaps most importantly, converging interests.[58] With "assistance from environmental groups or other broad-based constituencies," rent-seeking firms have a much higher likelihood of success in lobbying Congress for favorable legislation.[59] There is also some indication that industry actors are more successful in lobbying for a competitive advantage during down economic times.[60] One recent example of this is the "Buy American" provision included in the recent economic stimulus bill, which requires any steel or iron used in projects funded by that legislation to be produced in the United States.[61] The U.S.

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54. *See* Melnitzer, *supra* note 11. *See also* Lawrence Kogan, *Trade Protectionism: Ducking the Truth About Europe's GMO Policy*, N.Y. TIMES, Nov. 27, 2004, http://www.nytimes.com/2004/11/27/opinion/27iht-edkogan_ed3_.html?_r=1&scp=1&sq= lawrence%20A.%20kogan&st=cse (discussing regulatory requirements proposed by EU industries solely aimed at conferring a competitive advantage on domestic producers).

55. *See* CONG. REC., *supra* note 9, at 10,622. *See also* Press Release, Senator Ron Wyden, "Combat Illegal Logging Act" Levels the Playing Field for American Businesses, Protects American Jobs and the Environment (Aug. 1, 2007), *available at:* http://wyden.senate.gov/newsroom/record.cfm?id=280585.

56. *See* David Vogel et al., *Environmentally Related Trade Disputes Between the United States and Canada*, 27 AM. REV. OF CAN. STUDIES 271, 271 (1997).

57. *See id.*

58. R. Shep Melnick, *Strange Bedfellows Make Normal Politics: An Essay*, 9 DUKE ENVTL. L. & POL'Y F. 75, 78–79 (1998).

59. *Id.*

60. Mark Landler, *Trade Barriers Rise As Slump Tightens Grip*, N.Y. TIMES, Mar. 23, 2009, http://www.nytimes.com/2009/03/23/world/23trade.html.

61. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1605, 123 Stat. 115, 303 (2009). *See also* Anthony Faiola and Lori Montgomery, *Trade Wars Brewing in Economic Malaise*, WASH. POST, May 15, 2009, http://www.washingtonpost.com/ wp-dyn/content/article/2009/05/14/AR2009051404241.html.

steel industry gained a significant competitive advantage as a result of the economic crisis.[62]

Baptist-bootlegger coalitions have a history of success in terms of getting Congress to pass favorable trade-related legislation.[63] Perhaps one of the most widely cited examples of the Baptist-bootlegger paradigm is what led to the creation of the "dolphin-safe tuna" standard through the Marine Mammal Protection Act (MMPA).[64] In this case, environmental lobbyists and the oligopolistic fishing industry together were able to persuade Congress to ban the importation of tuna that failed to comply with certain measures that would ensure the protection of dolphins from incidental taking (killing).[65] Another example of the effectiveness of this type of coalition was when Congress passed Public Law 101-162, of which Section 609 provided that "[t]he importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely . . . species of sea turtles shall be prohibited."[66] Before the passage of this law, there was a Congressional hearing on the reauthorization of the Endangered Species Act (ESA), which also included a discussion on the protection of sea

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62. It should also be noted that the United Steelworkers (USW) union had supported the amending of the Lacey Act, stating that with respect to their overseas competitors, "[t]his committee action is important to our members, whose jobs depend on a level playing field." *See* Press Release, United Steelworkers, News From USW: United Steelworkers Commend Congressional Committee Passage of Illegal Logging Bill, BUSINESS WIRE (Nov. 13 2007), *available at* http://www.businesswire.com/news/google/20071113006623/en/News-USW-United-Steelworkers-Commend-Congressional-Committee. The USW represents 1.2 million members and retirees in North America and the Caribbean, and is also the largest paper workers union in North America with over 130,000 members in the U.S. paper and forest products industry. *Id.*

63. *See, e.g.*, Vogel et al., *supra* note 56, at 287 (finding the existence of a Baptist-bootlegger coalition in 9 of 10 cases analyzed involving environmentally-related trade disputes between Canada and the United States).

64. *See, e.g.*, Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2048 (1993) (discussing an approach by which domestic industries and environmental groups work together to eliminate the competitive advantage enjoyed by foreign producers through unilateral U.S. legislation aimed at their imports).

65. *See* Dale D. Murphy, *The Business Dynamics of Global Regulatory Competition*, *in* DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 103 (Robert Kagan & David Vogel eds., 2002); *see also* Report of the Panel, *United States – Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. 39S/155 at 50–51 (finding that the United States had violated the GATT principle of national treatment for like goods by discriminating against tuna imports on the basis of how they were caught).

66. Sea Turtles Conservation Amendment of 1989, Pub. L. No. 101-162, § 609(b)(1), 103 Stat. 1037, 1038.

turtles from incidental taking by shrimpers.[67] At this hearing, several U.S. shrimp associations had appeared in support of the ban with the "position" of protecting sea turtles and alluding to their "working relationship" with the environmental movement.[68] Yet the Concerned Shrimpers of America and the Louisiana Shrimping Association had also testified that their industry was in financial trouble and that "imports continue[d] to oversupply the U.S. markets," causing prices to drop.[69]

On their face, these two laws involve environmental protection issues; but the economic interests of the industry actors are also clearly recognizable. Despite their initial success, both of these measures were subsequently challenged in the World Trade Organization's dispute body and the U.S. lost both cases, as these measures were held to be unjustified discriminatory policies.[70] In the much broader case of timber and plant products, it is important to understand that the U.S. is a major producer and exporter of wood products.[71] Foreign timber and wood products are often available at lower costs (especially when they are of suspicious origin) and U.S. producers are at a great competitive disadvantage.[72] This fact, in itself, gives rise to the question of how much the Lacey Act was actually intended to stop illegal logging as opposed to an attempt to tie up the competition.[73] As a result, these issues are complex and require closer examination.

## III. LACEY'S OVERARCHING PROBLEMS

### *A. Burdensome Declaration Requirement*

There are two basic components to the revised Lacey Act in relation to wood product imports. While the first prong of the Lacey Act amendments sets out the ban on the import and sale of illegally sourced plants, the second prong of the Act requires importers to declare detailed information about their imports.[74] The Act also establishes stiff penalties for false labeling

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67. BERKELEY ROUNDTABLE ON THE INTERNATIONAL ECONOMY, THE GREENING OF TRADE LAW: INTERNATIONAL TRADE ORGANIZATIONS AND ENVIRONMENTAL ISSUES 64 (Richard Steinberg, ed., Rowman & Littlefield Publishers, Inc., 2002).

68. *Id.*

69. *Id*. at 65.

70. *Id*. at 65–67.

71. *House Hearings*, *supra* note 8, at 16 (statement of Ann Wrobleski).

72. *See* CONG. REC., *supra* note 9, at 10,621–22 (statement of Sen. Ron Wyden),

73. *See* discussion *infra* Part V.A–B.

74. 16 U.S.C. § 3372(a), (f) (Supp. III 2009). This declaration system differs considerably from a certification-type requirement, whereby third party organizations certify

offenses and non-compliance.[75] Pursuant to the declaration requirement, importers must report (1) the scientific name of the plant including the genus and species, (2) the value of the item, (3) the quantity and (4) the country of origin from which the plant was harvested.[76] As part of this last requirement, it is important to recognize that the country of origin may often be different from the country of import.

The intended purpose of these declaration requirements was to provide basic transparency for wood shipments.[77] According to Senator Wyden, the declarations:

> [H]ave critical value for combating illegal logging by 1. encouraging importers to ask basic questions regarding the origin of their timber and timber products; 2. providing information at the point of import that will allow authorities with limited resources to do efficient, targeted inspections and enforcement; and 3. helping enforcement agents to immediately identify ''low-hanging fruit,'' such as timber expressly prohibited to be exported.[78]

Nevertheless, these "basic questions" have turned out to be significantly more complex.[79] Thus, in order to allow some time for the trade community

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the wood's legal origin. Certification systems, such as FLEGT, require documentation at customs; otherwise shipments may be denied entry. While importers are not required to provide such verification under the Lacey Act provisions, nevertheless, it is their job to make sure that they can demonstrate that they have taken every possible step to ensure that their products are legal. *See* discussion *infra* Part III.B.

75. It is illegal to make or submit a false record, account, label or false identification of any plant that has been or will be (a) imported, exported, transported, sold, purchased or received from a foreign country, or (b) transported in interstate or foreign commerce. 16 U.S.C. § 3372(d) (Supp. III 2009).

76. 16 U.S.C. § 3372(f)(1) (Supp. III 2009). This section of the Lacey Act, as amended, makes it unlawful, as of December 15, 2008, to import certain plants and plant products without an import declaration. *Id.* The scope of products that will require a declaration under the Lacey Act is broad and includes certain live plants, plant parts, lumber, wood pulp, paper and paperboard. Products which may be included, therefore, are furniture, tools, umbrellas, sporting goods, printed matter, musical instruments, products manufactured from plant-based resins, and textiles. *See* Consensus Statement of Importers, Non-Governmental Organizations, and Domestic Producers on Lacey Act Clarifications to Animal and Plant Health Inspection Serv., Docket No. APHIS-2008-0119, at 5–6 (Jul. 17, 2009) [hereinafter Consensus Statement], *available at* http://www.troutmansandersnews.com/marcom/news/TS-Intl_Trade_2009-07-17.pdf.

77. *See* CONG. REC., *supra* note 9, at 10,622.

78. *Id*.

79. Separate from the Lacey Act declaration requirements, the U.S. Customs and Border Protection (CBP) already requires importers to declare certain information about the goods

to brace itself for these complex requirements, APHIS decided to use a four-step phase-in schedule with each phase lasting six months.[80] In addition, the agency solicited comments from stakeholders on the implementation of the Lacey Act provisions.[81] Despite the stated purpose of these provisions by Congress, many of the solicited comments that APHIS received from various businesses and organizations raised considerable concern over these potentially onerous requirements and their actual relation to the prevention of illegal logging.[82]

One of the principal issues raised in several of these comments relates to the fact that any amount of wood in a product must be reported, no matter how negligible the amount.[83] For example, the revised Lacey Act even applies to U.S. wine importers, who must provide all such information regarding the cork they use.[84] By one account, the specificity of these requirements means that a single importer could potentially have to file 30,000 entries per day.[85] Adding to this complexity, the provisions require importers to declare and swear by information that is often impossible to know.[86] In some cases, there may be more than one genus and species for a particular item; a chair made from simple "pine," for example, is considered a rather straightforward entry; yet there are over 100 different species of pine in four genuses.[87] Moreover, dozens of countries export pine. Other wood such as oak "consists of 275 to 500 species and species within each group look alike microscopically."[88] According to the guidelines offered by

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they are importing (e.g. product description, weight, value, etc.) and, in 2009, it began implementing the Importer Security Filing (10+2), requiring ten additional data elements about any vessel shipment arriving at a U.S. port. For more information on these requirements, visit http://www.cbp.gov/isf (last visited April 4, 2011).

80. Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 5911, 5911-12 (Feb. 3, 2009), *available at* http://www.aphis.usda.gov/plant_health/lacey_act/downloads/FederalRegister02-03-2009.pdf.

81. *Id.* at 5911.

82. *See infra* notes 84–88.

83. 16 U.S.C. § 3372(f) (Supp. III 2009).

84. Letter from Food Marketing Inst. to Animal and Plant Health Inspection Serv., Docket No. APHIS-2008-0119, at 3 (Dec. 17, 2008) *available at* http://www.fmi.org/newsletters/uploads/CommentsFiled/LACEY_act_comments_12-08.pdf.

85. *Id.* at 2–3.

86. Letter from Retail Indus. Leaders Assoc. to Animal and Plant Health Inspection Serv., Docket No. APHIS-2008-0119, at 3, 7 (Nov. 2, 2009) [hereinafter RILA Comment], *available at* http://www.rila.org/news/pblccomments/International%20Trade%20Public%20Comments/RILA%20Lacey%20comments%2011%2002%2009.PDF.

87. *Id*. at 5.

88. Letter from Int'l Wood Products Assoc. to Animal and Plant Health Inspection Serv., Docket No. APHIS-2008-0119, at 2 (Apr. 5, 2009), *available at*

APHIS, if the genus and species are unknown, the importer must list every possible species from which the product may have been made.[89] Likewise, if the country of harvest is not known, the importers must list all of the potential countries in which it might have been harvested.[90] Such information increases exponentially when dealing with more complex items such as particleboard, plywood, recycled wood and fiberboard.[91] Indeed, trying to work with composite wood materials, that is, products that are "made of byproducts such as sawdust, scraps, and other remnants from other manufacturing processes," presents a whole other predicament.[92]

As a response to these problems, many of the comments, including a "General Consensus" comment signed by 37 organizations,[93] called for various improvements and clarifications to these requirements. One such improvement would allow for the establishment of a *de minimis* standard, which would eliminate the need to file a declaration for products with only trace amounts of plants or wood.[94] APHIS had indicated that even though there is no *de minimis* exception, the enforcing agencies may exercise discretion "on any potential penalties depending upon the severity of the incident."[95] But this policy seems to offer little help to importers and, instead, may lead to significant misunderstandings between the government and importers. What is needed is an explicit threshold level (e.g. by weight, volume or content) that would eliminate uncertainty and avoid unnecessary paperwork as such small amounts often have very little to do with illegal logging.

There is also a need to improve the efficiency in reporting large amounts of data. For example, the General Consensus Comment proposed using "species groupings" whereby, whenever it is not possible to obtain species-specific information, to use "spp." to signify all species in a genus.[96] For composite material, there should be general nomenclature to indicate the type

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http://www.regulations.gov/search/Regs/contentStreamer?objectId=090000648094446e&disposition=attachment&contentType=msw8 (internal quotations omitted).

89. APHIS FAQs, *supra* note 7.

90. 16 U.S.C. § 3372(f)(2)(B) (Supp. III 2009).

91. *See* RILA Comment, *supra* note 86, at 3.

92. *Id.*

93. Consensus Statement, *supra* note 76, at 5.

94. *See, e.g.*, Letter from Food Marketing Inst., *supra* note 8484, at 3; Letter from Nat'l Retail Fed'n to Animal and Plant Health Inspection Serv., Docket No. APHIS-2008-0119, at 2 (Apr. 6, 2009), *available at* http://www.nrf.com/modules.php?name=Documents&op=viewlive&sp_id=2804.

95. *See* APHIS FAQs, *supra* note 7, at 1.

96. *See* Implementation of Revised Provisions, *supra* note 12, at 45,417.

of material (e.g. "MDF" for medium density fiberboard).[97] In its September 2, 2009 Federal Register Notice, APHIS indicated its belief that it did not have the authority to set a *de minimis* standard for imports, nor allow for a nomenclature system, since the Act explicitly calls for naming the species of "all plants" that are imported.[98] This means that these issues may have to go back to Congress for technical clarifications.

Beyond these improvements, one area where APHIS could ease the declaration requirements without the need for Congressional intervention pertains to the use of "blanket declarations." Several solicited comments received by APHIS after its February 3, 2009 Federal Register notice also proposed that the agency allow for the use of blanket declarations in certain instances.[99] The use of blanket declarations would have the effect of significantly reducing the amount of "paperwork" necessary for imports, allowing importers to file a single declaration for imports of the same fungible products from the same sources.[100] In some cases, this represents thousands of shipments per year. In reply to these collective comments in September, APHIS had decided to first evaluate such practices in pilot programs before it would allow these types of declarations.[101]

No matter what angle one takes, it is impossible to overlook the fact that this reporting system will substantially increase operating costs of importers. Both certification and chain-of-custody tracking add costs for producers and buyers, and these costs can vary widely. Percentage-based approaches can make procurement to chain-of-custody standards somewhat less onerous, but still put many operators at a cost or operational disadvantage.[102] The key to reducing the burden would be to somehow draw a balance between effective enforcement of the declaration requirements and, at the same time, collecting only that information which is valuable to track illegal materials. Short of such action by the enforcing agencies and Congress, the declaration requirements will remain unnecessarily inefficient and burdensome. It is, therefore, critical that the enforcing agencies report back to Congress

97. *See* RILA Comment., *supra* note 8686, at 3.

98. *See* Implementation of Revised Provisions, *supra* note 12, at 45,417.

99. *See* Letter from Nat'l Retail Fed'n, *supra* note 94, at 3.

100. *Id.*

101. Pilot blanket declaration programs include the Customs and Border Protection's expedited border release programs, Automated Line Release (ALR) and Border Release Advance Screening and Selectivity (BRASS). *See* Implementation of Revised Provisions, *supra* note 12, at 45,417.

102. AF&PA REPORT, *supra* note 4, at 22.

whenever they do not have the authority by themselves to make necessary improvements to the system.

### *B. Problems with Lacey's Ambiguous 'Due Care' Standard*

At the end of the new *Plant and Plant Product Declaration Form*, APHIS requires an importer to sign the document certifying, under the penalty of perjury, that the information is "true and correct" to the best of the importer's knowledge. [103] If the importer has exercised so-called "due care" then, in theory, the importer should not have to be worried about any adverse consequences or the threat of criminal prosecution. But under the new provisions of the Lacey Act, the circumstances surrounding whether an importer exercised "due care" in a given case seem to be much more complex. The Department of Justice uses the language "that degree of care which a reasonably prudent person would exercise under the same or similar circumstances."[104] Therefore, the Lacey Act amendment's "due care" standard essentially requires an importer to be able to show that he or she acted with a sufficient level of prudence. However, offering a sworn "guarantee" on something you know you cannot prove in the end is not a prudent act, to say the least. In effect, the importer's very first mistake in the whole process may be signing this declaration form.

Indeed, most of the criticism regarding the "due care" requirement comes from the uncertainty about the applied meaning of the term itself. Neither APHIS nor any other federal enforcing agencies have elaborated on what exactly an importer may do to ensure that they have fully exercised "due care." In the absence of any case law on this, the trade community has been left with a big question mark. In fact, shortly after the bill passed, many U.S. law firms rushed to advise their clients about steps they could take to practice "due care."[105] To illustrate the ambiguity of this standard, say an importer is importing brooms from China, a country known to have significant amounts of suspicious timber. Is it enough to ask one's supplier to provide certification/documentation guaranteeing legality of the wooden

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103. *See* Animal and Plant Health Inspection Serv., U.S. Dep't of Agric., *Plant and Plant Product Declaration Form*, at 2, *available at* http://www.aphis.usda.gov/plant_health/lacey_act/ downloads/declarationform.pdf.

104. Congress intended the common law definition of "due care" to apply. *See* S. REP. NO. 123, at 10-11 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1757–58.

105. *See, e.g.*, Steptoe & Johnson LLP, Customs Law Advisory—New US Law Will Impose Substantial Reporting Burdens on Importers of Any Wood or Tree Products, and Will Cover A LOT More Products Than You Think (Oct. 3, 2008), http://www.steptoe.com/publications-5608.html (last visited April 4, 2011).

handles? Alternatively, must one personally have to go to China to try to find out where the wood originated from? What steps are necessary beyond that? Indeed, the nature of the wood products supply chains presents an infinite number of possibilities of the types of actions one could conceivably take.

Testifying against the amendments in 2007 before the House Subcommittee on Fisheries, Wildlife and Oceans on behalf of the International Wood Products Association, Craig Forester explained:

> [I]t is necessary to understand that long supply chain and the fact that there are many people along that supply chain . . . [s]omewhere along the line as a business owner I have to rely on somebody to say that this is legal. I can do lots of things. I can have documents issued by foreign countries, I can have CITES documentation, I can have other third-party certifiers certify lumber . . . [but] I cannot audit the entire supply chain, and I cannot audit the entire documentation. Criminal behavior is criminal behavior. All I can do is work with the best of my knowledge, and work with the export documents from foreign countries and expect the government to do their due diligence.[106]

Consequently, it is impossible to ignore the fact that the "due care" standard has several major flaws. First, the exercise of "due care" is a subjective standard that is to be determined by the enforcing agency. The standard is applied differently to different persons with varying degrees of knowledge.[107] APHIS (or Congress) must make clear what exactly an importer should do to ensure that "due care" has been taken. Secondly, in attempting to exercise "due care" through means of certification or third party auditing,[108] the possibility of prosecution is still not out of the picture. In fact, there is no single document or "proof" that could render an importer immune from prosecution.[109]

Moreover, the consequences of "noncompliance" are excessively harsh. The revised Lacey Act provides that if a party "knowingly engages in illegal trafficking, while knowing that the fish or wildlife or plants were taken,

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106. *House Hearings*, *supra* note 8, at 55.

107. *See* S. REP NO. 123, *supra* note 104104, at 1757.

108. For example, the Forest Stewardship Council (FSC) announced that its program of forest certification was a reliable tool in helping importers demonstrate the legality of their imports. *See* FOREST STEWARDSHIP COUNCIL, News & Notes, *FSC Provides the Tool for Supply Chain Legality* (Sept. 5, 2008), at 6–7, http://www.fsc.org/fileadmin/web-data/public/document_center/publications/newsletter/newsletter_2008/FSC-PUB-20-06-09-2008-09-05_FINAL.pdf.

109. *See* APHIS FAQS, *supra* note 7, at 1.

possessed, transported or sold in violation of . . . a foreign law," that party is subject to felony prosecution, and penalties of up to $250,000 fine ($500,000 for organizations) and/or up to 5 years imprisonment.[110] On the other hand, if a party did not know but *should have known* of the underlying violation in the exercise of "due care", the offense is classified as a misdemeanor and is subject to penalties of up to $100,000 fine ($200,000 for organizations) and/or up to one year imprisonment.[111] It is important to note that each violation is a separate offense. On top of the Lacey violations, a violator could also be potentially charged with money laundering for something as simple as putting the money received into a bank.[112]

### 1. A Weak *Mens Rea* Requirement Means Over-Criminalization

While there is no case law, to date, to analyze its actual effects, the revised Lacey Act's "due care" standard combined with stiffer penalties may constitute an over-criminalization of otherwise administrative and civil regulations pertaining to plant harvesting.[113] For example, Section 3373(d) of the Act provides a criminal penalty for "knowingly" violating "any provision of [Chapter 16]," thus criminalizing all other sections contained in the Act. This over-criminalization is also evidenced by the Act's very weak *mens rea* requirement.[114] "Knowing" conduct usually involves a general intent requirement, which federal courts have usually read to mean nothing more than "conduct done consciously."[115] This contrasts with a specific intent requirement, where Congress most often uses the term "willfully" and

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110. *Id.* at 3; *see also* United States v. Eisenberg, 496 F. Supp. 2d 578, 582 (E.D. Pa. 2007) (holding that when Congress enacted 18 U.S.C. § 3571 in 1984 and added 3571(e) in 1987, it repealed the lower fines contained in the Lacey Act).

111. 16 U.S.C. §§ 3373(d), 3374(b), and 18 U.S.C. § 3571 (2006 & Supp. III 2009).

112. *See* United States v. McNab, 331 F.3d 1228 (11th Cir. 2003) (convicting defendants of conspiracy and money laundering in addition to a Lacey Act violation because defendants had deposited the money from the sale into a bank).

113. For example, in *United States v. Lee*, the Ninth Circuit affirmed defendants' convictions on various charges related to the illegal acquisition, sale and importation of salmon caught in Northern Pacific waters even though the criminal penalties under the Act were predicated on foreign regulations that imposed only civil sanctions. 937 F.2d 1388, 1393 (9th Cir. 1991).

114. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 82–84 (2009) [hereinafter *Over-Criminalization Hearing*], *available at* http://judiciary.house.gov/hearings/printers/111th/111-67_51226.PDF (statement of John Wesley Hall, President, National Association of Criminal Defense Lawyers).

115. *Id.* at 82.

requires that the defendant actually know of the specific crime the defendant is committing.[116] This distinction between the requirements is evidenced by the fact that Congress amended the Lacey Act in 1981, removing the specific intent standard in order to "put more teeth" into the law.[117] In effect, the general intent requirement means that an importer need not have known that he was violating one of thousands of foreign laws or acting in a wrongful manner. Considering the intricate supply chains, as well as the complexity of the composition of many imported products, there is indeed a substantial likelihood that importers have no knowledge, nor any way of knowing, that the items they are importing may be violative of the Act, thereby exposing them to prosecution. Such "knowing violations" also do very little to deter criminal activity and, "[d]espite every intention to follow the law, even the most cautious defendant can be found guilty under such laws."[118]

It is also important to note that the language of the Lacey Act did not always include the "knowingly" phraseology. In 1981, Congress took a step towards "ease of prosecution" when it removed the heightened proof standard of "willfully" and replaced it with the current "knowingly" standard.[119] The impetus for this change was the increased illegal trade of fish and wildlife in the 1970s.[120] The inevitable result of this modification in statutory language was to relax the *mens rea* requirement and substantially increase the government's chance of success in prosecuting these types of environmental crimes.[121] However, this also enables the government to wield its power to selectively enforce a myriad of foreign laws and regulations. Despite this trend, the U.S. Supreme Court has expressed concern with lower culpability standards. Most recently in 2009, the Supreme Court held in *Flores-Figueroa v. United States* that even though an identity theft statute used the word "knowingly," the prosecution must show that defendant had a specific intent, not merely an intent to use a false identification, but to steal another person's identity.[122] In the environmental criminal law context, at

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116. *See, e.g.*, United States v. Cheek, 3 F.3d 1057, 1062 (7th Cir. 1993) (holding that the word "willfully" means that there is a violation of a "known legal duty" and this requires "specific intent"); United States v. Nguyen, 916 F.2d 1016, 1018 (5th Cir. 1990) (finding it was sufficient that defendant "knew" he possessed a turtle, even if he did not know it was illegal to do so).

117. *See* CONG. REC., *supra* note 3, at 17,327.

118. *See Over-Criminalization Hearing, supra* note 114114, at 82.

119. *See* CONG. REC., *supra* note 3, at 17,327.

120. *Id.*

121. Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L. J. 861, 873 (1996).

122. 129 S. Ct. 1886, 1893–94 (2009).

least two circuit courts have similarly found a specific intent requirement necessary for conviction.[123]

By lowering the culpability requirements in 1981 and, subsequently, expanding the Lacey Act to encompass all plants in 2008, Congress has effectively created a law that is extremely broad in its scope. At the same time, it has offered little means through which importers and end users can shield themselves from culpability and/or liability. It is difficult to imagine that Congress would have intended to over-criminalize and penalize innocent importers for minor technical violations of little-known foreign environmental regulations. In order to remedy some of these burdens, Congress should revisit the Act to make much needed technical clarifications. For example, it could expand upon the definition of "due care" and, simultaneously, establish a *de minimis* standard for the declaration requirements. Congress could also empower the USDA, through partnership with other countries, to compile an index of enforceable foreign laws and regulations. While the feasibility of this type of remedy may be uncertain, the U.S. government's cooperation with foreign countries cannot be overemphasized.

2. The Due Care "Double Standard"

Beyond the *mens rea* requirement (or lack thereof), there is something inherently flawed with a system that expects importers and end users to exercise "due care" in a global industry that is fraught with foreign corruption. In many cases, government actors are entrenched in elaborate schemes. These corrupt actors are able to escape any liability despite refusing to adhere to their own country's laws and regulations. This effectively creates a double standard, whereby foreign producers are free to operate as they please while U.S. importers take the blame for their actions. Even with the Lacey Act in place, the demand for wood may decrease in the

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123. *See, e.g.*, United States v. Grigsby, 111 F.3d 806, 806, 816–17 (11th Cir. 1997) (deciding that the "knowingly violates" language of a criminal penalty provision of the African Elephant Conservation Act required specific intent); United States v. Lynch, 233 F.3d 1139, 1145 (9th Cir. 2000) (citing *Grigsby* and noting its decision relied not only on statutory language, but also on legislative history to reach the conclusion of a specific intent requirement). *See also* Rachel E. Donn, *Of Mens Rea and Elephant Ivory: An Analysis of Criminal Scienter Definitions in U.S. v. Grigsby*, *in* ENVIRONMENTAL LAW AND POLICY: NATURE, LAW & SOCIETY: 2002-03 TEACHER'S MANUAL UPDATE, 20-26 (Zygmunt Plater et al., eds., West Group 2002), *available at* https://www2.bc.edu/~plater/Newpublicsite06/suppmats/20.4.pdf (describing the inconsistency in federal courts regarding the intent requirement in environmental statutes).

U.S. but imports will not cease, even if importers risk being unable to provide 100 percent verification of the legality of their wood.

In order to practice "due care," most importers will rely on written documentation of some sort. Regardless of the type (e.g. governmental or non-governmental), however, such certifications cannot be entirely foolproof and more often than not are tainted with foul play. Consider, for example, the case of Bigleaf mahogany imports from Peru, sometimes referred to "red gold."[124] Before a log of Bigleaf mahogany ever enters any U.S. port, it passes through multiple hands, likely having crossed borders several times. In most countries, the structure of the forest products industry is such that thousands of mills operate using wood obtained from constantly changing sources.[125] Peruvian officials have also been known to have supplied false documentation for these products.[126] Illegally extracted timbers are commonly 'laundered' through various means and thus appear to be legal as they reach the market.[127] The treatment of Bigleaf mahogany from Peru shows that governments are indeed involved in illegal logging practices. Not only was timber being illegally harvested in Peru, but illegal timber was also being moved into Peru from neighboring countries to be laundered by fraudulently obtained CITES permits.[128] Such "deeply entrenched patronage systems" are most often linked to political networks, which are intent on guarding these lucrative activities as a means to sustain their very existence.[129] In other words, there is little to no incentive for producing countries to adhere to international treaties such as CITES.[130] Clearly, it is wrong to require U.S. importers to comply with a myriad of foreign laws when the governments enacting these laws not only fail to adhere to them, but seem to be at the very root of the problem.

In order to avoid the already burdensome "due care" standard from becoming even more onerous, Congress could work to ease the pressure on U.S. importers and get at the crux of the problem. One way to do this is by

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124. Ani Youatt & Thomas Cmar, *The Fight for Red Gold: Ending Illegal Mahogany Trade From Peru*, 23 NAT. RESOURCES & ENV'T 19 (2009).

125. *See* AF&PA REPORT, *supra* note 4, at 22.

126. *See* Youatt & Cmar, *supra* note 124, at 21.

127. MARCUS COLCHESTER, CENTER OF INT'L FORESTRY RESEARCH, JUSTICE IN THE FOREST: RURAL LIVELIHOODS AND FOREST LAW ENFORCEMENT 37 (2006).

128. Convention on Int'l Trade in Endangered Species of Wild Fauna & Flora (CITES), 54th Standing Committee Meeting, *Interpretation and Implementation of the Convention: Bigleaf Mahogany*, SC54 Doc. 31.1, at 2 (Oct. 2–6, 2006), *available at* http://www.cites.org/eng/com/SC/54/E54-31-1.pdf.

129. *Id*.

130. Countries such as Brazil, Peru, Honduras, Indonesia all fall within this category.

making sure that exporting countries follow their own laws, the same ones that U.S. importers are charged with following. Of course, this is easier said than done; nonetheless, it is interesting to note that the "Prevention of Illegal Logging" section in the 2008 Farm Bill (amending the Lacey Act) did not include any funding provisions to aid anti-illegal logging initiatives in high-risk countries. A demand-side solution alone will not suffice. Congress also has a duty to avoid exposing U.S. citizens to arbitrary foreign laws that make little sense in terms of protecting the environment, and should set more fixed parameters on the definition of "any foreign law." In applying foreign laws, U.S. courts should also take into account the foreign government's effort in enforcing those laws.

### *C. Attempting to Apply Foreign Laws May Lead to Unintended Results*

As discussed in Part III.B of this Note, the Lacey Act Amendments are likely to increase the number and nature of environmental criminal prosecutions. According to some legal scholars, with the ever-increasing expansion of federal criminal statutes like the Lacey Act, it is virtually impossible to know how many Americans are federal criminals.[131] But this criminal system becomes even more expansive when a countless number of foreign laws and regulations are factored into the equation. For example, Indonesia alone has approximately nine hundred laws related to logging.[132] Courts have also interpreted "any foreign law" very broadly, as it was Congress' intent to expand the scope of the statute in 1981.[133] While there is no significant federal case law as of yet since the 2008 revision, prosecution under the old Lacey Act has certainly not been immune from bringing about absurd rulings, especially when it comes to the interpretation of foreign laws. Consider, for example, the circumstances in *United States v. McNab*, where four businessmen were found guilty of violating an ambiguous Honduran

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131. CATO INSTITUTE, IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF CRIMINAL LAW" 44 (Timothy Lynch ed., 2009).

132. *House Hearings*, *supra* note 8, at 46, 54.

133. *See* United States v. 594,464 Pounds of Salmon, 871 F.2d 824 (9th Cir. 1989). In this case, the Ninth Circuit noted that:

> [T]he statutory language "any foreign law" cannot be said to be unambiguous when read in the context of the entire subsection. While the legislative history is not totally one-sided, the thrust of Congress's intention in amending the Act was to expand its scope and enhance its deterrence effect. To read the term as Union urges risks severely limiting the scope of the Act. Thus, we are convinced that the Act's term "any foreign law" necessarily encompasses the Taiwanese regulation.

*Id*. at 828.

fishing law, which was elevated to a federal crime due to the Lacey Act.[134] The businessmen had imported lobster tails which, unfortunately for them, had been transported in plastic bags rather than cardboard boxes and some of the tails had also fallen short of the minimum 5.5 inches in length requirement.[135] On top of the Lacey Act violation, the men were also found guilty of conspiracy and money laundering simply because they had deposited the money from the sale into a bank.[136] Three of the four businessmen were sentenced to ninety-seven months in prison.[137] The appellate court upheld their conviction, reasoning that:

> [T]he Honduran laws used as the underlying predicates for the defendants' convictions fall within the scope of the Lacey Act and were valid and legally binding during the time period covered by the indictment. The remaining issues raised by the defendants were decided properly by the district court or are without merit.[138]

What is truly disturbing about this case, however, is that the appellate court upheld the conviction in spite of the Honduran government's official position that the fishing regulations—the same ones that the businessmen were found to have "violated"—were actually invalid because Resolution 030-95 was not a law recognized by the Honduran government.[139] In his dissent, Judge Peter Fay, formerly of the Fifth Circuit, disagreed with the majority that the Honduran government had changed its position.[140] He explained that:

> [T]o suggest that the newly issued statements and opinions of Honduran officials do not carry the weight of the earlier statements is a strange position for members of the judiciary. The so-called "shift in position" is the result of lawful litigation within the courts of a foreign nation. I think we would be shocked should the tables be reversed and a foreign nation simply ignored

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134. *McNab*, 331 F.3d at 1228, *cert. denied*, 540 U.S. 1177 (2004). *See also* Tony Mauro, *Lawyers Seeing Red Over Lobster Case*, LEGAL TIMES, Feb. 16, 2004, http://www.iamnotguilty.org/CaseMediaLegalTimes.pdf..

135. *McNab*, 331 F.3d at 1233.

136. CATO INSTITUTE, *supra* note 131131, at 48.

137. *McNab*, 331 F.3d at 1235.

138. *Id.* at 1247.

139. *Id.* at 1247–48 (Fay, J., dissenting).

140. *Id.* (arguing that there was never any unanimity or official position of the Honduran government on Resolution 030-95 only until after the trial court had issued its ruling).

> one of our court rulings because it caused some frustration or inconvenience.[141]

*McNab* illustrates how the U.S. government exercises its broad discretion in prosecuting importers for dubious crimes and, perhaps more importantly, the ambiguous nature and enormous number of foreign laws and regulations. With the addition of the 2008 Amendments, the Lacey Act is no longer a narrow conservation law, limited to protecting certain threatened species. In its new form, the door has been opened for more prosecutions based upon a wide array of laws. As these types of prosecutions will become more and more prevalent considering the Lacey Act's new broad definition of "plant" and the countless different laws and regulations, the possibility for judicial absurdities like *McNab* will also increase.

As seen in *McNab*, under the Lacey Act, the determination of a foreign law is decided by the relevant court in which the case is tried. This means that presiding judges have a broad discretion to interpret and apply foreign laws, and sometimes even make laws where none exist.[142] While cooperation from foreign governments is welcome, it is not necessary. In fact, cooperation with a foreign government is by no means an "absolute requirement," which means that cases may be prosecuted even in the absence of any cooperation from foreign governments or groups trying to determine the validity of those laws.[143]

Even before the Lacey Act's revision in 2008, U.S. importers called upon Congress to define and put some viable parameters on the term "any foreign law."[144] This lack of specificity can lead to many problems and sometimes even absurd rulings like *McNab*. This is also one reason why Voluntary Partnership Agreements (VPAs) should be preferred over blanket measures like Lacey. Unlike the Lacey Act, VPAs work to define laws and increase understanding and cooperation between governments, thus working

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141. *Id*. at 1251.

142. Sources used by courts have included "affidavits and expert testimony from foreign judges, government ministers and lawyers; foreign case law; law review articles and translations of foreign decrees; information obtained from foreign officials; and the court's own research and analysis." *See* Duncan Brack, *Controlling Illegal Logging: Lessons from the U.S. Lacey Act* (Chatham House, EEDP/LOG Briefing Paper 07/02, July 2007), at 2, *available at* http://www.chathamhouse.org.uk/publications/papers/download/-/id/509/file/9383_bp0707laceyact.pdf.

143. *Id*. at 3.

144. *House Hearings*, *supra* note 8, at 39 (statement of Craig Forester, on behalf of Int'l Wood Prods. Ass'n).

to avoid ambiguities and unintended results. VPAs are discussed further in Part V.B of this Note.

## IV. A MISSING "INNOCENT OWNER" EXCEPTION UNDER LACEY

In addition to this ambiguity in the application of foreign laws and the perplexity underlying the "due care" standard, a significant part of the problem with the amended Lacey Act pertains to its potential for unreasonable administrative forfeiture. After the Legal Timber Protection Act of 2007 was given the nod of approval by the House Committee on Natural Resources, Congressman Henry E. Brown, Jr. (R-S.C.) expressed his deep concern to Congress about the judicial trend moving away from the recognition of an "innocent owner" defense under the Lacey Act.[145] The "innocent owner" defense works to eliminate culpability for those importers that do not know or have no reason to know, at the time of the acquisition of the goods, that they are the product of illegal activity.[146] Congress recognized the need for this allowance in 2000, when it passed the Civil Asset Forfeiture Reform Act (CAFRA).[147] Until 2005, this "innocent owner defense" essentially protected 'good actors' from having to forfeit potentially millions of dollars in imported goods. However, in *United States* v. *144,774 Pounds of Blue King Crab*,[148] the Ninth Circuit held that, despite the availability of this defense in most criminal cases, crab taken in violation of Russian fishing regulations is subject to forfeiture on a strict liability basis under the Lacey Act.[149] Consequently, this ruling essentially eliminated the innocent owner defense as it applied to Lacey Act violations. The majority wrote that where the "[item] at issue here was imported, received, or acquired in violation of the Lacey Act, 16 U.S.C. § 3372(a), it constitutes 'property that it is illegal to possess' for the purposes of section 18 U.S.C. § 983(d)(4)."[150] The court reasoned that under the plain meaning of the statute, all illegally imported goods should be effectively treated as contraband, even if not considered

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145. H.R. REP. NO. 110-882, at 20-21 (2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr882.110.pdf (statement of Rep. Brown).

146. *Id*. at 20.

147. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. § 983(d) (2006)).

148. 410 F.3d 1131 (9th Cir. 2005).

149. *Id.* at 1132, 1136.

150. *Id*. at 1136.

"contraband per se."[151] The *Blue King Crab* ruling has brought considerable uncertainty and frustration to the import community.

The impact of *Blue King Crab* can best be understood in the context of the following hypothetical. Assume that a furniture importer has imported one thousand dining tables but has no knowledge that a thin piece of the furniture's inlay is derived from Peruvian mahogany, which is believed by the U.S. government to have been illegally logged.[152] Assume also that the same furniture dealer operates consistently within all of the rules and has continually used FSC-certification to ensure the legality of all of the dealer's products.[153] However, at some unknown point along the wide supply chain, documents were falsified. Since both criminal and civil violations of the Lacey Act subject illegally-harvested wood to forfeiture (much like the illegally caught crab cargo in *Blue King Crab*) to the government—an administrative forfeiture—the furniture importer would be forced to forfeit his million-dollar cargo.[154] Additionally, as discussed in the previous section of this Note, the importer may potentially be prosecuted for a misdemeanor depending on what the enforcement agency believes the importer should have known in the exercise of "due care."

According to Roger Pilon, a senior fellow and an expert on Constitutional Law at the CATO Institute, who previously testified before the House Judiciary Committee on CAFRA, "modern forfeiture law [has its

151. *Id*. at 1134–36.

152. While these facts are merely hypothetical, this scenario is not necessarily far-fetched. In November of 2009, as perhaps the first instance where the new Lacey Act provisions were put into force, the U.S. Fish & Wildlife Service executed a search warrant at Gibson's guitar plant in Nashville, Tennessee. *See* April Wortham, *Gibson CEO Takes Leave From Rainforest Alliance Board After Federal Raid*, NASHVILLE BUS. J., Nov. 17, 2009, http://www.bizjournals.com/nashville/stories/2009/11/16/daily16.html. Gibson had been using Forest Stewardship Council (FSC) certifications to guarantee the legality of their wood and had also been known in the industry to lead the way in responsible forestry. *See* Martha Pickerill, *GOOD WOOD: Timber With A Green Pedigree*, TIME, Dec. 14, 1998, http://www.time.com/time/magazine/article/0,9171,989855,00.html (discussing Gibson Guitar's novel approach to responsible eco-friendly sustainable commercial forestry through the use of FSC certifications on its guitars).

153. It is interesting to note that the CEO of Gibson Guitars, Henry E. Juszkiewicz, was also a board member of the Rainforest Alliance, one of the original organizations to support the amending of the Lacey Act. *See* Wyden Press Release, *supra* note 17. After the raid and subsequent investigation of the company, Juszkiewicz took a "leave of absence" from the board. Press Release, Rainforest Alliance, Statement in Response to the United States Fish & Wildlife Service's Investigation of Gibson Guitar Corporation, http://www.rainforest-alliance.org/forestry.cfm?id=gibson_usfws (last visited April 4, 2011).

154. This authority is granted under 16 U.S.C. § 3374(a)(1) (2006 & Supp. III 2009) and 50 C.F.R. § 12.23(a) (2009).

roots] in notions that have no place whatever in our legal system, animistic and authoritarian notions that countless people have died over the ages to bury and replace with the rule of law."[155] Indeed, in circumstances where an importer has no knowledge of the illegality, it seems to go entirely against what Congress had originally intended when it passed CAFRA. Additionally, the Ninth Circuit's broad interpretation seems irreconcilable when considering Congress' intent in passing CAFRA just a few years beforehand.

Despite Congressman Brown's concerns, 16 U.S.C. § 3374(a) now states that "[illegal wood] shall be subject to forfeiture . . . notwithstanding any culpability requirements . . . ."[156] In the absence of any culpability requirement, importers are subject to strict liability forfeiture of their goods when, in most cases, importers can never be truly certain about the legality of foreign goods.[157] While forfeiture law, in general, is in many ways fundamentally unsound, the amended Lacey Act's lack of an "innocent owner" defense is difficult to reconcile especially in light of CAFRA. The best way to correct the problems associated with strict liability forfeiture in similar scenarios is "not merely to reform but to abandon it, relegating it to the dustbin of history from which it came."[158] By reinstating the Lacey Act's former innocent owner defense, Congress would eliminate a considerable burden on good actors. There is also no justifiable reason to suspect that the innocent owner defense will be abused. Besides imposing fines, there are numerous existing laws which enable the U.S. government to prosecute offenders if the government can build a good case against them. There is nothing to stop the government from seizing goods once a person, through due process, has been successfully prosecuted and convicted.

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155. *See Civil Asset Forfeiture Reform Act: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 159 (1997) [hereinafter Pilon Statement] (statement of Roger Pilon, Director, Center for Constitutional Studies, Cato Institute), *available at* http://www.cato.org/testimony/ct-rp061197.html.

156. 16 U.S.C. § 3374(a) (2006 & Supp. III 2009).

157. Additionally, in any criminal conviction under the Lacey Act, "[a]ll vessels, vehicles, aircraft, and other equipment used to aid in the importing [or other illegal act] shall be subject to forfeiture . . . if the owner of such vessel . . . was at the time of the alleged illegal act a consenting party or privy thereto or in the exercise of due care should have known that such vessel . . . would be used in a criminal violation of this [Act]." 16 U.S.C. § 3374(a)(2) (2006 & Supp. III 2009).

158. *See* Pilon Statement, *supra* note 155.

## V. AVOIDING THE POTENTIAL FOR A NON-TARIFF TRADE BARRIER

Regulations that control trade in one way or another, like the Lacey Act, fall under the purview of the rules of the World Trade Organization (WTO) and the General Agreement on Tariffs and Trade (GATT).[159] These rules promote a global system of liberalized trade[160] and impose upon individual nations the legal obligation to resist trade coercion and protectionism. The declaration requirements of the Lacey Act may arguably generate trade concerns because they apply only to importers and, thus, are potentially discriminatory in favor of domestic producers. Assuming *arguendo* that 10 percent of U.S. timber imports are of suspicious origin, then 90 percent of completely legal timber may potentially be held up at the border. Is this the least trade restrictive means of accomplishing the Act's stated objective? Is there a "legitimate" objective involved? Does this practice discriminate between like products and between processes? Are U.S. producers gaining an unfair advantage? Indeed, where domestic producers gain any type of competitive advantage through policies, other nations tend to view such measures with increasing skepticism. This, in turn, may negatively impact a nation's trade relations. When it comes to *other* countries, the U.S. itself has been one of the most outspoken proponents of global trade liberalization in international negotiations, most recently in the Doha Round. But the U.S. also has a long history of utilizing unilateral trade measures to achieve environmental objectives and such measures have always had the potential to be abused as protectionist practices.[161] The *US Shrimp-Turtle* and *US Tuna-Dolphin* cases discussed in Part II are just two examples of this.[162]

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159. General Agreement on Tariffs & Trade, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (*entered into force* Jan. 1, 1948) [hereinafter GATT].

160. *Id.* arts. I, III and XI. The WTO's free trade principles are set out in Article I ("most favoured nation" treatment) and Article III ("national treatment"), prohibiting discrimination in trade, and Article XI ("elimination of quantitative restrictions") forbidding any restrictions other than duties, taxes or other charges on imports from and exports to other WTO members.

161. Benjamin Simmons, Note, *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report*, 24 COLUM. J. ENVTL. L. 413, 414 (1999).

162. *See* discussion *supra* Part II.B.

### A. *Is the Lacey Act WTO Compliant?*

To date, the WTO has not been called upon to review any case involving issues even "vaguely similar" to those that the Lacey Act engenders.[163] Consequently, whether or not the Act conforms to WTO rules will remain an open question until it is challenged by another WTO member alleging discrimination or disguised protectionism (e.g., the imposition of unnecessary obstacles to trade). One thing that remains clear, however, is that the more the law deviates from its advertised purpose of "preventing" illegal logging, the more likely it will be challenged.[164] While the WTO has not yet addressed the various issues pertaining to the Lacey Act, there is some indication that a challenge is likely to take place.

In its first meeting of 2009, the WTO Committee on Technical Barriers to Trade addressed concerns about the implications of the Lacey Act.[165] Although the U.S. maintained in the WTO notification pursuant to Article 2.9.2 of the Agreement on Technical Barriers to Trade (TBT) that the revised Lacey Act is not a technical regulation, other WTO members expressed opinions to the contrary. The representative and delegation from Argentina, for example, expressed skepticism over whether the Act, in its new form, was still designed to protect endangered species or now aimed at solely protecting U.S. domestic markets from wood and wood product imports.[166] Switzerland, Canada and the European Communities echoed these same concerns before the committee.[167] In its own annual report on U.S. trade barriers, the European Union took the position that a majority of HTSUS chapters to be phased-in under the revised Act fail to have "any clearly identifiable link with illegal logging, and should therefore be excluded from the scope of the act."[168] It is important to note that the European Union has

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163. Duncan Brack, *Combating Illegal Logging: Interacting with WTO Rules* (Chatham House, EERG IL Briefing Paper 2009/01, June 2009), at 1, *available at* http://www.chathamhouse.org.uk/files/14185_bp0609illegal_logging.pdf.

164. *Id*. at 1. While Brack believes that none of the current measures pursued against illegal logging should experience any conflict in the WTO, Brack also states that "[t]he more the measure diverges from the core WTO principle of non-discrimination in trade, and the more trade-disruptive it is, the more vulnerable it could be to challenge." *Id*.

165. *See* Committee on Technical Barriers to Trade, *Note by the Secretariat: Minutes of the Meeting of Meeting 5–6 November 2008*, ¶¶ 34–38, G/TBT/M/46 (Jan. 23, 2009).

166. *Id*. at ¶ 36.

167. *Id*. at ¶¶ 35–38.

168. European Commission, Directorate General for Trade, *United States Barriers to Trade and Investment Report for 2008*, at 43 (July 2009) [hereinafter EU Trade Report], *available at* http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_144160.pdf. The Commission addressed concerns by the EU that the burdensome declaration requirements of

been known to favor environmentally related regulations (often protectionist) premised on the "precautionary principle."[169]

All of these expressed concerns indicate growing skepticism about the intended purpose of the revised Act, and this may foreshadow the possibility that it will be challenged in the WTO. The most significant concern is that the onerous declaration requirements (which are not required of domestic producers) on such a broad range of goods will increase costs on importers and delay trade flows without any viable relation to combating illegal logging.[170]

While the WTO rules accord governments some latitude in enacting environmental measures that might have the effect of restricting international trade, there has been considerable debate over the type and nature of measures that can be deemed justified and/or legitimate. GATT sets forth two potentially applicable exceptions for such measures: Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health,"[171] and Article XX(g) provides an exception for measures

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the amended Lacey Act may, in effect, constitute a non-tariff trade barrier. *Id.* at 12–13. The items being referred to here are those phased-in after September 30, 3009, which to include but are not limited to:

> Ch. 12 (oil seeds, misc. grain, seed, fruit, plant, etc.), Ch. 13 (gums, lacs, resins, vegetable saps, extracts, etc.), Ch. 14 (vegetable plaiting materials and products not elsewhere specified or included), Ch. 45 (cork and articles of), Ch. 46 (basket ware and wickerwork), Ch. 66 (umbrellas, walking sticks, riding crops), Ch. 82 (tools), Ch. 93 (guns), Ch. 95 (toys, games and sporting equipment), Ch. 96 (brooms, pencils, and buttons), and Ch. 97 (works of art).

*Id.* at 43.

169. *See* Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European "Fashion" Export the United States Can Do Without*, 17 TEMP. POL. & CIV. RTS. L. REV. 491, 493–95 (2008). While the EU has also implemented certain anti-illegal logging schemes such as the Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT), as of now, it does not impose such far reaching requirements as the revised Lacey Act. However, in 2009 the European Parliament did adopt a proposal that would place a due-diligence requirement on only those operators that place timber on the market for the first time. *See Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market*, at 7, 9, COM (2008) 644/3. These measures should be distinguished from the Lacey Act provisions, since the Parliament's proposal, still under consideration by the Council of the European Union, specifically aims to "avoid imposing any unnecessary administrative burden . . . [on] all operators involved in the distribution chain." *Id.* at 15.

170. *See* EU Trade Report, *supra* note 168168, at 43.

171. GATT, *supra* note 159, art. XX(b). *See also* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (reviewing, in part, the applicability of GATT Article XX(b)).

"relating to the conservation of exhaustible natural resources."[172] Yet, even assuming a WTO Member is able to establish that the measure itself qualifies under (or otherwise falls within the scope of) either or both of these exceptions, that Member must also demonstrate that such measure complies with the requirements of Article XX's chapeau. In other words, the promulgating Member government must also show that its measure was *not applied* in a manner which would constitute a means of "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, or "a disguised restriction on international trade."[173]

Additionally, Article 2.2 of the TBT Agreement provides that "[m]embers shall ensure that technical regulations are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade."[174] Essentially, regulations adopted in furtherance of an otherwise legitimate public (state) objective such as the "protection of human health or safety, animal or *plant life or health*, or the environment," much like the exceptions contained in GATT Articles XX(b) and (g), must not only constitute the *least trade-restrictive* means "necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create,"[175] but they must also be applied in a manner that does not have the effect of creating unnecessary obstacles to trade.

One of the potential problems the Lacey Act may encounter is that the discriminatory treatment between "legal" and "illegal" timber could violate Article I of GATT, whereas these two could, in fact, be considered "like products."[176] This is because legal and illegal timber "are grown and logged

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172. *Id.*, art. XX(g). *See also* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), and Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Shrimp-Turtle I] (reviewing, in part, the applicability of GATT Article XX(g)).

173. GATT, *supra* note 159, art. XX, ¶ 1 [hereinafter Article XX chapeau]. *See also* Shrimp-Turtle I, *supra* note 172, and Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Art. 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter Shrimp-Turtle II] (discussing the application of the Article XX chapeau).

174. Agreement on Technical Barriers to Trade, art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

175. *Id*. This also means that existing regulatory requirements shall not be maintained if such legitimate state objectives can be addressed in a less trade-restrictive manner. *Id.* art. 2.3.

176. *See* International Trade Administration, Department of Commerce, Like Product Determinations, http://ia.ita.doc.gov/pcp/pcp-likeproduct.html (last visited April 4, 2011).

in essentially the same ways."[177] For example, in the *US Tuna-Dolphin* case discussed earlier, the GATT Panel's conclusion regarding Mexico's complaint against the U.S. treatment of tuna imports was that number of dolphins killed incidental to tuna fishing had no effect on the end product.[178] In other words, the U.S. was required to treat tuna caught by Mexican fishing vessels in a manner "no less favourable" than tuna caught by domestic vessels.[179] The GATT Panel held that the most pertinent issue was not the environmental impact of the fishing method being used, but rather the quality of the tuna itself.[180]

Duncan Brack, a Chatham House senior research fellow on environmental law, suggests that an argument in support of the Lacey Act provisions could be made under the Article XX(d) exception.[181] This section allows "measures . . . necessary to secure compliance with laws or regulations which are not inconsistent with the provision of . . . [GATT], including those related to customs enforcement . . . and the prevention of deceptive practices."[182] According to Brack, it could be argued that imposing a legality requirement for timber at the border would "help to secure compliance with laws on timber harvesting, processing and export which are not themselves incompatible with GATT, and also to prevent deceptive practices" (referring to illegal wood passed off as legal wood).[183] Brack points to the decisions in the second *Tuna-Dolphin* dispute and in the *Shrimp-Turtle* dispute, in which the Panel found that GATT *does* permit countries to take steps in protecting natural resources outside their borders as long as there exists a sufficient "nexus" to those goods.[184]

However, these cases are distinguishable in that they involved an 'extrajurisdictional' application of U.S. laws and policies.[185] The Lacey Act, on the other hand, is an extrajurisdictional application of foreign laws.[186] In the *Mexico—Taxes on Soft Drinks*[187] case, the WTO Appellate Body

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177. Brack, *supra* note 163, at 4.

178. Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R-39S/155 (Sept. 3, 1991), 30 I.L.M. 1598, 1618 (1991).

179. *Id.*

180. *Id*. at 1622 ¶ 6.2.

181. Brack, *supra* note 163, at 5.

182. GATT, *supra* note 159, art. XX(d).

183. Brack, *supra* note 163, at 5.

184. *Id.*

185. *Id.*

186. *Id.* at 10.

187. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages,* ¶ 79, WT/DS308/AB/R (Mar. 6, 2006) (*adopted* Mar. 24, 2006).

interpreted the "certain laws and regulations" to mean measures only aimed at securing compliance with a WTO member's own laws and regulations. The interpretation would, therefore, seem to preclude the applicability of Article XX(d) to the Lacey Act.[188] Even without this opinion, arguing for the existence of a "nexus" based merely on the use of global timber products is tenuous to say the least. But, since the issues surrounding the Lacey Act are so unique, it will be up to the WTO to make a determination of whether any of the exceptions apply to the Lacey Act.

### *B. Other Factors to Consider*

While the WTO rules require that environmental trade measures not discriminate between countries, it is apparent that some countries remain more exposed to the problem of illegal logging than others. The AF&PA Report, for example, identified Russia, Indonesia, Malaysia, Brazil and China as countries in which a significant percentage of the timber production and/or imports are believed to be illegally harvested.[189] On the other hand, both the United States and Canada are considered to be low-risk countries with *de minimis* levels of illegal timber being handled in their markets.[190] Some may praise the fact that the Lacey Act draws no distinction between higher-risk versus low-risk countries. One of the problems that this creates, however, is an unnecessary "thickening" of the U.S.-Canada border.[191]

The U.S. imports a large quantity of its wood and wood products from Canada. In terms of the value of imports in 2009, it was estimated that nearly half of the Lacey Act declarations collected by APHIS and the CBP for the HTSUS headings in Chapters 44 and 47 related to products being imported from Canada.[192] Canada's forestry, packaging and value-added sectors have been subject to the Lacey Act declaration requirements for all plant products

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188. Steve Charnovitz, *An Introduction to the Trade and Environment Debate*, *in* HANDBOOK ON TRADE AND THE ENVIRONMENT 240–41 (Kevin P. Gallagher ed., 2008).

189. *See* AF&PA REPORT, *supra* note 4, at 11–12.

190. *Id.* at 13.

191. *See* Melnitzer, *supra* note 11 (explaining that increased inspection fees, non-tariff barriers, the extra-territorial impact of U.S. export control laws on the development of Canadian technology and the imposition of prohibitive duties on Canadian exports ruled as non-NAFTA originating by U.S. authorities are all contributing to the underlying deteriorating U.S.-Canada border situation).

192. Press Release, Miller Chevalier, New Lacey Act Certification Requirement Will Affect Wood Products Imported from Canada, China, Brazil, and Other Countries (Mar. 12, 2009), *available at* http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=4919.

"no matter how miniscule the quantity" and, not surprisingly, "[t]he Lacey Act has caused unprecedented delays at the [Canadian] border."[193] Despite a celebrated announcement in February of 2010 of a new agreement between the U.S. and Canada that would allow Canada to participate in U.S. infrastructure projects under the American Recovery and Reinvestment Act (which included the "Buy American" provision discussed in Part II.B of this Note), measures by the U.S., in particular the Lacey Act, continue to be counterproductive to U.S.-Canada trade relations.[194]

Indeed, it has been said that in expanding the Lacey Act to combat illegal logging, the U.S. is using a "blunt instrument where one with more precision is required."[195] While there rarely is a perfect solution to any problem, the U.S. could benefit from taking on a more narrowed approach to addressing the global illegal logging problem. One mechanism to consider is the use of Voluntary Partnership Agreements (VPAs), such as what the European Union's Forest Law Enforcement, Governance and Trade (FLEGT) model is based upon.[196] VPAs are essentially bilateral trade agreements that build upon mutual cooperation and understanding between two countries.[197] Consequently, VPAs may offer much more tailored/effective approaches in many of the areas in which the revised Lacey Act seems to be overbroad/ineffective.

VPAs are voluntary for exporting countries, but become legally binding once entered into, thus committing both countries to trade only in legally harvested timber.[198] According to the European Union's FLEGT model, there are four phases to fully implementing a VPA.[199] The first phase focuses on "preparation" to assess the needs of each country. This is also the phase during which stakeholders *in both nations* (e.g. non-governmental organizations, industries and government agencies) interact with one another to determine what their common interests are.[200] The second phase is comprised of negotiations between the two countries. During this step, nations may negotiate: a definition of legality, a timber tracking system,

193. *See* Melnitzer, *supra* note 11.

194. *Id.*

195. *See* Tom Travis, *The Evolution of Protectionism*, ENTREPRENEUR, Feb. 23, 2009, http://www.entrepreneur.com/article/200292.

196. *See* EUROPEAN FOREST INST., EFI POLICY BRIEF 3: WHAT IS A VOLUNTARY PARTNERSHIP AGREEMENT? 3 (Nov. 2009) *available at* http://www.euflegt.efi.int/uploads/EFIPolicybrief3ENGnet.pdf.

197. *Id*. at 4.

198. *Id*.

199. *Id*.

200. *Id.* at 4–5.

means of compliance, licensing, etc.[201] The key part of this second phase, however, is defining what 'illegal logging' means because "it is necessary for each party to have a clear understanding of what legal production in a partner country involves."[202] Finally, the third and fourth steps are "development" and "final implementation," respectively. During these last two phases, the two partners implement the licensing scheme in such a way that would prohibit those timber imports from partner countries without licenses.[203] In theory, imports from non-VPA countries should be unaffected. Furthermore, the entire system is monitored carefully by an independent institution to ensure proper implementation and compliance (e.g., alerting governments of flaws in the licensing scheme).[204]

Once implemented, these four phases would prepare and enable importers and exporters in both countries to have a clear understanding of the rules and regulations by which to operate. Unlike the revised Lacey Act, VPAs do not merely employ a one-sided approach but rather focus on both the supply and the demand associated with illegal logging (e.g., monitoring not only the legality of imports but also the legality of exports).[205] In other words, VPAs force exporting countries to demonstrate a commitment to their own laws as well, which the Lacey Act completely fails to do. This would avoid the unwanted creation of a double standard, whereby only the importer is responsible for legality of the product.[206] In fact, an effective legality system would include "checks of forest operations as well as controlling the transport and processing of timber through different owners, from harvesting to point of export."[207]

Of course, the FLEGT system and VPAs in general are not without their own significant flaws. One of the central problems associated with the FLEGT plan pertains to licensing and the treatment of non-VPA partners. More specifically, if the European Union decides to make it more difficult for operators in non-VPA countries to obtain FLEGT licenses than operators in VPA countries, this may well be in conflict with WTO rules. [208]

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201. *Id*.
202. *Id.* at 7.
203. *Id.* at 4–5.
204. *Id*. at 6.
205. *Id.* at 5.
206. *Id.* at 7–8.
207. *Id*. at 6.
208. *See* Fredrik Erixon & Brian Hindley, European Centre for International Political Economy, *New EU Trade Regulations to Combat Illegal Logging: A Critique*, 12–13 (Nov. 2009) *available at* http://www.ecipe.org/people/brian-hindley/other-publications/FINALTimber.pdf. Erixon and Hindley argue that a new proposal by the EU Parliament to

Additionally, the fact remains that these agreements are initially voluntary and, therefore, much of their success in the long term depends on a wide level of cooperation between many nations (especially those at risk for illegal logging). However, VPAs succeed where the Lacey Act fails by focusing on building partnerships in order to create clearer definitions by which the trade community can operate. The importance of this type of cooperation cannot be understated.

In addition to utilizing a VPA system, the U.S. Department of Justice (DOJ) could also try to initiate test cases based on existing statutes. Before the 2008 Farm Bill passed, the DOJ had indicated that "[i]n the absence of CITES listing there is no provision of U.S. domestic law that would prevent the importation of illegally harvested foreign timber in our view."[209] In "believ[ing] that existing U.S. laws do not adequately address the problem" of illegal logging, the DOJ has seemingly refused to make any attempt to prosecute importers who import illegal timber under existing U.S. laws.[210] In fact, Congressman Brown expressed his deep disappointment with the DOJ's consistent refusal to "even try to enforce existing laws to stop the illegal importation" of such goods.[211] Some of the laws that the DOJ could potentially test include the National Stolen Property Act (NSPA) of 1948,[212] the Cultural Property Act of 1983[213] and a whole host of existing money-laundering statutes. Brown stated "[i]t is my hope that before this legislation becomes law, we will hear a credible explanation as to why these laws were inadequate."[214] The proponents of the Lacey Act have also claimed that laws such as the NSPA are insufficient to target illegal wood, but the EIA did concede that the slew of existing anti-money laundering laws "continue to hold promise."[215] Notwithstanding the DOJ's ability and/or willingness to make use of such laws, the implementation of VPAs and other international

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modify the FLEGT scheme incorporating 'due diligence' and discriminatory licensing endangers the legitimacy of the system. *Id*. at 6–7. The authors also argue that the EU Parliament has not thought through their proposal and, therefore, it is bound to be whittled away in the WTO. *Id*. at 22–23.

209. *See House Hearings*, *supra* note 8, at 44 (testimony of Eileen Sobeck, Deputy Assistant Attorney Gen., Env't and Natural Res. Div., U.S. Dep't of Justice).

210. *Id.* (testimony of Madeleine Bordallo, Delegate in Cong. from Guam).

211. H.R. REP. NO. 110-882, *supra* note 145, at 20.

212. 18 U.S.C. §§ 2311–22 (2006).

213. 19 U.S.C. § 2602 (2006).

214. H.R. REP. NO. 110–882, *supra* note 145, at 20.

215. *See* EIA REPORT, *supra* note 26, at 22.

partnerships[216] to address illegal logging would be a step in the right direction.

## VI. CONCLUSION

By amending the Lacey Act as it did in 2008, Congress has not only taken on the formidable task of putting an end to illegal logging across the globe, but decided to do so using a blunt and overly broad instrument where a more targeted one is appropriate. The burden of this immense chore has fallen on virtually all U.S. importers, who must now become supply-chain policemen or face the threat of criminal prosecution. From a sound policy perspective, however, requiring U.S. importers to exercise "due care" should not be a substitute for effective governance in foreign countries. Allowing this would create a "due care double standard" and this, in turn, does little if anything to curb illegal logging. For the time being, perhaps the most important action Congress can take is to revisit the law, providing necessary technical clarifications and making sure that it once again contains an innocent owner provision within it. Beyond this, the near future will determine how this law holds up to the U.S.'s international trade obligations.

In our increasingly globalized trading system, the need to strike a balance between trade liberalization and environmental protection is becoming more and more necessary. While not losing sight of the legitimate purpose of a legal regime aimed at protecting the environment, any measure that has such far-reaching implications as the revised Lacey Act should immediately raise red flags. Measures truly aimed at protecting the environment must be implemented in the least trade restrictive manner and should be closely related to their desired objectives. Should this turn out not to be the case, the United States runs the risk of creating an expansive bureaucratic system that needlessly punishes legitimate operators while the illegitimate ones roam freely and are allowed to continue their operations in other markets. The inevitable result would be more harm done than good.

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216. In 2007, the year before the Lacey Act was amended, the United States and China signed a "ground-breaking" memorandum of understanding (MoU) after their third strategic economic dialogue in which the two countries agreed to share information on shipments of timber, step up law enforcement against illegal activity and encourage private-sector partnerships. *See* United States Office of the Trade Representative, *Weekly Trade Topic: Illegal Logging* (Sept. 8, 2009), http://www.ustr.gov/about-us/press-office/blog/weekly-trade-topic-illegal-logging.