

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

Francis G. Tanczos

RUTGERS LAW JOURNAL Vol. 42, 549 (2011)

I. INTRODUCTION

Abstract: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047121

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. In an ambitious effort to curb illegal logging activities across the globe, Congress recently amended a century-old law, the Lacey Act, that was originally used to combat wildlife trafficking in the United States. For the international trade community, the far-reaching implications of the revised Lacey Act are without precedent. The recent amendments dramatically expand the reach of the Act affecting thousands of different imported products under a broad definition of the term “plant.” Perhaps most alarmingly, the Act extends the reach of a seemingly infinite number of foreign laws making it illegal to take, possess, transport, or sell plant products in violation of any foreign law or regulation. In effect, importers are now required to become supply-chain policemen or face the threat of severe civil penalties as well as criminal prosecution. **This article examines the policy motivations including the peculiar coalition that led to the passage of this legislation and also addresses overly broad provisions of the Act. It is argued that less burdensome and less trade-restrictive alternatives for targeting illegal logging exist, particularly through the building of international partnerships.**

...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 (p. 558)

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 Doha Round.⁴⁸ (pp. 558-559)

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
(p. 559)

In light of 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.

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.*
(pp. 559-560)

...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
(p. 580)

It is important to note that the European Union has 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

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 168, at 43.

(pp. 580-581)