

INECE

International Network for Environmental Compliance and Enforcement

Recent Amendments to U.S. Lacey Act Should Help Protect Forests Worldwide

Highlights of Lacey Act Amendments

- Amendments provide sweeping and unprecedented criminal, civil and forfeiture authority to combat illegally harvested wood – and all manner of wood products ranging from hardwood flooring to pencils – from being imported into the United States
- Cases to be based on violation of the law or regulations of the country where the wood originated
- New declaration requirements to be phased-in beginning December 15, 2008 promote transparency by increasing U.S. importers' duty to know the species and origin of their wood and wood products; illegally-sourced shipments subject to strict liability forfeiture
- Importers subject to criminal charges when they “in the exercise of due care should have known” wood was illegally harvested (as well as for “knowing violations”)
- INECE calls for international cooperation to pursue illegal wood traffickers

Introduction: A New Tool at a Needed Time

The United States has enacted tough new legislation in the form of amendments to the federal wildlife trafficking statute known as the Lacey Act,¹ to curb illegal timber imports. The legislation not only bans logs and lumber, but also applies to all flora and forest products – ranging from furniture and flooring to paper – made with illegally harvested wood or plant materials.



This is the most far-reaching ban on illegal wood imports in the world.

Russian oak, birch and pine logs from just across the border crowd the railyard in Suifenhe, China. Some 80% of China's unprocessed log imports come from Russia. © EIA

¹ 16 U.S.C. §§ 3371-3378.

While the statute may be somewhat complex, the crux is clear: Anyone who exports or imports illegally harvested timber (or wood products derived from such timber) into the United States that knows or should have known that the wood was illegal, is guilty of a crime. The penalties are quite substantial, ranging up to five years of imprisonment and a \$500,000 fine per violation, as well as forfeiture of the merchandise.



Zhangjiagang, China: the world's largest tropical trading port. © Sam Lawson/EIA Telepak

As part of the new law, beginning December 15, 2008, it becomes unlawful to import any plant² (broadly including any wood or wood product) unless a customs declaration is filed including the scientific name of the wood contained in the importation, its value and quantity, and the name of the country from which the wood was harvested. The

declaration requirements will greatly improve the transparency of the pathway of wood entering the United States, and should increase incentives for importers to ensure the legal sourcing of their wood, as well as facilitate more effective enforcement. The U.S. government is currently creating an electronic filing system and writing detailed guidance to help importers comply with this component of the law. The implementing agencies are developing a phase-in approach for the declaration requirement. While the detailed guidance for this requirement is still being finalized, voluntary declarations are scheduled to begin on December 15th, and mandatory declarations for a subset of wood products (defined by tariff or HTS codes) will begin in April 2009 with several phase-in stages thereafter.

Billions of dollars of “high risk” – or potentially illegally harvested – wood enters the United States every year. If properly enforced, the effects of this legislation will help to address that massive illegal trade and greatly benefit the environment.

Background: Why the Lacey Act Amendments Matter

The negative consequences of deforestation and forest degradation are severe and closely interrelated. They are responsible for at least one-fifth of greenhouse gas emissions,³

² 16 U.S.C. § 3371(f)(1) states: “(1) IN GENERAL. – 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.” There are certain limited exceptions to the definition which can be viewed in the full text of the Lacey Act, attached to this document.

³ While the specific impacts of deforestation upon climate change is not the focus of this document, certain facts still bear mentioning. Forests contain as much as three times the total amount of carbon that is in the atmosphere and every year they process between 15 and 20% of that total. Deforestation not only eliminates the forest’s ability to convert and sequester CO₂, but the act of deforestation itself releases CO₂ back into the atmosphere; is the main source of emissions from land use change; and is by far the most important source of greenhouse gas emissions from developing countries. “The Economics of Illegal Logging and Associated Trade” (OECD General Secretariat, 2007). (“2007 OECD study”) at 10.

destroy habitats, lead to irreversible losses of biodiversity, deprive governments of billions of dollars in lost revenue, have negative impacts on agricultural productivity, and disproportionately harm millions of the world’s poor.⁴ While the causes of deforestation and degradation are complex, it is clear that wood extraction for commercial use is a leading driver, along with agricultural and infrastructural expansion, and can be the key factor in certain areas.⁵ The United States, as the world’s largest importer and consumer of forest products, plays a correspondingly significant role in the trade of illegally harvested wood. One NGO prominently involved in combating illegal logging states: “While reliable trade data for illegal goods is inherently scarce, estimates suggest that United States consumption of high-risk timber and wood products reaches 10% of the annual import stream – \$3.8 billion in high-risk timber and wood products in 2006, not including pulp and paper.”⁶ More to the point, there is substantial evidence that wood exports of certain countries doing large volume business with the United States contain a very significant percentage of illegally harvested wood. Some examples of these “high risk” countries with substantial direct exports to the United States are⁷:

Export Country	2006 Total Wood Exports to U.S. (excluding pulp and paper)	% total illegal wood exports
China	\$10,459,496,000	32 – 40%
Malaysia	\$ 1,173,887,000	20 – 35%
Indonesia	\$ 966,536,000	70 – 80%
Peru	\$ 83,753,287	30 – 40% ⁸
Honduras	\$ 48,968,355	50% softwoods 80% hardwoods

While the wood exports from the countries above may merit special focus given the size of their business with the United States and their degree of illegal exports, the illegal harvesting and trade of wood is documented in over 70 countries.⁹

The export of illegal wood products from China is particularly important, not only because of the extent of the trade and the percentage considered likely to be illegal, but

⁴ 2007 OECD at 7.

⁵ See, e.g., “Do Trees Grow on Money: The implications of deforestation research for policies to promote REDD,” Kanninen *et al.*, The Center for International Forestry Research (2007).

⁶ “No Questions Asked: The Impacts of U.S. Market Demand for Illegal Timber – and the Potential for Change.” Environmental Investigation Agency (2007) at 1 (“EIA study”). The 10% figure is supported by the most authoritative recent surveys, including the 2004 “‘Illegal’ Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry” commissioned by the American Forest & Paper Association (referred to as the “Seneca Creek study”), “Strengthening Forest Law Enforcement and Governance: Addressing a Systemic Constraint to Sustainable Development” (World Bank, 2006) and the 2007 OECD study.)

⁷ EIA study at 8 – 16.

⁸ While these percentages represent estimates of illegal exports on a *global* basis, rather than with specific respect to the United States, there is little reason to believe that the figures for the U.S. would differ by much, given that to date very little of the wood imported into the U.S. is certified as being legally harvested in the country of origin.

⁹ 2007 OECD study at 7.

also due to the rapid growth of the trade. China is the world's largest exporter of wood (over \$17 billion in 2005) and increased its business by nearly 500% in less than a decade – with the United States by far its largest customer.¹⁰ To fuel this growth, and in view of little of its domestic timber being made available for export, China relies upon importing massive amounts of wood, including from such high risk countries as Russia, Malaysia, Indonesia, Burma, Cambodia and those in the Congo Basin.¹¹ Moreover, China is rapidly becoming the “world's woodshop” and is in essence “laundering” vast amounts of illegally harvested timber through manufacturing and ultimate export. For example, in the huge and rapidly expanding market for hardwood plywood (used, for example, for kitchen cabinetry), trade between China and the United States increased at an annual rate of 37% during 2002 through 2007, with the bulk of the timber being supplied from such high risk countries as Russia, Papua New Guinea, Malaysia, Gabon and the Solomon Islands.¹²

In summary, vast amounts of illegally harvested wood from all corners of the globe – primarily as manufactured wood products and rarely as raw timber – are entering the United States either directly from the country of the timber's origin or through intermediary countries. The Lacey Act provides a new means of addressing this issue.

Specific Activities Made Illegal by the Lacey Act and Potential Penalties

The declaration requirements are fairly simple in principle, though in practice may be viewed initially as a burden by those importers who had previously not taken the necessary steps to determine exactly the type of wood they were importing and where it originated. As summarized in the Introduction, the declaration requires the following¹³:



Piles of illegal merbau cut by PT Marindo Utama Jaya in western Papua province, 2005. © Telepak/EIA

(A) The scientific name of the wood or wood product (including the genus and species) contained in the importation;

(B) The value and quantity of the wood or forest product being imported; and

¹⁰ EIA study at 8 – 9.

¹¹ EIA study 8 – 11.

¹² “Wood Flooring and Hardwood Plywood: Competitive Conditions Affecting the U.S. Industries” (Investigation No. 332-487, USITC Publication 4032, August 2008) at pages 2-5 and 4-6.

¹³ 16 U.S.C. § 3372(f).

(C) The name of the country from which the wood was harvested.¹⁴

Anyone who *knowingly* violates the declaration requirement is guilty of a felony, punishable by up to five years of imprisonment and/or a \$250,000 fine for individuals, while businesses are subject to a \$500,000 fine.¹⁵

It is noteworthy that none of the declaration information (with the possible exception of the value of the import) was required to be obtained, let alone filed under penalty of perjury, under preexisting U.S. law. While the new declaration requirement does not go so far as to require the importer to have all of the information necessary to be certain of the legal origin of the wood, it does require the importer to collect information that, depending on what it suggests about the origin of the wood, should prompt further inquiry by the importer to assure its legality.

What truly makes the Lacey Act unique in terms of environmental protection laws – and of particular interest to International Network for Environmental Compliance and Enforcement (INECE) participants in countries where illegally harvested timber is ultimately destined for the United States – is that the Act can be triggered by violation of a *non-U.S. law or regulation* designed to protect or gain government revenue from timber. Thus, to take a straightforward example, if timber is felled in a formally designated “no logging” zone in Country A (e.g., a national park), and then exported to Country B where it is manufactured into furniture, a “person” (including businesses and/or individuals) would violate the Act by importing the furniture into the United States. As explained in more detail below, the seriousness of the violation depends upon the degree of knowledge of the person importing the wood, or otherwise involved with its commercialization in the United States

The Lacey Act is a somewhat lengthy and detailed statute, and defies a truly succinct summary, but generally creates a felony criminal offense for any person who:

- (A) **Knowingly** imports, exports or engages in conduct involving the sale or purchase of wood¹⁶ (or wood product derived from such wood);
- (B) **knowing** that such wood (or wood product derived from such wood) was collected, harvested, cut, logged, removed, possessed, transported or sold (1) in violation of any non-U.S. law or regulation protecting wood **or** (2) in violation of any non-U.S. law governing the export or transshipment of wood (or wood

¹⁴ The Act contains a temporary loophole which permits the importer to, in the event the origin of the wood is unknown, submit the name of the country or countries from which it *may have been* harvested. 16 U.S.C. § 3372(f)(2). The loophole expires once the government implements regulations required under the Act, which are required to be in place by November 2010.

¹⁵ 18 U.S.C. § 3571 sets the fine amounts for all felony violations of the U.S. Code, including environmental violations. The sentencing statute, known as the Alternative Fines Act, also permits the government to seek an even greater fine than the \$500,000 “maximum” based upon calculating twice the amount of the illegal gain from the crime, or twice the loss caused by the illegal activity – though use of the “doubling” provision is limited to situations where it would not unduly complicate the sentencing proceeding.

¹⁶ If the offense is based upon the defendant “engage[ing] in conduct involving the sale or purchase” of wood, the market value of the wood must exceed \$350 in order for the crime to be a felony. 16 U.S.C. § 3373(d)(1)(B).

product derived from such wood) *or* (3) without the payment of appropriate royalties, taxes, or stumpage fees for such timber.¹⁷

It is significant that apart from the aforementioned felony offense, the Lacey Act provides a criminal misdemeanor offense for instances in which it cannot be established that the person *knew* that the wood was illegally harvested, but can be demonstrated that “*in the exercise of due care should have known* [that the wood was illegally harvested, etc.]” This may be thought of as a “negligence” offense. For example, if an importer learned that timber originating in Cambodia (a country thought to have a very high percentage of illegally harvested hardwoods¹⁸) supplied the veneer for hardwood plywood it was purchasing from a Chinese manufacturer, further inquiry into the legal origin of the veneer would be prudent, and failure to do so might show a lack of due care.¹⁹ This is critically important because in many instances it may be difficult or impossible to show that the importer had actual knowledge that the specific wood being imported into the United States was taken from a prohibited area, while it might be far easier to demonstrate that the circumstances surrounding the wood product in question – including the species of wood, the country of origin, the price and other indicators should have caused the importer to seek additional information confirming the legality of the shipment – or to refuse to purchase or import the plywood absent such indication. Of course, apart from the proof of importer’s criminal intent, the government must be able to establish that the specific wood (or wood product derived there from) imported into the United States was in fact illegally harvested.

The person to be charged under the Lacey Act need not be the one who violated the foreign law; the timber and associated products become “tainted” even if someone else commits the foreign law violation. However, the defendant must know, or in the exercise of due care should know, about the underlying violation.

Lacey Act misdemeanor violations are punishable by up to one year of imprisonment and/or a \$100,000 fine for individuals, while businesses are subject to a \$200,000 fine.²⁰ All penalties under the Lacey Act are per violation. Both criminal and civil violations of the Lacey Act also subject the illegally imported wood (or wood product derived there from) to forfeiture to the government – and administrative forfeiture is also provided.²¹ Because illegally harvested wood is considered “contraband” under the Lacey Act, it would not be subject to the “innocent owner” defense often applied under U.S. law²² –

¹⁷ 16 U.S.C. §§ 3372(a) and 3373(d). The complete text of the Lacey Act is attached as Appendix A.

¹⁸ Seneca Creek study at 13.

¹⁹ Legal precedents under the Lacey Act suggest that courts will hold persons routinely involved in the business of wood and wood product importation to a relatively high standard of care, which implies a duty of reasonable inquiry when faced with facts casting doubt on the legality of the wood. It is unlikely that an unsupported letter from the overseas manufacturer asserting the legality of the wood would necessarily be viewed by prosecutors or courts as “due diligence.”

²⁰ The Lacey Act also provides civil penalties for violations deemed less serious, subjecting the violator to a \$10,000 penalty per violation. 16 U.S.C. § 3373(a).

²¹ 16 U.S.C. § 3374 and 50 C.F.R. § 12.23.

²² “[Wood] shall be subject to forfeiture . . . notwithstanding any culpability requirements . . .” 16 U.S.C. § 3374(a).

raising the odds of businesses that operate illegally suffering the loss of cargos worth millions of dollars.²³

Other U.S. criminal statutes may come into play in the event of the importation of illegally harvested wood, including, for example, criminal conspiracy, customs laws, the false statements statute, and even the money laundering statute. Further, it should be understood that while this Alert speaks largely in terms of “importers,” other persons who are involved in the export, purchase, or sale of the illegal wood – including those operating domestically in the U.S. – are also potentially liable under the Lacey Act, while other persons knowingly involved in the scheme to export illegal wood to the United States (e.g., logging companies, shipping lines, customs brokers, etc.) could be liable of conspiracy or other criminal statutes, depending upon the facts.



Broom and mop handles stacked for export to the United States. Our market power can be harnessed for positive change, or it can continue to perpetuate crimes against the forest and its defenders. © Sims/EIA/CIP

The use of the Lacey Act and associated statutes have made imprisonment for those convicted of trafficking in fish and wildlife common, particularly where the value of the illegal goods is great, as would potentially be the case with illegally imported wood. For example, individuals involved in a scheme to import millions of dollars worth of illegal (undersized) lobster into the United States received sentences of imprisonment in excess of eight years²⁴ – sending a powerful deterrent message to potential traffickers. There is no good reason why violation of the timber amendments would not be viewed by courts with equal seriousness.

What to Do If You Become Aware Of a Lacey Act Timber Amendment Violation

Given that these amendments only became law in May 2008 and the fact that no particular agency had previously been primarily responsible for promoting the importation of legal wood and wood products into the United States, primary agency responsibility for investigating possible Lacey Act timber amendment violations is still being determined.

Presently, the most effective practice is to contact the Environmental Crimes Section (“ECS”) of the U.S. Department of Justice with any pertinent information. ECS has national responsibility for the prosecution of environmental and conservation crimes. The two primary contacts are: John Webb, Assistant Section Chief,

²³ Moreover, upon criminal conviction under the Lacey Act, “[a]ll vessels, vehicles, aircraft, and other equipments 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). Given the substantial economic value of vessels and other conveyances, it is possible that transporters might be incentivized to help ensure the importation of legal wood.

²⁴ See http://www.usdoj.gov/enrd/Electronic_Reading_Room/lit_Accomplish_2001.html.

john.webb@usdoj.gov (202-305-0227) and Senior Trial Attorney, Elinor Colbourn, elinor.colbourn@usdoj.gov (202-305-0205).²⁵

Based on the U.S. Department of Justice’s experience with fish and wildlife trafficking, successfully prosecuting Lacey Act timber amendment violators will nearly always require the active cooperation of parties – including, among others, governmental agencies and non-governmental organizations – within the country or countries where the illegal wood originated or was manufactured. It is essential to the success of a Lacey Act criminal prosecution to be able to prove beyond a “reasonable doubt” the illegal origin of the timber, following its path step-by-step to the port of entry to the United States.

The evidence needed to support such a prosecution would typically take a number of different forms. The strongest evidence generally is that which can be corroborated by documents or other sources that have no stake in the outcome of the investigation. Some examples of particularly useful evidence include:

- Eyewitness accounts, preferably supported by photographic, global positioning systems (GPS), wood sampling and other electronically recorded or otherwise highly specific evidence.
- Documentary evidence, such as business records which identify and describe specific shipments of wood (e.g., the origin, type, quantity, etc. of wood), and the movement of specific wood (both in terms of physical transportation and control, as well as ownership). The importance of being able to show, beyond a reasonable doubt, that the wood or wood product arriving in the United States is the same as (or derived from) the timber illegally taken from a specific place cannot be overstated.
- Statements or admissions of individuals in the chain of commerce confirming knowledge that the wood was illegally harvested or of questionable origin, preferably supported by audio and/or video recording (or, at least, contemporaneous notes).
- Copies of (or, at least, specific reference to) the particular laws or regulations – certainly including permits – violated by the harvesting, sale, etc. of the suspect wood. **Note well:** Absent violation of specific statutes or properly promulgated regulations (including appropriately issued permits issued under such statutes or regulations), it would not be possible to pursue a case. For example, the mere fact that particular timber was harvested in a non-sustainable manner would ordinarily be insufficient grounds upon which to base a prosecution. Minimally, there would need to be a statutory or regulatory requirement specifying what practices are considered “non-sustainable” and a clear-cut violation of those practices.

Conclusion

Illegal logging is a serious international problem, which the United States has contributed to through being the world’s largest consumer of wood products without – prior to the

²⁵ ECS’ general phone number is 202-305-0321. Its mailing address is U.S. DOJ – Environment and Natural Resources Division, Environmental Crimes Section, P.O. Box 23985, L’Enfant Plaza Station, Washington, D.C. 20026-3985.

Lacey Act timber amendments – sufficient safeguards in place to assure the legality of the products that reach its shores. The Lacey Act provides a powerful tool to help deter those who would engage in the trafficking of illegally harvested timber and resulting wood products in the United States, ranging from the overseas manufacturer to the store selling the merchandise in the United States. Further, the declaration requirements of the Lacey Act should significantly increase the transparency of the wood products business in the U.S., and will enhance to ability of everyone in the chain of commerce from the importer to the retailer to the ultimate consumer to make responsible environmental decisions. Naturally, the Lacey Act is no substitute for the commitment of producer countries to effectively police compliance with their own forestry requirements, thereby promoting good governance, ensuring receipt of fair and appropriate tax revenue from the sale of this valuable commodity and enabling sustainable development and protection of ecosystem assets. Working in close partnership with U.S. law enforcement, producer and manufacturer country governmental agencies, NGOs and other interested parties can help ensure that illegal logging and the illicit commerce stemming from it becomes an increasingly unattractive proposition.

Please address any suggestions, comments or questions concerning the Lacey Act amendments to Durwood Zaelke, Director of the INECE Secretariat, at zaelke@inece.org or Peter Murtha, on detail to the INECE Secretariat from U.S. EPA's Office of Enforcement and Compliance Assurance, at pmurtha@inece.org.

Attachment: Lacey Act: <http://inece.org/climate/LaceyActAmendments.pdf>.