

THE LACEY ACT AMENDMENTS AND UNITED STATES' POLICING OF INTERNATIONAL TRADE

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I. INTRODUCTION

The issue of the illegal logging trade has stayed quietly out of the public eye for the past several years.¹ Forests have become crowded out of public consciousness by bigger, more immediate global issues, such as the economy, terrorism, and global-warming.² When a little known United States law called the Lacey Act was amended in 2008 to address illegal logging, few outside the logging industry took note.³ That changed in August 2011, when the famous Gibson Guitar company was raided for the second time by federal agents for “fraudulently labeled” ebony that was illegally exported from India.⁴

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1. See JIM DOUGLAS & MARKKU SIMULA, *THE FUTURE OF THE WORLD'S FORESTS: IDEAS VS IDEOLOGIES* 21 (2010).

2. *Id.* Ironically, “global warming should be driving a new focus on the primary importance of retaining forests” because the loss of the planet’s forest cover is considered to be one of the primary causes of global warming. *Id.*; see *Deforestation Causes Global Warming*, FOOD AND AGRIC. ORG. OF THE UNITED NATIONS (Sept. 4, 2006), <http://www.fao.org/newsroom/en/news/2006/1000385/index.html> (commenting that at least a quarter of greenhouse gases released into the atmosphere each year is caused by deforestation).

3. See Victor J. Rocco, *Wildlife Conservation Under the Lacey Act: International Cooperation or Legal Imperialism?*, 80 N.Y. ST. B.J. 10, 11 (2008) (“The Lacey Act is . . . unknown even to many experienced criminal lawyers.”). The 2008 amendments create a “state of uncertainty about how to comply with . . . obligations under the Lacey Act Amendments of 2008.” Rachel Saltzman, *Establishing A “Due Care” Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1, 7 (2010). See *infra* Parts III and IV.

4. James R. Hagerty & Kris Maher, *Gibson Guitar Wails on Federal Raid*, WALL ST. J., Sept. 1, 2011, at B1, available at <http://online.wsj.com/article/SB10001424053111903895904576542942027859286.html> [hereinafter *Gibson Guitar Wails*]. Gibson’s chief executive officer claims “that a broker probably made a mistake in labeling the goods but that the sale was legal and approved by Indian authorities.” *Id.*

When the United States amended the Lacey Act, it became the first country to adopt a law making it illegal to import plants or plant products that are acquired in violation of another country's laws.⁵ The amended law aims to control the demand side of the illegal timber trade, and as the United States is one of the largest consumers of wood and wood products in the world,⁶ it follows that it fuels demand for illegal timber. In 2006, the estimated value of U.S. consumption of potentially illegally-sourced timber was \$3.8 billion.⁷ By closing off the largest market for timber, the Lacey Act Amendments are expected to have a substantial effect on the illegal logging trade.⁸

For domestic and foreign industries, the raid on Gibson Guitar brings into focus the potentially over-burdensome compliance costs that the Lacey Act Amendments carry with them.⁹ As other countries consider adopting similar laws to the Lacey Act, questions concerning the overall global effectiveness of laws like the Lacey Act are raised. First, these laws only target the demand-side of the illegal logging equation, without touching the supply-side factors that make illegal logging profitable.¹⁰ Second, a patchwork of such laws in all major import countries would create huge compliance burdens for the companies making legal imports.¹¹

5. *US Lacey Act*, ILLEGAL-LOGGING.INFO, http://www.illegal-logging.info/approach.php?a_id=202 (last visited Oct. 27, 2012) [hereinafter *Illegal-Logging*].

6. *Recent Amendments to U.S. Lacey Act Should Help Protect Forests Worldwide*, INT'L NETWORK FOR ENVTL. COMPLIANCE AND ENFORCEMENT, 8, http://inece.org/climate/ClimateComplianceAlert_LaceyAct.pdf (last visited Feb. 6, 2013) [hereinafter INECE]; *U.S. Recognized for 2008 Lacey Act Amendment*, HARDWOOD FLOORS (July 11, 2011), <http://hardwoodfloorsmag.com/editors/blog/default.aspx?id=529>.

7. *Lacey Act Background*, ENVTL. INVESTIGATION AGENCY, http://www.eia-global.org/forests_for_the_world/Lacey_Act_Background.html (last visited Oct. 25, 2012) [hereinafter EIA]; INECE, *supra* note 6, at 2–3.

8. See INECE, *supra* note 6, at 2–3, 9 (explaining how new requirements will greatly improve the transparency of the pathway of wood entering the United States).

9. Craig Havighurst, *Why Gibson Guitar was Raided by the Justice Department*, NATIONAL PUBLIC RADIO BLOG: THE RECORD (Aug. 31, 2011, 4:00PM), <http://www.npr.org/blogs/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department>.

10. See DOUGLAS & SIMULA, *supra* note 1, at 75 (pointing out that unilateral measures like the Lacey Act are binding on importers and not exporters).

11. *Id.* at 74; *Lacey Act*, RETAIL INDUS. LEADERS ASS'N, 1 (June 22, 2012),

In Part II, this Comment describes the Lacey Act and how the 2008 Amendments modified the pre-existing statute. Part III discusses the illegal logging trade and the reasons behind amending the Lacey Act, including the environmental impacts and organized crime, as well as the impacts of illegal logging on the United States' domestic industry and prior international efforts to stop illegal logging. Part IV analyzes some of the implementation issues within the Lacey Act Amendments, specifically the lack of a *de minimis* exception provision in the statute, as well as the inadequacies inherent in the model of Lacey Act as a solution for ultimately stamping out illegal logging. Part IV also examines steps that the international community should take as a part of a multilateral agreement that fully addresses the problem of illegal logging.

II. THE LACEY ACT AMENDMENTS

A. *The History of the Lacey Act*

The Lacey Act of 1900 represents one of the United States' earliest attempts at wildlife protection and targeted trafficking in "illegal" wildlife, fish, and plants.¹² The word "plant" in earlier versions of the statute only encompassed endangered plants and non-timber plant species.¹³ Industry and environmental groups lobbied for the 2008 Amendments. The American wood-products industry argued that illegal timber "resulted in unfairly low prices for imported wood" which consequently hurt U.S. jobs.¹⁴ Prior to the passage of the 2008

<http://www.rila.org/email/Lacey-Act.pdf> ("[T]he Lacey Act requirements could pose an unworkable burden on importers and raise a significant barrier on trade.").

12. Lacey Act Implementation Plan: Definitions for Exempt and Regulated Articles, 75 Fed. Reg. 46859 (proposed Aug. 4, 2010) (to be codified at 7 C.F.R. pt. 357) [hereinafter Implementation Plan].

13. *Lacey Act Amendment: Complete List of Questions and Answers*, ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T. OF AGRIC., Question 3 (Feb. 16, 2012), http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf [hereinafter *Lacey Act FAQ*].

14. Kris Maher & James R. Hagerty, *Forestry Law Splits Wood Industry*, WALL ST. J., Sept. 2, 2011, at B2, available at <http://online.wsj.com/article/SB10001424053111903895904576544930331756462.html?KEYWORDS=Forestry+Law+Splits+Wood+Industry&mg=com-wsj> [hereinafter *Forestry Law Splits Wood Industry*].

Lacey Act Amendments, no U.S. law to prevent the importation or sale of illegal wood in the United States.¹⁵ Numerous calls for laws prohibiting the sale of illegally sourced timber have been made,¹⁶ and the United States statute is one of the first of its kind internationally.¹⁷

As a part of the 2008 Amendments, Congress expanded the Lacey Act's definition of "plant."¹⁸ The 2008 Amendments also made it illegal for a person or organization to "import, export . . . or purchase in interstate or *foreign commerce* any plant . . . taken in violation of any Federal, State, tribal, or *foreign law* that protects plants" and "to make or submit any false record, account, or label for, or any false identification of, any plant covered by the Act."¹⁹ Importers now must also file an import declaration form for certain plants and plant products, and the form must accompany all shipments into the United States.²⁰

15. EIA, *supra* note 7 ("The problem [became] so pervasive that the U.S. Capitol building itself came close to hanging Honduran mahogany doors at high risk of illegal origin."). Besides the Lacey Act Amendments, the U.S.-Peru Free Trade Agreement of 2007, which went into effect in 2008, "prohibit[s] the import into the United States of timber and other plants or plant products obtained or exported in violation of foreign conservation laws" and "obligate[s] Peru to strengthen its capacity to enforce regulations on forest management and timber trade, and to conduct audits and investigations of Peruvian timber producers and shipments upon the request of the United States." David R. Downes et al., *International Environmental Law*, 43 INT'L LAW. 837, 852 (2009) (discussing Free Trade Agreement, U.S.-Peru, Apr. 12, 2007). This multilateral agreement is "unique in international law." *Id.* at 852.

16. See e.g., Faith Doherty, *Illegal Logging and the Illegal Trade in Timber and Wood Products: Fuelling Conflict*, in FROM EARLY WARNING TO EARLY ACTION? 303, 304, available at http://eeas.europa.eu/ifs/publications/book_2_en.htm (proposing that the European Union advance laws prohibiting the sale of illegal timber); DUNCAN BRACK ET AL., ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, CONTROLLING THE INTERNATIONAL TRADE IN ILLEGALLY LOGGED TIMBER AND WOOD PRODUCTS 4 (2002) ("[E]nding market share for illegal timber and wood products . . . would require new legislation . . .") [hereinafter ROYAL INSTITUTE].

17. *Illegal-Logging*, *supra* note 5.

18. *Lacey Act FAQ*, *supra* note 13, Question 42.

19. Implementation Plan, *supra* note 12 (emphasis added).

20. *Id.*; *The GFTN Guide to Responsible Sourcing*, WORLD WILDLIFE FUND, <http://sourcing.gftn.panda.org/index.php?id=27> (last visited Oct. 26, 2012).

B. *The 2008 Amendments*

The biggest change in the Lacey Act is the new definition of the word “plant.”²¹ Under the prior version of the statute, a “plant” was (a) “any wild member of the plant kingdom, including roots, seeds, and other parts thereof (but excluding common food crops and cultivars) which is indigenous to any State[,]” and (b) endangered according to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)²² or state law.²³ Now, a plant is defined as “any wild member of the plant kingdom, including roots, seeds, *parts, and products thereof, and including trees from either natural or planted forest stands.*”²⁴ Three categories of plants are exempt — common cultivators other than trees and common food crops, scientific specimens used only for research or laboratory work, and plants that are or are going to be planted or replanted.²⁵

C. *“Prohibited Acts” Under the 2008 Amendments*

This Comment focuses on the sections of the Lacey Act

21. PERVAZE A. SHEIKH, CONG. RESEARCH SERV., R42119, *THE LACEY ACT: COMPLIANCE ISSUES RELATED TO IMPORTING PLANTS AND PLANT PRODUCTS 2* (2012) (“The 2008 amendments . . . also expand the definition of a plant to include *any* plants (including foreign plants), whereas before it referred only to plants indigenous to any state or associated commonwealths, territories, or possessions of the United States.”).

22. 16 U.S.C. § 3371(f) (Supp. III 2003). The Convention on the International Trade in Endangered Species of Wild Fauna and Flora, of which the United States is a party, subjects international trade in certain plant and animal species to controls based on the degree of protection needed. Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 108, 243 U.N.T.S. 993, *available at* <http://www.cites.org/eng/app/index.php> [hereinafter CITES]. Appendix I includes wood that is threatened with extinction and that may not be traded commercially internationally; Appendix II includes wood that is not yet threatened with extinction and that may be traded internationally with an export permit; Appendix III includes wood that comes from a party that regulates its trade and that needs cooperation to prevent illegal exploitation, and trade of this wood is only allowed with permits. *Id.* at art. II. CITES is still applicable under the revised Lacey Act. 16 U.S.C. § 3371(f)(3)(A) (Supp. II 2008).

23. 16 U.S.C. § 3371(f)(B) (Supp. III 2003).

24. 16 U.S.C. § 3371(f)(1) (Supp. II 2008) (emphasis added).

25. Implementation Plan, *supra* note 12. The scientific specimen and the planting/replanting exceptions do not apply if the plant is listed under CITES, the Endangered Species Act of 1973, or under any State conservation law as “indigenous to the State and . . . threatened with extinction.” 16 U.S.C. § 3371(f)(3) (Supp. II 2008).

involving foreign law violations.²⁶ Under section 3372(a)(2)(B), the Lacey Act now makes a person criminally liable if they:

- “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—any plant
- (i) taken, possessed, transported, or sold in violation of . . . any foreign law . . . that protects plants or that regulates—
 - (I) the theft of plants;
 - (II) the taking of plants from a park, forest reserve, or other officially protected area;
 - (III) the taking of plants from an officially designated area; or
 - (IV) the taking of plants without, or contrary to, required authorization;
 - (ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation . . . any foreign law; or
 - (iii) taken, possessed, transported, or sold in violation of any limitation . . . under any foreign law, governing the export or transshipment of plants.”²⁷

The unusual feature of the 2008 Amendments is that a violation of U.S. law occurs through a violation of foreign law.²⁸ Essentially, the mechanism for violating this section of the Lacey Act is solely based on foreign law. This means, for instance, that a U.S. company that imports a shipment of wood that was illegally cut down, say, from a nature preserve in Indonesia, but otherwise has complied with all import regulations that pertain to U.S. law, is now criminally and civilly liable in the United States.

26. The Lacey Act also includes prohibitions on acts in violation of U.S. laws, treaties and regulations, Indian tribal laws, and laws and regulations of the states. 16 U.S.C. § 3372(a)(1)–(2) (Supp. II 2008).

27. 16 U.S.C. § 3372(a)(2)(B) (Supp. II 2008). The prior version of the statute read “any plant taken, possessed, transported, or sold in violation of any law or regulation of any State . . .” 16 U.S.C. § 3371(a)(3)(B) (Supp. II 2003).

28. 16 U.S.C. § 3372(a) (Supp. II 2008).

D. *The Labeling Requirement and the Import Declaration*

Another addition to the Lacey Act is the import declaration requirement for plant products.²⁹ Section 3372(f) requires that each plant shipment be accompanied by a declaration form in order to be imported into the United States.³⁰ The declaration must contain the scientific name of the plant (including the genus and species), the value of the importation, the quantity of the plant, and the name of the country from which the plant was taken.³¹ The Secretary of Agriculture and the Secretary of the Interior are responsible for delineating the regulations to carry out this section of the act.³²

E. *Penalties and Sanctions*

There are three basic types of penalties under the Lacey Act—civil, criminal, and forfeiture.³³ Civil penalties may be assessed for a sum up to \$10,000 “against a party who in the exercise of due care should have known of the illegal nature of the plant . . . or who knowingly commits a false labeling offense or knowingly violates the declaration requirements.”³⁴ An unknowing violation of the import declaration has a penalty of up to \$250.³⁵

Criminal penalties range from misdemeanor charges to felony charges.³⁶ The degree of a criminal penalty under the Lacey Act hinges on a defendant’s knowledge and the illegality

29. 16 U.S.C. § 3372(f)(1) (Supp. II 2008).

30. *Id.*; see *Sample Plant and Plant Product Declaration Form*, U.S. DEP’T. OF AGRIC., available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/SampleForm.pdf [hereinafter *Sample Form*] (providing an example of a filled-out Lacey Act Declaration Form).

31. 16 U.S.C. § 3372(f)(1); Gary A. Jones, *The Lacey Act*, PRINTING INDUSTRIES OF AMERICA: THE MAGAZINE, Sept. 2010, at 46.

32. 16 U.S.C. § 3376(e) (Supp. II 2008); Implementation of Revised Lacey Act Provisions, 76 Fed. Reg. 10874, 10875 (notice and request for information provided Feb. 28, 2011).

33. 16 U.S.C. §§ 3373–3374 (2006); *Lacey Act FAQ*, *supra* note 13, Question 41.

34. *Lacey Act FAQ*, *supra* note 13, Question 41; 16 U.S.C. § 3373(a)(1) (Supp. II 2008).

35. 16 U.S.C. § 3373(a)(2) (Supp. II 2008); *Lacey Act FAQ*, *supra* note 13, Question 41.

36. *Lacey Act FAQ*, *supra* note 13, Question 41; 16 U.S.C. § 3373(d) (Supp. II 2008).

of the defendant's conduct.³⁷ A felony under the Lacey Act occurs when the defendant, knowing the timber involved is illegally acquired, then "knowingly imports or exports" in violation of the Lacey Act or "knowingly engag[es]" in conduct that involves (a) the sale or purchase of, (b) the offer of sale or purchase of, or (c) the intent to sell or purchase plants with a market value in excess of \$350.³⁸ A felony carries a fine of up to \$250,000 for individuals and \$500,000 for organizations or twice the gross gain or loss, and up to five years in prison, or both per violation.³⁹

A misdemeanor under the Lacey Act occurs when a person "knowingly engages in conduct prohibited by" the Lacey Act and should have known in the exercise of due care that the plant was illegal.⁴⁰ A misdemeanor carries a fine of up to \$100,000 for individuals and \$200,000 for organizations, or up to one year in prison, or both for each violation.⁴¹

Finally, all illegally obtained timber is subject to strict-liability forfeiture to the United States Government "notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution."⁴²

37. *Lacey Act FAQ*, *supra* note 13, Question 41; 16 U.S.C. § 3373(d).

38. 16 U.S.C. § 3373(d)(1) (Supp. II 2008); *Lacey Act FAQ*, *supra* note 13, Question 41.

39. *Lacey Act FAQ*, *supra* note 13, Question 41. The statutory provisions of 16 U.S.C. § 3373(d)(1) actually state that the fine should be no more than \$20,000. 16 U.S.C. 3373(d)(1) (Supp. II 2008). However, under 18 U.S.C. § 3571, which raises the maximum permissible fines for Federal criminal offenses, the maximum fine for a felony violation of the Lacey Act would be \$250,000 for individuals and \$500,000 for organizations. 18 U.S.C. § 3571(b)(3), (c)(3) (Supp. II 2008). Under § 3571(e), maximum permissible fines are applicable unless a law sets out no fine or specifically states § 3571 does not apply; the Lacey Act does not fit either of these exceptions. 18 U.S.C. § 3571(e) (Supp. II 2008); Jones, *supra* note 31, at 47.

40. 16 U.S.C. § 3373(d)(2) (Supp. II 2008); *Lacey Act FAQ*, *supra* note 13, Question 41.

41. The statutory provision allows for a \$10,000 fine. 16 U.S.C. § 3373(d)(2). *But see* 18 U.S.C. 3571(b)(5), (c)(5) for the maximum fine that can be assessed for a Federal misdemeanor. *See also Lacey Act FAQ*, *supra* note 13, Question 41.

42. 16 U.S.C. § 3374(a)(1) (Supp. II 2008).

III. ILLEGAL LOGGING—A GLOBAL PROBLEM

A. *What is Illegal Logging and Why Was the Lacey Act Amended?*

Illegal wood is “defined as wood that is sold below market price or wood cut in violation of treaties, laws and regulations.”⁴³ Illegal logging activity consists of (a) harvesting in parks or reserves, (b) harvesting outside or in excess of concession limits, (c) failure to pay royalties or taxes, (d) intentional or misclassification or undervaluation of traded products, (e) violation of export bans, (f) harvesting protected species, (g) corruption and bribery, and (h) imports from illegal sources.⁴⁴ At least ten percent of all logging is estimated to be illegal, with illegal wood being “purchased . . . for one-half the cost of legally harvested and documented wood products.”⁴⁵

Though the illegal logging trade can involve woods that are legal species and readily available like oak or pine, the rare woods involved in the trade are protected species that are incredibly valuable. The Madagascar wood trade in ebony, for instance, has been called the “equivalent of Africa’s blood diamonds.”⁴⁶ The Lacey Act Amendments are meant to attack the issue of illegal logging on four fronts: protecting the environment,⁴⁷ helping conservation efforts,⁴⁸ fighting organized

43. Heath E. Combs, *Updated Lacey Act Becomes World’s First Ban on Illegal Logging: Focus on Supply Chain Could Affect Importers*, FURNITURE TODAY (June 23, 2008), http://www.furnituretoday.com/article/46783Updated_Lacey_Act_becomes_world_s_first_ban_on_illegal_logging.php.

44. See SENECA CREEK ASSOCS. & WOOD RESOURCES INT’L, “ILLEGAL” LOGGING AND GLOBAL WOOD MARKETS: THE COMPETITIVE IMPACTS ON THE U.S. WOOD PRODUCTS INDUSTRY 6 (2004) [hereinafter SENECA CREEK] (including a table listing the types of illegal logging activities).

45. Combs, *supra* note 43; SENECA CREEK, *supra* note 44, at 19. There is an estimated \$150 billion world trade value for wood products, meaning the impact of illegal wood hovers at around 15 billion dollars. *Id.* “This includes only the impact on production and trade of logs, lumber, and wood panels, and does not include the impact on secondary wood products, furniture, or pulp and paper production and trade.” *Id.*

46. Eric Felten, *Guitar Frets: Environmental Enforcement Leaves Musicians in Fear*, WALL ST. J., Aug. 26, 2011, at D8 [hereinafter *Guitar Frets*], available at <http://online.wsj.com/article/SB10001424053111904787404576530520471223268.html>. Madagascar wood is said to inhabit a “grey market”. *Gibson Guitar Wails*, *supra* note 4.

47. See Combs, *supra* note 43 (indicating the goal of the amendments is to protect

crime,⁴⁹ and protecting American jobs.⁵⁰

B. Environmental Protection Impacts: Deforestation and Conservation

The amount of global deforestation is vast, “total[ing] nearly 9.4 million hectares per year.”⁵¹ The impact from heavy deforestation caused by logging encompasses everything from landslides and property destruction to destroying biodiversity in deforested areas and increasing global carbon emissions.⁵² One must keep in mind that not all deforestation is per se bad, as it can be done legally for agricultural purposes that are “economically and socially desirable.”⁵³ To determine the desirability of deforestation, one must look at the local mix of economic motivations.⁵⁴ Illegal deforestation can be carried out by many types of actors for many different purposes ranging from “corporate agricultural interests to ranchers to poor slash-and-burn farmers desperately seeking a livelihood.”⁵⁵

Unchecked, illegal logging has become a huge problem for countries like the Philippines and Thailand “where valuable

forests).

48. EIA, *supra* note 7.

49. Sean H. Waite, *Blood Forests: Post Lacey Act, Why Cohesive Global Governance is Essential to Extinguish the Market for Illegally Harvested Timber*, 2 SEATTLE J. ENVTL. L. 317, 320 (2012).

50. See Combs, *supra* note 43 (estimating \$460 million was lost in the U.S. in 2007 because of illegally harvested wood).

51. THE WORLD BANK, STRENGTHENING FOREST LAW ENFORCEMENT AND GOVERNANCE: ADDRESSING A SYSTEMIC CONSTRAINT TO SUSTAINABLE DEVELOPMENT 13 (2006) [hereinafter WORLD BANK]. The total deforestation of the planet is estimated to consist of about a fifty percent decline in the world’s forests over the past 10,000 years. Raffi Khatchadourian, *The Stolen Forests: Inside the Covert War on Illegal Logging*, THE NEW YORKER, Oct. 6, 2008, at 64, 66, available at http://www.newyorker.com/reporting/2008/10/06/081006fa_fact_khatchadourian?currentPage=al.

52. WORLD BANK, *supra* note 51, at 2; DOUGLAS & SIMULA, *supra* note 1, at 198 (“Deforestation must be slowed significantly if there is to be any change of bringing anthropogenic emissions of greenhouse gases down to the levels needed to avoid catastrophic climate change.”).

53. WORLD BANK, *supra* note 51, at 13.

54. DOUGLAS & SIMULA, *supra* note 1, at 202.

55. WORLD BANK, *supra* note 51, at 13.

timber from unprotected forests has almost disappeared.”⁵⁶ Much of this logging is done in blatant violation of existing forest laws.⁵⁷ Weak legal protections and corruption are especially damaging for endangered forests.⁵⁸ In western Madagascar, a study by World Wildlife Fund Madagascar found that “only six species of rosewood are left from previously 15[,] . . . [n]o rosewood trees with a trunk diameter of more than 30 centimetres have been found[, and] [t]hree species of rosewood are very unlikely to regenerate.”⁵⁹ The loggers of Madagascar’s forests do not stop at felling endangered trees; they also hunt the endangered lemur population.⁶⁰ Despite these findings, the Malagasy government has continued to authorize the export of rosewood.⁶¹ The “plundering of Madagascar’s forests, particularly the protected areas” threatens biodiversity, hurts the local population by taking away jobs, and damages popular tourist sites.⁶²

C. The Role of Organized Crime and Government Corruption

Organized crime also plays a large part in the illegal logging industry.⁶³ Considering the huge financial incentives at stake,

56. CUT & RUN: ILLEGAL LOGGING & TIMBER TRADE IN THE TROPICS 12 (Rob Glastra ed. 1999).

57. See *id.* at 9–19 (describing various regions around the world where logging takes place in illegal and unsustainable ways). See generally Khatchadourian, *supra* note 51, at 64 (reporting on illegal logging investigations by the Environmental Investigation Agency in China and Russia); SENECA CREEK, *supra* note 44, at 137 (“China’s sources for hardwood log imports reads like a ‘Who’s Who’ of countries with problems with illegal logging. Russian hardwood log exports . . . have a higher percentage of suspicious wood than . . . softwood log exports to China, because these [have a] . . . higher value per log and the incentive for cheating is greater.”).

58. See *Loophole Looms for Illegal Loggers of Rare Madagascar Woods*, SCIENCE CENTRIC (Oct. 10, 2009), <http://www.sciencecentric.com/news/09101012-loophole-looms-illegal-loggers-rare-madagascar-woods.html> (discussing how the authorization from the Malagasy transitional government “risks opening a loophole for the legal export of illegally cut timber and encouraging further assaults on Madagascar’s endangered forests and wildlife”).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See, e.g., Annie-Marie O’Conner & William Booth, *In Mexico, Forests Fall Prey*

this should come as no surprise, as there can be a “wide gap in cost between legitimate, legally procured timber and illegal timber.”⁶⁴ The market for this wood consists of the developed, industrialized nations where seventeen percent of the world’s population resides; this seventeen percent consumes three-quarters of the world’s traded timber.⁶⁵ The magnitude of these countries’ appetite for timber is only expected to grow, with “[t]he three dominant industrial wood importing markets — Western Europe, Japan and North America— . . . all expected to more than double their net imports of wood products by 2020.”⁶⁶ China’s market for wood is also booming.⁶⁷ This huge, growing global market for wood therefore provides enormous financial incentives to engage in illegal logging, and it is little wonder that organized crime has infiltrated the logging industry.⁶⁸

Weak and corrupt local governments have supported the rise of organized crime in the illegal logging industry. These governments, usually in smaller developing countries, partner up with transnational logging corporations and then adopt a hands-off approach in their dealings with these companies that helps to facilitate illegal logging.⁶⁹ More than a “fifth of the world’s wood comes from countries that have serious problems enforcing their timber laws.”⁷⁰ Any attempts at enforcement of timber laws in these countries end up hampered by the undue

to Crime Mafias, WASH. POST (July 6, 2011), http://www.washingtonpost.com/world/in-mexico-forests-fall-prey-to-crime-mafias/2011/07/03/gIQAUApl0H_story.html (“Mexico has faced illegal logging for years, but now security experts say that Mexican cartels appear to be entering into the illicit trade, either by orchestrating the logging or serving as armed muscle and then taking their cut.”).

64. SENECA CREEK, *supra* note 44, at ES-2.

65. CUT & RUN, *supra* note 56, at 4.

66. ROYAL INSTITUTE, *supra* note 16, at 10; *see also* CUT & RUN, *supra* note 56, at 4 (noting that “hardwood production rose by 54% between 1966 and 1988”).

67. ROYAL INSTITUTE, *supra* note 16, at 10 (reporting that China is “the world’s second largest consumer of forest products by value, and by volume it ranks second in consumption of wood-based panels, second for paper and paperboard products and third for sawnwood”).

68. *See* Khatchadourian, *supra* note 51, at 64 (“[The flow of illegal wood has caused the emergence of] an entire criminal branch connected with the preparation, storage, transportation, and selling of stolen timber.”)

69. ROYAL INSTITUTE, *supra* note 16, at 12.

70. Khatchadourian, *supra* note 51, at 66.

political influence of ex-politicians and ex-military officers, poor government policies, and poor enforcement systems.⁷¹ Traditionally, local politicians have used timber concessions as a form of political capital to reward allies and extend patronage with little thought to environmental concerns.⁷²

Examples of these situations are numerous.⁷³ For instance, an in-depth investigation into Japanese and Malaysian logging companies in Papua New Guinea found a range of offenses from “[a] widespread abuse of power, corruption of cabinet ministers, transfer pricing as a standard practice, offences against local community rights, and blatant violations of regulations on the forest floor.”⁷⁴ The judge who headed the investigatory report ended up becoming the target of an assassination attempt, while a corrupt official named in the report was later named the deputy prime minister.⁷⁵ Meanwhile, little changed with the commission’s findings, and illegal logging has continued to be aided and abetted in Papua New Guinea.⁷⁶ The estimated loss to national income in Papua New Guinea from illegal logging is around \$180 million.⁷⁷

Compounding the problem of organized crime and corrupt local governments is that “tropical forests are very often regarded by economists as a resource that can kick-start an economy in a post-conflict or economically vulnerable country.”⁷⁸

71. ROYAL INSTITUTE, *supra* note 16, at 12; CUT & RUN, *supra* note 56, at 11.

72. CUT & RUN, *supra* note 56, at 11.

73. *Id.* at 9–19.

74. *Id.* at 12–13.

75. *Id.* at 13.

76. *Id.*

77. *See id.* (requiring conversion from 300 million Australian dollars at a 1.675 Australian dollar to 1 US dollar exchange). Since the publishing of the commission’s report, logging in Papua New Guinea has become more concentrated, with a Malaysian company named Rimbunan Hijau controlling eighty-six percent of logging. *Id.* Additionally, a new plan for national forests ended up setting aside more than half of the forests in the country for logging, tripling existing logging concessions to even more economically unsustainable levels. *Id.*

78. *Fighting Exploitation of Natural Resources and International Trade Systems*, in FROM EARLY WARNING TO EARLY ACTION? 307, 307 (Andrea Ricci ed., 2008), available at http://eeas.europa.eu/ifs/publications/articles/book2/book%20vol2_part3_chapter40_interview%20%20fighting%20exploitation%20of%20natural%20resources%20and%20international%20trade%20systems_patrick%20alley.pdf.

Unfortunately, these plans often end up facilitating illegal logging and corruption, causing even more deforestation and poverty while not leading to the expected economic benefits.⁷⁹ There is a misconception that deforestation is progress, and many developing countries push for deforestation with policies that require citizens to clear land to claim ownership.⁸⁰

Some simply regard the loss of forests as a small price to pay for economic development.⁸¹ Essentially, state-owned forests have turned into a tragedy of the commons, with “[t]he fate of the tropical rainforest . . . as one of the largest examples—perhaps surpassed only by the world’s oceans.”⁸² It is difficult to persuade persons in impoverished areas, who may be occupying forest areas illegally, not to cut down trees, especially when those persons rely on subsistence agriculture, and logging companies will pay wages to cut and haul high-valued tropical hardwood trees.⁸³ The rural poverty that contributes to illegal logging and deforestation will need to be addressed as a part of this “land tenure problem”; any “long-term solutions to deforestation and illegal logging will require . . . economic development to provide jobs” for local people that do not involve cutting down local forests.⁸⁴ People who illegally occupy forests should be dealt with through policies that encourage jobs and legal development, not criminalization, to build for a sustainable future.⁸⁵

The weak oversight of logging companies by local

79. *Id.*

80. TRACER, THE ROUGH GUIDE TO TRACEABLE CERTIFIED FOREST PRODUCTS 18 (3d ed. 2011).

81. WORLD BANK, *supra* note 51, at 13; DOUGLAS & SIMULA, *supra* note 1, at 22. An annual forest loss of “a quarter or even a half of one percent” would be regarded as mattering “relatively little . . . in the larger task of economic development.” DOUGLAS & SIMULA, *supra* note 1, at 24.

82. DOUGLAS & SIMULA, *supra* note 1, at 83.

83. CUT & RUN, *supra* note 56, at 8. Even though “forest dwellers are only too aware of the long-term consequences of such cutting,” they participate because they “[have] no other way to support their families.” *Id.*

84. SENECA CREEK, *supra* note 44, at 59; CUT & RUN, *supra* note 56, at 8–9 (“Only when rural families have alternatives that allow them to live in dignity can the temptation to cut and sell . . . be at least partially overcome.”).

85. WORLD BANK, *supra* note 51, at 13.

governments is not helped by the lack of “international and national frameworks” regulating the operations of these companies.⁸⁶ Globalized, vertically integrated large companies can easily move to different countries to take advantage of higher profits and lower costs.⁸⁷ In a situation with hands-off governments and “unclear” trade practices, it is not difficult to imagine these companies taking advantage of the situation for quick profits.⁸⁸

Finally, one of the difficulties in dealing with the illegal logging trade is that timber is regularly traded internationally, and “the legality of any particular shipment of timber is based on paperwork” that can be forged or purchased through bribery.⁸⁹ Furniture, for instance, has a “complicated supply chain, with offshore manufacturers often using wood imported from a third country or countries, mak[ing] documentation . . . difficult.”⁹⁰ In 2009, \$2.6 billion in illegally sourced wood-based products went to the European Union from China and Southeast Asia, while China imported illegal timber worth \$870 million.⁹¹ Because legal timber looks like illegal timber, it is a simple matter to insert illegal timber into the legal supply chain.⁹² It is relatively easy to hide the nature and origin of the wood by forging papers, and without correct papers legal wood is indistinguishable from illegal wood, and so the illegal logging trade is free to continue responding to increased demand for hardwoods without getting caught.⁹³

Once illegal wood enters the supply chain, it can be impossible to determine legitimacy, and companies can easily “claim ignorance as to the ultimate origin” if anyone questions

86. CUT & RUN, *supra* note 56, at 7.

87. *Id.*

88. *Id.*

89. U.N. OFFICE ON DRUGS AND CRIME, *THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT* 10 (2010).

90. Powell Slaughter, *Lacey Act Looms: Lacey Act Regulations on Illegal Wood Have Teeth*, HOME FURNISHING BUS., Dec. 2009, at 36.

91. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 89, at 10.

92. SENECA CREEK, *supra* note 44, at ES-3 (noting that illegal timber is “relatively easy to merge into legitimate distribution”).

93. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 89, at 166.

the legality of the timber source.⁹⁴ Because timber is a product that can be bought and sold legally in the open market, buyers typically take the timber source on good faith or do not care.⁹⁵ This makes buyers targets of unscrupulous companies that can take advantage of buyer complacency.⁹⁶

D. The Impact of Illegal Logging on U.S. Industry

Illegal logging, besides hurting the environment and contributing to corruption and organized crime, is also hurtful to the legitimate logging industry.⁹⁷ Illegal wood is estimated to depress world prices by anywhere from seven to sixteen percent on average, and prices in the United States are estimated to be depressed by two to four percent.⁹⁸ Illegal logging hurts legitimate U.S. manufacturers because they have to “compete against imported, illegally harvested low-priced wood and wood products.”⁹⁹ Illegal logging also hurts the U.S. unemployment statistics; illegal logging is estimated to have contributed to the “logging, wood, paper and cabinetry industries [losing] 242,000 jobs, or roughly 23 percent of its workforce, since 2006.”¹⁰⁰

A 2004 industry report estimated that eliminating illegal logging would have created, during the period from 2003 to 2012, \$275 million in yearly “export opportunities for U.S. producers of sawnwood and panels” and brought the average

94. *Id.* at 278.

95. *Id.*

96. See SENECA CREEK, *supra* note 44, at 139 (“[T]he most common theme among Chinese companies [interviewed about illegal logging] was that, even if there were problems, the customers simply didn’t seem to care If the foreign countries permitted the trade, and if the customers didn’t care, the Chinese companies did not understand the problem.”).

97. *Id.* at ES-1.

98. *Id.* at ES-2. “Cost comparison between illegal and legal material is complex,” because companies may be paying lower prices for the logs themselves and can avoid taxes and labor laws, but may have to pay more in bribes and risks. *Id.* at ES-4. Additionally, there is a wide range in prices for tropical hardwood logs, and “if illegal mills focus on higher value logs, their average log cost might be higher than legal mills consuming lower value logs.” *Id.*

99. ALDA CHAN, *ILLEGAL LOGGING IN INDONESIA: THE ENVIRONMENTAL, ECONOMIC AND SOCIAL COSTS 2* (2010).

100. *Id.* (citing U.S. Bureau of Labor Statistics).

annual value of industrial roundwood exports up to \$186 million.¹⁰¹ The sum total of this projected value in exports is about \$460 million.¹⁰² These numbers represent the lost “opportunity costs for U.S. exporters” due to illegal logging.¹⁰³

Several wood products companies backed the 2008 Lacey Act Amendments on the grounds that the Amendments would help keep lower-priced illegally harvested wood from flooding out the market, while unions and nonprofit groups backed the Amendments to protect U.S. jobs and the environment.¹⁰⁴ The wood-products industry hopes that the 2008 Amendments mean that “more U.S. manufacturers using wood will seek to ensure they are buying from legal sources, helping domestic wood producers.”¹⁰⁵

E. Past International Efforts to Combat Illegal Logging

The Lacey Act is unique in its scope as the first ban on illegal logging in the world.¹⁰⁶ However, it is neither the first nor the only attempt made to combat illegal logging.¹⁰⁷ One earlier attempt by the United States was at the national level; called The President’s Initiative Against Illegal Logging (“PIAIL”), the program was launched under President Bush in July of 2003.¹⁰⁸ PIAIL “committ[ed] the U[nited] S[tates] to assisting developing countries in their efforts to combat illegal logging, including the sale and export of illegally harvested timber, and in fighting corruption in the forest sector.”¹⁰⁹ The

101. SENECA CREEK, *supra* note 44, at 26. The estimated values “are based on the assumption in the model that the effect of stopping illegal logging [would] lead to a reduction in supply by 2012 that is less than the reduction in illegal logging.” *Id.* Additionally, the “actual ability of U.S. wood producers to capture additional global market share in the absence of suspiciously produced material will be a function of many factors including the substitutability of U.S. species in particular markets or for particular end uses.” *Id.* at 27.

102. *Id.* at 26.

103. *Id.*

104. *Forestry Law Splits Wood Industry*, *supra* note 14.

105. *Id.*

106. Combs, *supra* note 43.

107. *Id.*

108. SENECA CREEK, *supra* note 44, at 31.

109. *Id.*

areas that PIAIL targeted were “the Congo Basin, the Amazon Basin and Central America and South and Southeast Asia.”¹¹⁰

The only enforceable international multilateral effort that has touched on illegal logging is the Convention on the International Trade in Endangered Species (CITES); the “enforcement provisions [are] for limit[ed] trade in certain plant and animal products.”¹¹¹ Each country who is a party to CITES has agreed to CITES’s limitations and restrictions on trading of the listed plant and animal species, and has “a designated CITES management authority” in charge of permits and trade regulation.¹¹² Under CITES, some species of wood are completely banned from global trade, while others are allowed to be traded with “either an export permit if originating in the country where it is listed, or a certificate of origin if from another country.”¹¹³

Another international effort is the Forest Law Enforcement and Governance (FLEG) Initiatives,¹¹⁴ which are cooperative in nature and are funded by the World Bank.¹¹⁵ In 2001, the first Initiative was held in East Asia, and since then, FLEG Initiatives have been created in Europe and Africa.¹¹⁶ So far, FLEG Initiatives have focused getting bilateral, regional, and multilateral agreements between “timber producing and consuming countries . . . to intensify national efforts [and] strengthen . . . collaboration to address violations of forest law and forest crime and in particular illegal logging and associated trade.”¹¹⁷ The European Union’s FLEG has a trade element to it (FLEGT) that utilizes an export licensing system implemented by voluntary “bilateral agreements with supplier countries” that

110. *Id.*

111. *Id.* at 29.

112. *Id.*

113. *Id.*

114. DOUGLAS & SIMULA, *supra* note 1, at 73–74; Nalin Kishor & Tapani Oksanen, *Combating Illegal Logging and Corruption in the Forestry Sector—Strengthening Forest Law Enforcement and Governance*, ENVIRONMENT MATTERS 12, 15 (2006), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/11/16/000310607_20061116144825/Rendered/PDF/380060Environment0matters0EM0601PUBLIC1.pdf.

115. SENECA CREEK, *supra* note 44, at 30, 34.

116. *Id.* at 29–30.

117. *Id.*

would ensure that wood exported to the European Union is legal.¹¹⁸ FLEGT “also encourages the development of public procurement policies, measures to prevent investment in activities that encourage illegal logging, encouragement for private sector initiatives to source only legal timber, and commitments to address conflict timber problems.”¹¹⁹

A bilateral plan like FLEGT for the United States has “several possible implications.”¹²⁰ FLEGT could create “more opportunities for U.S. exports in Europe” as imports from developing countries fall off due to the licensing requirement.¹²¹ If timber that previously would have gone to Europe now goes to Asia, U.S. exporters would have even more competition in those markets.¹²² Moreover, “it might be difficult to license only product[s] destined for Europe from partner countries and European firms may seek to have all timber licensed from the exporting country in order to spread the costs . . . [that] would [help] U.S. exporters, but harm U.S. importers.”¹²³

The plans outlined above are by no means exhaustive of the initiatives taken against illegal logging.¹²⁴ It is worth noting that plans such as the FLEG initiatives are completely voluntary in nature,¹²⁵ as opposed to the Lacey Act, which is a complete ban on illegal logging enforced with criminal and civil penalties.¹²⁶

IV. ANALYSIS

A. *The Need for a De Minimis Exception*

Labeling requirements have often been supported as a means of combating illegal trade.¹²⁷ The Lacey Act’s mandatory

118. *Id.* at 30.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.* at 29–31 (detailing a list of initiatives against illegal logging).

125. DOUGLAS & SIMULA, *supra* note 1, at 73.

126. Combs, *supra* note 43.

127. ROYAL INSTITUTE, *supra* note 16, at 20 (“Any system to control trade in illegal

labeling requirement for all imports is a noteworthy change for an industry that has previously only dealt with labeling requirements of a voluntary nature.¹²⁸ The labeling requirement will potentially have a large impact on American businesses, affecting everything from the printing industry,¹²⁹ home furnishings,¹³⁰ and small-time music instrument dealers.¹³¹ The requirement means that companies will have to do much more in-depth record-keeping on imported products, which can be especially difficult when products are composed of “different species from different forests” from different countries.¹³²

After the raid on Gibson Guitar, people who believed they could potentially be affected by the Lacey Act started paying more attention to its requirements. Owners of antique musical instruments, which are often made with woods such as ebony and rosewood, were being warned to not bring their instruments outside of the United States when traveling.¹³³ This is because upon return to the United States, the labeling requirements would require travelers to identify the species and country of origin, a troublesome matter for antique instruments with components of uncertain provenance.¹³⁴

Yet these fears may prove to be unfounded. Going after antiques would hardly be within the intent of the Lacey Act Amendments.¹³⁵ The Animal and Plant Health Inspection Service (APHIS) has attempted to provide a workaround for

timber requires harvested logs to be identified, inspected and documented . . . with subsequent cross-checking with cooperating importers.”); *SENECA CREEK*, *supra* note 44, at 32, 76, 87, 156.

128. 16 U.S.C. § 3372(f) (Supp. II 2008); *Slaughter*, *supra* note 90, at 36–37.

129. *Jones*, *supra* note 31, at 46–47.

130. *Slaughter*, *supra* note 90, at 36–37.

131. *Upfront: Mounting Concern Regarding The Lacey Act*, MUSICAL MERCHANDISE REVIEW, June 2011, at 8 [hereinafter *Upfront*]; *Guitar Frets*, *supra* note 46.

132. *Slaughter*, *supra* note 90, at 36–37 (describing challenges to the furniture industry, which usually has a “complicated supply chain”).

133. *Havighurst*, *supra* note 9.

134. *Guitar Frets*, *supra* note 46; *Havighurst*, *supra* note 9 (quoting George Gruhn, “one of the world’s top dealers” in antique instruments, “[The Lacey Act is] ‘a nightmare. . . I can’t help it if they used Brazilian rosewood on almost every guitar made prior to 1970. I’m not contributing to cutting down Brazilian rosewood today.’”).

135. *See* *Havighurst*, *supra* note 9 (“[E]verybody understands that the intent here is to reduce illegal logging . . .”).

items that contain reused plant materials or were made prior to the 2008 Amendments by allowing importers to declare that a product “was manufactured prior to May 22, 2008, and that in the exercise of due care the genus, species, and/or country of harvest is unknown.”¹³⁶ Importers utilizing this workaround must still provide “all known or reasonably knowable genus, species, and country of harvest information” and “certify that the declaration is correct to the best of his or her knowledge.”¹³⁷

As APHIS attempts to formulate regulations for the new Lacey Act provisions, there are several proposals in the works that should ease the minds of those who think the Justice Department will come knocking on their door.¹³⁸ One of these is a *de minimis* exception for items containing minimal amounts of plant material.¹³⁹ A *de minimis* exception would make the declaration requirements less burdensome for businesses that ship items with small amounts of plant material.¹⁴⁰

Supporting a *de minimis* exception would not violate the intent of the Lacey Act, as targeting items that contain “minimal amounts of non-listed (i.e., not of conservation concern) plant materials contained in an otherwise non-plant product, such as wooden buttons on a shirt” does little to advance its conservation goals.¹⁴¹ The United States also only has a finite

136. Implementation of Revised Lacey Act Provisions, 76 Fed. Reg. 38330–31 (proposed June 30, 2011) (to be codified at 7 C.F.R. pt. 357) [hereinafter Implementation June 2011].

137. *Id.*

138. See Havighurst, *supra* note 9 (noting “that the government has tried to create exemptions to cover vintage instruments”).

139. See *Lacey Act FAQ*, *supra* note 13, Question 9 (explaining that there is currently no *de minimis* exception to the Lacey Act, but the relevant amount of an item may be a factor in enforcement). The term “*de minimis*” is shorthand for “*de minimis non curat lex*,” or the principle that “the law does not concern itself with trifles.” Black’s Law Dictionary 496 (9th ed. 2009).

140. See *Upfront*, *supra* note 131, at 8 (“[E]xport[ing] a \$5 set of pearl dots for guitar fingerboard inlays requires over \$200 in permits and formal export documentation.”).

141. Implementation June 2011, *supra* note 136, at 38330–31 (describing the declaration requirements as not ideal for shipments containing minimal amounts of non-listed plant materials). The “listing” refers to items on CITES. *Id.* at 38331; CITES, *supra* note 22, at apps. I, II, III. In a case “[w]here a very small amount of product is found to be in a shipment but not in a declaration, it may indicate a circumstance in

amount of resources available that will be dedicated to enforcing the Lacey Act, and going after items that contain miniscule amounts of plant material is hardly an efficient use those resources.¹⁴² Recognizing this, APHIS is currently “considering the feasibility of defining a *de minimis* exception for products containing minimal amounts of plant material.”¹⁴³ A potential *de minimis* exception would likely be based on a percentage threshold of plant volume, weight, or value, or a combination thereof.¹⁴⁴

Support for a *de minimis* exception is very strong. The National Association of Music Merchants stated in their submission to APHIS that implementing such an exception would greatly assist producers and importers because they could then structure their business decisions to plan for compliance.¹⁴⁵ “Moreover, as the exception would not include species ‘of conservation concern,’ it would not undermine the overarching conservation goals of the Lacey Act.”¹⁴⁶ The Association of Global Automakers, Inc., wrote in their submission that “massive [very costly] changes to our supply chain practices and our automation systems would be required” to comply with the declaration requirement, as many motor vehicle parts contain

which the declaration was not knowingly false, and thus [there would be no] criminal violation.” *Lacey Act FAQ*, *supra* note 13, Question 9.

142. Letter from Sally Kay, President/CEO, and Jed Holland, Chairman, The Hosiery Ass’n, to Regulatory Analysis and Dev., APHIS (Aug. 24, 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2010-0129-0023> (responding to the request for public comment on the proposed Lacey Act import declaration requirements: Docket No. APHIS-2010-0219).

143. Implementation June 2011, *supra* note 136, at 38331.

144. *Id.* APHIS is also considering an approach where an item could be defined as made of “composite plant materials” and importers would have to identify the point of origin and declare any plant material over a given percentage in the item or declare the average percent composite plant material without naming the species, genus, and country of origin. *Id.*

145. Letter from Mary L. Luehresn, Dir. of Pub. Affairs and Gov’t Relations, Nat’l Ass’n of Music Merchants, to Regulatory Analysis and Dev., APHIS (Aug. 29, 2011), *available at* [http://www.namm.org/files/Lacey%20Act%20APHIS%20Implementation%20Plan%20Letter%20\(August%202011\).pdf](http://www.namm.org/files/Lacey%20Act%20APHIS%20Implementation%20Plan%20Letter%20(August%202011).pdf) (responding to the request for public comment on the proposed Lacey Act import declaration requirement in letter entitled “Re: Implementation of Revised Lacey Act Provisions Docket No. APHIS-2010-0129”).

146. *Id.*

small amounts of plant materials.¹⁴⁷

Even trading partners of the United States who are concerned about the impact of the Lacey Act have written to AHPIS in support of a *de minimis* exemption. Sweden, in its public comment, addressed recycled material as a concern, stating that that APHIS should “make permanent current practice to allow declarations of products made before May 22, 2008 to state . . . the genus, species and/or country of harvest is unknown [if] due care has been exercised.”¹⁴⁸ Sweden also believes that importers should be able to put “unknown” down for recycled materials so that importers’ use of recycled materials is not disincentivized.¹⁴⁹ The Japanese government submitted a comment requesting that pulp and paper products be excluded altogether from the declaration requirement.¹⁵⁰

147. Letter from Paul D. Ryan, Dir. of Pub. Affairs, Ass’n of Global Automakers, to Regulatory Analysis and Dev., APHIS (Aug. 25, 2011), *available at* <http://www.globalautomakers.org/media/agency-comments/comments-regarding-implementation-of-revised-lacey-act-provisions> (responding to the request for public comment on the proposed Lacey Act import declaration requirement in a letter entitled “Comments Regarding Implementation of Revised Lacey Act Provisions”). An antithetical point of view presented by the United Steelworkers Union (USW) is that APHIS should not make a blanket *de minimis* exception for plants made from composite plant materials because it is contrary to the administration’s carbon limiting policy and “paper and board is a substantial majority of wood-based trade the Lacey Act amendments were designed to regulate.” Letter from Holly R. Hart, Assistant to the President, Legislative Dir., United Steelworkers, to Regulatory Analysis and Dev., APHIS (Aug. 29, 2011), *available at* <http://www.regulations.gov#!documentDetail;D=APHIS-2010-0129-0036> (responding to the request for public comment on the proposed Lacey Act import declaration requirements in a letter entitled “RIN 0579-AD44-Implementation of Revised Lacey Act Provisions”). Additionally, USW contends that the identification for paper is not “prohibitively expensive” since private entities like the Rainforest Action Network have been able to analyze paper to get this information, and a public entity such as APHIS should be able to as well. *Id.*

148. Ministry for Foreign Affairs, Swed., Sweden’s Comments on the Implementation of the Revised Lacey Act Provisions, APHIS (2011), *available at* <http://www.regulations.gov#!documentDetail;D=APHIS-2010-0129-0018> (submitting a public comment in order to “work towards [the aim of the Lacey Act] without introducing unnecessary and disproportional trade obstacles to the detriment of serious operators”).

149. *Id.*

150. Gov’t of Japan, Comments by the Government of Japan on the Declaration Requirements Pursuant to the Implementation of Revised Lacey Act Provisions, APHIS (2011), *available at* <http://www.regulations.gov#!documentDetail;D=APHIS-2010-0129-0009>.

Even with a *de minimis* exception, Japan argues, “relevant Japanese industries would not be able to adapt to the declaration requirements in certain cases due to high mixing rates of those products . . . [and] the declaration requirements will discourage industry from using recycled materials.”¹⁵¹ Canada also expressed similar concerns regarding the paper industry and recycled products, and wrote in support of a *de minimis* threshold that is “industry-specific.”¹⁵²

With strong public support and a seemingly favorable outlook by APHIS, a *de minimis* exception in the regulations for the Lacey Act should exist. Should a *de minimis* exception come into existence, companies might start breathing easier, but this and other tweaks to the Lacey Act alone are not a solution to the dilemma the Lacey Act presents.

B. The Future of Compliance

The debate over the need of a *de minimis* exception, including how to define the exception, is relatively straightforward.¹⁵³ Relevant industries and American trading partners have no problem with an exception.¹⁵⁴ More important is the concern over the consequences that will result when other countries begin enacting their own versions of a Lacey Act ban on illegal logging—will one country have a ten percent *de minimis* exception and another allow only two percent?¹⁵⁵

151. *Id.*

152. Gov’t of Can., Implementation of Revised Lacey Act Provisions, Comments of the Government of Canada, APHIS (2011), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2010-0129-0014> [hereinafter Canada’s Comments on the Revised Lacey Act Provisions].

153. See *supra* Part VI.A. (discussing the need and the strong support for a *de minimis* exception).

154. See *supra* Part VI.A. (discussing that several organizations, like the NAMM and the Association of Global Automakers, Inc., and U.S. trading partners, like Sweden, Japan, and Canada, support a *de minimis* exception).

155. See Implementation June 2011, *supra* note 136, at 38331 (discussing the consideration of a *de minimis* exception to the U.S. Lacey Act and the several potential systems for measuring what “*de minimis*” would be under the Lacey Act regulations). One of the more complex approaches would be to “define the term ‘composite plant materials’ and then formally recognize a *de minimis* exception from the declaration requirement for products containing such materials.” *Id.*

Though this situation is hypothetical, it could soon become the new reality for companies trying to engage in legal trade in wood and wood products.

Though the United States was the first country to pass a law as stringent as the 2008 Lacey Act Amendments, other countries have passed laws on a smaller scale.¹⁵⁶ Australia is considering passing a similar law to prevent the importation of illegally acquired timber.¹⁵⁷ Like the Lacey Act, these new laws being considered will require companies to not only record documentation of the wood's source to ensure their legality, but also be able to prove that they have been documenting the source of the wood to avoid prosecution.¹⁵⁸

Quite problematic, however, is that even though laws like the Lacey Act will definitely push for the end of illegal practices among suppliers, "regulations [will not be] identical and will be applied in parallel which may pose problems to exporters."¹⁵⁹ The current U.S. approach under the Lacey Act is unilateral in

156. Under FLEGT, EU members Belgium, Denmark, France, Germany, and the United Kingdom have adopted "green public procurement policies requiring timber . . . to be from legal and sustainable sources." *Forests: Illegal Logging/FLEGT Action Plan*, EUROPEAN COMM'N, http://ec.europa.eu/environment/forests/illegal_logging.htm (last visited Oct. 8, 2012). These policies are not necessarily as far-reaching as those in the United States. *Compare Lacey Act FAQ*, *supra* note 13, at Question 31 (stating that the Lacey Act's declaration requirement's civil and criminal penalty applies to "any person who knowingly violates the declaration requirements," and any person, except for knowing violators may be assessed administrative penalties), *with The UK Public Procurement Policy on Timber*, CENT. POINT OF EXPERTISE ON TIMBER (2007), <http://www.cpet.org.uk/uk-government-timber-procurement-policy/the-uk-government-policy#evidence-of-compliance> (noting the United Kingdom's policy is only mandatory for Central Government Departments and not the private sector).

157. *Illegal Logging*, AUSTRALIAN GOV'T, DEP'T OF AGRIC., FISHERIES AND FORESTRY, <http://www.daff.gov.au/forestry/international/illegal-logging> (last visited Nov. 3, 2012). Australia's Illegal Logging Prohibition Bill 2011 will, among other things, prohibit "timber products containing illegally logged timber" and "[require] importers of regulated timber products and processors of raw logs . . . to fulfill due diligence requirements." *Id.*

158. See 16 U.S.C. § 3372(f) (Supp. II 2008) (outlining declaration requires for plant products); *EU's Ban on Billion-Pound Illegally Logged Timber Trade Only the 'First Step'*, THE ECOLOGIST (July 8, 2010), http://www.theecologist.org/News/news_round_up/533147/eus_ban_on_billionpound_illegally_logged_timber_trade_only_the_first_step.html.

159. DOUGLAS & SIMULA, *supra* note 1, at 74.

nature, and multiple unilateral approaches would create a problematic situation with “several bodies . . . applying their own standards or broad definitions of legality.”¹⁶⁰ A simpler solution would be for there to be one single international standard, which would both be easier to implement and easier for companies to follow.¹⁶¹

Some suggest that “legality assurance through national systems rather than relying on private sector service providers” is a good way to go about improving national trade, supporting private industry, and promoting transparency about the legality of timber products.¹⁶² However, governmental oversight on a national level needs to go further. Instead of a system of different Lacey Acts for each individual nation, it would be far better to have one international system in place that bans illegal logging and provides for a global system of compliance.¹⁶³

The second problem with acts such as the Lacey Act is that they only attack the demand-side of the equation and the end of the supply chain. Any sort of multinational agreement for a ban on illegal logging should strive to attack both sides of the supply chain; moreover, “trade measures are only a complementary element in solving the governance problems in exporting countries.”¹⁶⁴ Different declaration requirements are not enough to stop illegal logging.¹⁶⁵ As Canada pointed out in its submission letter to APHIS, reporting requirements do little to combat illegal logging for countries that have “effective enforcement of forest legislation [which already] assures the

160. *Id.* at 74–75.

161. *See id.* at 75 (“[A multilateral solution] would facilitate implementation by companies which supply different international markets and not put exporters into different categories depending on whether their country is participating in a bilateral arrangement or not.”).

162. *Id.* at 74.

163. *See id.* at 75 (“[T]here will need to be a multilateral solution to the problem of trade regulation, rather than relying on unilateral importing country measures like the Lacey Act or bilateral arrangements like the EU voluntary partnership agreements.”).

164. *Id.* at 76.

165. *See CANADA’S COMMENTS ON THE REVISED LACEY ACT PROVISIONS*, *supra* note 152 (“[R]eporting information on genus and species on the important declaration for composite wood products that originate in Canada does not further the objective of combating illegal logging.”).

legality of forest products originating from [that country].”¹⁶⁶

Trade measures can be overly blunt instruments, and it is crucial to understand the local issues involved to avoid alienation of governments in supplier countries.¹⁶⁷ The real issue that must be tackled to stop illegal logging is on the supply-side of the equation—the corruption, poverty, and poor enforcement of laws in the countries that source illegal wood.¹⁶⁸

C. An International Agreement to Address Illegal Logging

The United States may be the largest consumer of wood in the world,¹⁶⁹ but it is still one consumer of many, and stopping illegal timber from entering the United States is only one step towards combating illegal logging.¹⁷⁰ An international treaty addressing these concerns would be more effective than a patchwork of “Lacey Acts” enacted by various countries, and would also be more effective at attacking problems in supplier countries.¹⁷¹

To eradicate illegal logging, a solution must start with the countries supplying the wood. However, for these countries, illegal logging is but one of a myriad of symptoms that these

166. *Id.*

167. DOUGLAS & SIMULA, *supra* note 1, at 202. For example, “in some cases, the new crop or other land use may have been the primary instrument of deforestation; in others, it may simply have been the last step in a long process with complicated social, cultural and political origins.” *Id.* A one-size-fits-all solution created from the outside aimed at solving local issues that create deforestation would not work, and in any case, cooperation of both the supplier and demand countries would be needed in order to make any solution truly viable. See *id.*

168. See *id.* at 76 (noting that “strengthening of governance” will require a “high level [of] political commitment to the linkage of larger economic and social developments to forest outcomes”); WORLD BANK, *supra* note 51, at xiii (“Strengthen[ing] supply-side measures . . . is especially important in countries where export demand is a significant driver of illegal activities in the forest sector.”).

169. EIA, *supra* note 7.

170. See *id.* (explaining that although the Lacey Act is a landmark step in changing the “unregulated global timber industry,” it is not the end of the story and that the act could empower other communities “around the world in their efforts to combat illegal logging”).

171. See WORLD BANK, *supra* note 51, at 21–22 (“The development of transnational cooperation is an increasingly common response to transnational organized crime.”).

countries face, and the overarching problem is corruption.¹⁷² The organized crime that profits from illegal logging is a vicious cycle.¹⁷³ Organized crime feeds off corruption, which weakens governments, and makes corruption more widespread and organized crime more entrenched.¹⁷⁴ Moreover, “[i]llegal logging and illegal timber trade are often interwoven with other illegal practices,” which makes it more difficult to isolate and weed out illegal logging.¹⁷⁵ Further compounding this is that a country’s entire economy is likely to suffer in the process of getting rid of corruption in the forest sector because “strengthening governance is usually a long tedious process . . . [that] will need to be underpinned by high level political commitment to the linkage of larger economic and social developments to forest outcomes.”¹⁷⁶

This is not to say that trade measures like the Lacey Act are useless. Bans on the importation of illegally cut wood would be very important to an international agreement, as these bans create disincentives for illegal timber while creating incentives for legal timber.¹⁷⁷ The Lacey Act is a big step forward in this respect because it forces transnational corporations to be accountable for the legality of their supply chains.¹⁷⁸ However, it is important to not forget to attack the root of the problem as well.

The international agreement should contain rewards for

172. See CUT & RUN, *supra* note 56, at 11–12 (explaining that factors such as undue political influence, poor government policies, and poor enforcement systems can encourage illegality and that, “[i]n some countries at least, corruption seems to be a fundamental element of the system”); see also INECE, *supra* note 6, at 9 (stating that producer countries, despite the Lacey Act, will still need to crack down on compliance with their own laws to ensure proper enforcement and allow for “sustainable development and protection of ecosystem assets.”)

173. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 89, at 13–14. Transnational organized crime “can present a major challenge even where the state is strong, but when, for a variety of reasons, the rule of law is already weakened, it can pose a genuine threat to stability.” *Id.*

174. *Id.*

175. CUT & RUN, *supra* note 56, at 93.

176. DOUGLAS & SIMULA, *supra* note 1, at 76.

177. *Id.*

178. See 16 U.S.C. § 3373 (Supp. II 2008) (imposing fines as well as criminal penalties on corporations that knowingly import illegal wood into the United States).

developing companies who take real steps to stamp out illegal logging. These “mechanisms [would] compensate developing countries that adopt sustainable models of development” since countries who adopt sustainable models would have to compete alongside countries that refuse to reform.¹⁷⁹ To participate in an international agreement, a developing country would have to both implement and enforce stronger environmental laws.¹⁸⁰ International assistance in this effort is very important in this process; even though “[l]ocal efforts are key[,] . . . [they] will only serve to displace the flow [of goods and services] until a coordinated effort is adopted.”¹⁸¹ Another means of enforcing anti-illegal logging measures would be to include in the treaty a provision limiting market access to participating countries, who will need to be complying with all “national forest-related laws and international treaties to which a country is a signatory”¹⁸²

Another issue that this agreement should address is the rural poverty that leads to violation of forest laws.¹⁸³ Most of current forest law centers on enforcement itself and not making sure laws are aimed at getting a correct result.¹⁸⁴ The Lacey Act’s focus on enforcement is not appropriate for a developing country with laws that need serious revision to both protect forests and local citizenry.¹⁸⁵ Transparency is key to this

179. CUT & RUN, *supra* note 56, at 95.

180. See U.N. OFFICE ON DRUGS AND CRIME, *supra* note 89, at 18 (stating that organized crime has grown in unregulated areas).

181. *Id.*

182. CUT & RUN, *supra* note 56, at 96.

183. WORLD BANK, *supra* note 51, at 6 (“[T]he efforts to combat poverty-driven forest crime should focus on closing the huge gap between legal supply and demand . . . that exists in many countries . . .”).

184. *Id.* at 6–7.

185. CUT & RUN, *supra* note 56, at 99 (explaining that governments should make critical assessments of forestry and other policies and laws and determine whether to simplify existing legislation or add new legislation). One of the ironies of the Lacey Act is that the United States is effectively enforcing poorly written and easily circumvented laws to stop illegal logging. Cf. Brian Walsh & Tiffany M. Joslyn, *Without Intent How Congress is Eroding the Criminal Intent Requirement in Federal Law*, THE HERITAGE FOUNDATION, 9–10 (2010), <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=17613> (noting that poor drafting results in difficulty in determining whether a mens rea requirement applies to each element of the criminal offense). However, the

effort.¹⁸⁶ In areas where the indigenous people own the land, local communities can be “lure[d] . . . into signing concessions . . . [with] seductive promises, which are seldom fulfilled and which in no way compensate for the havoc and dependency that the logging operations create.”¹⁸⁷ National and local leadership often partner with the logging companies to the detriment of the community as a whole; transparency will help local communities know their rights and be less likely to be taken advantage of by logging companies.¹⁸⁸

Forcing companies to perform their due diligence in order for them to prove their wood’s origin is central to encouraging transparency.¹⁸⁹ The declaration form in the Lacey Act is not just important for figuring out the species and origin of wood product imports—it also makes the declarant responsible for their suppliers.¹⁹⁰ There is no “innocent owner” exception in the Lacey Act, and sellers who do not check information are held liable.¹⁹¹ The United States does not plan to create a database of foreign laws that an importer will need to check, meaning the onus is on importers to know foreign laws relating to their shipments and to do their fact-checking.¹⁹² This process is meant to help legitimate companies since illegal practices “create unfair competitive advantages and undermine the resource base for the entire industry.”¹⁹³ Companies who complain about the costs of compliance should also keep in mind

United States is enforcing these laws against *companies* that are benefiting from violating foreign law. Local populations, then, are not the true target.

186. WORLD BANK, *supra* note 51, at 6 (“[T]ransparency is critical . . . [for] both broad dissemination of the laws and ensuring that the language is understandable to the public.”).

187. CUT & RUN, *supra* note 56, at 12.

188. *Id.*

189. ROYAL INSTITUTE, *supra* note 16, at 48 (“Central to encouraging greater transparency over company operations and greater due diligence in investments is a strong disclosure regime.”).

190. 16 U.S.C. § 3372(f) (Supp. II 2008); *Sample Form*, *supra* note 30; *Forestry Law Splits Wood Industry*, *supra* note 14 (explaining that gathering information from suppliers could be difficult because of supplier fears of losing business).

191. *Lacey Act FAQ*, *supra* note 13, Question 32; *Forestry Law Splits Wood Industry*, *supra* note 14.

192. *Lacey Act FAQ*, *supra* note 13, Question 8.

193. CUT & RUN, *supra* note 56, at 96.

that unscrupulous companies “tarnish the reputation of the entire industry.”¹⁹⁴

The above discussed policies would all be ideally carried out in an international treaty or agreement rather than several separate unilateral or bilateral actions.¹⁹⁵ They are certainly not exhaustive of the policies that should be put into place, but merely a starting point for the larger discussion in the international community that needs to be taking place following the passage of the 2008 Amendments to the Lacey Act.

V. CONCLUSION

The Gibson Guitar raids have brought increased attention to the issue of illegal logging and the methods of controlling it.¹⁹⁶ By banning illegally acquired wood products from entering the country, the United States has made a big commitment to the fight against organized crime and corruption by countries and timber suppliers. Importers will need to monitor the coming APHIS regulations for implementation of the Lacey Act Amendments.¹⁹⁷ As evidenced by Gibson Guitar, importers should not be waiting around to comply with the Lacey Act since “most of the statute is self-implementing and thus may be enforced prior to the issuance of any implementing regulations.”¹⁹⁸

Meanwhile, eyes should be on the still-ongoing saga between Gibson Guitar and the Department of Justice to see the outcome of what is setting up to potentially be the first high-profile case prosecuted under the revised Lacey Act.¹⁹⁹ The concerns

194. *Id.*; *Forestry Law Splits Wood Industry*, *supra* note 14 (noting also that the Lacey Act specifically helps domestic wood producers because manufacturers will “ensure they are buying from legal sources”).

195. DOUGLAS & SIMULA, *supra* note 1, at 75.

196. The Lacey Act has even inspired its own song, though admittedly its focus is on the plight of Gibson Guitar rather than on the Lacey Act itself. Steve Bryant, *Keep Your Hands Off Our Wood—For Gibson Guitars*, YOUTUBE (Sept. 8, 2011), http://www.youtube.com/watch?v=_XBf7rTtnPM.

197. *Lacey Act FAQ*, *supra* note 13, Questions 1, 4.

198. *Id.*, Question 4.

199. *Gibson/Lacey Act Update*, HOME FURNISHING BUS. (July 6, 2011), <http://www.hffbusiness.com/article/doj-says-gibson-lacks-legal-standing-claim-ownership-ebony#>. After the first raid, Gibson filed a civil lawsuit to recover the wood seized. *Id.*

mentioned in previous sections of this Comment about musical instruments potentially violating the Lacey Act have inspired another bill, this time to amend the Lacey Act again to protect instrument manufacturers, dealers, and musicians.²⁰⁰ An amendment of this sort would arguably be redundant, especially considering that several of APHIS's proposed regulations outlined for composite wood, dated products, and "*de minimis*" products address the concerns that amendment proponents have and the regulations are likely to be passed by APHIS in the coming months.²⁰¹

The Lacey Act will surely serve as a model for other developed countries looking to help stop illegal logging and who are considering bans. While similar bans by other countries are an improvement over participation in voluntary schemes (or nothing at all),²⁰² these responses do not represent the best

The Justice Department is claiming that Gibson does not have standing to claim ownership over the wood because it is contraband, or "inherently illegal to possess, 'both because it was unfinished wood and because Claimants' source for ebony in Madagascar was not authorized to sell it.'" *Id.*; *Endangered Species Trafficking: What Did Gibson Guitar Know?*, MONGABAY (July 7, 2011), http://news.mongabay.com/2011/0706-ebony_gibson.html#Ob7hmFjZc22Ombcv.99. Gibson Guitar and the Justice Department came to an agreement in August 2012 in which no criminal charges were filed and Gibson paid a \$300,000 fine and gave \$50,000 to the National Fish and Wildlife Foundation to "promote conservation of tree species used in the musical-instrument industry, implement a compliance program and withdraw its claims to the Madagascar ebony seized." Kris Maher, *Gibson Guitar to Pay Fine Over Wood Imports*, WALL ST. J. (Aug. 7, 2012), <http://online.wsj.com/article/SB10000872396390443792604577573010767171448.html>.

200. Juliet Eilperin, *Gibson Guitar Ignites Debate Over Environmental Protections*, WASH. POST (Nov. 13, 2011), http://www.washingtonpost.com/national/healthscience/gibson-guitar-ignites-debate-overenvironmentalprotections/2011/11/11/gIQAACDtIN_print.html. This amendment is sponsored by Gibson's CEO, and has been broadened to affect other industries in order to increase support for the bill in Congress. *Id.* For example, "[i]t would remove requirements for retailers and manufacturers bringing in non-solid wood products—such as pulp and paper—to identify their source, as well as prevent the confiscation of illegally logged wood from someone who did not knowingly possess it." *Id.* Of course, removing the declaration requirement and the forfeiture section of the statute would vastly weaken both the implementation and the enforcement of the 2008 Lacey Act Amendment and completely undermine the purpose and intent of the 2008 Amendments of the Lacey Act.

201. See Implementation June 2011, *supra* note 136, at 38330–31 (considering the feasibility of various *de minimis* exceptions).

202. SENECA CREEK, *supra* note 44, at 30, 34.

possible outcome for participants in the legal logging industry and exporting countries suffering from the deleterious effects of illegal logging.

To protect both the legal logging industry and the world's forests, an international agreement is needed that attacks illegal logging on all fronts, allows companies to operate efficiently in the global market, and stops the effects of organized crime and corruption.²⁰³ While there is no "silver bullet" approach that will magically stop all illegal logging, and effecting true change will not be easy, it is time for the international community to step up and deal with illegal logging head on.²⁰⁴

203. DOUGLAS & SIMULA, *supra* note 1, at 206.

204. *Id.*