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Comments

The Lacey Act: Extraterritorial Application Based on an Antitrust Paradigm

Currently, the Lacey Act applies to the illegal taking and commerce of fish, wildlife, and plants within the United States. This Comment proposes amending the Lacey Act to provide for application on an extraterritorial basis based on an antitrust paradigm. Extraterritorial application of the Act to conduct of United States citizens abroad would protect wildlife illegally taken outside the United States and would punish those who, today, profit by that taking.

INTRODUCTION

Unregulated or unsanctioned taking¹ of wildlife² combined with destruction of habitat for agriculture or urbanization has led to the extinction or diminution of numerous species of wildlife.³ Congress

1. The term "taking" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (1988). In this Comment, "taking" is used consistently with this definition.

2. "Wildlife" is defined as "any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian . . . whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof." Lacey Act Amendments of 1981, 16 U.S.C. § 3371(a) (1988).

3. "It has become increasingly apparent that some sort of protective measures must be taken to prevent the further extinction of many of the world's animal species The two major causes of extinction are hunting and destruction of natural habitat." SENATE COMM. ON COMMERCE, S. REP. NO. 307, 93d Cong., 1st Sess. 2 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2990.

recognized the irreparable consequences resulting from the unregulated taking of wildlife and enacted legislation directed toward national and international taking.⁴ Specifically, Congress enacted the Endangered Species Act⁵ and the Lacey Act.⁶

More generally, Congress enacted treaties and conventions in which the United States and other countries agreed to restrict or ban the taking of specified birds or wildlife.⁷ National laws regulate the taking of wildlife within the United States' borders,⁸ and international treaties and conventions regulate the uniform treatment of wildlife between countries.⁹ However, no United States law regulates the conduct of United States citizens regarding taking wildlife while those citizens are under the jurisdiction of other sovereign states.¹⁰

This Comment advocates expansion of the Lacey Act's jurisdiction to include conduct by United States citizens in foreign countries,

4. See *supra* note 3. In passing the Lacey Act Amendments of 1981, Congress noted the "grim environmental consequences" resulting from the illegal wildlife trade. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 123, 97th Cong., 1st Sess. 1 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1748.

5. 16 U.S.C. § 1532(19) (1988). This Act is primarily directed toward the conservation of endangered or threatened species of fish, wildlife, and plants in the United States. Within the Act, the United States recognized the international problem and pledged to conserve endangered or threatened species pursuant to various international treaties and conventions. 16 U.S.C. § 1531(a)(4) (1988).

In 1978, the National Marine Fisheries Service and the Fish and Wildlife Service promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) of the Endangered Species Act extended to actions taken in foreign nations. That regulation was revised in 1986 to require consultation only for actions taken in the United States or on the high seas. Recently, the United States Supreme Court, in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), held that environmental groups lacked standing to challenge that revised regulation.

6. The Lacey Act proscribes illegal taking and commerce of fish, wildlife, and plants, which taking would be illegal under any law, treaty, or regulation of the United States, Indian, or foreign law. 16 U.S.C. § 3371(i) (1988).

7. Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 23 U.S.T. 260, T.I.A.S. No. 7302; Convention of Migratory Birds and Their Environment, November 19, 1976, U.S.-U.S.S.R., 29 U.S.T. 4647, T.I.A.S. No. 9073; Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243.

8. National laws regulating the taking of wildlife are developed and enforced by the United States Fish and Wildlife Service. At the state level, the respective states issue and enforce fish and game laws.

9. Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 23 U.S.T. 260, T.I.A.S. No. 7302.

10. United States citizens, while in another country, are subject to that country's laws because their activities are taking place within its territory. This basis of jurisdiction is territorial and is recognized as the normal basis for exercise of jurisdiction. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmts. a-c (1987). The Restatement is the considered opinion of the American Law Institute with regard to International law.

known as extraterritorial jurisdiction,¹¹ imposed on the basis of citizenship. Currently, if a country does not regulate the taking of wildlife, or if it does not or cannot enforce its laws, United States citizens taking wildlife within that country go unsanctioned. These individuals are liable for their actions only if they attempt to bring the illegally taken wildlife across an international border. If the United States Fish and Wildlife Service detects the illegal wildlife shipment it can implicate the originator or owner.¹²

Oftentimes the actions of United States citizens abroad affect United States jurisdictional interests given the multi-national range of many species and their rapid depletion. Depletion of wildlife which either migrates through the United States or which has a range solely within a foreign country has an effect on the United States based on global environmental concerns of conservation and preservation. The effect illegal taking of wildlife has on United States environmental interests is analogous to the effect of United States business activity abroad producing injury within the United States.¹³ Such effect justifies the imposition of jurisdiction on a citizenship basis.¹⁴ Whether jurisdiction should be imposed may be determined on a case-by-case basis applying a tripartite analysis developed in antitrust law.

Expansion of the Lacey Act's jurisdiction will allow United States

11. Extraterritorial jurisdiction is defined as "[j]uridical power which extends beyond the physical limits of a particular state or country." BLACK'S LAW DICTIONARY 528 (5th ed. 1979). This type of jurisdiction embraces the concept of extraterritoriality defined as "[t]he extraterritorial operation of laws . . . their operation upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation, but still amenable to its laws." *Id.*

12. The Lacey Act proscribes the transportation of illegally-taken wildlife.

It is unlawful for any person—

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law. . . .

16 U.S.C. § 3372 (1988).

13. The analysis required for the application of antitrust laws to extraterritorial activities will serve as a paradigm for the application of the Lacey Act on an extraterritorial basis.

14. Section 402(2) of the *Restatement (Third) of the Foreign Relations Law of the United States* imposes jurisdiction on the basis of citizenship.

officials to prosecute offenders for violations of the Lacey Act committed in other countries. Currently, violations occur when the illegally-taken wildlife is moved in interstate commerce such as through a United States international border crossing or airport.¹⁵ Extraterritorial application of the Act will close enforcement loopholes which allow organizations and individuals to take wildlife illegally without threat of penalty from the United States.

Section One of this Comment discusses the Lacey Act, its historical development, modern provisions, and what problems the Act is intended to address. Section Two proposes extraterritorial application of the Lacey Act based on citizenship jurisdiction applied using a tripartite antitrust analysis. Section Three analyzes application of the Act using the tripartite analysis. Section Four discusses application of the Lacey Act on an extraterritorial basis based on the effects principle.¹⁶ Finally, Section Five proposes amendment of the Lacey Act's enforcement provisions to allow private citizens to bring an action based on existing private attorney general statutes.

I. THE DEVELOPMENT OF THE LACEY ACT

A. *The History of the Lacey Act*

When the Lacey Act was first enacted, it prohibited the importation of certain "injurious animals and birds"¹⁷ and required a special permit for importation of foreign wild birds and animals.¹⁸ Congress' intent was to protect indigenous wildlife and agricultural and horticultural industries from harm resulting from the introduction of foreign wildlife. The Act required marking packages containing wild animals or birds, alive or dead.¹⁹ It created civil and criminal penalties for violations of either provision.²⁰

In 1981, the Lacey Act was amended to address the separate and

15. 16 U.S.C. § 3372; *see supra* note 12.

16. The effects principle allows the imposition of extraterritorial jurisdiction when an activity is conducted outside a state, but has a substantial effect within that state. *See infra* note 113.

17. "The importation into the United States of the mongoose, the so-called 'flying foxes' or fruit bats, the English sparrow, the starling, and such other birds and animals as the Secretary of the Interior may declare to be injurious to the interests of agriculture or horticulture, is prohibited." 18 U.S.C. § 42 (1948) (current version at 16 U.S.C. § 3372 (1988)).

18. 18 U.S.C. § 43, *repealed by* Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1079 (codified as amended at 16 U.S.C. §§ 3371-3378 (1988)).

19. "Marking" packages meant plainly labeling the shipping package containing wildlife with the names and addresses of the shipper and consignee and with a statement of the contents "by number and kind." 18 U.S.C. § 44, *repealed by* Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1079 (1988).

20. Civil penalties included fines of up to \$500 and forfeiture of the wildlife. Criminal penalties involved imprisonment of not more than six months. Both civil and criminal penalties could be imposed concurrently. *Id.* §§ 42-44.

growing problem of taking threatened or endangered wildlife for commercial profit.²¹ The legislative history of the Amendments reflects concern in specific areas: the environmental impact caused by the illegal trade in birds and wildlife²² and the problem of professional guides offering their services to illegally obtain wildlife.²³ The Amendments simplified administration by merging two acts, the Black Bass Act²⁴ and the Lacey Act, into one comprehensive act.²⁵ The Amendments addressed enforcement problems, reclassified criminal violations previously prosecuted as misdemeanors as felonies,²⁶ and increased monetary penalties to provide additional deterrence.²⁷

21. Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (codified as amended at 16 U.S.C. §§ 3371-78 (1988)). The Amendments of 1981 define "taken" as "captured, killed, or collected." *Id.* § 3371(i).

22. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 123, 97th Cong., 1st Sess. 1 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1748.

In recent years, investigations by agents of the various agencies charged with enforcing wildlife laws have uncovered a massive illegal trade in fish and wildlife and their parts and products

The illegal wildlife trade has grim environmental consequences. It threatens the survival of many species of wildlife, particularly those which we value because of their aesthetic or commercial values.

Id.

23. "[A] commercial arrangement whereby a professional guide offers his services to illegally obtain wildlife is, in effect, an offer to sell wildlife." *Id.*

24. [The Black Bass Act] provided Federal sanctions for the illegal interstate transportation of black bass taken, purchased, sold, or possessed in violation of State law [It] was subsequently expanded to cover all species of fish, and in 1969 was amended to encompass foreign commerce and fish taken, bought, sold, or possessed in violation of foreign law.

SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 123, 97th Cong., 1st Sess. 2 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1749.

25. "S. 736 would correct the present insufficiencies in both the Lacey and Black Bass Acts and combine them into one statute to simplify administration and enforcement and promote public understanding." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 123, 97th Cong., 1st Sess. 2 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1749.

26. Lacey Act Amendments of 1981, 16 U.S.C. § 3373(d) (1988).

(d) Criminal penalties

(1) Any person who—

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter . . . shall be fined not more than \$20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

Id.

27. *Id.* § 3373.

(a) Civil penalties

In 1988, the Lacey Act was again amended to address problems in interpreting the legislature's intent and problems of enforcement which arose after the 1981 Amendments were enacted.²⁸ The 1988 Amendments clarified the activities subject to penalties under the Lacey Act.²⁹ The Amendments expanded the definition of "sale" to include guiding services. This particular change was in response to a circuit court decision which had held the term "sale" relating to wildlife did not include guide services.³⁰ The Lacey Act now specifically includes guiding services used for the illegal taking of wildlife within the term "sale."³¹ The 1988 Amendments also clarified what was considered a violation under marking offenses.³² Finally, the

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than section 3372(b) of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation: *Provided*, That when the violation involves fish or wildlife or plants with a market value of less than \$350, . . . the penalty assessed shall not exceed the maximum provided for violation of said law, treaty, or regulation, or \$10,000, whichever is less.

Id. See *supra* note 26 for criminal penalties. These penalties and sanctions represent an increase from penalties imposed under the repealed Lacey Act provisions of \$500, imprisonment for not more than six months, or both and forfeiture. Lacey Act, 18 U.S.C.S. §§ 42-44 (Law. Co-op. 1979), *repealed by* Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1079 (1981).

28. Lacey Act Amendments of 1981, Pub. L. No. 100-653, 102 Stat. 3825 (codified as amended at 16 U.S.C. §§ 3372-75 (1988)).

29. Activities subject to penalties under the Lacey Act were expanded to specifically include "the transportation or sale of wildlife that occurs in violation of another Federal law." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 563, 100th Cong., 2d Sess. 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5366, 5370.

30. In the legislative history of the 1988 Amendments to the Lacey Act, the House Record reflects expansion of predicate offenses for purposes of the Act. These offenses previously included taking and possessing in violation of the Marine Mammal Protection Act. They were expanded to include transportation and sale violations of the Marine Mammal Protection Act. In addition, in response to the circuit court decision, the amendment specifically included the provision for obtaining guide services for illegal purposes as a violation of the Act, specifically overturning the Ninth Circuit. *United States v. Stenberg*, 803 F.2d 422 (9th Cir. 1986). "This amendment will provide significant protection for wildlife, protection that Congress intended to be included under the Lacey Act." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 563, 100th Cong., 2d Sess. 9-10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5366, 5374.

31. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 563, 100th Cong., 2d Sess. 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5366, 5375. "Guiding, outfitting, and transportation services related to hunting have become a substantial commercial enterprise. Some individuals providing these services will knowingly violate the law in order to please the customer and become well known. The very nature of the enterprise can have a significant impact on the resource." *Id.*

32. Lacey Act Amendments of 1988, 16 U.S.C. § 3372(d) (1989).

"It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be—

(1) imported, exported, transported, sold, purchased, or received from any foreign country; or

(2) transported in interstate or foreign commerce."

Amendments expanded the enforcement power of officials to include warrantless searches, seizures, and arrests within certain guidelines.³³

B. Modern Provisions

Currently, the Act proscribes a wide range of activities involving marking³⁴ and nonmarking offenses. For nonmarking offenses, the Act prohibits: (1) the import, export, transportation, sale, acquisition, or purchase of wildlife taken or possessed in violation of any United States or Indian tribal law;³⁵ (2) the import, export, transportation, sale, acquisition, or purchase of wildlife in interstate or foreign commerce taken in violation of any State or foreign law;³⁶ and (3) the possession of wildlife taken, possessed, transported, or sold in violation of any state, foreign, or Indian tribal law within the special maritime and territorial jurisdiction of the United States.³⁷

Through these broad prohibitions the Act encompasses regulations under state and federal laws, such as the Endangered Species Act of 1973³⁸ and the Marine Mammal Protection Act of 1972,³⁹ and international treaties, such as the Migratory Bird Treaty Act.⁴⁰ However,

Id.

33. The 1988 Amendments add to the enforcement powers for persons enforcing the Act and reduce the risk to undercover agents' personal safety or tort liability by authorizing warrantless arrests. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 563, 100th Cong., 2d Sess. 10-11 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5366, 5375-76.

Any person authorized under subsection (a) of this section to enforce this chapter may . . . make an arrest without a warrant . . . if the person has reasonable grounds to believe that the person to be arrested has committed or is committing a felony; may search and seize, with or without a warrant.

Lacey Act Amendments of 1988, 16 U.S.C. § 3375(b) (1989).

34. A marking offense involves the shipment of wildlife in unmarked or mislabeled packages. 16 U.S.C. § 3372(b) (1988).

35. *Id.* § 3372(1).

36. *Id.* § 3372(2).

37. *Id.* § 3372(3). Special maritime and territorial jurisdiction of the United States is defined in 18 U.S.C. § 7 (1988). *See infra* note 42.

38. 16 U.S.C. §§ 1531-44 (1988). The Endangered Species Act of 1973 provides a means of identifying and conserving endangered and threatened species in the United States. The Act pledges international conservation through conventions, treaties, and other international agreements. *See supra* note 5 for a discussion of the application of the Endangered Species Act to actions taken in foreign nations.

39. *Id.* §§ 1361-407. The Marine Mammal Protection Act of 1972 prohibits taking and importing marine mammals, with specified narrow exceptions. It was enacted out of concern that commercial fishing, which regularly involved collateral taking of dolphins and porpoises, and unregulated taking were rapidly depleting marine populations.

40. The Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1988) (codified at 16 U.S.C. §§ 701-08, 712 (1988)).

the Act does not proscribe extraterritorial⁴¹ conduct by United States citizens in violation of the Lacey Act.

C. Enforcement

The Lacey Act is enforced within the special maritime and territorial jurisdiction of the United States.⁴² This limits the Act's jurisdiction to 'United States citizens' conduct abroad where those individuals are not subject to the jurisdiction of another country. Therefore, the Lacey Act is enforced in regard to conduct within the territorial jurisdiction of the United States or conduct within areas not subject to any country's sovereignty, such as the ocean floor⁴³ and Antarctica.⁴⁴ Such limitations result in dismissal of charges or reversal of convictions when a United States citizen has committed the illegal act, but was not subject to United States jurisdiction.

For example, the Marine Mammal Protection Act of 1972 prohibits taking marine mammals from waters within the United States jurisdiction or on the high seas.⁴⁵ The Act established a permanent moratorium on taking marine mammals and excepted from its prohibitions the taking of marine mammals pursuant to international agreement.⁴⁶ However, in a Fifth Circuit Court of Appeals case, it was not clear to the court whether the moratorium applied to conduct of American citizens in foreign jurisdictions or if it was limited to areas subject to United States jurisdiction.⁴⁷ The court found when Congress set out geographic prohibitions regarding taking marine mammals, it did not include taking in foreign countries.⁴⁸

41. Extraterritorial is defined as "[b]eyond the physical and juridical boundaries of a particular state or country." BLACK'S LAW DICTIONARY 528 (5th ed. 1979).

42. The special maritime and territorial jurisdiction of the United States is defined to include "[a]ny place outside of the jurisdiction of any nation with respect to an offense by or against a national of the United States." 18 U.S.C. § 7 (1988).

43. *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*, U.N. Doc. A/Res/2749 (1971). This Resolution recognizes that the sea-bed, ocean floor, and subsoil are the "common heritage of mankind," outside the sovereignty of any state. *Id.* at 2.

44. Antarctic Treaty, December 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780. The Antarctic Treaty recognizes that area as part of the common heritage of mankind.

45. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-84, 1401-07 (1988).

46. "There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter." Marine Mammal Protection Act § 1371(a).

47. *United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir. 1977).

48. [W]ith regard to the [Marine Mammal Protection Act] all inclusive language that does not expressly address territoriality cannot be held to indicate clear intent for extraterritorial application.

. . . The omission of the territory of other sovereigns permits the reasonable inference that Congress concluded the prohibitions should not extend extraterritorially.

Id. at 1004.

Therefore, the court could infer Congress did not intend to extend the prohibitions extraterritorially to apply to other states.⁴⁹ The government's lack of extraterritorial jurisdiction prevented the successful prosecution of an American citizen for the taking of dolphins in the territorial sea of another country, an activity which the drafters of the Marine Mammal Protection Act intended to prohibit.⁵⁰

The sanction of extraterritorial conduct of United States citizens requires conduct committed in violation of another country's laws and active enforcement of the laws by that country. If neither a prescriptive law nor its enforcement mechanism is in place at the time of the offense, the United States citizen will go unpunished.

The Lacey Act can be amended to extend its jurisdiction on an extraterritorial basis. The United States may enforce extraterritorial jurisdiction over its citizens on the basis of territoriality or citizenship.⁵¹ Unless an intent to apply the statute in an extraterritorial context is expressed, the statute is interpreted to apply on a territorial basis only.⁵² Whether the applicable law applies extraterritorially depends upon its construction, not on the legislative power of

49. *Id.* at 1004-05. *See also infra* note 101.

50. Congressional findings and declaration of policy include:

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem. . . ;

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic value, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.

Marine Mammal Protection Act § 1361.

51. International law recognizes jurisdiction enforced on the basis of territoriality or nationality.

[A] state has jurisdiction to prescribe law with respect to

(1) (a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

52. Territoriality is the most common basis for exercise of jurisdiction. *Id.* § 402 cmt. b.

Congress.⁵³

When a question arises regarding the jurisdictional scope of a statute, courts first look to the statute, then to legislative reports and history to determine the legislature's intent in application.⁵⁴ Where the statute applies extraterritorially, as in the area of antitrust law, the courts do not apply the law mechanically, but balance competing interests of the United States and the country in which the activity is alleged to have taken place before exercising jurisdiction.⁵⁵ Even when the statute specifies a basis for extraterritorial jurisdiction, such jurisdiction is not exercised if to do so would be unreasonable.⁵⁶

II. EXTRATERRITORIAL JURISDICTION MAY BE EXERCISED BASED ON UNITED STATES CITIZENSHIP AND IS SUPPORTED BY THE ANTITRUST ANALOGY

The Lacey Act should be applied on an extraterritorial basis to United States citizens. Extraterritorial exercise would not affect citizens of foreign countries in which conduct occurs. Jurisdiction based solely on citizenship is recognized by the international community as

53. Legislation is considered to apply only within the territorial boundaries of the United States unless an intent of extraterritorial application is found in the statute. "By virtue of the obligations of citizenship, the United States retained its authority over [the United States citizen], and he was bound by its laws made applicable to him in a foreign country." *Blackmer v. United States*, 284 U.S. 421, 436 (1932). International law limits the international exercise of United States jurisdiction by requiring such exercise to be reasonable. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). When the exercise of jurisdiction by the United States and another sovereign state is not unreasonable, but conflicts, each state must evaluate its interests and the interests of the other state in exercising jurisdiction. The state with the stronger interest prevails; the state with the lesser interest should modify or abandon its regulation to eliminate the conflict. *Id.* § 403 cmt. e.

54. "Resolution of the jurisdictional issue in this case therefore depends on construction of exercised congressional power, not the limitations upon that power itself." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282-83 (1952); *accord Blackmer v. United States*, 284 U.S. 421, 437 (1932).

55. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979).

This may, indeed, be a situation where the consequences to the American economy and policy permit no alternative to firm judicial action enforcing our antitrust laws abroad. But before that step is taken, there should be a weighing of competing interests When foreign nations are involved . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.

Id.

56. "Even when one of the bases for jurisdiction under section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). See *infra* note 93 listing factors which determine if exercise of jurisdiction is unreasonable.

a basis for the assertion of jurisdiction in foreign relations law⁵⁷ and is supported by the privileges and obligations which accompany citizenship.⁵⁸

American antitrust laws were enacted to protect intrastate and interstate commerce, including commerce with foreign countries, by proscribing activities conducted in restraint of trade.⁵⁹ These laws extend extraterritorially over the activities of Americans abroad and may encompass the activities of foreign citizens.⁶⁰ However, because there are implications and consequences which arise from applying antitrust laws to violations alleged to have been committed in a foreign country, more than a mechanical application of the law is involved.⁶¹ Where application of antitrust laws on an extraterritorial basis is requested, the reviewing court conducts a tripartite analysis,

57. "[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

58. See *supra* note 53.

59. The Sherman Act, 15 U.S.C. §§ 1-7 (1988); the Clayton Act, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (1988); the Wilson Tariff Act, 15 U.S.C. §§ 8-9 (1988). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The Sherman Act § 1. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 cmt. a (1987):

If a principal purpose of the challenged conduct or agreement outside the United States is to interfere with the commerce of the United States, and the conduct or agreement has some (i.e., not insignificant) effect on that commerce, it is presumptively reasonable for the United States to exercise jurisdiction over that conduct or agreement, even if the actual effect proves to be insubstantial.

Id.

60. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (holding that any state may impose liability on a foreign corporation which acts in violation of the Sherman Act with intent to and which did affect imports into the United States); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (holding that defendants, which included a foreign corporation, could be liable for anti-trust violations under the Sherman Act); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (holding that both the United States importer and the Mexican supplier of sisal were within the court's jurisdiction).

61. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). In this case, the court analyzed whether extraterritorial jurisdiction in anti-trust law should be exercised. The court stated:

That American law covers some conduct beyond this nation's borders does not mean that it embraces all, however. Extraterritorial application is understandably a matter of concern for the other countries involved In the domestic field the Sherman Act extends to the full reach of the commerce power [I]n the foreign commerce area courts have generally, and logically, fallen back on a narrower construction of congressional intent.

Id. at 609.

discussed at length in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*⁶² This tripartite analysis has been subsequently approved by the Department of Justice⁶³ and followed in other United States courts.⁶⁴

The first part of the tripartite analysis determines whether the alleged activity has some actual or intended effect on American foreign commerce.⁶⁵ There is no consensus among American courts and commentators on how to determine when an effect is substantial enough to justify the imposition of jurisdiction.⁶⁶ In the context of the tripartite analysis, because the effects test considers only the effect the alleged trade violation has on American foreign commerce, the *Timberlane* court found the test incomplete and required additional analysis to consider the foreign country's interests in the alleged violation.⁶⁷ That analysis considers other nations' interests, incorporating principles of comity,⁶⁸ while scrutinizing the effect the conduct within the foreign country has within the United States.

In the second part of the analysis, the effect the alleged activity has on American foreign commerce is scrutinized to determine if the effect is substantial enough to constitute an injury to the plaintiff such that an antitrust action may be sustained.⁶⁹ In situations where the United States brings the action, it may not be necessary to demonstrate as great a restraint on trade as in a private action.⁷⁰

62. 549 F.2d at 597.

63. The Department of Justice is cited as approving *Timberlane's* tripartite analysis. S. CHESTERFIELD OPPENHEIM ET AL., FEDERAL ANTITRUST LAWS 989 n.35 (4th ed. 1981).

64. Cases which follow the *Timberlane* analysis include *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161 (E.D. Pa. 1980), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). See also S. CHESTERFIELD OPPENHEIM ET AL., FEDERAL ANTITRUST LAWS 989-90 n.36 (4th ed. 1981).

65. "It is the effect on American foreign commerce which is usually cited to support extraterritorial jurisdiction." *Timberlane*, 549 F.2d at 610 (emphasis added).

66. Courts have required a "direct and substantial effect" on American foreign commerce. See *Timberlane*, 549 F.2d at 610 (district court concluded this was a prerequisite). Other courts use different expressions: *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) ("the combination affected the foreign commerce of this country"); *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (N.D. Ohio 1949) ("a direct and influencing effect on trade"). Commentators also use different language: RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(c) (1987) ("conduct . . . that has or is intended to have substantial effect within its territory"); James A. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 523 (1974) ("(1) if it occurs in the course of foreign commerce, or (2) if it substantially affects either foreign or interstate commerce").

67. *Timberlane*, 549 F.2d at 611-12.

68. Comity is defined to mean "courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction . . . out of deference and mutual respect." BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

69. *Timberlane*, 549 F.2d at 613 (citing *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972)).

70. *Id.*

In the third part of the tripartite analysis, the court determines whether the interests of and connections to the United States in relation to the interests of and connections to other nations justify the assertion of extraterritorial jurisdiction.⁷¹ The *Timberlane* Court preferred evaluating and balancing the relevant elements on a case-by-case basis.⁷²

The elements presented in *Timberlane*⁷³ were further refined in *Mannington Mills, Inc. v. Congoleum Corp.*⁷⁴ These elements include:

- (1) The degree of conflict with foreign law or policy;
- (2) The nationality of the parties;
- (3) The importance of the alleged violation of conduct in the United States compared to that abroad;
- (4) The availability of a remedy abroad and the pendency of litigation there;
- (5) The existence of intent to harm or affect American commerce and its foreseeability;
- (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
- (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
- (8) Whether the court can make its order effective;
- (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
- (10) Whether a treaty with the affected nations has addressed the issue.⁷⁵

In evaluating these elements, the reviewing court should identify

71. *Timberlane*, 549 F.2d at 613. The court stated, "[A]n effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness." *Id.*

72. *Timberlane*, 549 F.2d at 613. The court called this evaluation and balancing a "jurisdictional rule of reason." *Id.* (quoting KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958)).

73. The elements specified in *Timberlane* were:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614. In the third part of the tripartite analysis, these elements provide specific factors for determining whether to assert extraterritorial jurisdiction. See *infra* notes 91-112 and accompanying text.

74. 595 F.2d 1287, 1297-98 (1979).

75. *Id.* These elements are a further refinement of the factors listed by the court in *Timberlane* to determine whether to enforce extraterritorial jurisdiction.

potential conflicts which might arise if extraterritorial jurisdiction is asserted.⁷⁶ The court should determine whether the interests of the United States are sufficient to assert extraterritorial jurisdiction.⁷⁷ The application and analysis of these elements takes into consideration principles of international comity and fairness regarding application of laws on an extraterritorial basis.⁷⁸

Before the court conducts the tripartite analysis, it scrutinizes the alleged violation to determine if the antitrust action is barred by the "Act of State" doctrine.⁷⁹ The Act of State doctrine will only be applied where the alleged violation was committed by a foreign government. It requires the reviewing court to abstain from inquiring into the validity of acts by a foreign government.⁸⁰ The act of a sovereign power of a foreign state in its own territory cannot be questioned or be the subject of a legal proceeding.⁸¹ This doctrine results in American courts rejecting private claims brought against a foreign government which allege a violation of American or international law. More recently, there has been a shift in focus to concerns for preserving basic relationships between government branches in a system of separation of powers.⁸² However, when the foreign government's action consists of mere approval, or it takes no action but merely allows the conduct, the Act of State doctrine does not apply.⁸³ This allows the adjudication of claims involving violations of

76. *Timberlane*, 549 F.2d at 614.

77. *Id.* at 614-15.

78. *Id.* at 615.

79. *Mannington*, 595 F.2d at 1292.

The doctrine is a policy of judicial abstention from inquiry into the validity of an act by a foreign government. The premise upon which it rests is that an act by the sovereign power of a foreign state or by its authorized agent in its own territory and within the scope and authority of the office cannot be questioned or made the subject of legal proceedings in our courts.

Id.

80. *Id.*

81. "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)); *accord* *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

82. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

Id. This case expresses the modern interpretation of the Act of State doctrine which is concerned with preserving relationships in a system of separation of powers by not hindering the executive's conduct of foreign policy by judicial review or review of foreign acts. *Id.*

83. For example, in *Mannington*, the court found the Act of State doctrine did not apply because the foreign government involved did not act affirmatively, but issued foreign manufacturing patents to Congoleum based on its representations. *Mannington*

antitrust law or, by analogy, violations of the Lacey Act.

III. THE LACEY ACT SHOULD BE APPLIED TO EXTRATERRITORIAL CONDUCT OF UNITED STATES CITIZENS FOLLOWING THE TRIPARTITE ANALYSIS OF ANTITRUST JURISDICTION ANALOGY

An analysis of whether the Lacey Act should apply on an extra-territorial basis should be conducted within the framework of the *Timberlane* tripartite analysis. International interests of the governments involved and considerations of comity and fairness would be reviewed before the Act is applied. Such an analysis avoids a blanket application of law within a sensitive international context.

In the first prong of the analysis, the reviewing body considers whether the alleged violations have an effect on the United States sufficient to sustain an action brought under the Lacey Act. As stated in *Timberlane*, there must be some effect on the activity in question.⁸⁴ Here, the illegal taking of wildlife in a foreign country must have some effect on the United States.

Congress has stated the illegal taking of wildlife in other countries has severe environmental consequences, as well as health and safety risks to domestic animals in the United States.⁸⁵ Congress also demonstrated its belief that activities occurring abroad which extinguish or diminish wildlife have an effect on the United States.⁸⁶ Activities in a foreign country which diminish or extinguish indigenous or migratory wildlife have the effect of making that wildlife unavailable for aesthetic, cultural, or economic purposes to United States

Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293-94 (1979).

84. "[T]here [must] be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes." *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (1976).

85. The Lacey Act Amendments of 1981, 97th Cong., 1st Sess. 1, *reprinted in* 1981 U.S.C.C.A.N. 1748, 1748.

The illegal wildlife trade has grim environmental consequences. It threatens the survival of many species of wildlife, particularly those which we value because of their aesthetic or commercial values. The economic consequences of this trade are also severe. It directly threatens America's agriculture and pet industries and indirectly burdens individual taxpayers.

Id. See also *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2151 (1992) (Stevens, J. concurring) (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 179 (1978)).

86. Congress expressed its intent "to conserve to the extent practicable the various species of fish or wildlife . . . facing extinction." Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(4) (1988). See also Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-84, 1401-07 (1988).

citizens as well as the citizens of the country in which the illegal taking occurs. Therefore, the illegal taking of wildlife in a foreign country has an effect on the United States which should be sufficient to satisfy the first prong of the analysis.

The second prong of the analysis is to determine whether the effect on the United States is sufficiently large to present a recognizable injury, and thus a criminal or civil violation of the Lacey Act.⁸⁷ Conventions and treaties enacted between the United States and other countries for the protection of wildlife in other countries demonstrate the United States' strong commitment to preservation of wildlife wherever such wildlife occurs.⁸⁸ As discussed previously, the introduction of illegally-taken wildlife into the United States presents serious risks to the agriculture industry.⁸⁹ However, when the illegal taking of wildlife in other countries presents an injury to the United States sufficient to sustain a criminal or civil action under the Lacey Act, an analysis of elements which considers international comity and fairness, conducted in the third prong of the analysis, is required before making a decision to impose extraterritorial jurisdiction.⁹⁰

The third prong of the analysis weighs and considers each element to determine whether the interests of and connections with the United States are sufficient, when compared with the interests of other nations, to justify the assertion of extraterritorial jurisdiction.⁹¹ The first issue considered is whether enforcement of the Lacey Act on an extraterritorial basis conflicts with foreign law or policy.⁹²

87. "Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs." *Timberlane*, 549 F.2d at 613 (citing *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

88. For example, the Endangered Species Act lists species considered endangered or threatened occurring throughout the world and pledges to conserve such species. Endangered Species Act of 1973, 16 U.S.C. § 1531 (1988). To further deter the taking of threatened and endangered species, the Convention on International Trade in Endangered Species of Wild Fauna and Flora prohibits trade in endangered wildlife or their parts. It is the primary international agreement for the control of trade in illegal wildlife products. Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

89. See *supra* notes 17-20 and accompanying text.

90. "An effect on United States commerce . . . is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness." *Timberlane*, 549 F.2d at 613.

91. *Id.*

92. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (1987).

When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors.

Id. This section does not apply when a person subject to the regulations of two states can

Conflict is tied to the availability of a remedy abroad, the existence of foreign law, the pendency of litigation there, and the foreign country's action on violation of its law. In countries which have no laws regulating the taking of wildlife, imposition of the Lacey Act will not create a conflict. In countries which do have laws regulating the taking of wildlife, the issue is whether these countries enforce their laws. Countries may regulate the taking of wildlife but not enforce their laws. This lack of enforcement may stem from indifference, lack of adequate funding, or the lack of an adequate infrastructure for effective enforcement. If foreign laws are not enforced, extraterritorial application of the Lacey Act to United States citizens will not create a conflict. However, if the violation occurs in countries which regulate the taking of wildlife and which enforce their laws, the United States will have to determine whether its interests in imposing sanctions on its citizens are stronger than the foreign country's interests.⁹³

Another factor to consider is the importance of the alleged violation of conduct in the United States compared to that abroad.⁹⁴ The United States has demonstrated the importance it attaches to taking of wildlife by actively participating in conventions and treaties regulating such taking.⁹⁵ In addition, the United States has provided for

comply with the laws of both. *Id.* § 403(3) cmt. e.

93. This determination may be based on factors specified in § 403 of the *Restatement (Third) of Foreign Relations Law of the United States* which states:

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity of the territory of the regulating state . . . ;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity . . . ;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state . . . ;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system . . . ;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). Principles of reasonableness have been interpreted as requiring comity.

94. *Timberlane*, 549 F.2d at 614.

95. See *supra* note 7. However, federal agencies are involved in funding projects in foreign countries which may result in harm to endangered species. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2152 n.1 (1992) (Blackmun, J. dissenting). "The record

financial contributions to foreign countries to aid in the conservation of wildlife.⁹⁶ Under circumstances where a country in which wildlife is taken either has no wildlife laws or fails to enforce its wildlife laws, the responsibility for deterring the taking of wildlife should accrue to the United States.

The analysis of the existence of intent to harm or affect American commerce and its foreseeability is, by analogy, inapplicable to analyzing the application of the Lacey Act in an extraterritorial context.⁹⁷ While it is possible some United States citizens take wildlife in other countries in defiance of United States laws, most individuals take wildlife for recreation or commercial profit.⁹⁸ The Lacey Act is primarily directed toward commercial trade in wildlife.⁹⁹

An additional factor to consider is whether the assertion of extraterritorial jurisdiction has an effect upon foreign relations.¹⁰⁰ If the Lacey Act is imposed extraterritorially upon United States citizens when those individuals are not apprehended or prosecuted by the country in which their acts were committed, the Act will not conflict with any action of the foreign country due to that country's nonfeasance. If the country in which the wildlife is being taken condones the taking of wildlife, active prosecution by the United States under the Lacey Act will have a deterrent effect upon the taking.

The United States must consider whether the importance of deterring the taking of wildlife, the protection of which is recognized by the United States, outweighs the foreign country's interest in allowing the taking to occur.¹⁰¹ Enforcement of standards regarding either harmful economic activities in an antitrust context or harmful

is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects." *Id.*

96. *See supra* note 95. The Endangered Species Act of 1973 provides assistance to foreign countries in the form of foreign currencies and acquisition of lands and waters to foreign countries. Endangered Species Act of 1973, 16 U.S.C. § 1537 (1988).

97. This is the fifth factor considered in *Mannington Mills, Inc. v. Congoleum Corporation*, 595 F.2d 1287, 1297 (1979).

98. The Lacey Act Amendments of 1981 specifically address this issue: "investigations by agents . . . have uncovered a massive illegal trade in fish and wildlife . . . much of this illegal, and highly profitable, trade is handled by well organized large volume operations run by professional criminals." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, S. REP. NO. 123, 97th Cong., 1st Sess. 1 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1748.

99. *See supra* note 98.

100. *Mannington*, 595 F.2d at 1297.

101. *United States v. Mitchell*, 553 F.2d 996, 1004 (1977).

We cannot say that the interests of the United States in preserving dolphins outweighs the interest of the Commonwealth of the Bahamas in preserving its character as a tourist attraction by the issuance of a limited number of permits for the capture of dolphins within its narrow band of territorial waters.

Id. In this case, the Marine Mammal Protection Act, which proscribed the activity, was found to be inapplicable to activity in another country's territory.

environmental deprecations depends upon extraterritorial application. The United States can build from a floor of enforcement set by interstate commerce and jurisdictional requirements, giving law enforcement officials the ability to prosecute United States citizens for committing acts in violation of the Act outside the country. To effectively enforce its standards, the United States can continue the current trend of foreign policy incentives, such as trading debt for environmental conservation efforts¹⁰² or placing trade embargoes on countries which refuse to cooperate.¹⁰³ These enforcement activities should have the effect of bringing countries which either fail to enforce or which violate environmental standards into compliance with the higher standards set by the United States.

Will the grant of relief by the United States place a party in the position of being forced to perform an act illegal in either country or impose conflicting requirements by both countries? This question turns on whether the conduct is compelled by a foreign government.¹⁰⁴ The possibility of conflict or of being compelled to act is more pertinent in application of antitrust laws, where the activity in question involves conducting business abroad.¹⁰⁵ In contrast, the taking of wildlife involves affirmative acts which are done either under permits issued by the government of the foreign country or without that government's express permission. The issue of compulsion, therefore, rarely arises.

102. For example, Argentina has a debt for nature swap program by which creditor nations can trade existing debt for natural grassland and forest preservation. *National Development Bank Announces Its Handling of Debt-for-Nature Bonds*, 13 Int'l Env'tl. Rep. (BNA) No. 2, at 64 (Feb. 14, 1990).

103. Commentators have stated, "The economic sanction has emerged as a key device for a significant number of states, either individually or collectively, to enforce international norms." David D. Caron, *International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries*, 16 *ECOLOGY L.Q.* 311, 326 (1989).

An example of an economic sanction imposed by the United States occurred in 1988 when the United States refused to allow Japan to fish in United States waters pending compliance with the International Whaling Commission Moratorium on commercial whaling. This was in response to Japan's killing 300 Minke Whales in Antarctic waters under the guise of scientific experiments for commercial purposes. *President Reagan Denies Japan Fishing Access to U.S. Waters Because of Whaling Violation*, 11 Int'l Env'tl. Rep. (BNA) No. 4, at 236 (Apr. 13, 1988).

104. This is known as the defense of foreign compulsion, which shields from antitrust liability the acts of parties carried out in obedience to the mandate of a foreign government. The sovereign compulsion defense is not principally concerned with the validity of legality of the foreign government's order, but rather with whether it compelled the American business to violate American antitrust law. *Mannington*, 595 F.2d at 1293.

105. See *supra* note 104.

Can the court effectively enforce its order when it imposes penalties pursuant to the Lacey Act? Provisions of the Act are imposed after the United States citizen returns to his or her residence, either in the United States or abroad. Therefore, service can be effected and penalties enforced.¹⁰⁶

Another consideration is whether the order of a foreign country for relief against environmental infringements would be acceptable in the United States if made under similar circumstances. Currently, the United States cooperates with other countries in enforcing foreign court orders and extradition requests.¹⁰⁷ Because the United States has demonstrated and expressed its commitment to the conservation of wildlife, it should honor a foreign country's order against a United States citizen for a violation of that nation's conservation laws. In this situation, the foreign country actively enforces its wildlife laws, apprehending and sanctioning United States citizens in violation of those laws.

The final factor to consider is whether a treaty with the nation in which the conduct occurs addresses the issue.¹⁰⁸ In some instances, a treaty exists with respect to the wildlife in question,¹⁰⁹ in which the treaty would control.¹¹⁰ However, arguably, when treaty provisions are not enforced by the country in which the acts are committed, the United States may exercise extraterritorial jurisdiction upon its citizens pursuant to its power under the treaty by enforcing the provisions of the Lacey Act. The United States exercise of jurisdiction would be based on its interest in requiring its citizens to obey its laws and in protecting the environment. In addition, a treaty does not give citizens a private right of action unless its provisions prescribe a rule by which those rights may be enforced.¹¹¹ The reviewing court determines if the treaty confers a private right of action

106. In *Blackmer v. United States*, 284 U.S. 421, 437 (1931), the Court found that "the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal." The Court stated, "The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them." *Id.* at 438 (citing *United States v. Bowman*, 260 U.S. 94, 102 (1922)).

107. Cooperation with foreign states is consistent with principles of comity, which includes respect for the laws of foreign states and reciprocity. *See supra* note 68.

108. "[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

109. *See, e.g., supra* note 7.

110. *See supra* note 108.

111. *Mannington Mills, Inc. v. Congoleum Corporation*, 595 F.2d 1287, 1298 (quoting *Head Money Cases [Edye v. Robertson]*, 112 U.S. 580, 598-99 (1884)) ("A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.").

under its provisions.¹¹²

The tripartite analysis considers both the interests of foreign countries and the interests of the United States when applying and enforcing the Lacey Act extraterritorially. When the Act is applied to United States citizens in a foreign country which is not enforcing its conservation laws, the Act does not restrict the rights of foreign citizens nor does it interfere with that country's enforcement of its laws. Therefore, application of the Act does not interfere with foreign policy or government, except to the extent the foreign country allows the taking of wildlife recognized by the United States as endangered or threatened.

IV. EXTRATERRITORIAL JURISDICTION IMPOSED PURSUANT TO THE LACEY ACT MAY ALSO BE ENFORCED BASED ON THE EFFECTS PRINCIPLE

Extraterritorial jurisdiction may be imposed based on conduct taking place outside the state, but which has an effect within the state.¹¹³ This basis of jurisdiction is known as the effects principle.¹¹⁴ The Restatement (Third) of the Foreign Relations Law of the United States has recognized that the effects principle may be applied to exercise jurisdiction when the effect is substantial and the exercise of jurisdiction reasonable.¹¹⁵

Factors determining whether the exercise of jurisdiction is unreasonable include: the activity's link to the regulating state's territory,¹¹⁶ the connections between the regulating state and the person

112. *Mannington*, 595 F.2d at 1299.

113. The rationale underlying this exercise of jurisdiction is known as the effects principle. "Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state's territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d (1987).

114. See *supra* note 113.

115. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d (1987). "This Restatement takes the position that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under section 403." *Id.* "The principle that an exercise of jurisdiction on one of the bases indicated in section 402 is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well." *Id.* § 403 cmt. a.

116. *Id.* § 403(2)(a).

responsible for regulating the activity,¹¹⁷ the character and importance of the regulated activity,¹¹⁸ the existence of justified expectations which may be affected by the regulation,¹¹⁹ the regulation's importance to the international system,¹²⁰ the extent to which the regulation is consistent with international traditions,¹²¹ whether another state has an interest in regulating the activity,¹²² and the likelihood of conflict with another state's regulations.¹²³ These factors are not intended to be exhaustive¹²⁴ and should be applied on a case-by-case basis.¹²⁵

In *Timberlane*, the court conducted an analysis to determine whether the alleged activity had some effect on American foreign commerce before it exercised subject matter jurisdiction.¹²⁶ The court found the standards used to analyze the effect of the activity on American foreign commerce varied.¹²⁷ Where the effect on commerce is analyzed in a foreign commerce setting, the court found that factors other than the effect on American foreign commerce should be considered.¹²⁸ However, analysis of the factors in the *Restatement (Third) of Foreign Relations Law of the United States* takes into consideration international issues of comity and fairness in the application of jurisdiction.¹²⁹

117. *Id.* § 403(2)(b).

118. *Id.* § 403(2)(c).

119. *Id.* § 403(2)(d).

120. *Id.* § 403(2)(e). This can be political, legal, or economic.

121. *Id.* § 403(2)(f).

122. *Id.* § 403(2)(g).

123. *Id.* § 403(2)(h).

124. *Id.* § 403 cmt. b.

125. *Id.* "Not all considerations have the same importance in all situations; the weight to be given to any particular factor or group of factors depends on the circumstances." *Id.*

126. "[T]he antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction. . . ." *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 613 (1976).

127. The court in *Timberlane* stated, "Even among American courts and commentators, however, there is no consensus on how far the jurisdiction should extend." 549 F.2d at 610. Some courts require a "direct and substantial effect" on American foreign commerce, while others use different expressions, such as "intended to affect," "a direct and influencing effect," or "a conspiracy . . . which affects." *Id.* at 610-11.

128. *Timberlane*, 549 F.2d at 611.

Although courts have spoken in terms of the *Restatement* and of congressional policy, findings that an American effect was direct, substantial, and foreseeable, or within the scope of congressional intent, have little independent analytic significance. Instead, cases appear to turn on a reconciliation of American and foreign interests in regulating their respective economies and business affairs. . . .

Id. (quoting William Fugate, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 563 (1976)).

129. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

Where the taking of wildlife in a foreign country would be illegal under the Lacey Act, such taking should be subject to civil or criminal prosecution pursuant to the Act based on the effects principle. The effect a taking has on the United States is twofold. First, the introduction of illegal wildlife into the United States endangers the agriculture and horticulture industries through the introduction of disease.¹³⁰ Second, illegal wildlife threatens indigenous wildlife through the introduction of disease and the possibility of predation, or domination of the introduced species over indigenous species in relation to habitat essential for nourishment and reproduction.¹³¹ The harmful effect on the United States economy and indigenous wildlife justifies the imposition of the Lacey Act based on extraterritorial conduct by United States citizens. Third, the illegal taking of wildlife in a foreign country reduces the populations of that species, making it less available for recreational, nonconsumptive purposes.¹³² The simple knowledge that a given species is no longer represented in the wild has an effect on the United States through that species' recreational unavailability.

130. The effect on the United States economy has been well documented. Imported wildlife carry diseases that can affect poultry, livestock, fish and pets. The most important of these diseases is exotic Newcastle disease, which is transmitted by imported birds to native birds, including poultry. In 1971, the Federal Government destroyed more than 12 million fowl in poultry stocks exposed to this disease. That outbreak cost the Federal taxpayers \$56 million. Outbreaks in 1979 and 1980 cost taxpayers more than \$2 million each. According to 1975 Department of Agriculture estimates, if the disease becomes established in the United States, the yearly losses could amount to \$230 million or more.

Legislative History of Lacey Act Amendments of 1981, 97th Cong., 1st Sess. 1-2 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1748-49.

131. See *supra* note 130. "The illegal wildlife trade . . . threatens the survival of many species of wildlife, particularly those which we value because of their aesthetic or commercial values." Legislative history of Lacey Act Amendments of 1981, 97th Cong., 1st Sess. 1 (1981), reprinted in 1981 U.S.C.C.A.N. 1748, 1748.

132. *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

[Respondents] undoubtedly have alleged a sufficient "injury in fact" in that the whale watching and studying of their members will be adversely affected by continued whale harvesting, and this type of injury is within the "zone of interests" protected by the Pelly and Packwood Amendments.

Id.

V. UNITED STATES CITIZENS SHOULD HAVE STANDING TO BRING AN ACTION FOR VIOLATION OF THE LACEY ACT

The policy served by the Lacey Act, deterring the illegal capture, sale, purchase, or transportation of wildlife, would be served by private actions brought for civil damages as well as by governmental action. These actions are known as citizen suit enforcement,¹³³ or private attorney general actions.¹³⁴ In order for a private citizen to bring a legal action, the statute must contain a private attorney general enforcement provision specifically allowing legal action on behalf of the state,¹³⁵ and the citizen must have standing to bring the action.¹³⁶

The United States Supreme Court found that changes to the environment could result in an injury recognized by the Court as conferring standing upon an individual.¹³⁷ An organization which brings an action claiming an interest in the problem does not have standing to bring the action.¹³⁸ However, an individual may bring an action if he or she claims an injury personal to that individual.¹³⁹

133. Citizen suit enforcement is enforcement of an existing law through a legal action brought by a private citizen on behalf of the public interest. See JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 1-2 (1987).

134. *Id.* at 1 n.1. "[T]he citizen suit provision created 'private attorneys general' to aid in enforcement." *Id.*

135. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1971). "Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy.'" *Id.*

136. "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Id.* at 731-32.

137. *Id.* at 734.

We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

Id.

138. *Id.* at 739.

139. The Court indicated in *Sierra Club* that injuries may reflect " 'aesthetic, conservational, and recreational' as well as economic values." 405 U.S. at 738 (quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 154). The Court further stated in *Lujan* that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing." 112 S. Ct. 2130, 2137 (1992).

However, in that case, the Court held that organization groups lacked standing to challenge the revision of § 7(a)(2) to the Endangered Species Act. The Court stated that the affidavits submitted by individual members of the groups contained no facts showing how damages to the endangered species would harm those individuals. *Id.* at 2138. The Court stated:

To survive the Secretary's summary judgement motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad,

Therefore, if a private attorney general provision were added to the enforcement provisions of the Lacey Act, an individual could bring suit alleging injury based on an impact on his recreation, conservation activities, or aesthetic pleasure. People traveling in foreign countries who observe others engaged in the illegal taking of wildlife would have standing to sue.

Private citizen involvement would provide support to United States agencies with insufficient resources to address the problem.¹⁴⁰ Further, provisions in private attorney general statutes provide for the award of costs of suit, including reasonable attorneys and expert witness fees.¹⁴¹ Use of these provisions would allow concerned citizens to pursue violations of the Lacey Act without requiring them to privately bear the costs of suit.¹⁴²

A private attorney general statute could be tailored to require citizens, prior to bringing an action against the violator, to give notice of a violation to the United States Wildlife Service, United States Customs Service, and any state agency which enforces fish and wildlife provisions. This would allow agencies to determine whether the agency or the citizen should enforce the Lacey Act and its penalty provisions against alleged violators. On balance, creating a private

but also that one or more of respondents' members would thereby be "directly" affected apart from their "'special interest' in the subject."

Id. at 2137-38.

140. See *supra* note 133. "Federal or state enforcement resources might be insufficient." JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 1 n.1 (1987).

141. *Id.* at 9.

142. For an example of a private attorney general provision see Endangered Species Act, 16 U.S.C. § 1540(g). "[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter. . . ." *Id.* § 1540(g)(A) (*quoted in Lujan*, 112 S. Ct. at 2142). The Court in *Lujan* held that this provision did not give environmental groups standing to challenge the government's violation of a procedural duty, i.e., consultation with the Secretary of the Interior before taking action.

See also SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986, CAL. HEALTH & SAFETY CODE § 25249.7 (West Supp. 1991).

(d) Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation which is the subject of the action to the Attorney General and the district attorney and any city attorney in whose jurisdiction the violation is alleged to occur and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against such violation.

Id.

attorney general enforcement provision for the Lacey Act would benefit United States agencies and concerned citizens by allowing individuals to act on violations personally known to them which harm and diminish species.¹⁴³

CONCLUSION

Amending the jurisdiction of the Lacey Act to impose sanctions on United States citizens on an extraterritorial basis provides an enforcement mechanism for acts committed in violation of United States laws, conventions, or treaties. The amendment builds from the floor of enforcement set by interstate commerce and jurisdictional requirements, giving law enforcement officials the ability to prosecute violators for acts committed outside the United States. It reaches into foreign countries which have little infrastructure or enforcement capabilities and prevents decimation of wildlife resources.

The Lacey Act will only be applied to extraterritorial conduct after a tripartite analysis is conducted. This analysis determines whether the activity affects the United States, whether the effect is sufficient to recognize imposition of the Lacey Act on an extraterritorial basis, and whether jurisdiction should be imposed after considering individual factors which weigh the United States interests against those of the foreign nation in which the act is committed. Thus, the tripartite analysis serves as a safeguard against uninhibited application of the Lacey Act on an extraterritorial basis.

Finally, expansion of the Lacey Act's jurisdiction to include extraterritorial conduct deters the taking of wildlife which is prohibited under United States law. Expansion of the Lacey Act's jurisdiction supports the United States commitment to and policies of conservation of endangered and threatened wildlife. By restrictions on and sanctioning United States citizens wherever they go regarding taking wildlife, the United States is more effective in uniform enforcement of wildlife laws.

JULIA C. SHEPARD

143. A plurality of the United States Supreme Court reviewed standing as it applied to environmental groups in *Lujan*. The Court stated:

[T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

112 S. Ct. at 2136 (citations omitted).