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Matthew S. White

Washington University in St. Louis, School of Law

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OVERCRIMINALIZATION BASED ON FOREIGN LAW: HOW THE LACEY ACT INCORPORATES FOREIGN LAW TO OVERCRIMINALIZE IMPORTERS AND USERS OF TIMBER PRODUCTS

INTRODUCTION

On the morning of August 24, 2011, armed federal agents carried out a series of four coordinated raids across Tennessee in order to execute criminal search warrants.¹ In the process they shut down a massive operation,² confiscated electronic records, and seized alleged contraband with an estimated value of almost one million dollars.³

While this sounds like a typical raid by federal agents on an organized crime syndicate, it was anything but typical. The agents were not searching for narcotics, illegal weapons, counterfeit currency, or any of the other contraband normally associated with criminal activity. Nor was the government seeking to bring down a drug cartel, mafia family, street gang, or other such menaces to society. Rather than trying to protect American citizens from violent criminals and dangerous contraband, these particular agents were searching for wood and the world-renowned musical instruments it is used to produce.⁴ The target of the raid was Gibson Guitar Corporation, the iconic maker of guitars and other stringed instruments.⁵ As a result of the government raid, employees were sent home from work⁶ uncertain about their future employment in the midst of the worst

1. Andy Meek, *Gibson Guitar CEO Speaks Out About Raids*, MEMPHIS DAILY NEWS (Aug. 29, 2011), available at <http://www.memphisdailynews.com/news/2011/aug/29/gibson-guitar-ceo-speaks-out-about-raids/>; *Gibson Guitar Corp. Responds to Federal Raid*, GIBSON (Aug. 25, 2011) [hereinafter *Gibson Guitar Corp. Responds*], <http://www.gibson.com/en-us/Lifestyle/News/gibson-0825-2011/>; see also Eric Felten, *Guitar Frets; Environmental Enforcement Leaves Musicians in Fear*, WALL ST. J. (Aug. 26, 2011), <http://online.wsj.com/article/SB10001424053111904787404576530520471223268.html>.

2. *Gibson Guitar Corp. Responds*, *supra* note 1.

3. Meek, *supra* note 1.

4. *See id.*

5. *Id.*; see also *Products*, GIBSON, <http://www2.gibson.com/Products.aspx> (last visited Jan. 12, 2013).

6. *Gibson Guitar Corp. Responds*, *supra* note 1. Gibson employs approximately 1,200 people in the United States. Nancy Dewolf Smith, *The Government and the Guitar Man*, WALL ST. J. (Nov. 12, 2011), http://online.wsj.com/article/SB10001424052970203554104576655273915372748.html?mod=W_SJ_Opinion_LEADTop.

unemployment crisis since the Great Depression.⁷ Furthermore, Gibson CEO Henry Juskiewicz was left wondering if he could even continue making the guitars that have helped turn artists such as B.B. King, ZZ Top, Les Paul, and Jimmy Page⁸ into legends, or if he would instead be sent to federal prison.⁹ Mr. Juskiewicz's future and that of his iconic company would turn on a technical interpretation of foreign law¹⁰ made by officials in the United States.¹¹

The raid on Gibson is among the most high profile examples of over-criminalization in our modern society. The raid and risk of potential prosecution was a result of the 2008 amendments to the Lacey Act ("the Act").¹² The Act, as amended, makes it illegal to possess any plant, now including timber products,¹³ that was "taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law . . ."¹⁴ The Act extends liability not only to the initial importer of the wood products but also to anyone, including private individuals,

7. Ben Tracy, *Chronic unemployment highest since Great Depression*, CBS (June 5, 2011), <http://www.cbsnews.com/stories/2011/06/05/eveningnews/main20069136.shtml> (last updated June 13, 2011) ("About 6.2 million Americans, 45.1 percent of all unemployed workers in this country, have been jobless for more than six months—at its highest since the Great Depression.").

8. Smith, *supra* note 6.

9. See Felten, *supra* note 1 (discussing possible prison term for another person convicted of violating the Act).

10. Smith, *supra* note 6. The issue is whether the export of finished products, "such as the prepared slats of Indian rosewood used on guitar fingerboards," is permissible under foreign law. *Id.* Gibson claims the export was legal and that it had the requisite permits from the foreign government to export the wood at issue. *Id.* However, the Government is claiming that the fingerboards were not finished enough to qualify for export under foreign laws. *Id.* Indian law requires that that ebony veneers to be exported must be "finished within the country, by local labor, to a thickness of less than six millimeters." Andrew M. Grossman, *That silly little centimeter makes it a crime*, WASH. TIMES (Dec. 21, 2011), available at <http://www.washingtontimes.com/news/2011/dec/21/grossman-that-silly-little-centimeter-makes-it-a-c/>. Gibson's wood, however, was allegedly not a thin veneer but was rather almost a full centimeter thicker than the six millimeter requirement. *Id.*

11. Gibson eventually settled the matter for \$300,000 in order to avoid risking the potential consequences of a criminal conviction. Aaron Smith, *Gibson Guitar in settlement on illegal wood imports*, CNN Money (Aug. 7, 2012), <http://money.cnn.com/2012/08/06/news/companies/gibson-imports-wood/index.htm>. For more on the enormous pressure companies are under to settle in white-collar criminal cases, see HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

12. Smith, *supra* note 11. The Lacey Act is currently codified at 16 U.S.C. §§ 3371–78 (2006).

13. 16 U.S.C. § 3371; see also USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., *LACEY ACT PRIMER 6* (Apr. 2010), available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf. The timber at issue includes both that harvested from natural stands and that which has been grown specifically to be harvested for wood products. See, e.g., ENVIRONMENT INVESTIGATION AGENCY (EIA), *THE U.S. LACEY ACT: FREQUENTLY ASKED QUESTIONS ABOUT THE WORLD'S FIRST BAN ON TRADE IN ILLEGAL WOOD 2* (2008), available at <http://www.eia-global.org/PDF/EIA.LaceyReport.English.pdf> (last updated Jan. 2009).

14. 16 U.S.C. § 3372 (2006).

possessing the illegally harvested product.¹⁵ Both raw timber products and finished goods utilizing such wood are regulated by the Act.¹⁶ Potential punishment ranges from seizure of the contraband, up to a felony conviction punishable by both prison sentences and fines for the responsible party.¹⁷

The attention garnered by the raid on Gibson, despite the fact that the matter is now settled¹⁸ and the subsequent scrutiny given to the law in Congress,¹⁹ presents an opportune occasion to examine the 2008

15. *Id.* For a discussion about First Lady Michelle Obama giving a Gibson guitar containing some of the exotic woods in question to French First Lady Carla Bruni-Sarkozy, which could potentially put her in violation of the Act, see Deborah Zabarenko, *Is Michelle Obama strumming along with Gibson Guitar?*, REUTERS (Oct. 13, 2011), available at <http://www.reuters.com/article/2011/10/13/idUS365376484620111013>. The fact that the First Lady may have violated the Act by simply giving a gift made of wood to someone in a foreign country is highly indicative of the degree to which the Act, as currently written and interpreted, over-criminalizes common, innocuous behavior. Musicians, however, are allowed to travel internationally with their instruments after following certain procedures. LACEY ACT PRIMER, *supra* note 13, at 31 (discussing ability to declare instruments for performance).

16. 16 U.S.C. § 3371 (2006); see also LACEY ACT PRIMER, *supra* note 13, at 6, 10, 12, 26, 30 (including examples of bagpipes, wooden spoons, and even charcoal as regulated items).

17. 16 U.S.C. §§ 3373–74 (2006).

18. Smith, *supra* note 11.

19. In the wake of the Gibson raids, a movement grew in the halls of Congress to amend or repeal the Lacey Act. Grossman, *supra* note 10. Republican Senator Rand Paul of Kentucky, along with Democratic Congressman Jim Cooper and Republican Congresswoman Marsha Blackburn, both from Gibson's home state of Tennessee, have emerged as leaders in the movement to reform or repeal the Act. *Id.*; Marcus Washington, *Cooper, Blackburn Seek Changes To Lacey Act*, NEWSCHANNEL5.COM (Oct. 20, 2011), <http://www.newschannel5.com/story/15738896/cooper-blackburn-to-announce-bill-to-clarify-lacey-act>; see also Pete Kasperowicz, *Lawmakers Look to Ease Lacey Act Regulations After Gibson Guitar Raid*, THE HILL'S FLOOR ACTION BLOG (Oct. 20, 2011, 1:46 PM), <http://thehill.com/blogs/floor-action/house/188831-guitar-heros-lawmakers-look-to-ease-rules-after-gibson-guitar-raid>.

The initial efforts by Congresswoman Blackburn and Congressman Cooper, along with seventeen other cosponsors, were aimed at protecting consumers who may possess illegal wood in the form of musical instruments, rather than at protecting the producers of those instruments, through legislation titled the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act ("RELIEF Act"). Washington, *supra*; see also Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, H.R. 3210, 112th Cong. (2011). To do so, the RELIEF Act proposed protecting people who "unknowingly possess[ed] illegally imported wood . . ." Washington, *supra*. The RELIEF Act would also "require the federal government to establish a database of forbidden wood sources" to help potential possessors at all levels to identify potential problematic wood products. *Id.* Congressman Cooper and Congresswoman Blackburn's RELIEF Act proposal has gained broad support from industry groups including the American Home Furnishings Alliance ("AHFA"), the International Wood Products Association ("IWPA"), the National Association of Home Builders ("NAHB"), the National Association of Music Merchants ("NAMM"), the National Marine Manufacturers Association ("NMMA"), the National Retail Federation ("NRF"), and the Recreational Vehicle Industry Association ("RVIA"). Letter from AFHA, IWPA, NAHB, NAMM, NMMA, NRF, and RVIA to Jim Cooper, United States Congressman (Oct. 18, 2011), available at <http://www.woodworkingnetwork.com/news/woodworking-industry-trends-press-releases/Seven-Trade-Groups-Support-Lacey-RELIEF-Act-133293033.html>; see also NAMM Supports New Lacey RELIEF Act, NAMM (Oct. 20, 2011), <http://www.namm.org/news/press-releases/namm-supports-new-lacey-relief-act> (further

detailing NAMM support for Congressman Cooper's RELIEF Act); *NRF Calls Lacey Act Reform Bill 'Positive First Step,'* NAT. RETAIL FED'N (Oct. 20, 2011), http://www.nrf.com/modules.php?name=Newsletter&op=details&sp_id=390 (reiterating language from the letter to Congressman Cooper calling the RELIEF Act a "positive first step" and expanding upon the NRF's support for the RELIEF Act).

Senator Paul, on the other hand, seems to be driving toward a more sweeping reform or even wholesale abolishment of the Lacey Act. Grossman, *supra* note 10. Senator Paul's criticism does not seem limited to the 2008 Amendments dealing with wood products but rather the law more broadly. *Rand Paul on Lou Dobbs Radio* (radio broadcast Oct. 11, 2011), *available at* <http://www.youtube.com/watch?v=KKSgLi4srGU>. In particular, Senator Paul is concerned over the incorporation of foreign law and the resulting fact that citizens can face "civil and criminal penalties for breaking a law that no one in your country every voted on." *Id.* He went on to state he is "going to introduce legislation to try to reform or eliminate this law" because he disagrees with the ability for U.S. officials to prosecute on "laws formulated in another country." *Id.* He also rebuts some of the arguments that the Lacey Act helps create American jobs by pointing out that local processing requirements, such as the Indian law at issue in the Gibson matter, actually require work to be done overseas rather than in the United States. *Id.*; *see also supra* note 10 (discussing Indian local processing law). For a response to his colleagues' criticism of the Act, see Letter from Earl Blumenauer, U.S. Congressman, to Fellow Members of Congress (Sept. 19, 2011) [hereinafter Letter from Earl Blumenauer], *available at* <http://blogs.tennessean.com/politics/files/2011/09/9-19-11-Lacey-Act-Dear-Colleague-Gibson-Response.pdf> (Congressman Blumenauer's letter predates the RELIEF Act and many of the other more specific actions by Members of Congress but was written after several colleagues had begun voicing public criticism and discussing potential legislative solutions). Congressman Blumenauer's letter emphasizes the support for the 2008 Amendments at the time of their initial consideration and perceived benefit to American business. *Id.* He notes that:

The Lacey Act amendments that Congress overwhelmingly approved and that President George W. Bush signed into law protect America's small businesses and manufacturing jobs by helping our small businesses compete on a level playing field. That's why thousands of small and large companies came together to support the Lacey Act. From the American Forest & Paper Association, who employ nearly 900,000 people and are one of the top 10 manufacturing employers in 47 states, to the Hardwood Federation, which represents 14,000 businesses and over one million families, they understood that stopping illegal logging protects U.S. small businesses and manufacturing jobs. Law abiding U.S. small businesses and manufacturers had difficulty competing with foreign companies operating with complete disregard for the law.

Id. Additionally, efforts at reform have also gained some pushback from the domestic timber industry. *See, e.g.,* Karen M. Koenig, *Wood Industry Coalition Opposes Lacey Act Changes*, WOODWORKING NETWORK (Nov. 16, 2011), <http://www.woodworkingnetwork.com/news/woodworking-industry-news/Wood-Industry-Coalition-Voices-Support-for-Lacey-Act-133981638.html>. However, as noted by Grossman, such opposition very likely stems from self-interest as the domestic timber producers certainly benefit from the reduction in competition from foreign sources caused by the Act and uncertainty over how it will be enforced. Grossman, *supra* note 10. Turning to the specifics of the Gibson matter, Congressman Blumenauer states that:

[T]he company has been under investigation since 2009 for knowingly importing illegally harvested timber from Madagascar. Gibson's competitors chose not to pursue wood from this same market because of concerns about the legality of the timber. The new search warrants served by FWS [U.S. Fish and Wildlife Service] agents on 24 August were an investigation for both customs fraud and Lacey Act violations regarding Indian wood. The court system is now in the position to hear the evidence and make a decision on the merits. Congress should follow the same course.

In the meantime, many other businesses, including those in the guitar industry, support the rules. In a recent interview on NPR, Chris Martin, Chairman and CEO of the C.F. Martin Guitar Co., says of the Lacey Act: "I think it's a wonderful thing. I think illegal logging is

Amendments to the Act in a more scholarly light. After assessing the law, this Note argues that the application of foreign law to companies using timber products is an example of vast over-criminalization that should be addressed through judicial reinterpretation of case law that had developed under the Act prior to the inclusion of timber products, through rewriting the legislation to address the pertinent issues, or some combination thereof. Part I explores the history and expansion of the Act, including discussion of case law that developed before the Act was amended in 2008 to extend its applicability to timber and wood products. Part II argues that the timber and wood products markets are significantly different from the markets against which the Act has historically applied and that the law surrounding the Act needs to be reconsidered in light of these differences. Part III discusses various options for resolving these issues and ultimately argues that a repeal of the 2008 Amendments or other legislative modification of the law is warranted.

I. THE HISTORY AND EXPANSION OF THE LACEY ACT

This part presents some background on the historical development of the Lacey Act and how the Act has been judicially construed. There is particular focus on the inclusion of foreign law and how determinations about violations of foreign law are made under the Act.

appalling. It should stop. And if this is what it takes unfortunately to stop unscrupulous operators, I'm all for it."

Letter from Earl Blumenauer, *supra*. But see Craig Havighurst, *Why Gibson Guitar Was Raided By The Justice Department*, NAT. PUB. RADIO (Aug. 31, 2011), <http://www.npr.org/blogs/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department> (quoting Chris Martin discussing C.F. Martin Guitar Co.'s previous use of Malagasy rosewood before changing course). It is also important to keep in mind that Martin is not an unbiased commentator in this regard since the Lacey Act action against Gibson could potentially take out one of his primary competitors. Furthermore, Congressman Blumenauer's argument that the Lacey Act is about leveling the playing field and protecting American jobs falls flat on its face when applied to the specifics of the Gibson case, as many of the exotic woods used in the instruments are not domestically available.

Notably absent from Congressman Blumenauer's letter is any direct response to accusations that the Lacey Act as a whole, and the 2008 Amendments specifically, are substantively unfair or any argument that the incorporation of foreign law is the correct approach to addressing illegal logging. This Note, and much of the other Lacey Act criticism, is not intended to argue that nothing should be done to address the environmental threat from illegal logging. Rather, this Note makes the more limited argument that, at least as applied to wood products, the blanket incorporation of foreign law into a law with such potentially severe consequences for American businesses and citizens is unfair and unwise.

A. *The Statutory History Developed Around Solving a Different Set of Issues from the Current Threats of Deforestation*

The Lacey Act has a long history and was first passed in 1900.²⁰ At the time, one of the Act's primary objectives was the preservation of wildlife taken in violation of state or territorial law.²¹ The Act was amended in 1935 to incorporate violations of foreign law.²² It again underwent significant revisions in 1981²³ and 1988.²⁴ The most recent amendments in 2008 ("2008 Amendments")²⁵ extended coverage under the Act to timber and wood products²⁶ while also adding a declaration requirement.²⁷

The Act currently creates three levels of liability for violations.²⁸ Forfeiture of the contraband items is done on a strict liability basis.²⁹ Breach of due care, on the other hand, results in forfeiture plus up to a one year sentence and/or a fine of \$100,000 for individuals or \$200,000 for corporations.³⁰ In addition to forfeiture, knowing violations can lead to a five-year sentence and/or a \$250,000 fine for individuals, which potentially doubles to \$500,000 for corporations.³¹

20. Margaret E. McGuinness, Symposium, *Foreword: Return to Missouri v. Holland: Federalism and International Law*, 73 MO. L. REV. 921, 923 (2008).

21. *Id.* The failures of the Act in earliest forms led, in part, to the Migratory Bird Treaty and Migratory Bird Treaty Act which were decided in the famous case of *Missouri v. Holland*, 252 U.S. 416 (1920). *Id.* at 923–24.

22. *United States v. McNab*, 331 F.3d 1228, 1238 n.18 (11th Cir. 2003) (citing to H.R. REP. NO. 97-276, at 7 (1981)).

23. Act of Nov. 16, 1981, Pub. L. No. 97-79, 95 Stat. 1073 (1981); LACEY ACT PRIMER, *supra* note 13, at 5.

24. Act of Nov. 14, 1988, Pub. L. No. 100-653, 102 Stat. 3825 (1988); LACEY ACT PRIMER, *supra* note 13, at 5.

25. These amendments were part of the 2008 Farm Bill, Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 1291–94 (2008). This approach contrasts sharply with the 1981 and 1988 revisions which were done as standalone legislation giving individual congressmen and senators a better opportunity to assess the impact of the Lacey Act amendments and make a vote based solely on those issues, rather than having to vote as part of a larger omnibus bill. Section 8204 covers a mere four pages of the 629-page Farm Bill. *Id.*

26. LACEY ACT PRIMER, *supra* note 13, at 6.

27. *Id.* While the addition of a declaration requirement represents a significant addition to the Act, it is beyond the scope of this essay and will not be discussed at length. For more information, see *id.* at 11–12, 25–36; *see also* Felten, *supra* note 1 (discussing a case involving Pascal Vieillard's violation of the declaration requirement).

28. 16 U.S.C. §§ 3373–74; *see also* LACEY ACT PRIMER, *supra* note 13, at 13–14.

29. 16 U.S.C. § 3374; LACEY ACT PRIMER, *supra* note 13, at 13.

30. 16 U.S.C. §§ 3373–74; LACEY ACT PRIMER, *supra* note 13, at 13. For an argument that the due care standard needs additional clarity in light of the 2008 Amendments, see Rachel Saltzman, *Establishing a "Due Care" Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1 (2010), available at <http://www.michiganlawreview.org/assets/fi/109/saltzman.pdf>.

31. 16 U.S.C. §§ 3373–74; LACEY ACT PRIMER, *supra* note 13.

*B. Much of the Case Law Addressing Incorporation of Foreign Laws
Arose from Controversies Involving Importation of Animal Products*

Much of the case law that developed under the Act prior to the 2008 Amendments dealt largely with violations related to fishing or importation of exotic animals³² into the United States.³³ In these scenarios, violations of the foreign law have historically been rather obvious.³⁴

Determinations of foreign law³⁵ in these cases have typically been relatively straightforward due to the clarity of the regulations at issue³⁶ and

32. The importation of exotic animals as used in this context refers both to live animals and products derived from exotic animals, such as skins.

33. *See, e.g.*, *United States v. McNab*, 331 F.3d 1228, 1231 (11th Cir. 2003) (“Caribbean spiny lobsters”); *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) (“hides and horns of Punjab urial (wild sheep) and a Chinkara gazelle”); *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474, 475 (5th Cir. 1992) (hide and horns of wild sheep); *United States v. Lee*, 937 F.2d 1388, 1390 (9th Cir. 1991) (salmon); *United States v. 594,464 Pounds of Salmon, More or Less*, 871 F.2d 824, 825 (9th Cir. 1989) (same); *United States v. Rioseco*, 845 F.2d 299, 301 (11th Cir. 1988) (fishing in Bahamian waters without a proper license); *United States v. Molt*, 599 F.2d 1217, 1218 (3d Cir. 1979) (“snakes and other reptiles”); *United States v. The Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 387 (S.D. Fla. 1993) (lobster tails); *United States v. 2,507 Live Canary Winged Parakeets (Brotogeris Versicolorus)*, 689 F. Supp. 1106, 1109 (S.D. Fla. 1988) (live Canary Winged Parakeets); *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, 636 F. Supp. 1281, 1282 (S.D. Fla. 1986) (crusted caiman sides, i.e. caiman hides). This focus on seafood and exotic animals is primarily because the Act explicitly excludes “common cultivars . . . and common food crops,” which excludes most plant imports, and limits its animal application to “fish or wildlife,” thereby excluding common agricultural and domestic animals. *See* 16 U.S.C. § 3371.

34. *See infra* notes 59–60.

35. In the criminal context, questions of foreign law are determined in accordance with FED. R. CRIM. P. 26.1. *See, e.g.*, *Mitchell*, 985 F.2d at 1280 (discussing foreign law hearing in Lacey Act criminal case). “The determination of foreign law is a question of law to be established by any relevant source, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” *Id.* (internal citations omitted). Rule 26.1 provides that:

A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.

FED. R. CRIM. P. 26.1. Similarly, FED. R. CIV. P. 44.1 would apply in the civil seizure context and provides that:

A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.

FED. R. CIV. P. 44.1

36. *See infra* notes 58–60 and accompanying text.

the assistance of foreign governments in helping the U.S. courts interpret the relevant law of their nations.³⁷

Despite the relatively small number of cases that have been litigated under the Act in total,³⁸ and the even smaller subset that have had to deal with questions of foreign law, there are a few key trends that emerge and presumably are applicable in cases involving timber and wood products. To begin with, courts interpret “foreign law” quite broadly and apply the term to mean more than what is merely codified in foreign statutes.³⁹ Additionally, the laws need not be criminal or regularly enforced to serve as the basis for a Lacey Act violation.⁴⁰ Even if the foreign law is later deemed invalid in that country, the invalidation does not apply retroactively to prisoners who had been convicted under the Lacey Act.⁴¹ The courts also do not recognize an innocent owner defense for violation of the foreign laws.⁴² In this context, little weight is given to foreign permits or other approval means authorizing the items to be harvested and exported from the country.⁴³ In general, courts have shown little concern

37. *See, e.g.*, 2,507 Live Canary Winged Parakeets, 689 F. Supp. at 1109–10 (discussing testimony from Peruvian “Director of the Department of Forest and Fauna at the Ministry of Agriculture”).

38. *See* Saltzman, *supra* note 30, at 3.

39. *See, e.g.*, United States v. McNab, 331 F.3d 1228, 1239 (11th Cir. 2003) (concluding “that regulations and other such legally binding provisions that foreign governments may promulgate . . . are encompassed by the phrase ‘any foreign law’ in the Lacey Act.”); United States v. 594,464 Pounds of Salmon, More or Less, 871 F.2d 824, 830 (9th Cir. 1989) (“The Taiwanese Announcement that restricts the export of salmon from Taiwan constitutes ‘foreign law’ under the Lacey Act.”). In large part, this flexibility is needed as each nation takes different approaches to how their government is structured and how they choose to put forward environmental laws and regulations.

40. LACEY ACT PRIMER, *supra* note 13, at 22; *see also* McNab, 331 F.3d at 1240 (“a viable or prosecutable [foreign] law violation is [not] necessary to support federal charges”) (internal citation omitted). In theory at least, a defendant could receive a felony conviction, five-year prison sentence, and a very significant fine for violating a foreign environmental regulation that is rarely enforced and only carries a mild fine. Essentially, the Act allows for a felony conviction in the United States for the environmental equivalent of a speeding ticket received overseas. Furthermore, as the speeding ticket analogy demonstrates, these minor laws are the ones that are most likely to be “knowingly” violated and thus eligible for the felony prosecution. Consider that it is quite common, though not necessarily right, for people to speed or commit other minor regulatory infractions.

41. McNab, 331 F.3d at 1243.

42. United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep, 964 F.2d 474, 476 (5th Cir. 1992); 2,507 Canary Winged Parakeets, 689 F. Supp. at 1117. The lack of an innocent owner defense applies only to forfeiture; it would constitute a defense under criminal offenses as it goes directly to the required mens rea.

43. *See* One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep, 964 F.2d at 477 (“[E]ven if the Baluchistan export permit authorized removal of the respondent sheep from Pakistan, it would be void as repugnant to the Imports and Exports Act.”); 2,507 Canary Winged Parakeets, 689 F. Supp. at 1114 (holding that permit was invalid and thus “disagree[ing] . . . that there was no violation of Peruvian law because the permit was signed by the Director of the Department of Forest and Fauna.”).

over the act of state doctrine⁴⁴ or other issues of foreign sovereignty that could arise under Lacey Act enforcement.⁴⁵

II. DIFFERENCES BETWEEN TIMBER PRODUCTS AND THE INDUSTRIES HISTORICALLY REGULATED UNDER THE ACT CALL INTO QUESTION THE APPROPRIATENESS OF THE 2008 AMENDMENTS

This part articulates why the 2008 Amendments have created new concerns about the about the Act given differences between the market for wood products and those historically regulated under the Act. It also argues that these differences warrant a reexamination of the statute and case law.

A. *Markets for Timber and Wood Products Differ Significantly From Those Products Historically Regulated Under the Act*

The markets for wood products differ significantly from markets for historically regulated products. Wood is a component of many more commonly used products than are derivatives from exotic animals or seafood. Wood is used in everything from paper and charcoal to musical instruments, automotive interiors, furniture, buildings, etc. In contrast, seafood and exotic animal products are generally marketed more directly without the same degree of incorporation into other products.⁴⁶ The limited

44. 2,507 Canary Winged Parakeets, 689 F. Supp. at 1120 (rejecting claim that act of state doctrine prevented U.S. courts from reviewing whether Director had authority to issue a valid permit). The act of state doctrine is “[t]he principle that no nation can judge the legality of a foreign country’s sovereign acts within its own territory” and functions as “a prudential limitation on the exercise of jurisdiction designed so as to avoid harming relations with other nations.” BLACK’S LAW DICTIONARY 40 (9th ed. 2009); 2,507 Canary Winged Parakeets, 689 F. Supp. at 1120 (citing *Callejo v. Bancomer, S.A.*, 765 F.2d 1101 (5th Cir. 1985)).

45. *See, e.g.*, *McNab*, 331 F.3d at 1241–42 (declining to follow opinion of Honduran officials that law was now invalid and should not be applied to Lacey Act criminal defendant). This overall attitude may be reflective of the fact that the foreign government is cooperating and in agreement with Lacey Act enforcement in the majority of case creating issues as to interpretation of foreign law. *See supra* note 37 and accompanying text.

46. Leather is an example of an animal product that has attained wide usage. *Animal Leather Sources and Uses*, UNITED GLOVE, <http://www.unitedglove.com/leathersources.htm> (last visited Jan. 14, 2012). However, the overwhelming majority (98.8%) of leather used for such products comes from agricultural animals. *Id.* These hides from agricultural animals are excluded from Lacey Act regulation as the regulation only apply to “fish or wildlife” which is defined as “any wild animal, whether alive or dead, including without limitation any wild mammal bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof.” 16 U.S.C. § 3371(a). Since agricultural animals are not “wild” by definition, they do not fall under the terms of the Act. While truly exotic leathers from wild animals are indeed subject to regulation under the Act, the usage for such products is significantly narrower than that for agricultural leather, which is not covered.

number of industries historically regulated under the Act are ones that more specifically focused on importation and marketing of seafood and exotic animals. This narrow focus allowed for more effective supply chain management and thus decreases the potential for liability under the Act. Conversely, under the 2008 Amendments it has become significantly harder for businesses dealing in wood productions to similarly manage their exposure.

The supply chains for wood products and historically regulated items differ significantly. To begin with, the supply chain for wood products is typically longer and more complex than for most historically regulated items.⁴⁷ Seafood and animal products typically undergo less processing and get to market more quickly with fewer linkages in the supply chain when compared to timber products.⁴⁸ These few linkages and short time frame make it feasible for possessors of the historically regulated products

Therefore, regulation of leather hides under the Lacey Act and provides a very poor analogy to the regulation of timber products, which the Act covers regardless of the source, whether it is from natural stands or planted on plantations. *See supra* note 13 and accompanying text.

47. For instance, consider that “[m]any of the home furnishing industry’s leading companies source from hundreds of factories around the globe.” *AFHA Releases Responsible Sourcing Manual*, HOME FURNISHINGS BUS. (Jan. 6, 2012), <http://www.hfbusiness.com/article/guide-helps-home-furnishings-cos-set-social-responsibility-programs/1>. Furthermore, “[e]ven smaller companies may be doing business with dozen or more overseas resources.” *Id.*

48. This is not to suggest that there are not challenges to managing the supply chains in these other industries as well. Rather, this Note argues that, though still challenging, management of the supply chain and assurance of regulatory compliance in more historically regulated industries is more feasible than it is for wood products.

In the fishing industry, for instance:

[T]here are four possible routes fish caught by a foreign fleet may make its way to the consuming nation: 1) it may be exported directly after harvest; 2) it may be exported after only primary processing occurs within the foreign harvesting nation; 3) it may be exported after both primary and secondary processing occur within the foreign harvesting nation; or 4) it may be exported after harvest to a third country processor which will then re-export the product to the consuming public.

CATHY A. ROHEIM, SEAFOOD SUPPLY CHAIN MANAGEMENT: METHODS TO PREVENT ILLEGALLY-CAUGHT PRODUCT ENTRY INTO THE MARKETPLACE 4 (2008), http://cmsdata.iucn.org/downloads/supply_chain_management_roheim.pdf. The “emergence of third country processor[s]” (i.e. route 4 above) is a “relatively new feature of the global supply chain” *Id.* These are “count[ies] to which nations export unprocessed products simply to become processed, only to have those products re-exported.” *Id.* This trend could have implications for Lacey Act enforcement to this historical regulated market going forward and thus make compliance assurance more difficult as well. As stated by Roheim:

The primary nation serving this role [as a third country processor] is China. A growing and significant amount of fish is exported to China post-harvest, processed, then re-exported around the globe. This has significant implications for IUU [(illegal, unreported, and unregulated)] fish, in particular, as if one is successful in getting illegal fish into China, the product is essentially laundered, as it re-emerges as legal ‘product of China,’ if it does not remain in the domestic market for consumption there.

Id. at 1, 3.

to know the specifics of what was harvested, how and where it was harvested, and its condition at the time of import.⁴⁹ Wood products, on the other hand, are more likely to undergo extensive processing and pass through multiple suppliers before ending up in finished goods.⁵⁰ This is a result, in large part, of both the significantly broader uses for wood, and the higher perishability of historically regulated items.

Taken in combination, the market differences reveal the significant expansion of potential liability following the 2008 Amendments. To illustrate the extent to which the landscape has now changed, consider that Kmart can now have inventory seized and executives subjected to federal

49. In many of the reported cases, the criminal defendants or owners of the seized products clearly had a direct hand in both harvesting the goods and their importation into the country. *McNab*, 331 F.3d at 1232 (criminal defendants were directly involved in importing the suspect lobsters into the U.S.); *United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) (criminal defendant personally transported hide and horns out of Pakistan); *One Afghan Urial Oives Orientalis Blandordi Fully Mounted Sheep*, 964 F.2d at 475 (claimant in seizure case personally harvest and removed the sheep); *United States v. Lee*, 937 F.2d 1388, 1390 (9th Cir. 1991) (criminal defendants were fishermen involved in “the illegal acquisition, sale and importation of salmon”); *United States v. Rioseco*, 845 F.2d 299, 300–01 (11th Cir. 1988) (criminal defendant was in Bahamian waters without a license); *United States v. The Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 393 (S.D.F la. 1993) (claimant in seizure case “personally purchased the lobster tails . . . and saw at least some of them being packed”); *2,507 Live Canary Winged Parakeets*, 689 F. Supp. at 1111 (claimant in seizure case had agreed to purchase parakeets and have them imported); *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, 636 F. Supp. 1281, 1283 (S.D. Fla. 1986) (claimants were “jointly engaged in the business of procuring a shipping hides”).

In the fishing industry, efforts are under way to establish supply chain controls that are capable of tracing fish back to the vessel which initially caught the fish. ROHEIM, *supra* note 48, at 3. These efforts are largely being driven by private organizations such as “the Marine Stewardship Council (MSC) [which has a] program for sustainably-managed capture fisheries, and . . . the European Fish Processors Association (AIPCE).” *Id.* Though certainly governed by the Lacey Act in the U.S., such measures are largely done more out of social responsibility and economic incentives. As Roheim notes:

The economic incentives created by these initiatives might be framed under the rubric of corporate social responsibility—in other words, the corporate buyers at the top of the supply chain such as retailers and processors have a reputation at stake, i.e. their brand has value. As such, being associated with the purchase of illegally-caught product reduces the value of their brand and reputation, and thus is something several corporations are beginning to invest in avoiding. As a result, several firms in Europe, the U.S. and elsewhere are requiring that seafood they purchase either meet tractability requirements to prevent IUU [(illegal, unreported, and unregulated)] fish from entering the supply chain, or come from MSC-certified fisheries, in which case they must meet certain criteria, or both.

Id. at 1, 3.

50. At the end of the day, products from the historically regulated industries are likely to be sold as what they are, namely a piece of tuna or a caiman skin item. The wood products, on the other hand, are more likely to end up as part of another product, such a guitar or broom and, as such, are much harder to identify as a potentially illegal product.

charges for the wood used in broom handles on their shelves.⁵¹ Kmart likely plays no role in deciding where to source the wood or anything related to the brooms' production. It simply orders brooms to stock for its customers and likely never imagines that should it choose poorly, the inventory could be seized and Kmart could end up with civil liabilities or criminal charges.⁵²

Furthermore, markets for the products historically covered by the Lacey Act are much more heavily regulated than markets for wood products, and as such, have built up a higher institutional capacity for insuring compliance. Seafood, for instance, is heavily regulated because it is a food product and those dealing in living animals are well aware that their products are subject to animal welfare and invasive species regulations, among others.⁵³ This contrasts heavily with the market for wood products; for example, musical instruments and wooden spoons have not been historically subject to product specific regulation. In addition to the historical context, regulation of seafood and living animals makes normative sense due to food safety concerns and ethical issues surrounding animal welfare. On the other hand, it seems absurd to subject someone to federal prison, revoke their voting privileges, and administer all the other ramifications of a felony conviction over broom handles, wooden spoons, or guitars.

As a practical matter, it cannot be forgotten that regulation drives cost,⁵⁴ and it is unclear if consumers are willing to pay the additional cost

51. Roger R. Martella Jr. et al., *The New Frontier of Cross-Border Enforcement*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10127, 10132 (2010), available at http://www.morganlewis.com/pubs/ELI_CrossBorderEnforcement_Feb2010.pdf.

52. Even though a criminal conviction may be difficult due to the mens rea requirement, a charge alone can be very expensive or even financially and publicly devastating to a company. See generally Silverglate, *supra* note 11.

53. For example, farm raised fish are subject to country of origin labeling ("COOL") requirements. Mandatory Country of Origin Labeling, 74 Fed. Reg. 2,658 (Jan. 15, 2009) (to be codified at 48 C.F.R. pt. 60, 65). Such regulations are not limited to the U.S. and are also present, to some extent, in Europe, Japan, and a few other nations. ROHEIM, *supra* note 48 at 17. Furthermore, there are arguments that COOL requirements should be expanded. *Id.*

To the extent that COOL legislation would provide the impetus to implement mandatory traceability systems, more **governments should** institute and fully enforce COOL legislation. In addition to providing consumers with additional information for informed decision making, having traceability systems in place is the first step in assessing the tracking of IUU fish entering the market; having the need for traceability is the first step in creating traceability. There should be 100% compliance with all national labeling and traceability requirements on the part of the seafood supply chain when in place

Id. (emphasis in original) (internal cross references omitted).

54. 2,507 Canary Winged Parakeets, 689 F. Supp. at 1119 ("[The] duty to investigate the legality of a shipment is simply a cost of business"); see also Saltzman, *supra* note 13, at 3 (discussing enforcement efforts turning into a "cost of doing business").

associated with increased regulation for wood products. Furthermore, some producers of these products may no longer be able to justify the risk given that they are now exposed to potential criminal liability.⁵⁵

In terms of the regulations themselves, the historical applications to fish and wildlife largely depend on foreign laws that regulate easily determinable and verifiable product characteristics. For instance, it is determinable by simple, physical observation if harvested animals are below legal size or maturity requirements.⁵⁶ Similarly, violations regarding harvest and exportation of a prohibited species are fairly easily determined through visual examination.⁵⁷ Even violations such as not having the appropriate licenses or permits are quickly found with minimal effort.⁵⁸ The nature of these regulations make it feasible for interested parties to determine if the product they are importing complies, thereby allowing management of their Lacey Act exposure in an easier, more cost effective manner.⁵⁹

This is simply not the case with wood products. Returning to the *New Frontiers* hypothetical regarding Kmart broom handles, Kmart personnel cannot look at a shipment of brooms and see if the handles were produced from illegally sourced wood. Many of the foreign laws affecting wood

55. The wood products are more likely to be used by large corporations than historically regulated products, and some of the executives of these larger corporations may be more unwilling to expose themselves to criminal liability than are owners of small businesses who are better positioned to personally manage their risk. While some decreased demand for the products is likely an intention of the Act, the reduced availability and/or higher cost of products for customers must also be factored into the balancing equation.

56. *See, e.g.*, *McNab*, 331 F.3d at 1233 (lobsters below size requirements); *United States v. The Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 386–87 (S.D. Fla. 1993) (same); *3,210 Crusted Sides of Caiman*, 636 F. Supp. at 1286 (caiman hides below size requirements).

57. *See, e.g.*, *United States v. Mitchell*, 985 F.2d 1275, 1279–80 (4th Cir. 1993) (exporting from Pakistan hides and other trophy items from non-exportable game animals); *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474, 475–76 (5th Cir. 1992); *2,507 Live Canary Winged Parakeets*, 689 F. Supp. at 1109 (exporting live parakeets that were of a non-exportable species).

58. *See, e.g.*, *United States v. 594,464 Pounds of Salmon, More or Less*, 871 F.2d 824, 825 (9th Cir. 1989) (exportation of salmon without required permit); *United States v. Rioseco*, 845 F.2d 299, 301 (11th Cir. 1988) (violation of requirement to possess Bahamian fishing license).

59. It is important that regulated parties feel that compliance with a regulation is feasible. *Saltzman*, *supra* note 30, at 3. To begin, as a normative matter, it is preferable for those being regulated to feel that the regulations to which they are subjected are fair. Suppliers are much more likely to leave a market altogether if they feel there is no way to feasibly comply with the regulations that they are subjected to, particularly if those regulations entail potential criminal charges. The addition of potential criminal charges makes suppliers less likely to remain in the market and simply view the regulatory burden as a cost of doing business.

relate to where it was harvested within that country⁶⁰ and the amount of processing done in the country prior to export.⁶¹ Kmart cannot tell by visual inspection of a broom handle whether wood was permissibly harvested from a private tree farm or illegally cut on a forest preserve. This difference in location simply does not translate to a readily identifiable characteristic in the wood.⁶² Additionally, Kmart will not be in a position to easily determine if any applicable local processing requirements were met.⁶³ This inability to readily identify goods that are potentially in violation of the Act is a significant departure from the products historically regulated under the Act.

As a practical matter, exotic and precious timber products tend to come from economically and politically unstable regions.⁶⁴ This makes it much

60. For example, it is frequently illegal to harvest timber from national parks in many countries without specific permission from governmental authorities. GLOBAL WITNESS & ENVIRONMENTAL INVESTIGATION AGENCY (EIA), INVESTIGATION INTO THE GLOBAL TRADE IN MALAGASY PRECIOUS WOODS: ROSEWOOD, EBONY AND PALLISANDER 4 (Oct. 2010) [hereinafter GLOBAL WITNESS & EIA, MALAGASY PRECIOUS WOODS], available at http://www.globalwitness.org/sites/default/files/pdfs/ma_da_report_261010.pdf (discussing prior report on illegal timber harvesting from national parks in Madagascar).

61. As an example, consider India's local processing requirements, which appear to be at the heart of the most recent raid on Gibson's facilities. *See supra* note 10. The local processing requirements might be more easily discoverable by the initial importer. However, this ease of determinability diminishes quickly as the product moves down the supply and undergoes subsequent processing and assembly phases in its progression toward a finished product. It is simply not as feasible for a possessor further down the supply chain to know what state the product was in when it left the source country. While audit procedures can feasibly be established to help ensure subsequent possessors that home processing requirements were satisfied, such procedures do not come without cost, both in terms of direct cost for establishing and running the audit process, as well as through indirect cost for the lost efficiency caused by the audit procedures. The question then becomes whether cost-benefit analysis supports installing such an audit procedure both at the individual producer level and from the standpoint of the global society at large.

62. While this is also true to some extent with seafood, the cases are sufficiently distinguishable. Seafood, as a food product, is often marketed with a country of origin, which makes it easier for a subsequent possessor to know if the product came from an area where harvest and export is allowable.

63. Some countries also have local processing requirements in their fishing regulations. *See United States v. McNab*, 331 F.3d 1228, 1233 (11th Cir. 2003) (alluding to Honduran local processing requirement). However, compliance with such requirement in the seafood context is significantly easier to assess. The supply chains are significantly shorter and the products move through them more quickly due to their perishability. This makes it easier for subsequent possessors to get visibility up the supply chain. Furthermore, the heavier regulations around food processing also make determination of compliance with the local processing requirements easier.

64. For example, Madagascar is a large source country for ebony, rosewood, and pallisander—much of it illegally harvested and exported. GLOBAL WITNESS & EIA, MALAGASY PRECIOUS WOODS, *supra* note 60, at 4, 10–14. Madagascar also demonstrates the problems that can arise from the incorporation of foreign laws from such countries. To address the problems associated with illegal trade in precious woods, Madagascar's government issued a series of decrees in the wake of an earlier Global Witness and EIA report on the problem illegal wood harvesting in the nation. *Id.* at 4. These Malagasy decrees “recogni[z]ed the illegal nature of the timber [being harvested], [but] nonetheless authori[z]ed timber exports . . . following payment of a penalty.” *Id.* (also noting that the Malagasy

more challenging for those dealing in these commodities to navigate the regulatory landscape. Furthermore, courts historically disregard permits they see as being erroneously granted.⁶⁵ This creates significant issues for those operating in these countries even when they have gone through all the necessary steps of obtaining an export permit. It is not uncommon in such nations for timber producers to bribe government officials into certifying their products for export.⁶⁶ While this is certainly a real problem and creates a major barrier to enforcement, holding possessors near the consumer end of the supply chain liable for this corruption in a foreign country seems inherently unfair and can be highly disruptive to American businesses. This is especially true at a time when businesses need stability and certainty in attempting to overcome broader economic challenges. Furthermore, the issues regarding corruption and bribery by Americans can be handled in many cases through the Foreign Corrupt Practices Act.⁶⁷ As such, the Lacey Act does not need to over-criminalize good faith reliance on permits for the courts and prosecutors to have an avenue to deal with Americans engaging in corruption.

B. These Differences Are Such that the Act Should Apply Differently to Timber and Wood Products

The differences between historically regulated products and timber and wood products create policy issues regarding the Act's effectiveness in

government now appears to be taking a more aggressive approach). Such a foreign law scenario combined with the 2008 amendments to the Act presents quite a conundrum for potential users of that wood product located in the United States. On the one hand, the foreign government has approved the wood for export. On the other hand, it is still technically illegally harvested. As such, importation of the wood into the U.S. would constitute a violation of the Act and could result in a felony conviction for parties in the United States if they knew that the wood had been illegally harvested even though the party in the foreign nation had paid the associated fine and the government there had made the decision that the wood should still be available for export. Foreign governments, as the Madagascar authorities appear to have done at least for a period of time, may rationally make the decision that it is better for wood illegally harvested in their territory to enter the world market and be put to a beneficial use than to have it permanently confiscated or destroyed. However, the Act currently shows no deference to such a decision and would seemingly permit legal action against any party in the United States who ended up possessing wood products from such sources.

65. See *supra* note 43 and accompanying text.

66. See, e.g., GLOBAL WITNESS & EIA, INVESTIGATION INTO THE ILLEGAL FELLING TRANSPORT AND EXPORT PRECIOUS IN SAVA REGION MADAGASCAR 5 (Aug. 2009), available at http://www.parc-madagascar.com/doc/report_vsfinal.pdf ("The national government, short on cash due to the international economic crisis and a suspension of international aid, has restricted the already-low salaries of many civil servants, while the profitability of the illegal trade in precious wood has increasingly enabled timber traders to use bribery and violent coercion to undermine the enforcement of the forest law.").

67. 15 U.S.C. §§ 78dd-1--dd-3 (1977).

achieving the desired ends. The policy objective behind 2008 Amendments' move to include timber and wood products is to address global concerns over deforestation and its associated environmental, economic, and societal impacts.⁶⁸ However, the aforementioned differences between the markets for products historically under the Lacey Act's purview and those for wood products render the Act an ineffective tool for achieving this legitimate policy aim.⁶⁹ The theory behind such a law is that there are two ways in which the potential liability, both through seizure and criminal charges, can help to address the underlying environmental threats. First, the Act provides an additional disincentive⁷⁰ to those directly involved in the harvesting and importation of the regulated items. Second, even if the current possessors in the United States are not involved in the harvesting or importation, the Act provides an incentive for them to apply backward pressure through the supply chain to incentivize their suppliers, who may be outside the reach of United States jurisdiction, to comply with foreign environmental laws. The assumptions underlying these rationales, however, tend to break down for timber products where there is less direct involvement with the harvesting and importation. Moreover, the longer supply chains⁷¹ make it more difficult for the United States entities to apply pressure all the way back to the logger who is doing the illegal harvesting.

As a corollary, the 2008 Amendments present fairness issues when applied to users of wood products.⁷² One of the key fairness concerns associated with the Amendments is the expansiveness of the liability created by incorporation of "any foreign law."⁷³ This, combined with the fact that felony convictions can attach in the United States for violations of

68. See LACEY ACT PRIMER, *supra* note 13, at 7 (discussing purposes of the Amendments).

69. This Note is not disputing the severity of the problems created by deforestation or the legitimacy of Congress' desire to enact laws seeking to address the issue. Rather, the Note has the narrower goal of arguing that the means are inappropriate.

70. The foreign law itself and associated penalties provide the primary incentive against violation of foreign environmental laws.

71. See *supra* note 49 and accompanying text.

72. Some of these fairness concerns were present prior to the 2008 Amendments and affect historically regulated goods as well as timber products. See, e.g., Grossman, *supra* note 10 (discussing case of Texas retiree who lost his retirement, his small orchard business and sentenced to seventeen months in federal prison over some incorrectly labeled flowers that had been imported for his part-time small business). However, the market difference and newly expanded reach of the law highlights these concerns and heightens the need for addressing them. Congress could choose to address all the fairness concerns at once or address them for different categories of products independently. Ultimately, such fairness concerns should be addressed for all categories of products, but issues related to the timber products industry represent the more pressing concern and should be addressed first.

73. See *supra* notes 39–41 and accompanying text.

a minor, non-criminal offense⁷⁴ abroad, creates concerns over the inherent fairness of the law. The 2008 Amendments significantly exacerbate this unfairness. The greater attenuation from the initial harvester and other early linkages in the supply chain, combined with how hard it is to readily identify noncompliant goods, make it much less fair to seize goods or impose criminal liability. This is especially true for violations which are very minor and to which the actual offending party may be subject to a substantially less onerous punishment in the foreign country. Furthermore, the lack of robust regulatory framework on timber documenting each step along the supply chain⁷⁵ raises fairness concerns about holding the final possessor in the United States liable. The additional corruption in source countries, combined with the lack of an innocent owner defense⁷⁶ or any deference to erroneously issued foreign permits,⁷⁷ creates fairness concerns about the producers' and retailers' ability to rely on permits and certifications from the foreign nation stating that the products were acceptable for export.⁷⁸ Though these fairness concerns were looming in the background prior to the 2008 Amendments, their potential impact, and thus the need to address them, has increased in the wake of these changes to the Act.

The Act also raises concerns about respect for the sovereignty of foreign nations in directing the usage of their resources and the best way to go about achieving that goal. The Act's requirement of a foreign law violation ostensibly places the ball in a foreign nation's court to set policies regarding what should be legal and illegal. However, the Act's circumvention of that nation's enforcement mechanisms and decisions regarding appropriate punishment raises concerns about respect for foreign sovereignty. This concern is heightened given the historical disregard for foreign permits and the foreign nation's views on its own law.

The 2008 Amendments also pose significant administrative hurdles for the courts compared to those present in historical Lacey Act litigation. Just as violations of the foreign laws are more difficult to ascertain for domestic possessors,⁷⁹ they will also be more difficult for the courts to

74. *Id.* For example, consider the penalty payments required under the Malagasy decree discussed in *supra* note 64.

75. *See supra* notes 56–63 and accompanying text.

76. *See supra* note 42 and accompanying text.

77. *See supra* note 43 and accompanying text.

78. This issue creates a quandary for policy makers, as not allowing an innocent owner defense or exception for good-faith reliance on foreign permits raises fairness concerns, but allowing such a defense would in essence be incentivizing such corruption. However, such corruption by Americans can be addressed through the Foreign Corrupt Practices Act. *See supra* note 67 and accompanying text.

79. *See supra* notes 60–63 and accompanying text.

determine in both civil and criminal litigation under the Act. This will require more detailed fact-finding as the violations are not as readily apparent based on easily discernible facts. Furthermore, these factual determinations are challenged by the circumstances of these violations. By definition, the foreign law violations themselves occur largely outside the jurisdictions in which courts of the United States have the authority to compel witnesses to testify or produce evidence,⁸⁰ especially since the party charged or claiming ownership of the property is less likely to be the one who committed the violation.⁸¹ Furthermore, the higher propensity for corruption in source countries⁸² will make it harder to secure the assistance of foreign officials in making foreign law determinations. Such assistance has proven crucial in past cases,⁸³ at least when the courts have chosen to respect it. While solving complex challenges is an inherent part of what courts do, it is more than appropriate for the legislature to consider the burden it places on courts when making policy determinations.

The 2008 Amendments' addition of wood products to the category of items regulated under the Act represents a significant departure from the items historically regulated in terms of product type and market dynamics. These differences call into question the effectiveness, fairness, and wisdom of the 2008 Amendments.

III. OF THE AVAILABLE OPTIONS TO RESOLVE THE ISSUES FOR TIMBER AND WOOD PRODUCTS MARKETS CREATED BY THE 2008 AMENDMENTS, LEGISLATIVE MODIFICATION OR REPEAL IS THE MOST APPROPRIATE

The universe of potential solutions to help rectify the issues related to the 2008 Amendments is largely legislative in nature. This part briefly outlines some of the available options. It then argues that the best solution is to repeal the 2008 Amendments. To the extent Congress still feels the need for additional incentives to address the deforestation issue, it should address those concerns through new, more specifically tailored legislation.⁸⁴

One available option for resolving issues with enforcing foreign laws related to timber and wood products is to create an innocent owner defense

80. FED. R. CIV. P. 45(b)(3) and 28 U.S.C. § 1783 (2012) allow for service of a subpoena, but there is no way to enforce one as United States Courts lack jurisdiction to compel compliance abroad.

81. *See supra* note 49 and accompanying text.

82. *See supra* note 64 and accompanying text.

83. *See supra* note 37 and accompanying text.

84. The specifics of any new legislation are beyond this scope of this Note.

to the civil seizure actions.⁸⁵ Congress could apply the defense only to timber products rather than to all regulated products. However, this complicates the code and could lead to confusion and enforcement issues. There is also the general fairness concern of treating two categories of items regulated under the same statute differently. At a minimum, there should be some exception to the seizure provisions for a possessor who relied in good faith on a foreign government's permit or certification for export even if that permit turns out to be invalid. While not a complete solution to issues regarding the Act, this approach could be a good first step in crafting a fairer law and one that gives businesses some of the additional certainty they need to invest and make associated business decisions.

Congress should also consider adding some additional details to clarify what constitutes a foreign law for purposes of triggering a violation under the Act.⁸⁶ For example, Congress might require the foreign law violation to be subject to criminal penalties abroad before creating potential criminal liability in the United States. Furthermore, the foreign law at issue should be required to carry the equivalent of a felony degree of punishment in the foreign nation before a felony charge could attach to the Lacey Act violation in the United States. In the seizure context, there should also be some consideration of a parity requirement, forbidding seizures that are grossly disproportionate to the punishment severity of the offense and punishment available in the foreign nation. The opportunity for unfairness exists if the Act continues to allow for seizure of millions of dollars worth of inventory for what would only amount to a minor violation and a small fine abroad.⁸⁷ As with the innocent owner defense, the addition of some parity requirements as to the severity of the foreign law violation and the associated level of punishment under the Act is not a complete solution to the issues created by the 2008 Amendments. However, it would be an important improvement.

The best solution to the issues created by the 2008 Amendments is simply to repeal those amendments. Congress tried to take a shortcut to a legislative means of addressing the problem of deforestation by lumping

85. The language in 16 U.S.C. § 3374 seems to create a strict liability standard and foreclose any opportunity for a judicially created exception.

86. This potential amendment to the Act should be considered regardless of what happens concerning the continued inclusion of timber and wood products. The situation where a minor, non-criminal violation abroad could, if knowingly made, result in a felony conviction in the United States is inherently unfair regardless of the category of goods at issue.

87. For instance, the value of seized goods should be limited to value of the potential fine abroad or a reasonable multiple thereof, at least in non-criminal cases.

timber and wood products into the category of regulated goods under the Lacey Act even though the Act was created and tailored over the years to address a different problem. This approach has failed and should be abandoned. There are other mechanisms already in place to help address the problem of deforestation. For instance, CITES Treaties and enacting legislation provide a viable alternative for the most susceptible species and have been added to the list of regulated goods.⁸⁸ There is also the potential for enforcement under the Endangered Species Act (“ESA”) for qualifying species of timber.⁸⁹ Additionally, market forces can apply pressure on producers to ensure that their products come from wood that is sustainably produced.⁹⁰ To the extent Congress believes these alternatives fall short, it can certainly enact additional legislation to address the deforestation issue. However, it should do it correctly by taking the time to craft a measured piece of legislation that responds to the peculiarities of the market for wood products and does not unfairly expose American businesses and citizens to seizure of their goods or criminal liability.

88. See generally Ani Youatt & Thomas Cmar, *The Fight for Red Gold: Ending Illegal Mahogany Trade from Peru*, 23 NAT. RESOURCES & ENV'T 19, 20–21 (2009) (discussing CITES listing and enforcement of Mahogany from Peru).

89. *Id.* at 22 (discussing attempted application of ESA in case about Peruvian Mahogany).

90. Gibson, for instance, has been voluntarily active in groups that promote responsible use of exotic woods such as the Rainforest Alliance and the Music Wood Coalition, amongst others. Smith, *supra* note 6; see also Gibson *Guitar Working with Rainforest Alliance on Wood Sourcing Legality*, RAINFOREST ALLIANCE (July 20, 2010), available at http://www.enn.com/press_releases/3436 (discussing Gibson’s work with the Rainforest Alliance but noting that the wood at issue in both the 2009 and 2011 raids did not involve sources audited or approved by the Rainforest Alliance); *Who is in?*, MUSIC WOOD, <http://www.musicwood.org/who.htm> (last visited Jan. 5, 2012) (listing Gibson as partner). “The Rainforest Alliance” is an organization that “works to conserve biodiversity and ensure sustainable livelihoods by transforming land-use practices, business practices and consumer behavior.” *About Us*, RAINFOREST ALLIANCE, <http://www.rainforest-alliance.org/about> (last visited Jan. 5, 2012). The Music Wood Campaign was an effort by Greenpeace to partner “with the music industry to protect threatened forest habitats and safeguard the future of the trees critical to making musical instruments.” *The Music Wood Campaign*, MUSIC WOOD, <http://www.musicwood.org/campaign.htm> (last visited Jan. 5, 2012). Furthermore evidence of the market response concerns over wood products sourcing is supplied in the American Home Furnishing Alliance’s (“AHFA”) recent publication of its “Responsible Sourcing Manual” to help aid home furnishing companies in establishing the audit procedures necessary to satisfy both market demand for responsibly sourced home furnishings while also helping achieve compliance with the Act. *AHFA Releases Responsible Sourcing Manual*, *supra* note 47. As noted by UL-STR, a company specializing in providing quality assurance services including responsible sourcing assurance, “[u]sing raw materials from irresponsible sources can damage . . . brand [image] and profits.” David Schatsky, *Traceability Provides Evidence of Conflict Free Minerals and Timber*, DODD-FRANK SECTION 1502 (Nov. 16, 2011), <http://section1502.com/2011/11/16/raw-material-traceability-programs-underwriters-laboratories/>. This public pressure and associated risk to companies are heightened by increased consumer awareness driven by organizations such as Change.org and Greenpeace. *Raw Material Traceability Programs*, *supra*. Similar efforts at social responsibility driven by market have also been seen in other industries, such as seafood. See *supra* note 49.

CONCLUSION

Deforestation poses a real threat to the global environment, and America should do its part to help address the issue. However, as the recent experience at Gibson Guitar demonstrates, the current means of addressing this issue pose serious risk for American citizens and businesses. The Lacey Act was enacted and has been tailored over the years to address problems unrelated to timber production and the potential issues of deforestation. As such, it is not well suited for the peculiarities of these markets, and the 2008 Amendments should be repealed, or at least substantially altered.

*Matthew S. White**

* J.D. (2013), Washington University School of Law; B.S. Mechanical Engineering (2007), Washington University in St. Louis. Mr. White is a native of Scotts Hill, TN and currently resides in Nashville, TN.