



FOREST GOVERNANCE, MARKETS AND TRADE:

IMPLICATIONS FOR SUSTAINABILITY AND LIVELIHOODS

森林管理、市场与贸易对可持续发展和人民生计的影响和意义

**AMENDMENT TO THE
U.S. LACEY ACT:**

**IMPLICATIONS FOR CHINESE
FOREST PRODUCTS EXPORTERS**

美国雷斯法案修正案：
对中国林产品出口商的影响

R. JUGE GREGG
AMELIA PORGES



AMENDMENT TO THE U.S. LACEY ACT: IMPLICATIONS FOR CHINESE FOREST PRODUCTS EXPORTERS

R. Juge Gregg & Amelia Porges

August 2008

A version of this publication is also available in Mandarin Chinese. Subsequent publications relating to the Vietnamese and Indonesian markets, in both English and native languages, will be available at: www.forest-trends.org

Amendment to the US Lacey Act: Implications for Chinese Forest Products Exporters
© 2008 Forest Trends and Sidley Austin LLP
ISBN 1-932928-28-6; Reproduction Permitted with attribution
Cover photo by Christian Cossalter

Collaborating Institutions

Sidley Austin LLP (<http://www.sidley.com>): Sidley is a global law firm, with more than 1800 lawyers in 16 offices, advising clients on environmental and sustainable development matters for decades. This work has included due diligence for multinational transactions, advising companies on the environmental risks and requirements associated with doing business in the United States, China, Europe, South America and Asia, and assisting clients with the design and implementation of environmental management systems, including those based on ISO 14001. Sidley also advises clients on a broad range of issues related to climate change, including carbon trading, international trade consequences of various regulatory regimes, and alternative energy projects, as well as representing clients in climate change related litigation. The group's experience extends to global supply chain management and product stewardship issues, including restrictions on product content, packaging and labeling (e.g., the EU's REACH, ROHS/WEEE and ELV requirements). Sidley advises clients on compliance with a variety of international environmental treaties, including the Basel Convention on the transnational movement of hazardous waste, the Montreal Protocol regarding CFCs, the Stockholm Protocol regarding persistent organic pollutants (POPs) and the Convention on International Trade in Endangered Species.

For further information please contact:

R. Juge Gregg, Washington, DC, rjgregg@sidley.com (environmental and forestry regulation)
Brenda Jacobs, Washington, DC, bjacobs@sidley.com (customs enforcement and business planning issues)
Amelia Porges, Washington, DC, aporges@sidley.com (trade issues)
Henry Ding, Beijing, hding@sidley.com
Tim Li, Hong Kong, htli@sidley.com
Tang Zhengyu, Shanghai, zytang@sidley.com
William O. Fifield, Hong Kong, wfield@sidley.com

Forest Trends (<http://www.forest-trends.org>): Forest Trends is a non-profit organization that advances sustainable forestry and forestry's contribution to community livelihoods worldwide. It aims to expand the focus of forestry beyond timber and promotes markets for ecosystem services provided by forests such as watershed protection, biodiversity and carbon storage. Forest Trends analyzes strategic market and policy issues, catalyzes connections between forward-looking producers, communities, and investors and develops new financial tools to help markets work for conservation and people. It was created in 1999 by an international group of leaders from forest industry, environmental NGOs and investment institutions.

For further information, please contact:

Kerstin Canby, kcanby@forest-trends.org
Jordan Sauer, jsauer@forest-trends.org

This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act upon this information without seeking professional counsel.

TABLE OF CONTENTS

INTRODUCTION 1

IMPLICATIONS FOR CHINESE EXPORTS TO THE U.S..... 1

OVERVIEW OF THE U.S. LACEY ACT 2

NEXT STEPS FOR THE U.S. GOVERNMENT 3

AVOIDING PROSECUTION UNDER THE LACEY ACT 3

VIOLATIONS OF THE LACEY ACT..... 4

PENALTIES UNDER THE LACEY ACT 5

MORE INFORMATION ON THE LACEY ACT 6

INTRODUCTION

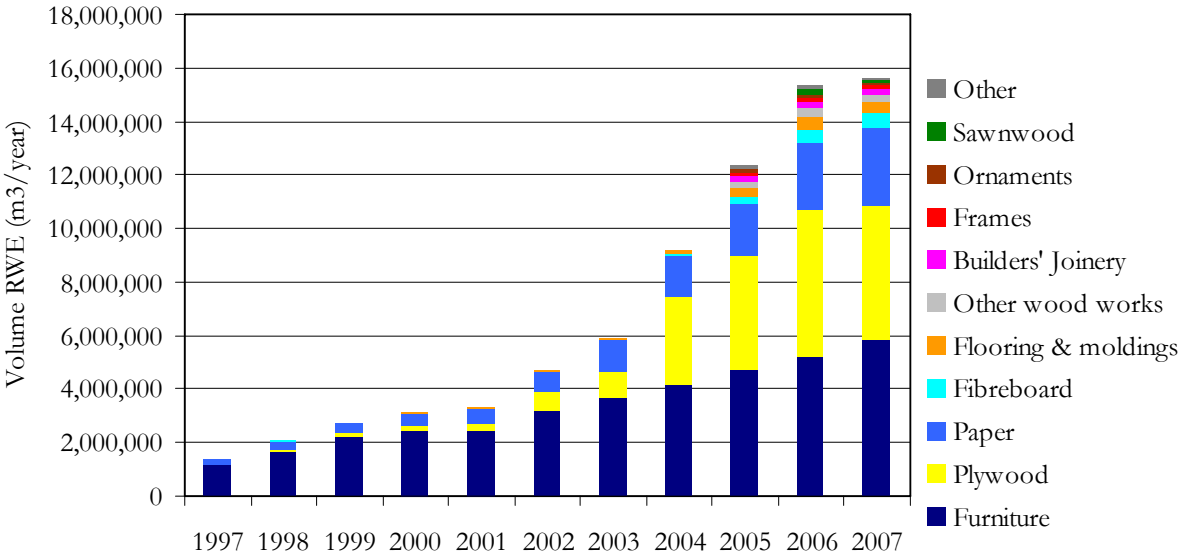
A recently passed law gives the U.S. government the power to fine, and even jail, individuals and companies who traffic in illegally harvested wood products. The U.S. government can even use this law, called the Lacey Act, to impose significant penalties on individuals and companies who do not realize that their wood is tainted. This new law, and the new import declaration it requires, will affect manufacturers and exporters who ship a variety of products made from wood to the United States, including paper, furniture, lumber, flooring, plywood or even picture frames.

The U.S. Department of Justice already has warned that it intends to use the Act to prosecute those who import timber taken or transported in violation of the laws of the country in which the timber was originally harvested. Penalties under the Act include civil administrative penalties, forfeiture of the trafficked goods, criminal fines or imprisonment. A Lacey Act violation may also trigger charges of smuggling or money laundering. The Lacey Act will now apply to a broad range of imported wood products and species, far beyond those few species listed as endangered under the Convention on International Trade in Endangered Species (CITES).

IMPLICATIONS FOR CHINESE EXPORTS TO THE UNITED STATES

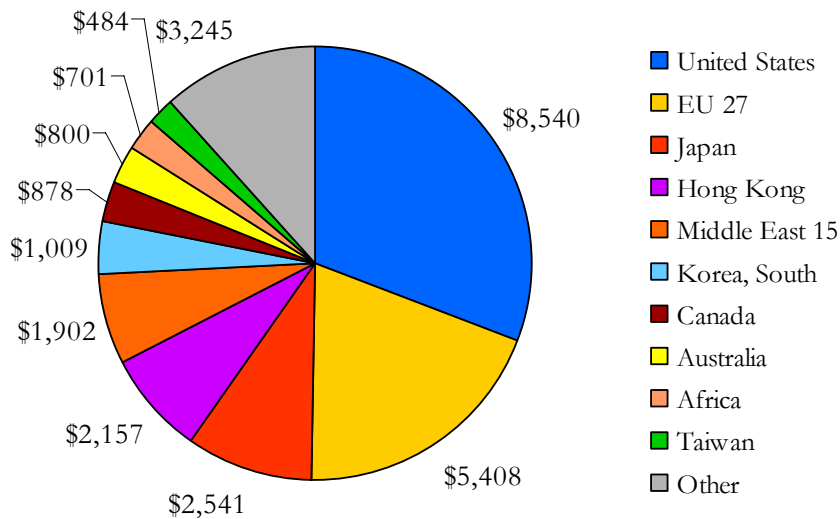
China is one of the largest producers and suppliers of forest products for the U.S. market. In 2007, China exported 22% of its total wood product exports to the United States – mainly furniture, plywood and paper – totaling 15.7 million m³ RWE in volume and \$8.5 billion in value. The U.S. has been one of China’s most rapidly growing markets.

Figure 1: U.S. Imports of China’s Forest Products, 1997-2007, by Volume



Source: China Customs data, compiled by Forest Trends

Figure 2: China's Export of Forest Products, 2007, by Value (millions US\$)



Source: China Customs data, compiled by Forest Trends

Many of China's wood product exports are manufactured from raw wood materials such as logs, timber and pulp that have been harvested in countries such as Russia, Papua New Guinea, Indonesia, Gabon and the Solomon Islands. These are countries where illegal harvesting and other legal violations covered by the Lacey Act are well-documented. This creates a risk that manufacturers, exporters and retailers of goods made in China with suspect timber could face forfeiture, penalties and even imprisonment under the newly-amended U.S. law.

OVERVIEW OF THE U.S. LACEY ACT

Foreign Timber Laws Enforceable in U.S. Courts: The Lacey Act extends the reach of foreign laws and regulations by making it a violation of United States law to traffic in products made from wood that was harvested, transported or sold in violation of foreign laws – such as forest management laws and regulations in producer countries such as Russia, Indonesia, Gabon or Peru. Further details on the types of violations covered under the Lacey Act are included below.

Penalties: The key to avoiding or minimizing penalties under the Lacey Act is exercising due diligence in the sourcing of wood inputs. The U.S. government can use the law to penalize individuals and companies regardless of whether they know anything about any illegalities in the sourcing of their wood. However, the potential for significant penalties or imprisonment increases the more that someone knows – or should have known – about any illegalities. Further information on the types and size of potential penalties and how they relate to knowledge of illegalities is included below.

New Import Declaration Requirements for Wood Products: Congress also added new import declaration requirements that reinforce the need to know precise sourcing information. Although the law states that the

declaration requirements become effective in late 2008, the U.S. government has stated that it will not enforce the requirements until at least the spring of 2009. The government will be publishing updates regarding the phase-in of the declaration requirements. When the requirements go into effect, importers will be required to declare the scientific name(s) of any timber contained in the goods, the value of the importation and the quantity of the wood product, and the name of the country, or countries, from which the timber was taken. Importers will need to obtain this information from their suppliers, and the suppliers will need to keep track of this information on a regular basis. The law does allow, at least initially, for exporters to list multiple likely countries of origin and/or possible species of the wood, if that information is unknown. Shipments of wood products that are not accompanied by the required declaration at the time of entry into the United States would be deemed inadmissible.

NEXT STEPS FOR THE U.S. GOVERNMENT

The Lacey Act ban on imports of illegally harvested wood products is already in effect and the Department of Justice can prosecute people violating that ban. The U.S. government, however, will be issuing regulations or guidance in late 2008 and early 2009 to clarify the import declaration requirements.

The U.S. government may use the new Lacey Act tools to take high-profile enforcement efforts in the near future in order to send a message to foreign exporters. Even before the Lacey Act was amended, the U.S. government was targeting illegal trade in furniture made from endangered tree species. On April 16, 2008, a federal grand jury in Newark, New Jersey indicted a Chinese furniture maker under the Endangered Species Act and the anti-smuggling statute for importing a container of baby cribs made with ramin, an endangered tree species listed under CITES. The goods have already been forfeited and the indicted person and company face potential imprisonment and hundreds of thousands of dollars in fines. The Lacey Act makes it possible for the U.S. government to pursue similar prosecutions of people who traffic in non-endangered timber species (species that are not listed under CITES).

AVOIDING PROSECUTION UNDER THE LACEY ACT

In order to avoid problems with the new provisions of the Lacey Act, there are several common sense measures that exporters and importers of wood-containing products can take.

- **Pay attention to your customers** – Customers will be asking increasingly detailed questions about wood sourcing. Manufacturers and exporters/importers may be able to attract new customers – or lose them – depending upon what assurances they can provide about the legality of their wood inputs.
- **Understand your sourcing** – Manufacturers and exporters/importers should put a management process in place designed to investigate the product supply chain and provide documented assurance

that potentially illegal wood products are not being received and used. Companies and company officials who simply ignore potential sourcing problems can still be found liable for violations of the Lacey Act.

- **Do not rely on “paper” assurances** – Some of the provisions of the Lacey Act apply regardless of whether a firm has actual knowledge of illegalities in the sourcing of a product’s raw materials. It is not enough to simply get a letter or contract from your supplier stating that the wood products were legally obtained. Although helpful, such a document may not prevent the forfeiture of product if the government has reason to believe the wood was illegally obtained.
- **Do not rely solely upon certificates of legality or sustainability** – A certificate of legality or sustainability, although helpful, may not provide a shield against enforcement. If the U.S. government has sufficient reason to believe that the wood was obtained illegally, it can take enforcement action regardless of whether the product is accompanied such a certificate.
- **Structure contracts to protect your financial interests** – Wood or paper product importers can structure contracts so that they pay for, and take possession of, the product only after it has been cleared through Customs. Similarly, firms manufacturing paper or wooden products can contractually require indemnification from wood suppliers for any financial harm resulting from U.S. government actions taken against products.
- **Pay attention to the regulations** – The U.S. government will be issuing regulations or guidance in late 2008 and early 2009 that will provide additional insight regarding the import declaration requirements and possibly other aspects of the law. Firms need to be aware of what those regulations may entail and how they may affect business.

VIOLATIONS OF THE LACEY ACT

Prosecution under the Lacey Act requires proof of two violations, an “underlying” violation and an “overlying” violation. The “underlying” violation would be a breach of a foreign or U.S. state law that regulates the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants. The “overlying” violation would be the breach of the Lacey Act ban on importing, exporting, transportation, sale, acquisition or purchase of the tainted goods. The prosecution must take place within 5 years after the Lacey Act violation.

The Lacey Act amendments laid out a broad list of potential illegal activities covered by the act as “underlying” violations. The list covers readily understandable violations of law, such as the illegal harvesting of timber in national parks. However, the Lacey Act may also extend to less obvious activities, such as the transporting of timber at night in violation of a curfew designed to combat illegal timber trafficking. Under the Lacey Act amendments, “underlying” violations include violations of laws that generally “protect plants,” or of laws that regulate:

- (I) the theft of plants;
- (II) the taking of plants from a park, forest reserve, or other officially protected area;
- (III) the taking of plants from an officially designated area; or
- (IV) the taking of plants without, or contrary to, required authorization

In addition, “underlying” violations also include the failure to pay appropriate royalties, taxes, or stumpage fees and violations of laws governing the export or transshipment of plants.

PENALTIES UNDER THE LACEY ACT

The penalties for a Lacey Act trafficking violation depend on the defendant’s knowledge regarding the underlying violation of foreign law.

Civil administrative penalties: The government may impose significant civil penalties on any person committing a violation of the Lacey Act. If the defendant actually knew, or in the exercise of due care should have known, that the fish or wildlife or plants were taken, possessed, transported or sold in violation of an underlying law, the government can assess a civil penalty up to \$10,000. For example, the National Oceanic and Atmospheric Administration (NOAA) regularly proves lack of “due care” by fish importers by showing that the respondent is in the commercial fishing business.

The agency with jurisdiction over the offense may issue a notice of violation and assess a civil administrative penalty. If the defendant contests the penalty, the agency must prove its case to an administrative law judge, by a preponderance of the evidence.

Forfeiture: Fish or wildlife or plants imported in violation of the Lacey Act are subject to forfeiture even if the defendant did not know of the underlying violation (e.g., that the timber was harvested illegally). Although U.S. criminal laws generally provide for an “innocent owner defense” for forfeitures, this defense does not apply where the property to be forfeited is “contraband or other property that it is illegal to possess,” likely including goods whose possession is illegal under the Lacey Act. *See U.S. v. 144,774 Pounds of Blue King Crab*, 410 F. 3d. 1131 (9th Cir., 2005). Vessels, vehicles, aircraft or other equipment used in the commission of a Lacey Act felony (see below) are also subject to forfeiture after a felony conviction, if the owner knew, or in the exercise of due care should have known, they would be so used. The Customs law rules on forfeitures apply to all forfeiture proceedings.

Fines and imprisonment: If a party knowingly engages in illegal trafficking, while knowing that the fish or wildlife or plants were taken, possessed, transported or sold in violation of an underlying law, it is subject to felony prosecution, and penalties of up to \$250,000 fine (\$500,000 for organizations) and/or up to 5 years imprisonment. *See United States v Eisenberg*, 496 F Supp 2d 578, 582. (ED Pa 2007) (holding that when Congress enacted 18 U.S.C. § 3571 in 1984 (and added 3571(e) in 1987), it repealed the lower fines contained in the Lacey Act). If the party in the exercise of due care should have known of the underlying violation, the offense is a misdemeanor subject to penalties of up to \$100,000 fine (\$200,000 for organizations) and/or up to one year imprisonment. Each violation is a separate offense.

Smuggling and money laundering: Importers who bring in goods in violation of the Lacey Act can also be prosecuted for violations of the smuggling statute, 18 USC §545, a Class D felony. A smuggling charge can also support a felony money laundering charge for transferring money from the United States to the foreign seller “with the intent to promote the carrying on of a specified unlawful activity,” because smuggling is an unlawful activity. *See U.S. v. Lee*, 937 F.2d. 1388 (9th Cir., 1991). Finally, the declaration requirements in the new law may trigger the felony false statement statute, 18 USC §1001, which provides that a person who knowingly and willfully makes materially false statements, makes or uses false documents, or conceals material facts, is subject to fine and/or imprisonment up to 5 years.

MORE INFORMATION ON THE LACEY ACT

U.S. Department of Justice: www.usdoj.gov

Environmental Investigation Agency (EIA): www.eia-global.org

Also available on the Forest Trends Website: www.forest-trends.org

- Amendment to the U.S. Lacey Act: Implications for Chinese Forest Products Exporters (Chinese)
- Amendment to the U.S. Lacey Act: Implications for Vietnamese Forest Products Exporters (English)
- Amendment to the U.S. Lacey Act: Implications for Vietnamese Forest Products Exporters (Vietnamese)
- Amendment to the U.S. Lacey Act: Implications for Indonesian Forest Products Exporters (English)
- Amendment to the U.S. Lacey Act: Implications for Indonesian Forest Products Exporters (Indonesian)