

AMENDMENT TO THE U.S. LACEY ACT: IMPLICATIONS FOR EXPORTERS OF THAILAND'S FOREST PRODUCTS

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Amendment to the U.S. Lacey Act: Implications for Exporters of Thailand's Forest Products
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INTRODUCTION

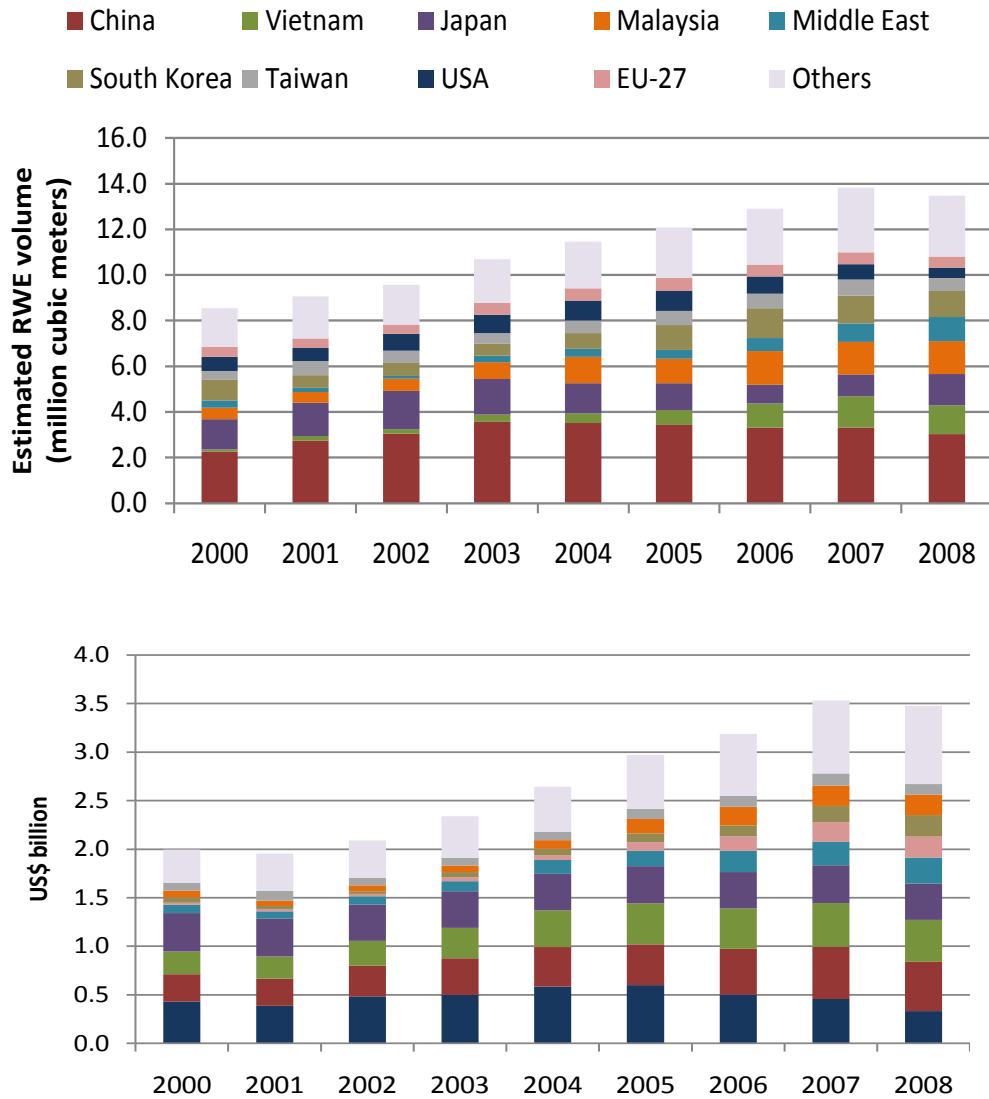
A new law gives the U.S. government the power to fine – and even jail – individuals and companies who deal in illegally harvested or trafficked wood products. The U.S. government can even use this law, called the Lacey Act, to impose significant penalties on individuals and companies who do not realize that their wood is tainted. This 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. government recently conducted a high profile raid of a well respected company that was reported to be based on potential violations of the Lacey Act. The U.S. Department of Justice 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 the full range of imported wood products and species, far beyond those few timber species listed as endangered under the Convention on International Trade in Endangered Species (CITES).

IMPLICATIONS FOR THAI EXPORTS TO THE UNITED STATES

The United States is one of Thailand's largest markets for tropical hardwood and related products – either through direct exports to the United States or via shipments through other processing centers such as China, Vietnam or Malaysia (see Figure 1 and 2). Between 2000 and 2008, the United States accounted for approximately 10-23% of Thailand's exports of timber products – in particular furniture, photo frames, plywood and paper. In general, the value of timber products destined for the United States is much higher than those sent to China, and Vietnam (Figure 2). While this direct bilateral trade with the United States is substantial on its own, it is likely that even larger volumes of Thai wood and processed products are traded through intermediary countries, such as China, Vietnam and Malaysia for further processing prior to being imported into the United States.

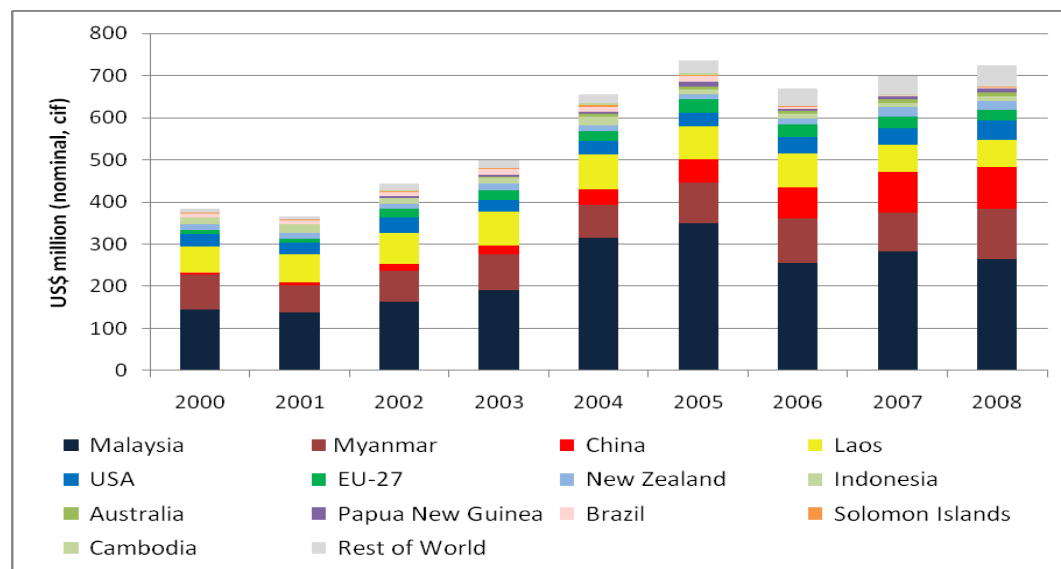
Figures 1 and 2: Export Destination of Thai Timber Products, 2000-2008



Source: the Customs Department of the Kingdom of Thailand, compiled and converted by www.globaltimber.org.uk

In addition to using domestically harvested wood, Thailand itself serves as a manufacturing hub of raw wood materials imported from other countries, notably Malaysia, Myanmar, China, and Laos. There are reports of problems with the legal sourcing of some of these woods harvested in supplying countries or other countries of origin (e.g., Myanmar wood coming through China or Malaysia). The possibility that some of the Thai processed products exported to the United States are associated with illegal harvesting and other legal violations covered by the Lacey Act – even if the illegal acts occurred in the original producer country -- will create a risk that manufacturers, exporters and retailers of goods made with suspect timber could face forfeiture, penalties and even imprisonment under the newly-amended U.S. law.

Figure 3: Thai Imports of Wood Products, 2000 - 2008



Source: the Customs Department of the Kingdom of Thailand, compiled and converted by www.globaltimber.org.uk

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 Thailand, Malaysia, Myanmar, China, and Laos. 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 significant categories of wood products are already covered by the declaration requirements, the U.S. government is phasing in the requirements for certain other types of products. Once the requirements go into effect for particular products, importers are required to declare the scientific name(s) of any timber species contained in the goods, the value of the import shipment and the quantity of the wood product, and the name of the country, or countries, from which the timber was taken. Importers need to obtain this

information from their suppliers, and the suppliers 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.

ENFORCEMENT BY 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 import declaration requirements are already in place for many, but not all, types of products. As discussed in the next section, although an importer may not yet be required to prepare a declaration for a particular type of product, that importer would still be subject to enforcement if the wood was illegally harvested.

The U.S. government intends to use the new Lacey Act tools to take high-profile enforcement efforts in order to send a message to foreign exporters. It has already begun to target the wood products trade:

- **Raid on Gibson Guitars** – In what appears to be the first enforcement effort under the amended Lacey Act, U.S. federal agents raided a manufacturing facility of the well known guitar-maker Gibson Guitars in late 2009. Widespread media reports state that the agents seized wood and documents from the company. Although the government has refused to comment on the matter, the raid is reportedly related to an investigation into the trade in a rare species of hardwood from Madagascar. This raid reflects the government’s stated desire to take aggressive action targeting illegalities in the wood products trade.
- **Prosecution of a Chinese furniture maker** – Even before the Lacey Act was amended, the U.S. government was prosecuting those allegedly involved in the 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 Style Craft Furniture Co. Ltd. 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 company eventually plead guilty and was sentenced to pay a \$40,000 fine and serve three years of probation. 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.
- **Exercise “due care” in understanding your sourcing** – While key enforcement provisions of the Lacey Act are tied to the concept of a company exercising “due care,” that phrase is not defined in the Act. It is a flexible concept that encompasses the efforts that a company should take to ensure that its supply chain is untainted. Companies should expect that the government will hold up whatever are the current “best in class” programs by their competitors as examples of “due care.” Thus, manufacturers and exporters/importers should put a benchmarked 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. As part of the management process, companies should consider using internal tracking systems, sourcing policies, third-party verification and other available tools. 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 by 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.
- **Do not confuse the declaration requirements with the legality requirements** – It is important to understand that the declaration requirements are only one part of the amended Lacey Act. If the wood is tainted by illegality, the U.S. government can take enforcement action

against a company regardless of whether the declaration form was properly completed. Similarly, the legality requirements of the Lacey Act apply regardless of whether the declaration requirements have been phased in for a particular type of product.

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 and by comparing the respondent’s actions to practices by others in the 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

The Animal and Plant Health Inspection Service: www.aphis.usda.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 Exporters of Malaysian Forest Products (English)
- Amendment to the U.S. Lacey Act: Implications for Chinese Forest Products Exporters (Chinese and English)
- Amendment to the U.S. Lacey Act: Implications for Indonesian Forest Products Exporters (English and Bahasa Indonesia)
- Amendment to the U.S. Lacey Act: Implications for Vietnamese Forest Products Exporters (English and Vietnamese)