

**Call in the Yanks?:
US Lacey Act,
Witness Cooperation & Restitution**

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Roadmap

- **The Lacey Act**
- Witness Cooperation Framework
- Restitution

Basic Trafficking Offenses

- It is a violation of the Act “to import, export, transport, sell, receive, acquire or purchase” any fish or wildlife or plant “taken, possessed, transported, or sold” in violation of any federal, state, foreign, or Native American tribal law, treaty, or regulation. 16 U.S.C. § 3372(a)



Trafficking Offense – Two Step Approach

- Underlying or “predicate” law violation – fish, wildlife, plant or plant product must have been taken, possessed, transported or sold in violation of underlying federal, state, foreign, or Native American tribal law, treaty, or regulation
- US-based trade – fish, wildlife, plant or plant product must have been imported, exported, transported, sold, received, acquired or purchased in the United States
 - 16 U.S.C. § 3372(a)

Penalties/Consequences of a Violation

- Felony – 16 U.S.C. § 3373(d)(1)
- Misdemeanor – 16 U.S.C. § 3373(d)(2)
- Forfeiture – 16 U.S.C. § 3374
- Civil penalties – 16 U.S.C. § 3373(a)

Penalties/Consequences of a Violation

- Felony – 16 U.S.C. § 3373(d)(1)
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- Civil penalties – 16 U.S.C. § 3373(a)
- **Key distinction? Mental state**
 - Also value and actions in US

Felony Penalty – Mental State (*Mens Rea*)

- Predicate law violation – defendant had to know that the goods had been taken, possessed, transported or sold in violation of predicate law
- US-based trade – defendant had to knowingly import, export, transport, receive, acquire or purchase the goods
- Penalty – maximum five years in prison and fine
 - Imports or exports (§ 3373(d)(1)(A)); or
 - Conduct that involves sale or purchase when market value of goods more than \$350 (§ 3373(d)(1)(B))

Misdemeanor Penalty – Mental State (*Mens Rea*)

- Predicate law violation – defendant in the exercise of due care, should have known that the goods had been taken, possessed, transported or sold in violation of predicate law
- US-based trade – defendant had to knowingly import, export, transport, receive, acquire or purchase the goods
- Maximum penalty – one year in prison and fine
 - § 3373(d)(2)

Forfeiture – Strict Liability



- All fish, wildlife, or plants imported, transported, sold, received, acquired, or purchased in violation of the Lacey Act are subject to forfeiture
- Vehicles and equipment used to aid in Lacey Act violations may also be subject to forfeiture

Underlying or “Predicate” Law

- Fish, wildlife or plant related
- Regulate the “taking, possession, importation, exportation, or sale of fish or wildlife or plants”
- Need not be criminal
- Must be a valid law at time
- Defendant need not personally have violated underlying law

Other Offenses

- Marking offenses – § 3372(b)
- Guiding and outfitting services and invalid permits – § 3372(c)
- False labeling offenses – § 3372(d)
- Plant declaration requirements – § 3372(f)

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Up the Chain – Exploiting the Prisoner’s Dilemma

- “Inside” v. “Outside” the conspiracy
- Actus Reus v. Mens Rea
 - Individualized proof
- Incentive for witnesses to cooperate: U.S.S.G. § 5K1.1 – Substantial Assistance to Authorities
 - “Upon motion of the government stating that the defendant has provided **substantial assistance in the investigation or prosecution of another person** who has committed an offense, the court may depart from the [otherwise applicable sentencing] guidelines”

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Restitution

- MVRA, 18 USC § 3663A
 - Restitution mandatory in all cases involving “an offense against property under this title [Title 18] . . . , including any offense committed by fraud and deceit . . . in which an identifiable victim or victims has suffered . . . a pecuniary loss.”
- VWPA, 18 USC § 3663
 - “The court, when sentencing a defendant convicted under this title [Title 18] may order . . . that the defendant make restitution to any victim of such offense”

South African “OLRAC” Report

- OLRAC “catch forfeiture” calculation (OLRAC I)
 - Cost of remediation – What it would cost South Africa to restore the fishery to the level it would have been had the defendants not engaged in overharvesting
 - \$46.7 million
- OLRAC “market value” calculation (OLRAC II)
 - Market value of the poached lobster = (quantity of overharvested fish) x (the prevailing market price)
 - \$61.9 million

Court of Appeals – January 2011

07-4895-cr
United States v. Bengis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: December 10, 2008

Decided: January 4, 2011)

Docket No. 07-4895-cr

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

— v. —

ARNOLD MAURICE BENGIS, JEFFREY NOLL, and DAVID BENGIS

Defendants-Appellees.

Before:

Court of Appeals – January 2011

- “[L]obsters possessed in violation of the regulatory scheme do not become property of the possessors, rather they are subject to seizure and sale by the government of South Africa. **Under this logic, the moment a fisherman pulls an illegally harvested lobster out of the sea, a property right to seize that lobster is vested in the government of South Africa. Evading seizure of overharvested lobsters thus deprives South Africa of an opportunity to sell those illegally captured lobsters at market price and retain the proceeds, representing an economic loss to South Africa each time an illegally harvested lobster goes unseized.** South Africa's interest in those illegally harvested lobsters, therefore, goes beyond a mere regulatory interest in administering the fishing activities in its waters.”

Order – 14 June 2013

CAPE TIMES
with Business Review

Net loss
We give it all we've got, says legend after falling out to make World Cup Page 18

Flour power
Cop chief George Nene wins World Pasta Championship in Italy Page 3

US COURT RULES AGAINST THOU SHAY MAN

Lobster thief told to repay R294m

Zuma warns youth of freedom's enemies

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