

The United States Lacey Act:

its application to fisheries, and considerations for the potential adoption of Lacey-like provisions in the countries of the Western Indian Ocean





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1 INTRODUCTION

The United States' Lacey Act has become well-known around the world for its unique approach to combatting the international trafficking of wildlife, fish, and plants. Broadly, the Lacey Act makes it illegal to engage in commerce in the United States (U.S) of any wildlife, fish, and plants that were taken, possessed, transported, or sold in violation of any U.S. (including state and tribal) or foreign law. While the Lacey Act has been and is increasingly being used to combat the trafficking of everything from birds to reptiles and even timber, this brief focuses on the Act's application to fisheries and the potential adoption of similar Lacey-like provisions by other countries in order to better combat illegal, unreported and unregulated (IUU) fishing.

To begin, this brief outlines a condensed history of the evolution of the Lacey Act in order to demonstrate how it has come to be in its present version. From there, this brief presents a summary of the key Lacey Act provisions that relate to fisheries. Next, three past Lacey Act fisheries cases are highlighted in order to demonstrate the circumstances in which they arose and how the Act was applied to deter further IUU fishing. Then, this brief discusses the potential adoption of Lacey-like provisions by other countries, in this instance the members of FISH-i Africa. This discussion begins by outlining the associated implications of a Lacey-like provision, including the obligations, financial impacts, advantages, and disadvantages. This brief then concludes by presenting textual examples of Lacey-like provisions that currently are included in the laws of various countries and a summary of the key components for consideration when drafting a Lacey-like provision.



2 HISTORY OF THE LACEY ACT¹

1.1 Introduction

- First introduced in the U.S. Congress because of concern over the decline in wildlife resources, particularly from game poaching and wildlife laundering.
- On May 25, 1900, the Lacey Act was signed into law and became the United States' first far-reaching wildlife protection law, making it illegal, among other things, to transport through interstate commerce (between U.S. states) any wild animals or birds that were killed in violation of state or territorial law.
- The original Lacey Act did not apply to fish and in 1926 the U.S. Congress passed the Black Bass Act in order to regulate the interstate transshipment of bass (again, to address resource decline).
 - Over the years, amendments were made to both the Lacey and Black Bass Acts. Of particular note:
 - In 1935 the Lacey Act was expanded to: apply to any "person, firm, corporation or association" rather than just individuals; include violations of federal and foreign laws (rather than just state and territorial); penalize fraudulent marking of wildlife shipments; authorize agents to execute warrants for the seizure of illegal wildlife, which was subject to forfeiture after conviction.
 - In 1952, the Black Bass Act was expanded to cover all fish
 - In 1981, the Black Bass Act was repealed and was combined with the Lacey Act. Coverage of indigenous plants was added and a two-pronged felony/misdemeanour criminal scheme was established.
 - In 2008, the Lacey Act was amended to include a wider variety of prohibited plants and plant products (including those from illegally logged woods).

¹ <https://www.animallaw.info/article/lacey-act-americas-premier-weapon-fight-against-unlawful-wildlife-trafficking>



3 THE CURRENT LACEY ACT AND ITS APPLICATION TO FISHERIES²

Under the Lacey Act it is illegal to "import, export, transport, sell, receive, acquire, or purchase" any fish or wildlife "taken, possessed, transported, or sold" in violation of any United States, U.S. state, or foreign law. It also is illegal to attempt to commit any act described above. (Note: The Lacey Act requires first a violation of another law and then, second, the import, export, transport etc., which is the Lacey Act violation. Therefore, the Lacey Act is not enforcing against the original violation (or other country's law), but rather the engagement in commerce in the U.S. (the Lacey Act violation).)

- Under the Lacey Act it is illegal to possess any fish or wildlife that was "taken, possessed, transported, or sold" in violation of any U.S. state or foreign law in the U.S. special maritime and territorial jurisdiction. It also is illegal to attempt to commit any act described above.
- Under the Lacey Act it is illegal to make or submit any false label or false identification of any fish or wildlife which has been, or is intended to be, imported, exported, transported, sold, purchased, or received from any foreign country.
- Under the Lacey Act, it is illegal for any person to import, export, or transport any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labelled, or tagged.
- The Lacey Act establishes civil and criminal penalties and permit sanctions, the application of which depends on the offense and its severity.
- The Lacey Act provides for forfeiture.
- The Lacey Act applies to individuals, partnerships, associations, corporations, or any other entity subject to the jurisdiction of the United States.
- The term "fish or wildlife" includes any wild animal, whether alive or dead, including fish, mollusc, crustacean etc. and any part, product, or egg thereof.

² <http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html>



4 EXAMPLES OF LACEY ACT FISHERIES CASES

4.1 The case of Bengis and the illegal trafficking of South African rock lobster and Patagonian toothfish into the U.S.³

The players - Arnold Bengis was the Managing Director and Chairman of Hout Bay Fishing Industries in Cape Town, South Africa. He also exercised control over Icebrand Seafoods, Inc. and Associated Sea Fisheries Inc. in NYC, United States of America. Noll was the Chairman and President of both Icebrand and Associated in NYC. David Bengis, son of Arnold, was the President of Icebrand Seafoods Maine Inc. in Portland, Maine, U.S.

The violation of foreign law - From 1987 to 2001, Arnold, Noll, David, and their co-conspirators engaged in an elaborate scheme to harvest illegal quantities of South and West Coast rock lobster and Patagonian toothfish from South Africa's waters. The perpetrators underreported the fish harvested to the South African authorities, bribed South African fisheries inspectors to assist in the overharvesting scheme, and submitted false export documents to South African authorities to further conceal their overharvesting.

The Lacey Act violation - In 2003, all three of the perpetrators were charged with importing, processing, and distributing illegally harvested fish in the U.S.

The result in South Africa - South Africa focused a prosecution on the South African-based entities involved in the scheme, including Hout Bay Fishing Industries, its operational manager, several lobster fishermen who had collaborated, and fourteen fisheries inspectors who had taken bribes throughout the scheme. In April 2002, Arnold Bengis returned to South Africa to enter a guilty plea on behalf of Hout Bay Industries, paying a fine of 12 million Rand and forfeiting two fishing boats and the contents of the container that the government had seized.

The result in the U.S. - In April 2004, Arnold Bengis and Noll pled guilty to one count of conspiracy to violate the Lacey Act and to commit smuggling and to three separate counts of violating the Lacey Act. David Bengis pled guilty to one misdemeanor count of conspiracy to violate the Lacey Act. As a result, Arnold Bengis was sentenced to 46 months imprisonment, Noll was sentenced to 30 months imprisonment, and David Bengis was sentenced to one year

imprisonment. Additionally, Arnold Bengis and Noll forfeited \$5.9 million to the US Government and David Bengis forfeited the proceeds of the sale of his fish-processing factory in Portland, Maine (a sum of \$1.5 million). Each of the defendants also was sentenced to a term of supervised release.

Follow-up results - In 2013, a U.S. Judge ordered the defendants to pay restitution (compensation for the loss) to the government of South Africa in the amount of \$29,495,800 USD to account for the illegally harvested rock lobster (which South Africa had a property interest in). Since \$7,049,080 USD already had been paid for their illegal conduct, the adjusted total was \$22,446,720 USD.⁴

4.2 The case of Lee and the illegal trafficking of salmon into the U.S.⁵

The players: Meng Hsu, Lin, Chu, Lee, Wesley Hsu, and Wang (all involved in the importation scheme)

The violation of foreign law: A Taiwanese squid fishing vessel illegally harvested salmon in Northern Pacific waters in contravention of a Taiwanese regulation.

The Lacey Act violation: An undercover US agent negotiated with Lee to purchase 500 metric tons of illegally harvested salmon for \$1.3 million USD. According to the plan, Lee agreed to transfer the salmon on the high seas from Taiwanese fishing vessels to an American carrier. The salmon then would be smuggled into Seattle, Washington with the use of fraudulent U.S. Certificates of Origin. In July 1989, the Taiwanese fishing vessels met with the carrier in international waters where Meng Hsu, Lin, and Chu boarded the carrier to await word of payment. There they were arrested by U.S. government officials. At the same time, Lee and Wesley Hsu accompanied the undercover agent to the bank, where they also were arrested. Wang also was arrested on the same date in his hotel room. The men were charged with violating the Lacey Act for engaging in a scheme to import illegal salmon into the U.S.

The result in the U.S.: The men pled guilty to their Lacey Act violations, though they reserved the right to appeal the applicability and constitutionality of the Lacey Act.

³ <http://www.justice.gov/usao-sdny/pr/officers-fishing-and-seafood-corporations-ordered-pay-nearly-225-million-south-africa>

⁴ For additional information on the decision to award restitution, see: <https://www.animallaw.info/case/us-v-bengis> and <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3097&context=clr>

⁵ <https://www.animallaw.info/case/us-v-lee>

4.3 The case of McNab and the illegal trafficking of Caribbean spiny lobster into the U.S.⁶

The players: David McNab, Robert Blandford, Abner Schoenwetter, and Diane Huang (all involved in the importation scheme)

The violation of foreign law: A cargo transport vessel contained a shipment of lobsters that were undersized, egg-bearing (or had their eggs removed), and had not been processed or recorded in accordance with the laws of Honduras.

The Lacey Act violation: A multi-year scheme to import illegally taken lobsters into the U.S.

The result in the U.S.: David McNab was sentenced to 97 months imprisonment and fined \$100,000 USD. Robert Blandford was sentenced to 97 months imprisonment and fined \$15,000 USD. Abner Schoenwetter was sentenced to 97 months imprisonment and fined \$15,000 USD. Diane Huang was sentenced to 24 months imprisonment and fined \$10,000 USD.

Follow-up results: \$500,000 USD was given to Honduras as restitution (compensation for the loss).

⁶ <https://casetext.com/case/us-v-mcnab-3> and <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/130111colbourn.pdf>



5 POTENTIAL IMPLICATIONS ASSOCIATED WITH THE ADDITION OF A LACEY-LIKE PROVISION

When considering whether to add a Lacey-like provision in national legislation (whether within a law that governs over fisheries specifically, natural resources more broadly, or a specialized piece of legislation such as the U.S. Lacey Act), there are various potential implications to consider. The below discussion outlines the potential obligations, financial impacts, advantages, and disadvantages associated with the addition of a Lacey-like provision.

5.1 Obligations

- As with any legal provision or law, the country would be responsible for enforcing the added Lacey-like provision.
- This would involve further investigations into the stream of commerce involving fish. These investigations likely would be complex and would extend beyond national boundaries, as they would require confirmation of the original foreign-based violations. These investigations would require time, funds, and resources.
- Additionally, depending on the results of the investigations, legal actions may be required, which may require the use of experts and added preparation in order to adequately prove the foreign-based and Lacey violations.
- Moreover, constitutional challenges to the Lacey-like provision or questions of its appropriate application may be raised and then may need to be defended against.
- Overall, a Lacey-like provision also would require closer cooperation and communication with other countries and further outreach with the various levels of industry involved in the chain of **fisheries production**.

5.2 Financial impacts

As discussed above, the addition of a Lacey-like provision carries with it obligations with associated financial costs. The investigations and potential legal actions required to ensure compliance with the Lacey-like provision also requires staff, resources, and time, all of which require funding. Additionally, these investigations and legal actions may be complex, which means that they may be drawn out over many years, especially if they involve appeals etc. (for example, the Bengis and McNab cases detailed above).

In addition to financial costs, the enforcement of the Lacey-like

provision also has the potential to result in collected penalties. While illegally sourced/traded fish and fisheries products likely already exist within a country's stream of commerce, the addition of a Lacey-like provision provides another vehicle with which to enforce against these actors. Moreover, Lacey-like provisions may carry heavier penalties for its violations than do the laws governing over fisheries. However, it should be noted that no figure has been seen that compares the expense of prosecuting a Lacey Act violation versus the fines collected. It also should be noted that often the goal of Lacey-like provisions is for the collected fines to be shared with the country that experienced the original violation (in compensation for its loss).

5.3 Advantages

- A Lacey-like provision provides a country with a very strong tool to address and better control the trafficking of illegal fish (and potentially other wildlife/plants) within its territory.
- A Lacey-like provision also enables one country to assist other countries by penalizing the bad actors that are involved in larger chains of transboundary, international illegal fisheries activities.
- When adopted by various countries within a region or subregion, Lacey-like provisions provide another tool for collaboration and for closing the gaps through which seasoned IUU fishers continue to escape.

5.4 Disadvantages

- Drafting and enacting a Lacey-like provision, whether in the law that governs over fisheries, natural resources, or as a specialized piece of legislation, requires time and resources.
- Additionally, enforcing a Lacey-like provision requires time, funding, and resources. As described above, investigations and legal actions associated with Lacey-like violations may be complex, highly technical, and draw out over many years.
- Enforcing the Lacey-like provision requires communication and cooperation with other countries in order to be successful and effective.
- As with any other law, if the Lacey-like provision is not enforced, it will not be effective or fulfil its potential.



6 EXAMPLE LACEY-LIKE PROVISIONS

Currently, various countries around the world, in addition to the U.S., maintain Lacey-like provisions within their legal frameworks in order to better address the trafficking of fish. Some of these countries include Comoros, Mauritius, Nauru, Papua New Guinea, Seychelles, and Solomon Islands.

Below, textual examples from four of these countries' laws are excerpted in order to demonstrate the language that has been used in establishing their Lacey-like provisions.

6.1 Solomon Islands: The Fisheries Act 1998

"(1) Subject to subsection (3), a person who -

(a) on his own account, or as partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or

(b) causes or permits a person acting on his behalf, or uses a fishing vessel, to land, import, export, transport, sell, receive, acquire or purchase, any fish taken, possessed, transported or sold contrary to the law of another State shall be guilty of an offence and shall be liable to a fine not exceeding one million dollars.

(2) This section does not apply to fish taken on the high seas contrary to the laws of another State where Solomon Islands does not recognise the jurisdiction of that State to extend to the high seas.

(3) Where there is an agreement with another State relating to an offence referred to in subsection (1) (b), the penalty provided by subsection (1), or any portion of it according to the terms of the agreement, shall, after all the costs and expenses have been deducted, be remitted to that State according to the terms of the agreement."

6.2 Papua New Guinea: Fisheries Management Act 1998

"(1) Notwithstanding Section 3(2), this section applies to all persons, vessels, fishing and other activities to which this Act has application.

(2) Subject to Subsection (1), any person who, within Papua New Guinea or in the fisheries waters - (a) on his own account, or as the partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or (b) causes or permits a person acting on his behalf, or any fish taken, possessed, transported or sold, contrary to the law of another State commits an offence.

(3) This section does not apply to fish taken on the high seas contrary to the law of another State where Papua New Guinea does not recognize the jurisdiction of that State over those fish.

(4) Section 25(1) of the Criminal Code (Chapter 262) is not a defence to a prosecution for an offence under this section.

(5) Where there is in existence an agreement with another State to this effect, the penalty provided by Subsection (2), or any portion of it according to the terms of the agreement, shall, after all costs and expenses incurred by the government and the Authority have been deducted, be remitted to that State according to the terms of the agreement."

6.3 Seychelles: Fisheries Act 2014

"(1) A person who, within Seychelles or Seychelles waters- (a) on his or her own account, or as partner, agent or employee of another person, lands, transships, imports or otherwise brings into Seychelles or Seychelles waters, exports, transports, sells, receives, acquires or purchases; or (b) causes or permits a person acting on his or her behalf, or uses a fishing vessel, to land, transship, import or otherwise brings into Seychelles or Seychelles waters, export, transport, sell, receive, acquire or purchase, any fish in contravention of the laws of another State or of an international conservation and management measure, commits an offence and is liable on conviction to a fine not exceeding SCR18,750,000.

(2) In addition to any penalty imposed under subsection (1), any fish or fish product on board the vessel or any fish unlawfully caught shall be forfeited."

6.4 Mauritius: The Fisheries and Marine Resources Act 2007

No person shall, within Mauritius or the maritime zones - (a) on his own account, or as partner, agent or employee of another person, land, import, export, transport, sell, receive, acquire or purchase; or (b) cause or permit a person acting on his behalf to land, import, export, transport, sell, receive, acquire or purchase, any fish taken, possessed, transported or sold contrary to the law of one or more States with which Mauritius has entered into an agreement on a reciprocal or multilateral basis for the management of fisheries.



7 KEY POINTS TO CONSIDER FOR DRAFTING A LACEY-LIKE PROVISION

- Before committing to the addition of a Lacey-like provision to a country's legal framework, first consider the added obligations, financial and resource impacts, the advantages, and the disadvantages of such an addition. Then, decide if it is in the country's best interest to add such a provision.
- If it is decided to move forward with the addition of a Lacey-like provision, consider the best approach to do so, including whether it should be in the law governing over fisheries, a broader natural resource law, or a specialized law, such as the U.S. Lacey Act. Accordingly, consider whether the Lacey-like provision should apply to fisheries only or to wildlife and plants as well (note: this may raise constitutional or other legal issues, which should be considered and are discussed more in a later bullet point).
- The Lacey-like provision should outline broad rather than narrow definitions. For example, for terms such as "import," "export," and "fish" etc.
- The Lacey-like provision should apply to individuals, partners, agents, corporations, employees etc.
- The provision should apply to activities that take place within the country and also within the country's waters.
- The commercial activities that trigger the Lacey-like violation, for example, "to import, export, transport, sell, receive, acquire, or purchase," should be outlined clearly.
- The activities, and of what type of law, that constitute the original violation should be outlined clearly. For example, the "taking" and "possession" etc. of fish in violation of any foreign law and international conservation and management measures.
- A scheme to share the collected fines/compensate the country in which the original violation/loss occurred may be included.
- Civil and criminal penalties and permit sanctions should be outlined. Penalties should be strong enough to serve as a deterrent against further IUU fishing and provide another tool in the enforcement toolbox.
- Provisions that enable for forfeiture should be outlined.
- Provisions that address the false labelling or identification and the plain marking or labelling of fish (as done in the U.S. Lacey Act) may be outlined.
- The constitutionality of the proposed text of the Lacey-like provision should be assessed according to the country's legal system. For example, it may be assessed if any constitutional issue arises when a Lacey-like provision only applies to fisheries (the U.S. Lacey Act applies to wildlife, fisheries, and plants) or other such issues. Furthermore, any potential conflict of law or other legal issue that may arise from the addition of a Lacey-like provision should be assessed.
- The addition of other terms, which may be required to enable the effective implementation of the Lacey-like provision, should be assessed. For example, the assignment of powers to authorities or the explanation of the associated legal processes.



8 ACRONYMS AND ABBREVIATIONS

IUU	Illegal, Unreported and Unregulated (fishing)
NFDS	Nordenfjeldske Development Services
Pew	The Pew Charitable Trusts
SA	South Africa
SIF	Stop Illegal Fishing
TMT	Trygg Mat Tracking
U.S.	United States
USA	United States of America
USD	United States Dollars
WIO	Western Indian Ocean



FISH-i Africa is a partnership between Western Indian Ocean countries to stop large-scale illegal fishing in the region. FISH-i Africa is achieving success through strengthened regional coordination and information sharing, which in turn supports targeted enforcement actions against illegal operators.

www.fish-i-africa.org

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