

**AN OVERVIEW OF THE U.S. LACEY ACT  
AMENDMENTS OF 1981 AND A PROPOSAL FOR A  
MODEL PORT STATE FISHERIES ENFORCEMENT  
ACT**

**Prepared for**

**the Ministerially Led Task Force on Illegal, Unreported and  
Unregulated Fishing on the High Seas**

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# **AN OVERVIEW OF THE U.S. LACEY ACT AMENDMENTS OF 1981 AND A PROPOSAL FOR A MODEL PORT STATE ENFORCEMENT ACT**

## **EXECUTIVE SUMMARY**

This paper sets forth a general background of the Lacey Act Amendments of 1981 - the primary statute used by the United States in its role as a port state to combat illegal, unregulated and unreported (IUU) fishing, when such fishing occurs outside the jurisdiction of the United States but the illegal catch from the fishing is then imported into the United States. This type of import is conducted via both fishing vessels and on shipping containers aboard cargo vessels, and the United States has had success in pursuing enforcement actions against IUU product and the persons behind it. The paper details: the Lacey Act prohibitions on trafficking, the broad definitions of statutory terms that make the statute so effective, and the various sanctions authorized by the Lacey Act (civil monetary penalties, forfeiture of illegal fish and vessels, and criminal sanctions). With regard to the sanctions, the paper also sets forth the legal requirements of the U.S. Government to impose liability in a court of law, as well as the process for doing so.

The second section of the paper puts forth a Model Port State Fisheries Enforcement Act for the consideration of the High Seas Task Force member nations seeking to implement effective port state controls on the trafficking of IUU fish product. The Model Act utilizes the best aspects of the Lacey Act and the experiences of the United States and other nations to set forth provisions and language - and explanations for same - that will assist member nations in developing effective port state authority. The provisions of the Model Act include model prohibitions, definitions, civil penalty/forfeiture/criminal sanction authority, and penalty sharing authority.

The goal of the paper is to serve as a document to identify issues and processes by which fishery policymakers from port states around the globe can aid international cooperation among responsible flag, coastal and port states by using port state sanctions to eliminate the trafficking of IUU fish product.

# **AN OVERVIEW OF THE U.S. LACEY ACT AMENDMENTS OF 1981 AND A PROPOSAL FOR A MODEL PORT STATE ENFORCEMENT ACT**

## **2. INTRODUCTION**

At the invitation of the Ministerially Led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas, the U.S. National Oceanic & Atmospheric Administration (NOAA) presents this brief overview of the Lacey Act Amendments of 1981 and the pertinent experience of the United States with regard to enforcing the Lacey Act against foreign fishing vessels and fish product containers entering U.S. ports with illegally obtained fish product. In addition, a Model Port State Fisheries Enforcement Act based on Lacey Act authorities, principles, and U.S. experience is provided for consideration by Port States. Port States may consider all or part of the provisions of the Model Act for potential implementation in order to create a cooperative enforcement regime among nations to address the problem of natural resource poaching by foreign fishing vessels operating in various international fisheries.

## **3. HISTORY OF THE LACEY ACT**

The Lacey Act was originally enacted in 1900 in order to supplement the laws of states within the United States which regulated the taking or possession of wildlife or birds. Many such states had wildlife protection laws, however they were unable to exercise jurisdiction over violators who had taken their illegally caught wildlife to another state. The Lacey Act made it a federal crime to transport in interstate commerce game or birds taken in violation of a state law. Even today, a violation of the Lacey Act requires a separate underlying violation of a state, foreign or Indian tribal law. In 1926, the Black Bass Act was enacted as a counterpart to the

Lacey Act in order to address illegally taken fish. Both Acts underwent various amendments over the years adding additional species and additional types of underlying violations to the prohibitions, as well as increasing penalty amounts from US\$200 originally to US\$10,000 and adding misdemeanor and felony criminal penalties. The two acts were joined in 1981 creating what is known now as the Lacey Act Amendments of 1981<sup>1</sup> (hereinafter the Act).

The Act remains one of the United States' primary laws directly targeting illicit interstate or foreign trade in illegally taken species.

#### **4. OVERVIEW OF LACEY ACT PROVISIONS**

##### a. General Provisions

##### i. Scope

The provisions of the Act are utilized by several federal agencies with authority to regulate trade and commerce of fish, wildlife and plants. Due to its dynamic structure and broad authority, the Lacey Act is often charged in conjunction with smuggling laws, money laundering statutes, theft statutes, conspiracy laws, and other federal laws to achieve a stronger litigation position than those provided by any individual natural resource statute.

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<sup>1</sup> 16 United States Code ' 3371, *et seq.* For a complete overview of the history of the Lacey Act and a survey of U.S. case law, *see* "The Lacey Act: Stemming the Flow of Illegally Commercialized, Fish, Wildlife, and Plants/Its Legislative History and Selected Issues," Michele Kuruc, Assistant General Counsel for Enforcement and Litigation, NOAA. Copies provided upon request.

ii. Prohibitions and Definitions

The Act prohibits two types of activity: a) the failure to accurately mark/label shipments of fish and wildlife, and; b) trade in wildlife, fish, or plants that have been illegally taken, possessed, transported or sold. This paper will focus on this latter “trafficking” prohibition, which states in relevant part:

Prohibited Acts - it is unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of an foreign law. 16 U.S.C. § 3372(a)(2)(A).

Thus, this prohibition requires evidence of both an underlying, or “trigger,” violation of some law (“any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law”), as well as evidence of an overlying violation of the Lacey Act=s prohibited actions (“import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce”). The underlying violation occurs when a person illegally takes, possesses, transports, or sells the wildlife, fish or plant. The Lacey Act violation then occurs when a person imports, exports, transports, sells, acquires or purchases the tainted product.<sup>2</sup>

Enforcement of this prohibition is aided by exceptionally broad statutory definitions for several key terms contained in the prohibition, including:

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<sup>2</sup> The Lacey Act contains a second prohibition on trafficking that allows the “underlying” violation to be a treaty term or regulation - “It is unlawful for any person -- (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.” 16 U.S.C. § 3372(a)(1). A helpful diagram of the trafficking prohibitions can be found at Appendix “A.”

- A) “person” includes any individual, partnership, association, corporation, trust, or any officer, employee, agent, department, or instrumentality of the Federal Government or of any State or political subdivision thereof, or any other entity subject to the jurisdiction of the United States. 16 U.S.C. § 3371(e).

This definition is sufficiently broad to cover the vast majority of entities that the U.S. comes across in the trafficking of fish and wildlife.

- B) “import” means to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States. 16 U.S.C. § 3371(b).

The explicit departure from customs law was intended by the U.S. Congress to permit the seizure and forfeiture of illegal catch being transshipped through U.S. ports, as well as to allow for seizures at the time of entry, rather than waiting until quarantined or bonded wildlife is released and thus “imported” under customs law.

- C) "fish or wildlife" means 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).

This definition covers most fish and wildlife, with the exception of domesticated pets, farm animals and feral (wild, but formerly domesticated) animals.

iii. Underlying Violations and Lacey Act Violations in General

As with any prosecution, the Act requires that several issues, both legal and factual, be addressed prior to determining that the prosecution should go forward.

First, the underlying foreign law must be resource related. “Resource related” means that the protection of wildlife is one of the purposes of the law. Whether an underlying law has a

sufficient nexus to wildlife protection is an issue for the court to decide. However, it is clear from both case law and legislative history that the underlying law may have other purposes, including revenue generation, in addition to the wildlife protection purpose.<sup>3</sup>

Second, the catch must have been taken, possessed, transported, or sold in violation of a foreign law. The question of what constitutes a valid “foreign law” for purposes of the Act is a question of law for a court to determine. NOAA believes that the term can be interpreted broadly to include most lawful resource protection rules and requirements in foreign jurisdictions. Notably, the U.S. courts that have looked at the issue of what constitutes a valid foreign law have supported this broad interpretation, to include statutes, regulations and “other such legally binding provisions that foreign governments may promulgate to protect wildlife...”<sup>4</sup>

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<sup>3</sup> Prior to the 1981 Amendments to the Act, the courts determined that laws which were “merely a revenue law” were not sufficient for a prosecution under the Act, however laws which contemplated protection for wildlife other than the conventional products of commercial agriculture and fisheries were sufficient. See United States v. Molt, 599 F.2d 1217 (3d Cir. 1979). During the amendment process, the U.S. Senate determined that the requirements of the courts were too restrictive, and stated that a law that has wildlife protection as one of several purposes is sufficient to support a charge under the Act. S. Rep. No. 123, 97th Cong., 1st Sess. 6 (1981) U.S.C.C.A.N. 1748.

<sup>4</sup> U.S. v. McNab et al, 324 F.3<sup>rd</sup> 1266 (2003). On the same issue, a second U.S. court held that –

. . . [b]ecause of the wide range the forms of law may take given the world's many diverse legal and governmental systems, Congress would be hard-pressed to set forth a definition that would adequately encompass all of them. Moreover, if Congress were to have included explicitly "foreign regulation," then the door would have been opened for alleged violators to argue that the Act's forfeiture provision is not triggered by violation of a "law" (in the broad sense) that does not fall easily into either "law" (in the more narrow "statutory sense") or "regulation" categories. Thus, if Congress had sought to define "any foreign law" with any kind of specificity whatsoever, it might have effectively immunized wildlife smugglers from enforcement under the

Treaty provisions, if used by a foreign government to regulate wildlife, could be included, but Conservation Measures of Regional Fishery Management Organizations (RFMO) without direct implementation by a member nation may not.

Third, the tainted fish/wildlife must have been imported, exported, transported, received, acquired or purchased in a manner prohibited by the Lacey Act. Notably, these latter two legal considerations cannot be collapsed. There must be a separate, underlying violation of foreign law. While both are necessary elements to the charge, the only illegal act for prosecution purposes of the Lacey Act is the importation (export, transport, et al.). The underlying violation of foreign law is an element of a charge under the Act, but it is not a violation of U.S. law.

iv. Sanction Authority and *Mens Rea* Requirements

The Lacey Act provides the U.S. Government with authority for three primary sanctions - civil administrative penalties (i.e., monetary fines), forfeiture of illegal product and vessels, and criminal sanctions. In order to prove liability under each type of sanction, the government must show differing degrees of *mens rea* of the party alleged to have violated the Lacey Act.

(1) Civil Administrative Penalty Sanctions: For civil penalty prosecutions, the *mens rea* requirement varies depending on the amount of the penalty that the government is seeking to

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Act despite violation of conservation laws of a large portion of the world's regimes that possess systems of law and government that defy easy definition or categorization. In addition, [a narrow reading] works to immunize even a large portion of those smugglers in violation of laws of foreign countries that do have a system that fits within the "laws/regulations" rubric. That is, because much of the enforcement of wildlife conservation laws is performed by "agencies," or their equivalent, as in this case, the rules such bodies generate would also be beyond the scope of the Act.

impose. At the basic level, a strict liability standard (i.e., no knowledge required) for both the Lacey Act violation and the underlying violation is applied for any sanction of US\$250 or less. 16 U.S.C. § 3373(a)(2). This modest amount is rarely, if ever, pursued by NOAA. NOAA generally pursues civil penalties up to the current statutory maximum of US\$11,000, and therefore has a strict liability standard for the overlying Lacey Act violation (e.g., need not prove the party knew an import was illegal, or even occurring), but is required to prove that the violator either 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. See 16 U.S.C. § 3373(a)(1). This higher “due care” standard is regularly met in NOAA cases by showing that the respondent is in the commercial fishing business - a business that is regarded by U.S. courts as pervasively regulated. Due to the pervasive regulation, courts impose a high due care standard such that they should be able to determine if product being imported was legally taken, and have a good understanding of the laws, both domestic and foreign, affecting their business.

(2) Forfeiture Sanctions: The Lacey Act also authorizes forfeiture of illegal fish and wildlife on a strict liability basis for both the overlying and underlying violation. Ergo, the government need not prove the higher “due care” standard for the underlying violation that is required in civil penalty cases. The strict liability standard for both violations ensures that illegal wildlife products do not enter the stream of commerce in the United States regardless of the knowledge of the importing party. This is noteworthy because under the Act, the party

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See U.S. v. 594,464 Pounds of Salmon, 871 F.2d, 824, 827 (1989)(finding regulation from Chinese Taipei sufficient foreign law for Lacey Act purposes).

importing the fish/wildlife product does not need to be that same party that took the product illegally in the first place. As such, significant amounts of fish product can be seized and forfeited to the US Government without a showing of knowledge or intent on the part of the party from whom the product was seized. Recent case law has supported NOAA's position that there is no innocent owner defense that would allow a forfeiture claimant to retain fish product that was illegal to possess under the Lacey Act.<sup>5</sup>

(3) Criminal Sanctions: For criminal sanctions to apply, the U.S. must prove that a party knowingly engaged in the illegal act (e.g., import, export, transport), and that the party knew of the underlying violation (felony), or in the exercise of due care should have known of the illegality stemming from the underlying violation (misdemeanor). 16 U.S.C. § 3373(d).

## **5. U.S. EXPERIENCE WITH LACEY ACT PROSECUTIONS IN THE INTERNATIONAL FISHERIES CONTEXT**

### **a. Imports via Fishing Vessels: The Fight Against IUU Tuna Fishing in the Pacific Ocean**

The Act has extensive applicability in the protection of wildlife resources through a combination of its application to a large variety of animal and plant species, as well as its reliance on myriad underlying resource laws. Accordingly, there has been a large number of prosecutions under the Act by various agencies of the United States government. However, for purposes of this paper the most relevant experience of the United States is that of NOAA's prosecution of foreign fishing vessels (hereinafter, FFVs) that import illegal catch into U.S.

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<sup>5</sup>See United States v. 144,774 Pounds of Blue King Crab, 410 F.3rd 1131 (2005).

ports, where the underlying violation is for fishing within the exclusive economic zone (EEZ) of a foreign nation without holding a valid permit authorizing the fishing activity.

An excellent example of this type of prosecution stems from FFVs offloading tuna in the U.S. ports of Guam and American Samoa after fishing in the Western and Central Pacific Ocean - home to many national EEZs. Flag nations have been free to make bilateral arrangements with coastal states in the Pacific to authorize fishing in national EEZs. Despite the availability of fishing access rights, IUU fishing efforts for tuna in EEZs throughout the Pacific have been going on for decades. As a port state, the U.S. - through Guam and American Samoa<sup>6</sup> - have two of the premier ports in the Pacific Ocean for offloading, shipping and processing tuna. NOAA's most recent experience as a port state for the import and offloading of illegally taken tuna in the Pacific has, for the most part, been based on ten prosecutions over the last decade. All ten cases were settled<sup>7</sup> prior to hearing resulting in the collection of US\$90,000 in civil penalties and US\$139,000 in forfeited catch. A review of these types of cases and prosecutions is provided below.

i. The Investigative Process

(1) Boarding Vessels and Gathering Evidence

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<sup>6</sup> Landing of tuna products taken on the high seas by FFVs in U.S. ports is, with a few exceptions, limited by statute to Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. *See* the Nicholson Act, 46 U.S.C. Appx 251.

<sup>7</sup> While some nations do not authorize government attorneys to settle cases prior to a hearing/trial, U.S. government prosecuting attorneys are authorized to settle cases with varied terms of settlement (e.g., reduced penalty for admission of liability and waiver of their right to a hearing).

An ordinary investigation under the Act begins with a routine fisheries enforcement dockside boarding by an investigator from NOAA Fisheries Office for Law Enforcement or United States Coast Guard personnel.<sup>8</sup> During the boarding, the vessel=s logbooks are reviewed, including an analysis of the latitude/longitude coordinates listed for fishing sets. The fishing set coordinates are plotted on a nautical chart, and the set positions are checked to determine if any part of the vessel=s sets occurred within the US EEZ or the EEZ of any other nation. If a set did occur within an EEZ, the vessel master or fishing master is interviewed to determine if the vessel was authorized to fish in the relevant EEZ. If no valid authorization is produced, the vessel master is then informed that the vessel is being detained for further investigation, and a NOAA Fisheries investigator completes the remaining procedures of an investigation.

The investigator further analyzes the vessel=s logs and may interview the vessel master, fishing master, and crew for information regarding their fishing activity. At this point, the investigator may also seek to retrieve electronic plotter information from the vessel, and/or may seek to get access to any vessel monitoring system data being collected by a flag/coastal state or a RFMO. This type of evidence may help to verify the validity of the vessel logbook or statements by the master/crew. In addition, it may also assist in developing evidence for investigation into other potential violations of law.

(2) Confirmation and Statement of Support from Foreign Nation

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<sup>8</sup> Both NOAA Fisheries and the U.S. Coast Guard have broad authority to board commercial fishing vessels at sea or dockside to conduct fisheries enforcement investigations, with or without a warrant.

It is the policy of NOAA to proceed with a Lacey Act prosecution only when the nation whose underlying law has been violated supports the prosecution. This is a determination that NOAA seeks to make early on in the investigation. As such, the NOAA investigator also contacts the fisheries authority of the nation whose EEZ was violated, and relays the following information and requests: brief description of the facts of the case; requesting a clarification on any fishing authorization or permit to the vessel, and; requesting a statement of support regarding proceeding with the investigation and prosecution if it appears that a violation of their law has occurred. A written response from the national fishing authority, or other authorized office, is required for the case to proceed.

This policy is based on a desire to not expend agency resources pursuing a case that is not a priority matter for the foreign nation, and because the full cooperation of the foreign nation will be required if the case goes to hearing.<sup>9</sup> Notably, the letter does not ask the foreign nation for a legal opinion on whether the underlying law has actually been violated. That determination is made for charging purposes by the attorney for NOAA.

ii. Seizure of Catch and/or Vessel

(1) Determination of Illegal Catch Volume

After consultation with the NOAA Office of General Counsel over whether there are sufficient facts to meet the standard of proof for a violation of the Lacey Act and whether such a sanction is appropriate, the investigator may also begin the process of seizing illegal catch. The

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<sup>9</sup> A certified copy of the underlying law may be required for the prosecution, as well as an expert witness to testify on various aspects of the foreign law.

investigator uses the vessel=s logs, statements of the vessel operator and the vessel=s local agent to determine what amount of fish was caught during illegal sets. Often there are only a few illegal sets in a trip consisting of many sets meaning that it is likely that not all of the catch was taken illegally. The investigator will generally not seize the actual fish because of the problems of perishability and storage costs, but will either a) seize the proceeds from the sale of the fish if there is a local dealer/auction handling the product, or b) work with the vessel owner and local agent to ensure that the United States receives a check for the proceeds from the sale of the illegal catch after the fish goes to market.<sup>10</sup> In cases, where there are no logs or other information to determine the actual amount of illegal catch, all of the catch may be seized for later determination by the court as to the appropriate amount to be forfeited.

While detention of the vessel for an ongoing investigation is authorized under various statutes, NOAA rarely seizes the vessel for forfeiture because a felony conviction is required for forfeiture of vessels/conveyances under the Lacey Act. No such conviction is required for forfeiture of the illegal product. In addition to the felony requirement, vessel seizure/forfeiture can often be costly and time consuming for NOAA. As such, vessel forfeiture is reserved only for the most egregious cases.

iii. The Civil Administrative Prosecution Process

After the investigation is completed, the vessel is allowed to leave when the local fish agent accepts service of process of any charging documents. The investigator prepares an

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<sup>10</sup> NOAA has been successful in working with local agents to ensure the value of the catch is returned to NOAA based on the desire of local agents to not run afoul of the U.S. government=s enforcement processes.

evidence package which is then referred to NOAA's Office of General Counsel for Enforcement and Litigation (GCEL).

GCEL is the civil prosecution section of the NOAA General Counsel's office and has sole authority to initiate civil prosecutions under the Act for fishery related violations. Once the GCEL attorney receives the evidence package from the investigator, he/she makes the determination as to whether there is sufficient evidence to support a prosecution and whether there is sufficient Agency interest in pursuing the prosecution. First, the determination must be made as to whether the underlying violation (e.g., a prohibition on unauthorized fishing in the EEZ) is sufficiently "resource related" as required by the Act. This is discussed further below. Next, the determination is made as to whether the underlying law has been violated. For an underlying violation of foreign law dealing with unauthorized fishing in an EEZ - the type of violation most relevant to this paper - the elements necessary are illegal location of fishing set, actual fishing activity including the catch of fish, and confirmation that the vessel does not have a valid permit. Finally, the GCEL prosecutor must determine whether there has been an importation of the illegal fish under the Act. Quite simply, the broad definition of import under the Act means that if the vessel is within the jurisdiction of the United States with illegal catch on board, there has been an illegal importation.

If the preceding determinations are all answered in the affirmative, the GCEL attorney then determines who should be charged<sup>11</sup> and what penalty amount should be assessed. The standard penalty for FFV cases is \$11,000 per importation - the maximum authorized by the Act.

The GCEL attorney issues a Notice of Violation and Assessment (NOVA)<sup>12</sup> to be served on the vessel owner/operator (termed “respondents”), or the vessel’s local agent. The vessel owner/operator has 30 days from the issuance of the NOVA to decide if they are going to settle the case or request a hearing.

Civil penalty hearings are heard in the United States by Administrative Law Judges. These are non-jury hearings with less stringent litigation rules than those in criminal trials. As such, NOAA is required to prove liability by a “preponderance of the evidence” rather than the criminal burden of proof of beyond a reasonable doubt. The preponderance of the evidence standard has been interpreted to mean that NOAA must show that it is more likely than not that the Respondents committed the violation as charged.

(1) Underlying Violation of Foreign Law - The “Resource Related” Requirement

At the administrative hearing, NOAA must prove that the underlying foreign law is resource related. “Resource related” means that the protection of wildlife is one of the purposes of the law. Whether an underlying law has a sufficient nexus to wildlife protection is an issue for the court to decide. However, it is clear from both case law and legislative history that the underlying law may have other purposes, including revenue generation, in addition to the

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<sup>11</sup> Under the Lacey Act and NOAA’s procedural regulations, GCEL may charge the vessel owner, vessel master, or both under a theory of joint and several liability. Also, the vessel owner is held liable for the actions of the vessel’s master and crew under the theory of *respondeat superior*.

<sup>12</sup> A sample NOVA is attached at Appendix “B.”

wildlife protection purpose.<sup>13</sup> In cases where the underlying violation is fishing within a foreign nation's EEZ without authorization, NOAA is confident that a prohibition making such fishing illegal has as one of its purposes the protection of fishery resources. To date, no respondent has argued otherwise.

As stated previously, in civil administrative penalty cases, the burden is also on NOAA to prove at hearing that the Respondents either knew, or in the exercise of due care, should have known that the product was taken in violation of the foreign law. This burden is met either through introduction of facts showing knowledge or a showing that the Respondent is in a business - generally, the commercial fishing business - where the due care standard is high with regard to the expected knowledge of its participants of relevant laws.

Notably, recent case law in the United States has supported NOAA's position that even if the underlying foreign law changes after the conviction, the fact that it was a valid and enforceable law at the time of the import is sufficient for a finding of liability under the Lacey Act.<sup>14</sup>

(2) Proving the Case at Hearing

Proving the underlying violation of unauthorized fishing in an EEZ is fairly uncomplicated. First, there is evidence of unauthorized fishing, either fishing sets detailed in a

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<sup>13</sup> See Footnote No. 3.

<sup>14</sup> United States v. McNab, et al., 324 F.3d 1266 (2003)(Denial of appeal of defendant's Lacey Act criminal conviction for import/sale of undersized lobsters from Honduras because the Government of Honduras changed the minimum size limit for lobsters - making the original lobsters of legal size - after the defendants had been convicted.)

vessel logbook, or statements of the crew/master. Under U.S. law hearsay evidence like logbooks may normally be considered inadmissible evidence, however logbooks fall within the “business record” and “admission against interest” exceptions to the rule against hearsay, and are therefore admissible as evidence. The logbooks provide evidence of both fishing activity and location.

Next, NOAA will introduce into the record evidence from the foreign nation, either documentary or from a foreign government official, that confirms the vessel was not authorized to fish within its EEZ. There is no requirement that the foreign nation make their own official finding of the illegal fishing.

Lastly, under the broad definition of “import” in the Lacey Act, the importation element of the violation is proved simply by showing the vessel arrived in a U.S. port. Notably, NOAA is confident that even a showing that the vessel entered the U.S. contiguous zone (generally, 12-24 miles seaward of the outer boundary of territorial sea) would be sufficient to show an import under the Lacey Act.

After NOAA puts in its evidence, the respondent has the opportunity to cross examine all NOAA witnesses and documents, as well as put their own witness/documentary evidence into the record. The administrative law judge then makes a determination as to whether NOAA has met its burden of showing by a preponderance of the evidence that the violation occurred. If that determination is made in the affirmative, the judge can then impose a monetary penalty *de novo*. Generally, NOAA’s originally assessed penalty is accepted by the judge.

Administrative hearings over Lacey Act import violations by fishing vessels are rare. Because of the broad application of the prohibitions and definitions of the Lacey Act, and the

discretion of the NOAA prosecutors in choosing good cases, there is often no good defense for a respondent to raise at hearing. As such, settlement negotiations can quickly be focused on the amount of civil penalty to be paid, and the amount of catch proceeds to be forfeited.

b. Imports via Shipping Containers: The Fight Against IUU Patagonian Toothfish Imports

Increasingly, the United States has applied the forfeiture provisions of the Lacey Act, in addition to civil penalty and criminal sanctions, against imports of IUU fish product into U.S. ports in shipping containers rather than on board a fishing vessel. In these types of cases, NOAA experience has been that evidence of illegal recordkeeping, or other trafficking measures, is more likely to be found rather than evidence of illegal fishing. An excellent example of these types of cases are those involving the importation of illegally taken Patagonian Toothfish (PTF) in violation of Conservation Measures implemented by the U.S. under the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR).

PTF is harvested primarily from waters surrounding Antarctica and countries within the extreme southern hemisphere. This fishery is managed internationally pursuant to the CCAMLR treaty, of which the United States is a member. The United States has implemented its responsibilities under the treaty through enactment of the Antarctic Marine Living Resources Convention Act of 1982 (AMLRCA) and regulations promulgated thereunder. 16 U.S.C. 2431-2444.

According to CCAMLR, illegal, unregulated and unreported (IUU) fishing for PTF is a significant problem which threatens to seriously deplete this fishery resource. After identifying this problem, CCAMLR member nations developed a “catch documentation scheme” (CDS)

which required certain paperwork detailing the catch and shipment of PTF to follow the fish product throughout the stream of commerce. As one of the largest importers of PTF in the world, the U.S. was concerned that significant amounts of illegally taken PTF were entering the U.S. market. Any such illegally taken PTF would either show up as illegal in the CDS paperwork, or had to be trafficked in violation of the CDS using either false or non-existent CDS paperwork. As such, a concerted effort to investigate potential violations of the U.S. regulations implementing the CCAMLR catch documentation scheme was implemented by the NOAA Fisheries Office for Law Enforcement.

NOAA investigators work closely with agents of the U.S. Customs and Border Protection Service to identify containers of PTF, and then focus on the existence, and veracity, of the catch documentation paperwork that accompanies the shipments. Investigators will review the catch document, bills of lading, and paperwork from customs agents. Investigators may also request additional information from importers, as well as vessel monitoring system data from flag nations to assist in confirming the information on the catch document. The investigator will, if possible, interview the importer, customs agent and any consignee.

Failure to provide the required paperwork, inaccurate completion of the paperwork, or falsification of the paperwork, is a violation of the CCAMLR treaty conservation measure and AMLRCA - both of which can serve as underlying violations for the Lacey Act. These are violations of treaties or domestic law/regulations rather than the violations of foreign law as in the imports from fishing vessels example discussed above.<sup>15</sup> For these types of cases, the

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<sup>15</sup> See prohibition on treaty violations serving as an underlying violation, footnote #2 above.

inaccurate or false information may include: name of harvesting vessel, harvest dates, amount of PTF harvested/landed/ transhipped/exported, and the name or signature of government officials certifying the catch document.

In rare instances, the U.S. might be able to determine whether the fish was actually illegally taken or not (e.g., fishing in CCAMLR Convention Area without a permit). However, since our cases focus on the paperwork alone, we may be pursuing legal action against fish product that was illegally caught and is being imported with false documents, as well as fish that was legally caught and is being imported with inaccurate paperwork. Both are subject to Lacey Act liability, and the U.S. prosecutors may exercise their discretion in the level of sanction to pursue for each type of case.

It should be noted that imports of PTF into the United States from a single vessel often involve numerous ports around the nation. This involves substantial coordination between several NOAA investigators, U.S. Customs agents, and government attorneys.

Forfeiture actions involving PTF regularly involve shipments with a wholesale value exceeding US\$500,000 - with one current case exceeding US\$2.2 million in seized catch proceeds. As such, there is significant motivation for importers of IUU fish product to violate the law in order to get the product into the lucrative U.S. market. Conversely, the high value of the product make for excellent forfeiture cases where the U.S. Government can send a strong message to the violator, and potential violators, that they can lose a significant amount of money when the laws/treaties of the U.S. have been violated.

In most NOAA enforcement actions where perishable fish product is seized, the product is sold and the proceeds from the sale become the *res* for forfeiture purposes. In the forfeiture

action, the U.S. proceeds against the illegal product (or proceeds from sale of same) itself rather than prosecuting any particular party. As such, all parties that believe they have a claim to the seized product (e.g., lienholders) can enter the litigation to prevent the U.S. from forfeiting the product. Forfeiture is found against the product on a strict liability basis, where the government must meet its burden of proof by a preponderance of the evidence.

The forfeiture action may be accompanied by a civil or criminal action against the responsible persons. A civil penalty action would proceed in the same fashion as that described above for illegal tuna imports by fishing vessels. In the PTF context, NOAA regularly works with the U.S. Department of Justice to bring criminal sanctions for these types of violations *in lieu* of civil penalties as the maximum civil penalty under the Lacey Act and AMLRCA are limited to US\$11,000 per count - an amount that is often simply a minor cost of doing business in shipments of significant value. A brief discussion of criminal actions under the Lacey Act is provided in the next section.

## **6. CRIMINAL PROSECUTIONS UNDER THE LACEY ACT**

While much of NOAA's experience with Lacey Act prosecutions has been with civil penalty sanctions, the criminal process should not be overlooked as it has provided the most significant sanctions received for Lacey Act violations in the fight against trafficking of IUU fish products.

As previously stated, criminal charges require the U.S. to prove a knowing violation beyond a reasonable doubt. While this level of proof can be difficult to meet, when done

successfully, felony sanctions apply which can bring both significant monetary penalties and prison terms.

In 2004, NOAA and the U.S. Department of Justice convicted three principals in a vertically integrated South African/U.S. fish product operation (e.g., associated companies conducting the fishing, processing, export/import and sale of product) under the Lacey Act for importing into the U.S. rock lobster and Patagonian Toothfish in violation of South African law. Because of the fraud involved and the massive illegal over-harvesting of the species in South Africa, the three were sentenced to prison terms from ranging 12-46 months, and penalties of approximately US\$7.4m.<sup>16</sup>

Readers interested in an in-depth review of the provisions of the Lacey Act, with a focus on criminal sanctions, are encouraged to read *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, Robert S. Anderson, U.S. Department of Justice, Public Land Law Review (1995)(available online at <http://www.animallaw.info/articles/arus16publlr27.htm>).

## **7. TRADE OBLIGATIONS AND THE LACEY ACT**

While there is currently no case law on the issue, the United States is confident that the application of Lacey Act prohibitions to imports taken unlawfully in foreign jurisdictions do not violate U.S. trade obligations. The Lacey Act is an internal regulation that is being applied at the border to certain prohibited items in a non-discriminatory fashion, while affording equitable treatment to the same products if taken and imported lawfully. The Lacey Act does not provide

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<sup>16</sup> See United States v. Arnold Bengis, David Bengis, Jeffrey Knoll, Hout Bay Fishing Industries, Icebrand Seafoods, Inc., et al.

protection to any domestic product at the expense of foreign product, and in fact, the law applies equally to illegally taken product imported by domestic or foreign entities. Moreover, the Lacey Act, as applied to imports of tuna product taken illegally from foreign jurisdictions, benefits the foreign jurisdiction by assisting it in enforcing its wildlife/fisheries laws.

## **8. ISSUES RELATED TO APPLYING THE LACEY ACT IN THE INTERNATIONAL FISHERIES CONTEXT**

Despite the relative simplicity of prosecution for this type of violation, and a 100% success rate in prosecutions, the U.S. has identified several areas where the Act could be modified to increase its efficacy when applied to international fisheries matters.

Most importantly, the low maximum civil penalty currently authorized by the Act limits its effectiveness in penalizing illegal imports of IUU fish product. The Act limits penalties to US\$11,000 and forfeiture of the catch, while reserving larger fines and forfeiture of the vessel for criminal felony prosecutions only. In the context of most wildlife commercial transactions, a US\$11,000 fine may be more than sufficient to prevent further illegal activity, however in the context of international commercial fishing it is often nothing more than a small cost of doing business for the vessel owner.

The ability to seize and forfeit the illegal catch is often a more powerful enforcement tool than the monetary penalty, but still may fall short in achieving the ultimate goal of ensuring compliance with international fisheries laws. Seizure and forfeiture of vessels is the strongest deterrent measure to future violations. The U.S. uses vessel seizure regularly against FFVs found fishing within the U.S. EEZ, and for other significant violations of its domestic fishery

regulations.<sup>17</sup> However, the Lacey Act limits vessel seizure to cases involving the sale or purchase of fish where a felony conviction is obtained and where the vessel owner was a consenting party (or in the course of due care should have known) to the vessel being used in a criminal violation of the Act. NOAA generally does not seek felony convictions for Lacey Act imports by FFVs for various policy reasons,<sup>18</sup> making vessel forfeiture impossible. Accordingly, the low civil penalty and loss of the illegal proceeds are the maximum sanction the U.S. can generally pursue.

A second problem with NOAA's use of the Lacey Act arises from our historical reliance on FFVs to accurately record their fishing positions - legal and illegal - in the logbooks, or attempt only a minimal effort to hide damaging evidence of illegal activity. Under U.S. evidentiary law, the vessel logbooks can be used as evidence at a hearing under an exception to the rule against hearsay. Unfortunately, the U.S. may have been too successful in using vessel logs as evidence because NOAA now sees vessels arrive in port without any logs on board, or with only minimal information regarding its fishing sets. The idea of fishing without logbooks is anathema to most large-scale commercial fishing vessels, so NOAA believes that FFVs arriving in U.S. ports without logs are hiding or destroying the logbooks prior to entering U.S. waters. These vessels may be poachers who are aware that without logbooks to analyze, the U.S. efforts to enforce the Act are significantly hampered.

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<sup>17</sup> Such violations fall under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. ' 1801 *et. seq.*, the domestic fisheries resource protection and management statute for the U.S.

Unfortunately, there is no U.S. law requiring FFVs to have logbooks on board when they enter U.S. waters. FFVs arriving without logbooks are therefore violating no prohibitions, while successfully removing the key piece of evidence we use for prosecutions under the Act. GCEL believes that failing to have a reporting requirement for FFVs is a definite shortcoming of U.S. fisheries and customs laws. While such a requirement may be difficult to introduce for a port state due to international law restrictions, the FAO IPOA on IUU envisions something similar as a flag state responsibility. *See* FAO IPOA on IUU, para. 47.2 (2001).

If there were a prohibition against making port without logs, the U.S. could at least prosecute the vessel for failing to have logbooks, which may assist in getting FFVs to accurately record and maintain catch records in their logbooks.

## **9. A PROPOSAL FOR A MODEL PORT STATE FISHERIES ENFORCEMENT ACT**

### **a. Introduction**

As with most nations, the U.S. has incomplete information on the full extent of IUU fishing activity by distant water fleets in its EEZ. However, there is certainly enough anecdotal evidence - combined with evidence maintained by RFMOs and responsible fishing nations - to suggest that IUU fishing remains a significant problem globally. To address the problem, the FAO's IPOA on IUU seeks to have all responsible flag/coastal/port state nations implement procedures, laws and policies to eliminate IUU.<sup>19</sup> Notably, the IPOA on IUU recognizes that a

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<sup>18</sup> These policies include application of the general restriction on the use of imprisonment as a sanction for fisheries violations in UNCLOS, Article 73(3).

<sup>19</sup> See generally, FAO IPOA on IUU (2001)

port state may have, and should use, the ability to sanction vessels that conduct IUU beyond the jurisdiction of the port state.<sup>20</sup> Furthermore, the Ministerially Led High Seas Task Force paper “Promoting Responsible Ports” specifically recommends that port states implement Lacey Act-type laws to combat illegal fishing.<sup>21</sup> Lastly, the potential positive results of cooperation between nations, as well as port state enforcement against IUU violations from other jurisdictions, is identified in the terms of the “Model Port State Memorandum of Understanding.”<sup>22</sup> The need for port state actions, and recommendations for how to achieve them, envisioned by these important policy documents forms the basis for the Model Port State Enforcement Act described in this section.

Those involved in fisheries enforcement know that it is difficult and expensive to monitor even the smallest EEZ areas, let alone the massive stretches of ocean that make up national EEZs around the world. RFMOs and numerous flag and coastal states have instituted vessel monitoring systems to monitor the location and activity of domestic and foreign fishing vessel operations around the world. These projects lead to an increase in the amount of information regarding the fishing activities of a large number of fishing vessels, which in turn may lead to nations uncovering evidence of illegal fishing by monitored vessels. The monitoring nation will know where and when the suspect fishing vessel is going, and where the vessel makes its next

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<sup>20</sup> *Id.*, para. 59

<sup>21</sup> HSTF/06, 25 February 2005.

<sup>22</sup> FAO, APort State Measures@, AGR/FI/IUU (2004), para. 27.

port call. If the evidence of illegal fishing can be forwarded to the Port State whose jurisdiction the suspect fishing vessel has entered, that nation will have the ability to conduct an investigation and prosecution under a statute following the provisions of the Model Act. With the anticipated monitoring of thousands of fishing vessels operating in oceans around the world, the opportunity for a significant number of cases to be prosecuted under a statute with Lacey Act-type provisions is significant.

It should be noted that several nations have already implemented Lacey-Act type laws that authorize them to effectively regulate imports as a Port State - Papua New Guinea, Nauru, Federated States of Micronesia, Marshal Islands, Solomon Islands, and Tonga.

In light of the principles set forth by the IPOA on IUU, as well as the responsibilities inherent in being a Port State, the following Model Port State Fisheries Enforcement Act is set forth here for consideration by Port States for potential implementation into existing fisheries laws. Because this is a Model Act for general consideration, the provisions were drafted under the assumption that there would be no specific bars to implementation as drafted. Accordingly, any individualized legal issues of a Port State resulting from conflicts with existing constitutional or statutory provisions which may prevent all or part of this Model Act from being implemented are not addressed here. Further, while the specific language used may be acceptable for implementation in the United States, it does not take into account adaptations for the many legal systems that may seek to implement a Port State Fisheries Enforcement Act. As such, policymakers and statutory drafters are encouraged to focus on the concepts raised by the proposed language rather than the language itself.

The Model Act is designed to:

- # provide exceptionally broad applicability,
- # strong sanction provisions,
- # flexibility in exercising prosecutorial discretion,
- # the sharing of monies from penalties and forfeitures in the spirit of the cooperative enforcement efforts of responsible flag, coastal and port states.

The suggested provisions for a Model Port State Fisheries Enforcement Act, along with an explanation of each term, is provided below:<sup>23</sup>

b. The Model Port State Fisheries Enforcement Act

(1) **MODEL PROHIBITIONS:**

- (a) **It is unlawful for any person to import, export, transport, sell, receive, acquire, or purchase any fish<sup>24</sup> taken, possessed, transported, or sold in violation of any law or regulation of another state.**

This provision is modeled after the U.S. Lacey Act and the Fisheries Act of Papua New Guinea, but has been limited to apply to fish and to violations of underlying foreign law only. The various types of possible illegal activity (import, export, et al) are there to ensure the model Act will be applicable to any and all scenarios under which a person could have illegal catch within the jurisdiction of the Port State. The element from the Lacey Act that the illegal act be in interstate or foreign commerce has been removed in order to reduce the number of elements that must be proven in order to apply the law.

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<sup>23</sup> A version of the Model Act without comments is attached at Appendix “C.”

<sup>24</sup> While this paper, and Model Act, are written in terms of “fish” and fisheries laws, reviewers are encouraged to consider implementation a Lacey Act type law for all wildlife species. See e.g., Lacey Act definition of “fish or wildlife.” 16 U.S.C. § 3371(a).

Under the Model Act, the possession of illegally caught fish within the Port State's jurisdiction would be illegal regardless of the purpose for which the FFV is carrying the fish. The U.S. has been effective in using the slightly more restrictive language of the Lacey Act, and so it is apparent that the less restrictive model language used here would be at least as effective, if not even more applicable than that of the Lacey Act. Quite simply, the model prohibition - combined with the definitions provided below - will make an extremely effective law to allow Port States to prosecute poachers under most factual scenarios involving a FFV with illegally caught fish on board.

Reviewers may also want to consider expanding the scope of underlying violations to include treaty terms and domestic laws.

- (b) It is unlawful to falsify, fail to make and/or maintain, or fail to have on board vessel catch records as required by this Act.**

This provision is intended to add a prohibition to support the requirement that all FFVS making port calls must carry vessel catch records (logbooks). See the Model Record keeping and Reporting Requirement below.

- (c) MARKING/FALSE LABELING.**

- i. It is unlawful for any person to import, export, or transport any container or package containing any fish unless the container or package has previously been plainly marked, labeled, or tagged in accordance with [Port State standards].**
- ii. It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of any fish which has been, or is intended to be - (1) imported, exported, transported, sold, purchased, or received from any foreign country; or (2) transported in interstate or foreign commerce.**

As falsification of, and failure to accurately mark, shipping labels is an hallmark of illegal product trafficking, nations may want to consider specific prohibitions against this type of activity. This language is modeled after provisions in the Lacey Act.

**(2) MODEL DEFINITIONS:**

**For purposes of this Act:**

- (a) The term “Fish” means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds, whether alive or dead, and includes any part, product, egg, or offspring.**

This definition is adapted from the Magnuson-Stevens Fishery Conservation and Management Act (MFCMA) - the primary U.S. statute for regulating domestic and foreign fishing within its EEZ - and is intended to apply to all potential commercial fisheries or harvestable marine resources. The Lacey Act definition extends to non-marine species of animals and plants and is therefore too broad for the purposes of this provision.

- (b) The term "import" means to land on, bring into, or introduce into, any place subject to the jurisdiction of [Port State], including the exclusive economic zone or other waters under the jurisdiction of [Port State], whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of [Port State].**

This definition is adapted from the Lacey Act and is intended to have broad application. Any fishing vessel possessing illegally caught fish found within the EEZ of the prosecuting nation should fall within the scope of the model provisions. Such a broad reading is specifically meant to address a situation where the investigation is conducted during an at sea boarding - within the EEZ - and therefore the FFV has yet to make a port call. The latter part of the

definition is necessary in the Lacey Act to differentiate from customs law definitions and may not be necessary for all Port States depending on whether there is a conflict with national customs law.

- (c) **The term "law or regulation of a foreign State" means laws, treaties, regulations which regulate the taking, possession, importation, exportation, transportation, or sale of fish and which has fishery resource protection as one of its purposes.**

This definition explicitly states the requirement that one purpose of the underlying prohibition be resource related. The requirement is necessary to maintain the integrity of the law by establishing it as a resource protection law itself. If the model Act could be triggered by any type of underlying violation, the need for strong penalty and forfeiture provisions is undermined by creating a scenario where a large penalty could be assessed for the importation of catch that is illegal because of any insignificant violation that can be found. One example under U.S. law would be if a FFV fished in U.S. waters without the proper safety gear on board and then imported that catch into a foreign state where it was prosecuted under the model Act. The model Act is designed as an important tool in the cooperative enforcement effort to address poaching, and should be limited to its resource protection focus.

Reviewers should also consider the issues raised by U.S. courts (see footnote #4) on ensuring that “foreign law” is defined broadly to include the many types of legal systems around the world that regulate wildlife.

- (d) **The term "person" includes any individual, partnership, association, corporation, trust, or any officer, employee, agent, department, or instrumentality of the Federal Government of any State or political subdivision thereof, or any other entity subject to the jurisdiction of [Port State].**

This definition is adapted from the Lacey Act and is intended to have a broad application to any and all entities which may own or operate FFVs in any way.

**(e) The term "taken" means captured, killed, collected or harvested.**

This definition is adapted from the Lacey Act, and is intended to have broad application to the processes by which fish or fish product might be taken illegally in a foreign jurisdiction.

**(f) the term "transport" means to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment.**

This definition is taken from the Lacey Act, and is intended to have broad application to the various modes of moving fish product.

**(3) MODEL RECORD KEEPING AND REPORTING REQUIREMENTS:**

**(a) All foreign fishing vessels making port calls within the jurisdiction of [Port State] must maintain on board the vessel an accurate and complete fishing logbook for each day of fishing activity, completed within \_\_ hours of the fishing activity, whether the fishing took place within the jurisdiction of the [Port State] or not. The recordkeeping must include the following information:**

- i. Name of the fishing vessel.**
- ii. The number of any permit that authorized the fishing activity within the waters of any State.**
- iii. Date, time, latitude and longitude of the location at which the setting of fishing gear was begun, and for when the set was ended.**
- iv. Amount and species of any fish caught during each set.**
- v. Signature of vessel operator and date of signature.**
- vi. [Other Requirements]**

This provision is based on record keeping regulations applied in several U.S. domestic fisheries under the MFCMA where the data provided from the records is critical to the effective management of the fishery resource. The provision as applied here is meant to address the problem the U.S. is now experiencing of FFVs arriving in U.S. ports with no logs on board. The record keeping requirement may be better addressed as a resource stock assessment issue rather than a method of improving enforcement of the Model Act. The need for accurate stock assessments in international fisheries is an issue that is receiving greater attention in light of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and the Agreement for the Implementation of the Provision of the UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The latter agreement specifies that each flag state should collect and exchange data on stocks, ensure that the data is sufficient, and seek standardized reporting form. Indeed, many of the licensing agreements entered into by Port States currently contain record keeping requirements to address this issue. While there is a move toward improved flag-state reporting by RFMOs and nations, this model provision pursues the goal of accurate reporting to the Port state. Whether that information is used in a stock assessment database or solely for enforcement purposes is an issue to be determined as the U.N. agreements are implemented. Suffice to say that reporting of set locations to the Port-state will remain an important part of a cooperative enforcement efforts among Port States as long as logbook and fishing records are integral to fishery management.

**(4) MODEL CIVIL PENALTY PROVISIONS:**

- (a) Any person who engages in conduct prohibited by this Act and in their exercise of due care should know that fish were taken possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying foreign law, treaty, or regulation, may be assessed a civil penalty of not more than [\$xxx,xxx.00 - Port State currency] for each such violation.**
- (b) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which a person may have taken or been in possession of said fish.**
- (c) In determining the amount of any penalty assessed pursuant to paragraphs (1) and (2), the [Port State authority] may take into account the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, and such other matters as justice may require.**
- (d) Any penalty charged pursuant to this Act may be assessed against two or more respondents jointly and severally. Each respondent is liable for the entire penalty, but no more than the amount finally assessed may be collected from the respondents.**
- (e) [Possible penalty of suspending the good standing status of FFV on Regional Register, or some type of permit sanction].**

In jurisdictions where specific penalties are not set by statute, the issue of assessing an appropriate penalty in prosecutions is generally a matter for the attorney prosecuting the case to determine after evaluating many factors, not the least of which is that the penalty achieve the goal of ensuring compliance in the future. Accordingly, the prosecuting attorney must have the authority to assess a penalty that will make paying the penalty more than a mere cost of doing

business for the FFV owner. If it is an option, the prosecuting attorney should also be sensitive to the fact that not all violations warrant the imposition of the maximum penalty.

While each Port State will have to determine for itself what an effective maximum penalty will be, it should be noted that the U.S. currently can assess US\$130,000 per day, per count, under its primary fishing statute (the Magnuson Act), and is seeking to increase that amount to US\$240,000. It is greater than the maximum allowed under the Lacey Act (US\$11,000), however it is significantly less than that available under Papua New Guinea=s Lacey Act-type law (K500,000, or approximately US\$375,000).

In most cases, the combination of a civil penalty along with catch and vessel forfeiture should be more than sufficient to ensure that an effective penalty can be assessed. The forfeiture provisions - described below - can result in very large dollar forfeitures when there is high market value fish on board or if the vessel has a good market value. Additionally, the detention of the vessel in port during the investigation or prosecution of the case can result in considerable financial loss to the FFV owner.

One of the keys to effective prosecution in the U.S. is that the prosecutors are able to settle the cases for a compromise amount that is less than the penalty assessed. Settlement is beneficial to both parties in that it frees up scarce Agency resources and allows the respondent to both get their vessel underway sooner and avoid costly attorney fees. While it is difficult to write such a provision into this type of law, it is suggested that prosecutors working with the model Act have the authority to settle the cases in the interest of saving government time and resources.

**(5) MODEL CRIMINAL SANCTION PROVISIONS:**

- (a) Any person who knowingly imports or exports fish in violation of any provision of this Act, or violates any provision of this Act by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase, or the intent to sell or purchase, fish, knowing that the fish were taken, possessed, transported or sold in violation of any underlying law, treaty or regulation, shall be fined not more than [\$xxxxx.00 - Port State currency], and/or imprisoned for not more than [x] years.**
- (b) Any person who knowingly engages in conduct prohibited by any provision of this Act and in the exercise of due care should know that the fish were taken, possessed, transported or sold in violation of any underlying law, treaty or regulation, shall be fined not more than [\$xxxxx.00 - Port State currency], and/or imprisoned for not more than [x] years.**

These criminal provisions are taken from the Lacey Act, with the former being for felony sanctions (containing a higher knowledge standard) and the latter being for misdemeanor sanctions. Reviewers may wish to consider how applying such criminal provisions will comport with the UNCLOS restriction on imprisonment as a sanction for fisheries violations. See UNCLOS, Article 73(3).

**(6) MODEL FORFEITURE PROVISIONS:**

- (a) All fish imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of this Act, or any regulation issued pursuant thereto, may be subject to forfeiture to the [Port State].**
- (b) Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used in any manner in connection with or as the result of the commission of any act prohibited by this Act may be subject to forfeiture to the [Port State].**

The forfeiture provisions are drafted to give the prosecutor maximum flexibility in the exercise of prosecutorial discretion by using the “may” qualifier in both the catch and vessel provisions. While the illegal catch should always be forfeited as ill gotten gains, the decision to proceed with vessel forfeiture should be fully analyzed before going forward. The vessel is usually the large dollar item in forfeiture consideration, which makes it an attractive target. However, the potential of actually having to take possession of the vessel should the forfeiture proceed without a bond or other arrangement, can create more problems than it is worth. Currently, the U.S. has such discretion in pursuing prosecutions for violations of its EEZ, and has found the seizure and potential forfeiture of a vessel to be a potent penalty which often leads to settlement of the case without having to move onto actual forfeiture proceedings. As with the imposition of civil penalties, the authority to negotiate settlements prior to hearing is a great benefit. Case settlements achieve the goal of effectively and efficiently allowing the government to impose an appropriate penalty without having to go through expensive and time consuming forfeiture hearings. Additionally, the FFV owners find early settlement beneficial because they can get their vessel back to the fishing grounds and avoid the costs of going to hearing.

**(7) MODEL PENALTY SHARING PROVISION:**

- (a) Where there is an agreement with another state to this effect, any penalties received pursuant to a violation of this Act - including such sums collected from the forfeiture and disposition of or sale of catch, vessels or property seized subject to the authority of this Act - shall, after the payment of direct costs of the enforcement action to all entities involved in such action, be remitted to that state in accordance with the terms of the agreement.**

One complaint that the U.S. has received in the past is that the Lacey Act has no provisions for sharing penalties and forfeited catch proceeds with the nation whose fish products were taken illegally. The penalty sharing provision above is based on the terms in both the U.S. Pacific Insular Areas Act and the Papua New Guinea Fisheries Act, both of which allow for penalty sharing in certain situations. Rather than mandate a percentage split between the two nations, the percentages to be shared are left to the negotiation process of a bilateral agreement, where the parties can also negotiate to have an established split or evaluate the split on a case-by-case basis. Note, the terms of such an agreement may be subject to significant complications by the laws of the states involved.

Another topic that a Port State may want to consider is model language to create a fund to be dedicated exclusively for use in enforcement related costs (e.g., travel, equipment), and that is funded by the penalties received in these cases. The U.S. has such a fund and its use is quite beneficial to the enforcement efforts of NOAA.<sup>25</sup>

**(8) MODEL INTERNATIONAL LAW DISCLAIMER PROVISION:**

- (a) In no event shall this Act be interpreted to conflict with any existing Bilateral or Multilateral treaty relating to cooperative fisheries management or enforcement to which [Port State] is a signatory.**

This provision is intended to support any treaties relating to fisheries management or enforcement among nations by ensuring that any treaty provisions relating to any topic also addressed in this Act will remain in effect. This provision was suggested by nations that have

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<sup>25</sup> Specific information on the NOAA Asset-Forfeiture Fund is available upon request.

previously considered implementing Lacey Act type laws, and believe that this language allows all parties to be confident that the treaties that have been negotiated will remain in effect despite the provisions of this later enacted national law.

## **9. CONCLUSION**

This paper is intended as a source document for discussions among Ministerially Led Task Force on IUU Fishing on the High Seas members, and for all nations that seek to improve their port state enforcement capability. Because the United States and other Port State nations have implemented and utilized Lacey Act type prohibitions, the stream of commerce available to IUU fishers has been reduced, and they must seek other markets for their illegal catch or risk sanctions. Worldwide implementation of the concepts and provisions raised by this Model Act will help to ensure that FFVs involved in illegal fishing will have no safe ports from which to ship their illegal catch to market. Implementation of Lacey Act type laws, and the inherent international cooperation they engender, would go a long way to achieving the goals of the IPOA on IUU and would be a great benefit to the world's fishery resources. Eliminating IUU fishing will, *inter alia*, take the resolve and cooperation of all responsible Port States. It is hoped that this paper will provide an effective impetus towards that end.

The author would like to recognize the invaluable assistance and advice over many years of the members of the Forum Fisheries Agency Working Group on Port State Enforcement in developing the concepts and language for the Model Port State Fisheries Enforcement Act.

## Appendices

- A) Copy of Lacey Act Prohibition Diagram
- B) Sample Notice of Violation and Assessment of Civil Penalty
- C) Model Port State Enforcement Act