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Recommended Citation

Elzerman, Audrey, "Evasion of Foreign Taxes for Wildlife Exports as a Violation of the Lacey Act" (2017). *Sea Grant Law Fellow Publications*. 71.

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Evasion of Foreign Taxes for Wildlife Exports as a Violation of the Lacey Act

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August 2017*

The global illegal trade in ornamental fish and corals presents an ongoing threat to the sustainability of endangered species and habitats. Development of novel, technology-based tools promises to radically improve the ability of wildlife inspectors to detect unlawful shipments of ornamental fish and other live fish and wildlife. Early results from the Automated Shipment Forensics (ASF) system have identified an epidemic of export duty fraud. Effective detection of this type of fraud raises the issue of whether it can and should be prosecuted under United States law. This study considers whether and how violations of foreign live animal export duty requirements violate the Lacey Act. It concludes that ornamental fish importers are subject to Lacey Act liability when they import shipments for which export duty has not been paid by the exporter under foreign law. In addition, it suggests that rigorous prosecution of these violations could potentially create incentives for importers to establish a heightened culture of compliance within the industry.

1 Illegal Trade in Ornamental Fish: Hiding in Plain Sight

The scale of the global trade in wildlife was estimated at more than \$323 billion in 2009.¹ That trade is estimated to include more than 30 million live specimens of ornamental fish, corals, and other marine species (collectively “ornamental fish”) in global trade each year, representing an estimated 2,000 fish species and 150 coral species and an annual value of up to \$330 million.² A substantial part of the trade in ornamental fish and other wildlife and wildlife products is legal and carried out by reputable actors. In addition to this legal trade, however, observers note a thriving illegal wildlife trade, estimated at between \$7 and \$10 billion per year (not including illegal logging or fishing).³ The United States is a major player in the international wildlife trade, importing about \$773 million worth of declared wildlife and importing and exporting an estimated \$250 million in illegal wildlife

¹TRAFFIC, WILDLIFE TRADE, WHAT IS IT? <http://www.traffic.org/trade/> (2008).

² Rebecca Kessler, NEW INITIATIVES TO CLEAN UP THE GLOBAL AQUARIUM TRADE (2013), http://e360.yale.edu/features/new_initiatives_to_clean_up_the_global_aquarium_trade.

³ Liana Sun Wyler & Perveze A. Sheikh, International illegal trade in wildlife: threats and U.S. policy. CRS Report for Congress 7-5700 (2013)



each year.⁴ The United States thus is an important market for illegal wildlife exports and a substantial end-user of illegal wildlife products.

Effective border enforcement is an important tool for efforts to stem the flow of illegal wildlife imports, including ornamental fish. Illegal shipments of ornamental fish often enter the United States without detection because they are hidden in plain sight.⁵ Live specimens of illegally-imported ornamental fish may be intentionally mismarked as a different, legal species, or may be concealed within larger shipments of legal species.⁶ United States inspectors are hampered in their efforts to detect these illegal shipments because of a lack of time and resources and because they lack automated audit tools to analyze manifests and identify high-risk shipments for in-person inspection.⁷

In fiscal year 2014, 180,463 wildlife shipments entered United States ports for clearance by Fish and Wildlife Service (USUSFWS) inspectors.⁸ Federal law and USFWS regulations require that each shipment be marked⁹ and that importers file an import declaration (“form 3-177”)¹⁰ and make available to the inspector:

- (1) All shipping documents (including bills of lading, waybills and packing lists or invoices);
- (2) All permits, licenses or other documents required by the laws or regulations of the United States;
- (3) All permits or other documents required by the laws or regulations of any foreign country;
- (4) The wildlife being imported or exported; and
- (5) Any documents and permits required by the country of export or re-export for the wildlife.¹¹

While some of the required documents are submitted electronically, USFWS inspectors may be faced with extensive paper records that must be evaluated in real-time to

⁴ U.S. GEN. ACCT. OFFICE, WILDLIFE PROTECTION 10 (1994).

⁵ Gail Emilia Rosen & Katherine F. Smith, *Summarizing the Evidence on the International Trade in Illegal Wildlife*, 7 ECOHEALTH 24 (2010).

⁶ Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LANDS L. REV. 27, 32 (1995) (citing Endangered Species Project, Organized Crime and the Illegal Wildlife Trade, 1 (1994)).

⁷ New England Aquarium, Wildlife Crime Tech Challenge Grant Prize Application: New England Aquarium Proposal: Automated Shipment Forensics (2016) (on file).

⁸ *Id.*

⁹ 16 U.S.C. § 3372(b) (prohibiting shipments that are not marked per USFWS regulations); 50 C.F.R. § 14.81 (marking requirements).

¹⁰ 50 C.F.R. § 14.61.

¹¹ 50 C.F.R. § 14.52(c).

determine whether to clear the shipment or hold it for inspection.¹² The inspectors cannot inspect all shipments, and may not identify undeclared organisms or mislabeled organisms even if they hold a shipment for inspection.¹³ As a result, the rate of violations detected during inspections is low.

Fortunately, inspectors may soon be gaining a new tool to help detect violations and target violators. The ASF system will increase the inspectors' ability to detect irregularities and potential illegality in incoming shipments. ASF analyzes all wildlife import documentation, runs it against a biological database, and flags any irregularity in the shipment.¹⁴ For example, discrepancies could include shipments that list endangered species on the invoice but not on the declaration form, or shipments with common species with an associated high value that are "look-alikes" for endangered species.¹⁵ Instead of manually reviewing every shipment's documents, inspectors with access to the ASF tools would be able to identify flagged shipments for inspection and clear those that do not raise red flags, saving time and resources—simultaneously facilitating the legal trade while increasing detection of violations.

Initial tests of the ASF system, based on historic import declarations and Philippine export manifests, have identified a range of illegal activity, including endemic underpayment of export duties on ornamental fish.¹⁶ The ASF database flags instances where the price of the shipment on the import manifest is greater than the value stated on the export duty form.¹⁷ In 2011, about 55% of all incoming shipments reported a higher manifest value than export duty value (Figure 1). In each of these shipments, the exporter declared an inaccurately low value for the shipment—in short, the exporter committed tax fraud against the exporting country.¹⁸

¹² *Id.*

¹³ New England Aquarium, *supra* note 7, at 1 ("Inspectors manually sort through these piles of paper, and to be effective, have to operate fast enough to process shipments in a timely manner, yet be diligent enough to catch illegal trade. It is this manual processing that creates a bottleneck for the inspectors and provides an opening in which illegal traders can operate. An easy route to smuggle illegal species through a port is to place them within the shipment, but not list them on declaration paperwork. This occurs even with species requiring more sophisticated declaration commitments (e.g. CITES species), where they are listed on invoices but omitted from the declaration form When inspectors are overwhelmed by paperwork, this provides opportunities for illegal traders to operate.")

¹⁴ *Id.*

¹⁵ Personal Communication with Andrew Rhyne, Roger Williams University.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Personal Communication with Andrew Rhyne, Roger Williams University.

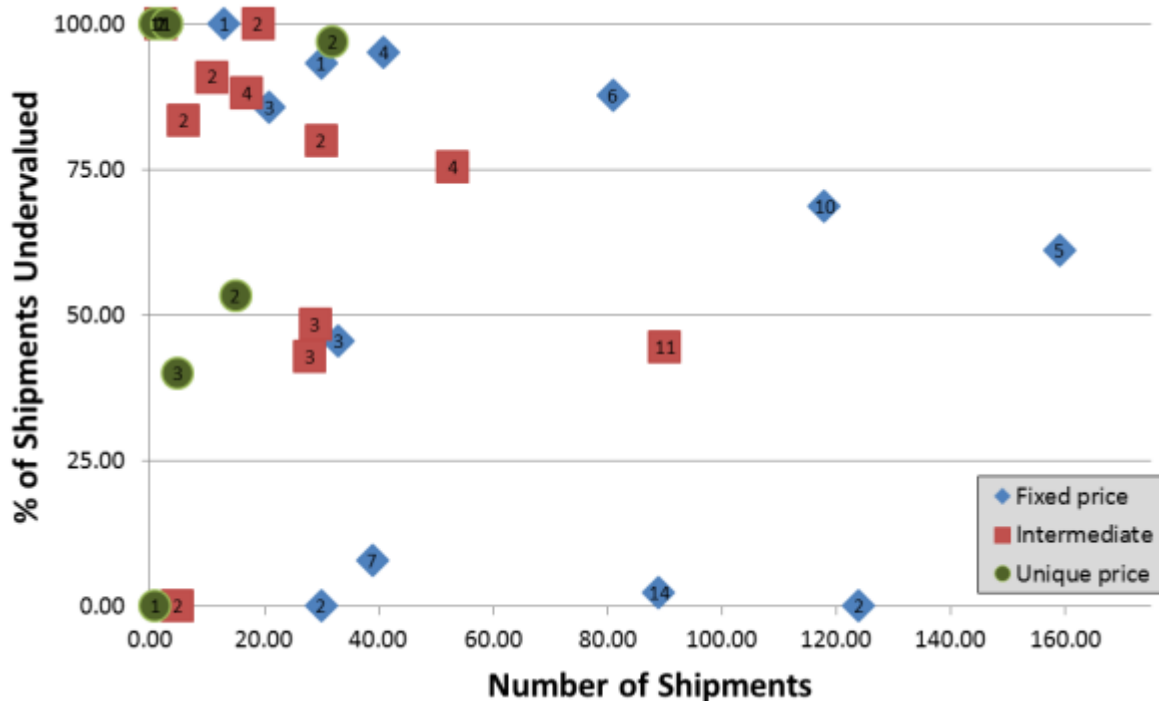


Figure 1. The number of shipments each Philippine exporter sent and the percentage that were valued less at export than they were at import. Fixed price indicates the exporter uses a single price for all shipments, unique price is when all shipments have a different price, and intermediate is between these two extremes. Numbers within the symbols indicate the number of importers in the US to whom each exporter ships.¹⁹

Tax fraud is a sustainability concern because it denies exporting country governments revenues they rely upon to implement wildlife conservation laws—the front lines of global ornamental fish and coral conservation. In addition, the frequency of tax fraud in import records suggests that the ornamental industry does not take compliance seriously, which is not a positive conclusion for an industry where smuggling is an ongoing concern.

This study considers whether violations of foreign export duty requirements for live wildlife shipments can be prosecuted under United States law. The next section introduces the Lacey Act, which offers a potent enforcement tool against wildlife trafficking and related offenses. The study then considers whether and how export duty fraud violates the Lacey Act and the possible penalties that apply to such violations. Finally, it uses the Philippines as a case study to illustrate the utility of exporting country laws for Lacey Act prosecution of these cases.

¹⁹ Michael F. Tlusty & Andrew Rhyne, Automated shipping forensics - Preventing IUU with invoice scanning technology, Presentation to Conservation Alliance for Seafood Solutions Annual Meeting, Carlsbad CA (Nov 9, 2016).

2 The Lacey Act

The Lacey Act is the primary tool for enforcement of violations related to the wildlife trade.²⁰ First introduced by Senator John Lacey in 1900,²¹ the original purpose of the Act was largely to protect and preserve game and birds, as well as prevent the introduction of non-native birds and animals.²² The Act was needed to fight wildlife crime due to the inability of states to stop the interstate sale of fraudulently mismarked game killed by poachers.²³ In 1926, Congress enacted the Black Bass Act in recognition that further federal action was needed to prevent loss of popular commercial fish species. The Black Bass Act was modeled on the Lacey Act and supplemented state laws regulating interstate shipments of fish.²⁴

Congress enacted the next significant revisions to wildlife trade law in 1981.²⁵ In addition to subsuming the Black Bass Act into the Lacey Act,²⁶ the amendments expanded provisions on the domestic and foreign wildlife trade to prohibit the importation or interstate trade of wildlife and wildlife products that were taken in violation of either state or foreign law.²⁷ Enforcement powers were also expanded through higher maximum civil and criminal penalties,²⁸ and wildlife agencies were allowed to obtain and execute search and arrest warrants and make warrantless arrests for felony violations.²⁹

Subsequent amendments came in 1988, when Congress expanded the scope of violations related to falsification of documents to include falsification of “any document related to wildlife, fish, or plants intended for import, export or transport.”³⁰ This expansion was intended to stem the persistent problem of the illegal wildlife trade by granting the Lacey Act broad regulatory and enforcement power. More recently, Congress amended the Lacey Act in 2003 to alter protections for certain predatory cats³¹ and in 2008 to prohibit trade in

²⁰ See generally Anderson, *supra* note 6.

²¹ Lacey Act, ch. 553, 31 Stat. 187 (1900).

²² H.R. REP. NO. 56-474, at 1-2 (1900).

²³ See, e.g., *People v. Buffalo Fish Co.*, 58 N.E. 34 (N.Y. 1900) (holding state's legitimate interest in regulating and preserving its wildlife insufficient to justify a law prohibiting the possession of all fish during a closed season because the law would have regulated items traveling in interstate commerce).

²⁴ Black Bass Act, ch. 346, 44 Stat. 576 (1926), repealed by Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1079 (1981).

²⁵ Pub. L. No. 97-79, 95 Stat. 1079 (1981).

²⁶ S. REP. NO. 97-123, at 1 (1981), as reprinted in 1981 U.S.C.C.A.N. 1748, 1748.

²⁷ 16 U.S.C. §§ 3372(a)(1), (a)(2), (a)(3) (1981).

²⁸ 16 U.S.C. § 3373(d) (1981).

²⁹ 16 U.S.C. § 3375(b) (1981).

³⁰ 16 U.S.C. § 3372(d).

³¹ Captive Wildlife Safety Act, Pub. L. 108-191, 117 Stat. 2871 (2003).

plants and plant products (e.g., timber) taken in violation of domestic and foreign laws and regulations.³²

2.1 Prohibited Activities

The Lacey Act establishes two types of offenses related to the import and interstate commerce in fish and wildlife: marking offenses and trafficking offenses. While these offenses are limited to the trade in fish and wildlife, the applicable definitions are sufficiently broad that all ornamental fish in trade fall within the definition of fish and wildlife in the Act.³³ Similarly, importation is explicitly included in the activities subject to the Lacey Act.³⁴ This section therefore reviews only whether and how the evasion of foreign export duties on shipments of ornamental fish into the United States qualifies as a marking or trafficking offense under the Act.

2.1.1 Trafficking

The Lacey Act's wildlife trafficking prohibition applies to any importation of "fish or wildlife taken, possessed, transported, or sold" in violation of any foreign law.³⁵ To be used as the basis for a Lacey Act trafficking prosecution, violations of foreign law clearly relate to wildlife, but need not necessarily be "designed and intended for the protection of wildlife."³⁶

In *United States v. Molt*, reptiles were smuggled into the United States after violating Fijian customs laws and New Guinea regulations.³⁷ The Third Circuit rejected the Lacey Act trafficking charges in relation to Fijian customs statute, stating it was "merely a revenue law" as it applied to all exports from the country.³⁸ On the other hand, it determined that the New Guinea law was sufficiently wildlife-related because it made specific reference to "fauna" and contemplated protection "for wildlife other than the conventional products of commercial agriculture and fisheries."³⁹

Congress viewed the *Molt* holding that the foreign regulations must be "designed and intended for the protection of wildlife" to be too restrictive and sought to broaden the wildlife-relatedness test in the 1981 amendments.⁴⁰ The Senate committee report on the

³² Food, Conservation, and Energy Act of 2008, Pub. L. 110-234, 122 Stat. 923, at § 2802 (2008); Pub. L. 110-246, 122 Stat. 1651, at § 2802 (2008).

³³ Anderson, *supra* note 6, at 54; *see also* 16 U.S.C. § 3371(a), 50 C.F.R. § 10.12 (2007) (defining terms).

³⁴ 16 U.S.C. § 3372.

³⁵ *Id.* § 3372(a).

³⁶ *U.S. v. Molt*, 599 F.2d 1217, 1218-19 (3d Cir. 1979)

³⁷ 599 F.2d 1217 (3d Cir. 1979).

³⁸ *Id.* at 1219.

³⁹ *Id.* at 1219-20.

⁴⁰ S. REP. NO. 97-123 (1981), at 6, *as reprinted in* 1981 U.S.C.C.A.N. 1748, 1753.

1981 amendments criticized *Molt* by pointing out a State's hunting license law would be a revenue law and violations would not be covered by the Lacey Act, even though the law clearly relates to wildlife.⁴¹ Congress amended the Lacey Act and clarified that a predicate law, treaty, regulation or tribal law that has wildlife protection as one of several purposes is sufficient to ground a Lacey Act charge.⁴² Since 1981, courts have regularly held that foreign regulations that “clearly relate to wildlife” can support wildlife trafficking charges under the Lacey Act.⁴³

2.1.2 Marking

The Lacey Act prohibits importation of any shipment of fish or wildlife “unless the container or package has previously been plainly marked, labeled, or tagged in accordance with” USFWS regulations.⁴⁴ USFWS regulations require that each container or package be labeled conspicuously with the name and address of both the shipper and recipient, and that “[a]n accurate and legible list of [the shipment’s] contents by species scientific name and the number of each species and whether or not the listed species are venomous must accompany the entire shipment.”⁴⁵ Alternative marking requirements are also provided, which among other requirements require that an “invoice, packing list, bill of lading, or similar document” providing the relevant information be attached to the outside of the shipment.⁴⁶ Such packing lists must include both the common names and number of organisms in the shipment.⁴⁷

2.1.3 False Labeling

Not only must shipments be marked as required, but markings and other import documentation also must be accurate and complete. “It is unlawful for any person to make or submit any false record, account, or label for, or any false identification” of imported fish or wildlife.⁴⁸ False labeling does not need to be “material” to violate the Act.⁴⁹ In *United*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *United States v. McNab*, 331 F.3d 1228, 1245 n.32 (11th Cir. 2003), as amended (May 29, 2003) (holding a Honduran regulation prohibiting the harvesting or destruction of lobster eggs to be “unquestionably” related to fish and within the scope of the Lacey Act); *United States v. Lewis*, 240 F.3d 866, 869 (10th Cir. 2001) (holding Oklahoma hunting law violation to be an adequate basis for a Lacey Act prosecution); *United States v. Lee*, 937 F.2d 1388, 1392 (9th Cir. 1991) (holding Taiwanese salmon regulation sufficiently wildlife-related to ground a Lacey Act violation against fishermen who imported salmon into the United States knowing that it had been illegally taken by Taiwanese squid fishing vessels).

⁴⁴ 16 U.S.C. § 3372(b).

⁴⁵ 50 C.F.R. § 14.81.

⁴⁶ 50 C.F.R. § 14.82.

⁴⁷ *Id.*

⁴⁸ 16 U.S.C. § 3372(d).

⁴⁹ Materiality means “having a natural tendency to influence, or [being] capable of influencing, the decision of the decision-making body to which it was addressed.” *Kungys v. United States*, 485 U.S. 759 (1998).

States v. Fountain, the defendants were indicted for creating false records relating to their oyster sales to maximize the quantity of oysters sold to their customers.⁵⁰ The defendants maintained that the false records must be material to be prosecuted under the false labeling prohibition, or else the statute would become one of strict liability.⁵¹ The Fifth Circuit Court of Appeals found that the Act contains neither textual nor common law support for a materiality requirement.⁵²

False labeling offenses do not require a violation of an underlying state or foreign law.⁵³ Instead, these offenses “provide an independent basis to sustain a Lacey Act violation,” which is “consistent with a plain reading of the statute and congressional intent to provide for an additional enforcement mechanism in light of the difficulty of proving that fish and wildlife were illegally taken in violation of foreign law.”⁵⁴ For example, in *United States v. Allemand*, defendants were charged with violating the Lacey Act by submitting false export declaration forms for illegally killed deer that were being exported from the United States to Canada.⁵⁵ The court held that filing the false export forms was an unlawful act, independent of any duty to complete forms under applicable foreign law.⁵⁶

2.2 Penalties

The Lacey Act proscribes a wide-ranging penalty scheme, ranging from criminal felony convictions to civil fines, permit sanctions, and forfeiture. This section reviews the applicable penalties to provide a foundation for consideration of how the Act applies to export duty fraud.

2.2.1 Civil Penalties for Trafficking and Marking Offenses

The Lacey Act authorizes the Secretary of Interior to assess a civil penalty against violators.⁵⁷ Maximum civil penalties differ based on the type of violation and the violator’s knowledge of the crime.⁵⁸ In practice, however, civil penalties are less than the maximum: the Secretary must consider when determining the penalty “the nature, circumstances,

⁵⁰ *United States v. Fountain*, 277 F.3d 714, 716 (5th Cir. 2001).

⁵¹ *Id.* at 717.

⁵² *Fountain*, 277 F.3d at 717 (applying a two-part test to determine whether materiality was an element of a labeling violation: whether the text required a showing of materiality, and, if not, whether Congress used terms that have specific common law meaning that incorporates a materiality requirement). *See also* *Wells v. United States*, 519 U.S. 482 (1997); *Neder v. U.S.*, 527 U.S. 1, 20-21 (1999).

⁵³ H.R. REP. NO. 100-732, at 6 (1988); S. REP. NO. 97-123, at 4.

⁵⁴ *United States v. McDougall*, 25 F. Supp. 2d 85, 90 (N.D.N.Y. 1998) (citing H.R. REP. No. 100-732 at 6).

⁵⁵ 34 F.3d 923, 926 (10th Cir. 1994).

⁵⁶ *Id.*

⁵⁷ 16 U.S.C. § 3373(a).

⁵⁸ *Id.*

extent, and gravity” of the violation and the violator’s “degree of culpability, ability to pay, and such other matters as justice may require.”⁵⁹

Maximum civil penalties for trafficking violations are significant—any person who “in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law” may be assessed a civil penalty of not more than \$10,000 for each violation.⁶⁰ Any person who “knowingly violates” the false labeling provisions may face the same fine.⁶¹ However, violations involving fish or wildlife worth less than \$350 “and involves only the transportation, acquisition, or receipt of fish or wildlife or plants taken or possessed in violation of . . . any foreign law,” the maximum fine is the lesser of the maximum penalty provided under the underlying law or \$10,000.⁶² Marking violations carry a lesser penalty, not to exceed \$250 per violation.⁶³

2.2.2 Criminal Penalties for Trafficking and Marking Offenses

The Lacey Act provides for criminal penalties for more serious offenses, which are separated by the type of violation and the violator’s knowledge. Criminal sanctions are available for trafficking violations and false labeling violations, but not for marking offenses.⁶⁴

Trafficking offenses may be prosecuted as a felony or misdemeanor.⁶⁵ Felony penalties attach to any person who “knowingly imports” fish or wildlife while “knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law.”⁶⁶ Felony prosecutions may result in fines of up to \$20,000 and imprisonment for up to five years for each violation.⁶⁷ The same conduct may result in a misdemeanor prosecution if the violator “in the exercise of due care should know” that the fish or wildlife was taken, possessed, transported, or sold in violation of an underlying law. Misdemeanors may result in a \$10,000 fine and imprisonment for up to one year.⁶⁸

⁵⁹ 16 U.S.C. § 3373(a)(6).

⁶⁰ 16 U.S.C. § 3373(a)(1).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* § 3373(a)(2).

⁶⁴ 16 U.S.C. § 3373(d).

⁶⁵ 16 U.S.C. § 3373(d)(1).

⁶⁶ 16 U.S.C. § 3373(d)(1).

⁶⁷ *Id.*

⁶⁸ *Id.*

False labeling criminal penalties require that the violator have actual knowledge of the violation. Fines for false labeling violations are based on federal criminal law penalties for such conduct under Title 18 of the U.S. Code, and violations involving importation of fish or wildlife may also result in imprisonment for not more than 5 years.⁶⁹

The “knowing” requirement for a felony conviction only requires that the defendant know the activity may be unlawful, not what law they are violating. In *United States v. Santillan*, the defendant violated the Lacey Act by smuggling three baby parrots into the country, and when he was caught, stated he knew he was not allowed to bring the parrots into the United States but assumed the only penalty would be seizure of the birds.⁷⁰ The defendant stated he was not aware he needed to complete and file an import declaration form.⁷¹ The defendant argued that the Lacey Act required the government to “prove he knew about the regulation” and the required form in order to meet the knowledge requirement for a felony count.⁷² The court disagreed: “the Lacey Act does not require knowledge of the particular law violated by the possession or other predicate act, so long as the defendant knows of its unlawfulness.”⁷³ Thus, “the requirement of knowledge [for a felony conviction] is satisfied if the person knows that the possession etc. was violative of any law, without regard to whether the person knows which law the act violated. The point of the second knowledge requirement is to assure that the violator is not strictly liable, but instead knows that the fish, wildlife or plants he imported was [*sic*] tainted by illegality.”⁷⁴

2.2.3 Sanctions and Forfeiture

In addition to civil and criminal penalties, the Lacey Act provides for additional sanctions, including seizure and forfeiture of shipments and permit sanctions as described in this section. These sanctions may cause substantial economic loss to the importer and are applied automatically to any violation on a strict liability basis. As a result, these sanctions may have a strong deterrent effect.

The Secretary may suspend, modify, or cancel an import permit upon conviction for a criminal offense.⁷⁵ Import permits are required to import any fish or wildlife, and

⁶⁹ 16 U.S.C. § 3373(d)(3).

⁷⁰ *United States v. Santillan*, 243 F.3d 1125, 1127 (9th Cir. 2001).

⁷¹ *Id.*; see also 50 C.F.R. § 14.61 (“importers or their agents must file with the Service a completed Declaration for Importation or Exportation of Fish or Wildlife (Form 3-177), signed by the importer or the importer's agent, upon the importation of any wildlife at the place where Service clearance . . . is requested.”)

⁷² *Santillan*, 243 F.3d at 1128.

⁷³ *Id.* at 1129.

⁷⁴ *Id.*

⁷⁵ *Id.*

cancellation of the permit may restrict the violator's ability to continue in the trade in the future.⁷⁶

Fish and wildlife imported in violation of any Lacey Act prohibition, except for the marking requirements, are subject to forfeiture to the United States.⁷⁷ In addition, vessels, aircraft, and other equipment used to aid the importation of fish and wildlife resulting in a felony trafficking conviction may be forfeit where the owner was privy to or in the exercise of due care should have known of the illegality.⁷⁸ Forfeiture is a matter of strict liability and the "innocent owner" defense is not available because the merchandise is contraband.⁷⁹ Strict liability for forfeitures fulfills Congress's intention to protect species from harmful illegal trade by withdrawing illegal shipments from the marketplace, even when the violation itself is inadvertent."⁸⁰

3 The Lacey Act and Export Duty Fraud

This section evaluates the application of the Lacey Act to export duty fraud in ornamental fish imports and concludes that underpayment of foreign export duties is likely to be a trafficking offense under the Act. Sale of ornamental fish by a foreign seller to a U.S. buyer for importation into the United States is activity subject to the Lacey Act.⁸¹ If the sale of the wildlife violates a foreign country law or regulation related to wildlife, it also violates the Lacey Act.⁸² In many cases, export duties are part of wildlife-related laws that qualify as underlying violations for prosecution because they are included as part of a comprehensive wildlife management regulatory framework required for compliance with the Convention on International Trade in Endangered Species (CITES) rather than a general customs or revenue law (see section 3.2, *infra*). In such instances, failure to pay the required export duty is a violation of an underlying, wildlife-related law or regulation that may trigger Lacey Act liability.

Importers of shipments that violate an underlying export duty law may be subject to civil or criminal sanctions, forfeiture of the shipment, and sanctions, depending on their knowledge of the violation. If the importer knows that the duties were not paid in full, he or she may be subject to felony criminal penalties as well as lesser penalties. If the importer lacks actual knowledge, but in the exercise of due care should know that the exporter

⁷⁶ 50 C.F.R. § 14.91.

⁷⁷ 16 U.S.C. § 3374.

⁷⁸ *Id.*

⁷⁹ *United States v. 2,507 Live Canary Winged Parakeets etc.*, 689 F. Supp. 1106, 1117 (S.D. Fla. 1988).

⁸⁰ *Id.* at 1117-18 (citing S. REP. NO. 97-123, at 13 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 1748, 1760).

⁸¹ 16 U.S.C. § 3372(a) (applying to all fish "taken, possessed, transported, or sold" in violation of foreign law).

⁸² *Id.*

violated the law in underpaying, the importer may be subject to a misdemeanor civil penalty or to civil penalties for the activity, in addition to forfeiture and/or permit sanctions.

Shipments of ornamental fish subject to civil liability may be limited to the maximum penalty under the foreign law. Most individual ornamental fish and corals captured in the ASF database are worth less than \$350 individually, although shipments as a whole often well exceed this threshold.⁸³ In addition, the importers' violations in most cases will "involve[] only the transportation, acquisition, or receipt" of illegally-exported organisms.⁸⁴ As a result, importers will often qualify for reduced penalties, where the maximum penalty is the lesser of \$10,000 or the maximum provided under the foreign law.⁸⁵ The maximum penalties for wildlife crime under foreign law may be substantially lower than \$10,000 per violation, which may meaningfully reduce the deterrent effect of civil penalty violations in export duty cases for ornamental fish.

While maximum penalties in trafficking cases predicated on export duty violations may be limited, such cases have countervailing benefits: namely, that the import documentation must contain direct evidence of the violation. As all shipments must contain both the manifest and declarations from the exporting nation, it is a simple matter to identify violations by comparing the declared export value and the amount paid by the importer. With such documentation in hand, penalty assessment cases could be resolved rapidly and in a large number of cases, so that even modest civil penalties would provide sufficient incentives for importers to ensure that their trading partners comply with the law. For those few importers seeking to evade detection rather than comply, other provisions of the Lacey Act would apply: failure to include the required documentation would result in a marking offense, and falsifying the export permit paperwork would constitute false information on the shipment.

4 Philippines Wildlife Export Duties: A Case Study for Ornamental Fish

The foregoing analysis indicates that, in some cases, shipments of ornamental fish may expose the importer to Lacey Act liability if the exporter underpaid the export duty. Prosecution of such cases depends in part on whether the export duty requirement in the foreign jurisdiction is wildlife-related. This section evaluates whether Philippine laws are sufficiently wildlife-related to ground a Lacey Act trafficking violation.

⁸³ New England Aquarium, *supra* note 7. *But see* Kessler, *supra* note 2 (noting rare fish may be valued at up to \$30,000 per specimen).

⁸⁴ 16 U.S.C. § 3373(a)(1).

⁸⁵ *Id.*

The Philippines is the top country of origin for ornamental fish imported into the United States.⁸⁶ In 2011, the Philippines was the country of origin of over 5.5 million individual live fish and corals—more than Indonesia and Haiti, the next two largest exporters, combined.⁸⁷ ASF analysis of import documentation for shipments originating in the Philippines indicates a high rate of underpayment of export duties (Figure 1). As a result, the Philippines is a natural first case study for considering whether the Lacey Act can be used to clean up this form of noncompliance.

Export duties for wildlife shipments under Filipino law are wildlife-related rather than general customs duties. The Philippines Wildlife Resources Conservation and Protection Act, also known as Republic Act No. 9147, is the legal authority for wildlife export duties. The Act's stated purpose is to conserve and protect wildlife species, regulate the collection and trade of wildlife, pursue Philippine commitments to international conventions, protect wildlife and wildlife habitats, and initiate and support scientific studies on the conservation of biological diversity.⁸⁸ The Act governs import and export of all wildlife and authorizes the Secretary of Agriculture to issue export permits.⁸⁹ Export duties are part of the statutory scheme to protect and manage the nation's wildlife, and fees collected under it are placed in a Wildlife Management Fund to be used for specific wildlife-related uses.⁹⁰ In relevant part, the Act provides that the government will charge:

[an] export permit fee of not greater than three percentum (3%) of the export value, excluding transport costs . . . *Provided, however,* That in the determination of aforesaid fee, the production costs shall be given due consideration. . . . *Provided, further,* That fees and charges shall be reviewed by the Secretary every two (2) years or as the need arises and revise the same accordingly, subject to consultation with concerned sectors.⁹¹

In practice, the Bureau of Fisheries and Aquatic Resources (BFAR) of the Philippines Department of Agriculture implements the Act with respect to ornamental fish. It requires exporters to submit for each shipment an Export Commodity Clearance form along with a pro forma invoice, or export declaration, indicating the species, price, and quantity of each

⁸⁶ Roger Williams University and New England Aquarium, MARINE AQUARIUM BIODIVERSITY AND TRADE FLOW, <https://www.aquariumtradedata.org/>.

⁸⁷ *Id.*

⁸⁸ Wildlife Resources Conservation and Protection Act, REP. ACT No. 9147, § 2 (Jul. 30, 2001) (Phil.), <http://www.officialgazette.gov.ph/downloads/2001/07jul/20010730-RA-09147-GMA.pdf>.

⁸⁹ *Id.* §§ 11, 20.

⁹⁰ *Id.* § 29.

⁹¹ *Id.* § 21.

included organism.⁹² BFAR indicates on completed ECCs that fees paid pursuant to Fisheries Administrative Order 233 (FAO 233), as amended, which implements Republic Act 9147.⁹³ FAO 233-2 provides that the export fee for live tropical/ornamental fish is equal to the export value times the export fee, which is set at 1.0%.⁹⁴ The export value is the total declared value of the shipment.⁹⁵

The Act also contains prohibitions and penalties for violations. It is unlawful to willfully and knowingly engage in “trading” or “transporting” of wildlife “unless otherwise allowed in accordance with this Act.”⁹⁶ Illegal acts related to the trading of wildlife are greater than those for transporting, but both acts may result in imprisonment and/or fines, the severity of which depends on the conservation status of the organism at issue.⁹⁷ The fine amounts increase by statute by ten percent every three years⁹⁸—and thus have increased five times since enactment of the Act in 2001. The penalty amounts as originally enacted, as shown in Table 1, were nonetheless substantial, at a maximum of almost US\$6,000 for critically endangered species.

Table 1. Penalties for illegal acts related to trading in wildlife in the Philippines.⁹⁹

Conservation status	Range of Fines (P1 = \$0.02)	Range of Imprisonment Term
Critical	P5,000 – P300,000	2-4 years
Endangered	P2,000 – P200,000	1-2 years
Vulnerable	P1,000 – P100,000	6 months-1 year
Threatened	P500 – P50,000	1-6 months
Other	P200 – P20,000	10 days-1 month

⁹² BFAR, *Issuance of Export Commodity Clearance (ECC)* (unpublished guidance), <http://www.bfar.da.gov.ph/files/img/photos/ExportCommodityClearance.pdf>.

⁹³ Republic of the Philippines Department of Agriculture, Fisheries Administrative Order 233, at § 32 (Phil.) (listing document submission requirements for export permits); *see also, e.g.*, ECC No. 2015-27973 (Jul. 23, 2015) (completed ECC for ornamental fish export shipment) (indicating fees collected “per FAO 233-2”) (on file).

⁹⁴ Republic of the Philippines Department of Agriculture, Fisheries Administrative Order 233-2 (2012) (Phil.).

⁹⁵ *Id.* (defining “export value” as the “total declared value in Philippine peso equivalent of a particular commodity, to be shipped out of the country, as shown in the proforma invoice”).

⁹⁶ Wildlife Resources Conservation and Protection Act, REP. ACT No. 9147, § 27 (Jul. 30, 2001) (Phil.).

⁹⁷ *Id.* § 28. The Secretary of Agriculture and Secretary of the Environment and Natural Resources determine species status. *Id.* § 22.

⁹⁸ *Id.* § 28.

⁹⁹ *Id.*

The Philippines Wildlife Resources Conservation and Protection Act provides a strong basis for effective prosecution of importers for export duty fraud under the Lacey Act. Its stated purpose is wildlife conservation, and all export fees are used for wildlife-related purposes, so it “clearly relates to wildlife” as required by the Lacey Act for trafficking violations and can support a trafficking prosecution.¹⁰⁰ Moreover, the penalties authorized under the Act are substantial, at least for violations related to vulnerable, endangered, and critically endangered species. On the other hand, where species are not protected, maximum penalties are low and would meaningfully limit available civil penalties for trafficking offenses for ornamental fish.

5 Conclusion

International borders are critical points for limiting the global illegal wildlife trade. The volume of the wildlife trade has historically presented a challenge for inspectors, who have lacked the tools to detect violations within the flood of legal trade. New data processing tools, including ASF, are changing the status quo by rapidly analyzing shipment documentation for ornamental fish and flagging potential violations. ASF has already identified systemic export duty fraud in the aquarium trade. The scale of this issue suggests a culture of noncompliance in the industry and reduces the resources available to implement wildlife conservation initiatives in exporting countries. The Philippines, for example, place the fees into a Wildlife Management Fund that supports conservation work.

This study suggests that violations of export duty requirements on ornamental fish shipments are violations of the trafficking provisions of the Lacey Act—and therefore that the United States can deter foreign violations by enforcing the law against importers in this country. Such prosecutions depend in part on whether the foreign law is wildlife-related, but the example of the Philippines suggests that this test will be met for key ornamental fish exporting nations. However, maximum civil penalties for species worth less than \$350 may be less than the maximum amounts provided under the Lacey Act. Nonetheless, these penalties are likely sufficient to deter this form of noncompliance by providing an incentive for importers to work with exporters to ensure compliance.

¹⁰⁰ See *supra* note 43 and accompanying text.