

The Lacey Act Amendment and Forest Product Trade with Indonesia

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Presenters

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Mr. Bart van Assen, CEO, Gaia Commoditas

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In May of 2008, the U.S. Congress passed legislation banning the importation, sale or trade of all illegally-harvested wood and forest products. The legislation, known simply as the Lacey Act Amendment, has implications for Indonesia, a major producer and supplier of wood and other forest products to the United States. This USINDO workshop discussed the contents of the Lacey Act Amendment, and how it pertains to Indonesian businesses.

Mr. Machut Shishak explained the purpose of the Lacey Act amendment is to prevent trade in illegally harvested lumber, prevent trade in products made from such lumber, and provide tools to assist the U.S. and other countries to

combat illegal logging. The amended Act makes it unlawful to trade in any plant product that was procured in violation the laws of either the United States or the country of origin, or to falsify the records of any plant product covered by the Act.

The amended Lacey Act does not require certification or establish any standard, but does require a plant import declaration – prepared by the importer – for certain plants and plant products. The plant import declaration is not a technical regulation or standard; nor does it require information on legality or chain of custody. It does, however, require information that is usually available to importers: the plant's scientific name, country of harvest,

value, and quantity.

Importers should make sure that their shipments were obtained legally, accompanied by complete and true documents, and properly declared under the Lacey Act Declaration Requirement. Exemptions from the Lacey Act Declaration Requirement include plants and plant products used exclusively for packing material for other items, common cultivars and common food crops, and plants meant for horticulture. However, the Declaration Requirement is only one part of the Lacey Act; even if a shipment is exempt from the Declaration Requirement, the provisions of the Lacey Act will still apply. Businesses should engage in due care with their exports of plant and plant products. Due care indicates what people engaged in the business should exercise to avoid potential investigation or prosecution under the Lacey Act amendment. It involves looking for red flags, checking, questioning, and verifying.

Penalties for violations under the Lacey Act range from forfeiture of product, to fines, to imprisonment. Any

investigation or enforcement may come from information obtained from U.S. customs agents, industry members, foreign governments, international organizations, NGOs, and other credible sources.

Mr. Bart van Assen offered an overview of the independent verification and certification processes available to businesses. He began by stating that increasing concern about illegal harvesting of tropical forests has led to a proliferation of initiatives to address the issue, including efforts to verify and certify sustainable forest management. Currently, there is no signal, global principle agreed on for verification and certification. Much still needs to be discussed about transparency, forms of participation, the level of transgressions, how to legislate and enforce standards, as well as an urgent need for hard data on illegal and legal logging.

While the Lacey Act does not require it, many importers seek some form of independent certification and/or verification to avoid any risks. Voluntary initiatives differentiate between the legal right to harvest, and a legal compliance

that is more moralistic in nature.

Mandatory initiatives are mainly kept to an official institution such as the SPLK in Indonesia.

Voluntary initiatives for timber trading require physical and administrative marking and traceability back to the point of harvest. Most of these initiatives deal with single-supply chains or trees, whereas the mandatory system works with a supply web. Voluntary initiatives have a central monitoring system because they are still separate from each other. On the other hand, the mandatory system appears to be based on the existing timber transport documents. It employs a 1-step-back traceability, only requiring the company to check one step back with the supplier whether the material is legal.

The main requirements for timber processing in voluntary initiatives include a physical and administrative separation of certified and uncertified materials, and clear and independent marking of the certified and non-certified materials, the verification being based on the conversion factor. SPLK seems to make no separation between

verified and unverified materials and appears to be based on the conversion factor.

Mr. Elfian Effendi discussed the challenges faced by Indonesia's forestry industry in response to the Lacey Act. He began by stating that a major question facing Indonesian forestry businesses is whether they will be able to continue exporting their products to the U.S. One objective of the Lacey Act is to combat trade in forestry products that contain illegally sourced timber. Thus, the Indonesian forestry sector has no choice but to respond by developing well-established tools of its own at the company level if it is to continue exporting products to the US. Failure to do so will result in the businesses losing their US market.

Based on an independent evaluation and assessment commissioned by the Department of Forestry, few logging concessionaires show good performance. Indonesian forestry businesses should exercise care in obtaining their timber supply from the upstream forestry industry and ensure that the timber they supply to the downstream processing

firms who export to the U.S. will not result in any difficulties.

In the pulp and paper industry, for example, there are two issues that need to be discussed with the U.S. authorities: the legality of raw materials produced by clearing unproductive natural forest to establish industrial forestry plantations, and the fact that a significant portion of the raw materials used by the pulp and paper industry come from natural forests. Another case that needs to be discussed is the clearing of natural forests for oil palm plantations, since the timber produced from this process is used by timber companies. These two raw material sources are very easy to link to such issues as deforestation, carbon emission, and global warming.

Greenomics believe that the Indonesian forestry business should consult the U.S. authorities early on regarding the legality or status of these raw material sources. The land clearing of natural forests for oil palm plantations over the next few years will generate a very significant amount of timber that can be used as raw materials for the downstream forestry industry. There are

also plans to convert some unproductive natural forests into industrial forestry plantations. If the U.S. authorities believe that the raw materials from these sources are “illegal”, a significant amount of the material for the pulp and paper industry would be refused entry into the U.S. market.

Another issue concerns administrative violations in the forestry sector. Raw materials supplied by logging concessionaires often consist of a mix of timber logged in legal cutting blocks and from illegal cutting blocks but still inside the logging concession area. If the timber goes to the downstream companies and the resulting product is exported to the U.S., this may pose a problem under the Lacey Act; yet under the Indonesian forestry regulations, this will only be regarded as an administrative violation rather than a criminal offense.

Another crucial issue is how to deal with protected timber species in the land-clearing process of natural forests. Under the Lacey Act, a protected timber log found in the mix of raw materials for a product that is exported to the U.S. will

cause the product to be rejected. This situation poses two questions that Indonesian forestry businesses will need to discuss with the US: whether the land clearing-based timber which does not contain protected species but came from natural forests that include protected timber species can be used as raw materials for the downstream forestry industry, and whether companies involved in the clearing of natural forests that contain protected species will be regarded as destroying the habitat of the protected species.

Indonesia has a negative image as the country with arguably the most rampant illegal logging in the world – an image that puts exported Indonesian timber product under the spotlight. There are four situations faced by the Indonesian forestry industry that need to be understood. First, there has been no mechanism for regular ground checks by the Indonesian forestry authorities, only administrative checks. Second, too few players in Indonesian upstream industries comply with the legal framework established by the Indonesian government in managing their concessions. Third, Indonesia still lacks

a monitoring system; as a result, the information used by the Indonesian government is several years out of date. Finally, the legality of the timber is only based on the legal documents, while in reality illegally sourced timbers are accompanied by legal documents. If the raw materials from these sources are used by the downstream forestry industry and exported to the US, the product will be rejected. It also needs to be acknowledged that it will be very difficult for the Indonesian forestry industry to comply with the Lacey Act. A logical consequence – the first-round impact – will be a sharp decline in Indonesia’s forest product export to the U.S. if the Indonesian forestry business and government do not make the proper preparations.

Greenomics recommend an MOU between Indonesia and U.S. that will be based on the spirit of bilateral trade to promote cooperation, since there is an assumed need to improve the Indonesian forestry industry’s confidence through the means provided by the MOU to respond positively to the Lacey Act implementation. Greenomics also recommend developing pilot projects

involving the export of Indonesian forest product to the U.S. based on mentoring provided by a special Indonesia-U.S. Working Group. The companies involved in these projects will provide lessons learned for Indonesian downstream industry players interested in exporting to the U.S. The MOU should also produce a practical guide based on these pilot projects.

Mr. Tony Djogo of USAID finished the workshop by inviting participants to ask questions and to engage in a dialog on the appropriate kind of mechanism for additional information and outreach on the Lacey Act Amendment.

Q: What is your strategy to promote compliance, given that it will not be easy to promote understanding about the Lacey Act in the provinces and districts?

A: The Lacey Act is about Indonesians not just understanding but also following their own laws. They do not need to understand the U.S. laws. The burden of proof is with the U.S. government authorities with close consultation with the Indonesian authorities.

Q: Identifying the species being cut for

forestry/agricultural development will be difficult since most of the species are lesser known and perhaps even unidentified.

A: The Declaration Requirement for pulp and paper recognizes the mixing of different kinds of wood. It requires listing the species that are in the imported product. In cases where there are mixed sources, the Declaration Requirement requires listing all of the possible species that may go into the product, since we can reasonably expect you to develop an understanding of all the species that exist in the harvest for your product. Additionally, importers can exercise due care by finding out as much as possible about what their suppliers are providing to them.

Q: If only a minor portion of Indonesian timber is legal, according to the Greenomics study, why did you not report it to the Department of Forestry or the police?

A: The majority of the upstream Indonesian forestry industry has a poor performance index. This does not mean that they produce illegal logs, but rather that there is no way to determine legality.

Workshop participants also offered several comments indicating areas where additional information would be useful for businesses, and especially requested more information on how to implement the Act, especially for smaller companies whose human resource might have limited capacity to understand and implement the Act. Additionally, many noted that there are so many actors in the chain of custody a need to do a proper stakeholder analysis is necessary to properly identify who all the actors are. Several participants also requested more information about the investigation and prosecution procedures in the U.S.

Participants also offered suggestions for additional outreach on Lacey. Several requested that the U.S. should work with the trade associations to disseminate information about Lacey in Indonesia. Seminars around the regions would also be useful. Other ideas for outreach included following a model established by USAID projects, stakeholder consultations with the central government, media advocacy, and NGO consultation. For example, there was a recent USAID project called Senada that

involved the Indonesian Furniture Association (Asmindo) and PB NU's National Movement for Forestry and the Environment (GNKL). Asmindo has several thousand members who are concerned with issues on legal wood, while GNKL PB NU has some 20,000 *pesantrens* and 60 million members who are concerned about the legality issue and community forest management. Finally, since companies have to go to Customs to obtain an export declaration before they can export their product, it will be useful to provide information on the Lacey Act to the Customs offices to facilitate exporter compliance with Lacey.