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## RESTITUTION

### **Ruling on Restitution to South Africa for Overharvesting of Lobsters Has Potential Implications for Illegal Taking of Natural Resources**



BY SAMUEL M. WITTEN AND CHRISTOPHER A. JAROS

**T**he U.S. Court of Appeals for the Second Circuit recently issued a restitution decision holding that South Africa has a property interest in rock lobsters illegally harvested from its shores. In *United States v. Bengis*,<sup>1</sup> three defendants who pleaded guilty to U.S. criminal charges relating to their scheme to ex-

port large quantities of illegally harvested lobsters from South Africa asserted that South Africa did not have a property interest over lobsters in its territorial waters and thus could not be awarded restitution pursuant to the Mandatory Victims Restitution Act.<sup>2</sup> The Second Circuit held that because South Africa was authorized under South African law to seize and sell lobsters illegally harvested from its shores, it had a cognizable property interest in the lobsters under the terms of the MVRA and, therefore, it was entitled to restitution from the defendants. In so holding, the Second Circuit both expanded prior caselaw regarding property rights within the terms of the MVRA and left open the ques-

<sup>1</sup> — F.3d —, No. 07-4895-cr, 2011 WL 9372 (2d Cir. Jan. 4, 2011) (88 CrL 518, 2/2/11). The case was argued at the Second Circuit for the Bengis defendants by Barry A. Bohrer of the law firm Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer P.C., New York. It was argued for the U.S. government by Marcus Asner, at the time an Assistant United States Attorney in the Southern District of New York and now a partner at the law firm Arnold & Porter LLP, New York.

<sup>2</sup> 18 U.S.C. § 3663A (MVRA).

tion of whether states and nations that serve as trustees over natural resources have a property right in those resources.

**The Second Circuit's Opinion.** From 1987 to 2001, three American citizens, Arnold Bengis, David Bengis, and Jeffrey Noll (the "Bengis Group") developed and implemented a scheme to overharvest substantial quantities of South African rock lobsters and export them to the United States in violation of both South African and U.S. law. The effect of this illegal activity on South Africa's rock lobster population was nearly catastrophic. The South African government estimated that during the 14-year period of the Bengis Group's illegal operations, the South Coast rock lobster population declined by 65 percent, requiring South African regulators to reduce the total allowable catch permitted by all licensed fishing businesses in the country. In 2001, South African authorities investigating the Bengis Group's activity seized and opened a container of unlawfully harvested rock lobsters and obtained arrest warrants for the three members of the Bengis Group, as well as a number of South African-based entities involved in the scheme. However, after South African authorities concluded that the defendants' "financial resources and presence outside of South Africa rendered them beyond the reach"<sup>3</sup> of South African law enforcement, South African authorities declined to press charges, opting instead to cooperate with U.S. prosecutors in their investigation and prosecution of the Bengis Group for violations of U.S. law. Thereafter, U.S. prosecutors indicted the three members of the Bengis Group in the Southern District of New York on a variety of charges related to violations of the Lacey Act, which makes it a federal crime to import fish or wildlife obtained in violation of foreign law.<sup>4</sup>

On March 2, 2004, each of the three members of the Bengis Group pleaded guilty to charges, including conspiracy to violate the Lacey Act, that triggered potential awards of restitution under the MVRA and the Victim

and Witness Protection Act of 1982.<sup>5</sup> In connection with the restitution determination, the United States submitted two expert reports prepared by Ocean and Land Resource Assessment Consultants (OLRAC), a group of experts commissioned by the South African Department of Marine and Coastal Management, in which OLRAC provided two differing methodologies to determine the appropriate measure of restitution. The first methodology calculated the injury to South Africa by computing the cost to restore the country's coastal rock lobster fisheries to levels existing prior to the Bengis Group's illegal activity, an amount that OLRAC estimated at \$46,775,150. The second methodology calculated the injury to South Africa by computing the market value of the overharvested lobsters, which OLRAC estimated to be \$61,932,630. The United States recommended the court adopt the lower value of the two methodologies, which, after deducting the value of fines assessed against the three defendants by the South African government, totaled \$39.7 million.

The Bengis Group did not submit a proposed alternative restitution calculation but argued instead that restitution to South Africa was improper as a matter of law.<sup>6</sup> Specifically with regard to the MVRA, the group asserted that because South Africa does not "own" the lobsters in its territorial waters, the group's criminal activity does not qualify as "an offense against property" under the statute, rendering restitution unavailable under the law.<sup>7</sup> The issue was referred by the district court to a U.S. magistrate judge for a report and recommendation. In an opinion that was adopted in full by the district court, the magistrate judge held that, because "South Africa ha[s] no property interest in the fish [taken] from South African waters, and [has] no property interest in any tax or other form of revenue as a result of [the Bengis Group's] breach of South Africa's conservation regulatory laws," restitution under the MVRA was not permitted.<sup>8</sup> In adopting the magistrate judge's report and recommendation, the district court also held that such an award would have been improper due to the "complication" of "fashioning . . . an order of restitution."<sup>9</sup>

On appeal, U.S. government prosecutors challenged the magistrate judge's report and recommendation by way of two primary arguments. First, the United States asserted that because South Africa acts as trustee of its natural resources under South African law, the nation has a property right over natural resources in its waters, including the lobsters that were harvested illegally by the defendants. This argument was predicated primarily on South Africa's domestic law, in combination with its assertion of interests under the U.N. Convention on the Law of the Sea, ratified by South Africa in 1997, which provides that coastal nations party to the treaty have certain sovereign rights over the exploitation and conservation of living marine resources within

<sup>3</sup> No. 07-4895-cr, 2011 WL 9372, at \*2.

<sup>4</sup> The Lacey Act, 16 U.S.C. § 3372(a)(2)(A), provides: "It is unlawful for any person (2) to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce (A) 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."

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<sup>5</sup> 18 U.S.C. § 3663 (VWPA).

<sup>6</sup> The Bengis Group also asserted that restitution was not proper under the VWPA because the South African government was not a "victim" within the terms of the statute. That argument is not addressed in this article.

<sup>7</sup> 18 U.S.C. § 3663A(c)(1).

<sup>8</sup> *United States v. Bengis*, No. S1-03-Cr. 308, 2006 WL 3735654, at \*9 (S.D.N.Y. Dec. 19, 2006) (report and recommendation).

<sup>9</sup> *United States v. Bengis*, No. 03-Cr. 308, 2007 WL 2669315, at \*1 (S.D.N.Y. Sept. 12, 2007).

the belt of sea extending 200 miles from their coastline, referred to as the Exclusive Economic Zone (EEZ).<sup>10</sup> The United States asserted that, while international law did not itself create a property right in the lobster, international law did create the framework through which South Africa has exercised sovereignty over the living resources in its EEZ. The United States argued that, under South African law, “the lobster resource in its EEZ properly is considered the property of South Africa as *res publicae*; that is, South Africa’s lobster resource is *owned by the state . . . on behalf of the public at large.*”<sup>11</sup> The United States argued that the Bengis Group’s illegal activity constituted an offense against South African property, rendering restitution appropriate under the MVRA.

Second, separate from its argument of a *res publicae* ownership interest, the United States asserted that South Africa has a property interest over lobsters illegally harvested in its territorial waters because the country’s law authorizes the South African Department of Marine and Coastal Management to seize fish that have been harvested illegally and to sell such fish on the market. Basing its argument on this law, the United States asserted that each of the lobsters harvested by the Bengis Group above the permitted quota was subject to seizure the moment it was caught. The United States asserted that the Bengis Group’s actions to shield this illegal activity from South African authorities took from the South African government its right to seize and sell the illegally harvested lobsters, constituted an offense against South African property under the MVRA, and rendered restitution to South Africa an available remedy under that law.

The Second Circuit vacated the district court’s decision, holding that restitution is proper under the MVRA because South Africa has a property interest in lobsters illegally harvested from its waters as the result of its authority to seize and sell those lobsters.

The Second Circuit did not rule on one important legal issue presented by the case. The magistrate judge’s report and recommendation (which was fully adopted by the district court) had suggested that permitting restitution in this case would lead to broad and unreasonable consequences. The report and recommendation stated in relevant part: “It is commonplace for criminal defendants to be required to forfeit the proceeds or instrumentality of their crime to the government. It is illogical to say, however, that the government has a property interest in every object that may be the proceeds or instrumentality of a crime *prior* to that object being forfeited.”<sup>12</sup>

The Second Circuit did not address this potential expansion directly but ruled in favor of restitution by reasoning that, under the applicable South African regulatory scheme, the illegally harvested lobsters never became the property of the Bengis Group because the

lobsters were subject to South African government seizure and sale at the moment they were illegally removed from the water.<sup>13</sup>

By adopting this reasoning, the circuit court may have sought implicitly to agree with the logic set forth in the U.S. government’s briefs, which set forth two distinctions between this case and “commonplace” criminal cases referenced by the report and recommendation. First, the United States asserted that because South Africa had a *res publicae* property interest over the lobsters before they were caught and a property interest in the lobsters the moment they were illegally harvested, no private party including the defendants ever had a valid property claim with respect to the lobsters. By contrast, in a typical criminal case, the proceeds or instrumentalities of the crime would, absent the commission of the crime, belong to a private person. Second, the United States asserted that unlike a typical criminal case, the defendants in this case already pleaded guilty to the scheme, and their guilty pleas set forth that the illegally harvested lobsters were the proceeds of their crimes. However, because the Second Circuit did not expressly address these distinctions, the issue remains unresolved. U.S. prosecutors may seek to use this opinion in the future to seek restitution in an increasingly wide variety of cases where the property in question was subject to forfeiture to the government.

Interestingly, in reversing the district court’s opinion, the Second Circuit chose not to address the U.S. government’s primary argument that South Africa, as a public trustee over natural resources, has a property right over lobsters in its EEZ. In affirming the magistrate judge’s report and recommendation, the district court expressly rejected this argument, holding that although South Africa has regulatory authority over natural resources in its EEZ, that authority is separate and distinct from property rights, which are required for restitution under the MVRA.<sup>14</sup> In vacating the district court’s opinion on other grounds, the Second Circuit chose not to address this question. Importantly, however, a number of state courts have held that states, as trustees, can obtain compensation for damage to wildlife within their territorial boundaries, thus affirming that those states have both a regulatory *and* an economic interest in their natural resources within the terms of state law.<sup>15</sup> Looking ahead, these state cases could provide support to the argument that a state’s *res publicae* property right over its natural resources provides a basis for restitution where the underlying crime triggers potential restitution under the MVRA. If adopted, this theory could expand restitution rights in environmental litigation. This issue will continue to be of considerable interest in environmental and white collar criminal jurisprudence.

<sup>13</sup> *Bengis*, 2011 WL 9372 at \*5.

<sup>14</sup> Report and recommendation, *supra* note 8, at \*7.

<sup>15</sup> See Brief for the United States, at 44 (citing *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974); *State Dep’t of Fisheries v. Gillette*, 621 P.2d 764, 767 (Wash. Ct. App. 1980); *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1100 (D. Me. 1973)).

<sup>10</sup> U.N. Convention on the Law of the Sea (UNCLOS), Art. 62, Dec. 10, 1982, 1833 U.N.T.S. 397, 421.

<sup>11</sup> Brief for the United States, at 40 (emphasis original) (internal quotation omitted).

<sup>12</sup> Report and recommendation, *supra* note 8, at \*7 (emphasis original).