

Developments in Federal
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BENGIS AND THE "VICTIM" OF AN ENVIRONMENTAL CRIME

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The Second Circuit recently issued an opinion in a Lacey Act prosecution that may have far-reaching consequences for damages calculations and who constitutes the "victim" in environmental crimes. The Second Circuit ruled that the South African government was entitled to restitution for the defendants' extensive overharvesting of rock lobster in violation of South African fishing laws. The ruling raises some important issues regarding what type of interest a state has in its wildlife and how it can be considered a victim of environmental crimes

under the federal restitution statutes. Although the ruling could be considered a missed opportunity because the court did not reach the issue of state ownership of wildlife, the ruling could create a vital incentive for greater national and international cooperation and enforcement of environmental crimes.

I. Background

A. The Scheme

Between 1987 and 2001, three men—Arnold Bengis, David Bengis, and Jeffrey Noll—carried out a scheme in which they overharvested South African rock lobsters and sold them in the eastern United States for considerable profit.¹ Marine and Coastal Management, a branch of the South African Department of Environmental Affairs and Tourism, regulates the fishing of rock lobsters off the country's coast.² It establishes seasonal fishing quotas and issues harvesting and exporting permits, and those with licenses who fish rock lobster are required to report the weight harvested and the weight to be exported.³ Under South African law, when rock lobsters are taken out of the water in excess of those quotas, the South African government may seize the wildlife captured in excess of the quota, sell the harvest and receive the proceeds.⁴

The scheme the men concocted spanned two continents. Arnold Bengis ran Hout Bay Fishing Industries, a fishing

¹ *United States v. Bengis*, 631 F.3d 33, 35 (2d Cir. 2011).

² See Marine Living Resources Act 18 of 1998, § 21 ("MLRA"); Marine & Coastal Management, *About MCM*, available at <http://www.mcm-deat.gov.za/about/index.html>.

³ See Marine & Coastal Management, *Rights Register—WCRL (Offshore)* (2006), available at <http://www.mcm-deat.gov.za/commercial/2006/Rights%20Register%20-%20WCRL%20Offshore.pdf> (showing commercial license weight quotas for West Coast rock lobsters); *Rights Register—South Coast Rock Lobsters* (2006), available at <http://www.mcm-deat.gov.za/commercial/2006/Rights%20Register%20-%20South%20Coast%20Rock%20Lobster.pdf> (same for South Coast rock lobsters).

⁴ MLRA §§ 51(3)(c)(iii); 63(1)(b); 68(1).

operation in Cape Town, South Africa. Hout Bay Fishing Industries and its operational team caught lobsters in excess of its quotas and massively underreported the catch, also bribing officials to turn a blind eye. It then processed the excess lobsters to export to the United States. The lobsters were exported to two U.S. corporations, run by David Bengis and Jeffrey Noll, that imported, packed and shipped tons of rock lobsters on the U.S. east coast.⁵ The defendants made millions of dollars from this scheme.⁶

South African authorities seized and opened a container of the defendants' illegally taken lobsters in May 2001.⁷ The authorities then notified U.S. authorities that another shipment was on its way to the United States. South African law enforcement officials concluded that the defendants' financial resources and presence outside South Africa meant they were, practically speaking, beyond South Africa's jurisdiction and therefore concentrated on charging and prosecuting more realistic targets in South Africa.⁸ Nonetheless, South African authorities continued to assist U.S. law enforcement in its own investigation.

The United States investigated the Bengis defendants for, among other things, violating the Lacey Act. The Lacey Act proscribes U.S. trade in illegally obtained wildlife.⁹ The Act was enacted in 1900 to deal with illegal shooting of endangered bird species, and Congress has since expanded it to cover wildlife, trees and endangered plant species.¹⁰ The Lacey Act provides that 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 any foreign law."¹¹ Because South Africa had outlawed the overfishing of rock lobster, importing, selling, transporting, exporting or buying such illegally taken lobsters within the United States violated the Lacey Act. Because the Bengis defendants imported and sold the lobster throughout the eastern United States, the U.S. government had jurisdiction over them.

The defendants pleaded guilty to Lacey Act charges in 2004. Arnold Bengis and Jeffrey Noll pled guilty to violating the Lacey Act, conspiracy to violate the Lacey Act, and conspiracy to smuggle; David Bengis pled guilty to a misdemeanor charge of conspiracy to violate the Lacey Act.¹² Each received a prison sentence and the defendants together forfeited a total of \$13.3 million to the U.S. government.¹³

B. The Lower Courts and Restitution

In addition to fines and prison time, the U.S. government pressed for restitution for South Africa under two provisions in federal law. First, it argued that South Africa should be compensated under the Mandatory Victims Restitution Act ("MVRA").¹⁴ The MVRA grants restitution to a victim where the crime harmed the victim's property.¹⁵ The magistrate judge assigned to the case rejected the government's arguments that South Africa qualified as a victim under the MVRA, ruling that the lobsters were not South Africa's property because South Africa did not "own" the lobsters under South African law and merely had a regulatory interest in them.¹⁶ Thus, the magistrate judge ruled that the South African government was not entitled to restitution under this statute.¹⁷

The government also argued that South Africa was entitled to restitution under the Victim and Witness Protection Act ("VWPA").¹⁸ The VWPA provides restitution to a victim directly harmed by the defendant's crime. Unlike the MVRA, the VWPA requires the court to take into account "the financial resources of the defendant."¹⁹ The government submitted a report prepared by the Ocean and Land Resource Assessment Consultants ("OLRAC") that assessed South Africa's damages. OLRAC used two different methods of calculation. The first method, OLRAC I, was based on "remediation": that is, how much it would cost South Africa to restore the fisheries to the lobster population that would have existed without the defendants' overharvesting. The second method, OLRAC II, calculated restitution as the market value of the overharvested lobsters.²⁰ Under the

⁵ *Bengis*, 631 F.3d at 35.

⁶ *See id.* at 36 (defendants' plea deal included forfeiting \$13.5 million).

⁷ *Id.*

⁸ The South African government charged and prosecuted Hout Bay Fishing Industries, its operational manager, several fisherman and fourteen fisheries inspectors who had received bribes from the scheme. *Id.*

⁹ 16 U.S.C. §§ 3371–78.

¹⁰ 16 U.S.C. § 3372; *see also* Marcus A. Asner and Grace Pickering, *The Lacey Act and the World of Illegal Plant Products*, 21 *ENVTL. L. IN N.Y.* 101, 102–03 (June 2010) (describing history of Lacey Act).

¹¹ 16 U.S.C. § 3372(a)(2)(A).

¹² *Bengis*, 631 F.3d at 36.

¹³ *Id.*

¹⁴ *United States v. Bengis*, 2006 U.S. Dist. LEXIS 91089, at *2 (S.D.N.Y. Dec. 19, 2006) ("*Bengis MVRA*"); 18 U.S.C. § 3663A (MVRA).

¹⁵ 18 U.S.C. 3663A(c)(1) ("This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense that is . . . (ii) an offense against property under this title. . . .").

¹⁶ *Bengis MVRA*, at *21.

¹⁷ *Id.* at *2.

¹⁸ *United States v. Bengis*, 2007 U.S. Dist. LEXIS 35902, at *1–2 (S.D.N.Y. May 17, 2007) ("*Bengis VWPA*").

¹⁹ 18 U.S.C. § 3663(a)(1)(B)(i).

²⁰ *Bengish VWPA*, at *25.

VWPA the government merely had to show "direct harm" to the victim, not an injury to property.²¹ Nonetheless, the magistrate judge rejected this claim because it was "premised on [the] claim that the lobsters belonged to South Africa" and, per the court's analysis of the MVRA claim, the lobsters did not belong to South Africa.²²

In each instance the government appealed to the district court judge, who adopted the magistrate judge's findings.²³ The government appealed the district court's rulings to the Second Circuit.

II. The Second Circuit and *Bengis*

The Second Circuit issued its opinion on January 4, 2011, overturning the district court and holding that South Africa was a victim under the MVRA and VWPA and, accordingly, that it was entitled to restitution from the *Bengis* defendants.²⁴ In its opinion, the Second Circuit made two crucial rulings that entitled South Africa to receive restitution: that the nature of South Africa's property interest made it a victim, and that the conspiracy itself directly harmed the South African government.

Crucial in the Second Circuit's ruling was the way that South African law dealt with the lobsters. When lobsters are fished in excess of their quota, South African law allows the government to seize the excess lobsters and, significantly, sell them itself.²⁵ The Second Circuit held that this constitutes a property interest under the U.S. Supreme Court's ruling in *Pasquantino v. United States*.²⁶ In *Pasquantino*, the Court ruled that Canada was entitled to restitution for the defendants' evasion of certain tax revenues. The Court reasoned that, had the defendants behaved lawfully, the Canadian government would have been entitled to collect the revenue and thus Canada had a "straightforward 'economic' interest" in it.²⁷ In *Bengis*, the defendants' unlawful export and sale of the illegally taken lobsters deprived South Africa of the proceeds of those sales. The defendants' actions therefore deprived the South African government of its property interest and, accordingly, inflicted direct harm upon it. Accordingly, the South African government fit the definition of a victim under both the MVRA and the VWPA.²⁸

The Second Circuit also held that the conspiracy itself harmed South Africa. The defendants had asserted that, even if South Africa had a property interest in the lobsters, it was the illegal harvesting of the lobsters that harmed South Africa, not the conspiracy to import them into the United States. This distinction is crucial for the purpose of the restitution statutes. The Lacey Act falls under Title 16 of the U.S. Code, which deals with conservation. But a victim is only eligible for restitution under either the MVRA or VWPA if it is a victim of a crime under Title 18, which deals with crimes and criminal procedure.²⁹ The Second Circuit disagreed with the defendants' assertion that only the importation to the United States harmed South Africa—that is, the defendants' substantive violation of the Lacey Act. Instead, the court reasoned that because the South African government had a property interest in the rock lobsters as soon as they were removed in excess of the quota, actions that took the rock lobsters away from the government directly harmed South Africa. The conspiracy involved enabling the smuggling of the lobsters out of South Africa, facilitating the illegal harvesting, and helping the poaching go undetected by the authorities and falsifying documents. The Second Circuit held that these actions, which were part of the conspiracy, all "directly harmed" the South African government.³⁰

III. What *Bengis* Means for Future Enforcement

While *Bengis* expands who may be a victim of an environmental crime, the extent of the ruling is fairly narrow. The Second Circuit held that South Africa was a victim not because it had an ownership right in the lobster in general. Instead, it held that because South Africa had the right to sell any fish that had been illegally taken out of the water, it had been damaged and was a victim under federal law.³¹

The Second Circuit's ruling fits within the concept of ownership of wild creatures. In general, state ownership of wild animals has long been rejected by U.S. courts. Instead, the rule of *possession* has governed who has a property ownership in wild animals. Most first year law students are taught seminal cases about whaling and foxes, and the determination that wild animals

²¹ 18 U.S.C. § 3663(a)(2) ("For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.").

²² *Bengis-VWPA*, at *2.

²³ *United States v. Bengis*, 631 F.3d 33, 34–35 (2d Cir. 2011) ("*Bengis*"). The district court also exercised its discretion under the VWPA to decline restitution on the basis that the complications and extension of the sentencing process outweighed the need for restitution. *Id.* at 35.

²⁴ *Id.*

²⁵ MLRA §§ 51(3)(c)(iii); 63(1)(b); 68(1).

²⁶ *Bengis*, 631 F.3d at 40 (citing *Pasquantino v. United States*, 544 U.S. 349, 357 (2004)).

²⁷ *Pasquantino*, 544 U.S. at 357.

²⁸ *Bengis*, 631 F.3d at 40.

²⁹ 18 U.S.C. §§ 3663(a)(1), 3663A(a)(1), (c)(1).

³⁰ *Bengis*, 631 F.3d at 40–41; see also Christine Fisher, Comment, *Conspiring to Violate the Lacey Act*, 32 ENVTL. L. 475, 501–07 (2002) (arguing that prosecutors should consider making greater use of the conspiracy statutes against wildlife traffickers due to sentencing and evidentiary advantages).

³¹ *Bengis*, 631 F.3d at 41.

are without an owner until they are caught.³² The state does not "own" wild animals on public property in the usual sense.³³ A state as a sovereign entity may, nonetheless, regulate who is entitled to capture wild animals through permits and licenses. For example, a state may regulate who may catch fish and how many they can catch.³⁴ In *Bengis*, the government argued that South Africa's public trust or *res publicae* interest in the wildlife in its waters was a property interest for the purposes of the MVRA and the VWPA, but the Second Circuit did not address this broader argument.

What constitutes a state's waters is more complex for oceanic creatures due to boundaries of the continental shelf and international waters. According to the United Nations' Convention on the Law of the Sea, a nation may exert sovereign rights over a continental shelf, including "living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."³⁵ Similar to the reasoning above, however, just because there are sovereign rights over a wild animal does not mean that the government of that country "owns" the animal. The Marine Living Resources Act does not grant the South African government the ownership of the animals in its coastal waters. Instead, the Act merely grants the government the right to sell on what is taken in violation of the restrictions the government places on fishing.

The Second Circuit created a very narrow ruling that failed to discuss *res nullius* or reach the question of whether the South African government owned the lobsters in trust for the South African people. The Second Circuit's method of damages calculation reinforces the victim as a damaged actor in the marketplace, not one suffering environmental damage. OLRAC propounded two potential methods of restitution damages calculation. The first, OLRAC I, calculated the amount that it would cost South Africa to repopulate its waters with rock lobsters.³⁶ The second, OLRAC II, worked out how much money South Africa would have received had they sold the over-harvested lobsters for on the open market.³⁷ The Second Circuit accepted the valuation methodology of OLRAC II. The court did not reach OLRAC I, which

financially benefitted South Africa because OLRAC II led to higher damages.

While *Bengis* did not expand the concept of what constitutes environmental harm, it could help create a more effective global enforcement system. The defendants will have to pay as much as \$62 million in restitution damages to the South African government—over four times what the defendants have already forfeited.³⁸ Such large figures could foster an enforcement regime in which the consequences of environmental crime are taken far more seriously.

Restitution could also encourage greater compliance with conservation and environmental laws both domestically and further afield. For example, under *Bengis*, New York may well have a property interest in the wildlife on its public grounds. The New York Environmental Conservation Law provides:

in the conduct of the public hunting, trapping and fishing grounds, game refuges and other areas held for use by the department, in the opinion of the department it becomes necessary to remove trees and other products in order to manage such areas along lines scientific research indicates are best calculated to produce the optimum conditions for fish or wildlife, the department may, upon such terms as it may deem to be for the best interests of the state, sell the trees, timber and other products on any such grounds, refuges or other areas acquired by purchase, gift or devise for use by the department.³⁹

Because New York has the right to sell trees and timber on land it owns, under *Bengis* the state appears to have a property interest in trees unlawfully taken from its land that may trigger the federal restitution statutes.

A sale of seized goods could create a dual disincentive system to deter the illegal wildlife trade. First, were governments to lay claim to the fruits of an illegal harvest, that in and of itself may create a disincentive for illegal traders because governments would have an economic incentive to detect and punish offenders. One of the reasons for the scale of the illegal logging trade is its vast profitability. In 2009, it was estimated that the value of

³² Wild animals are subject to the rule of capture, the principle stating that that wild animals belong to the person who captures them, regardless of whether they were originally on another person's land. Black's Law Dictionary (9th ed. 2009) ("rule of capture (2)").

³³ See *People v. Monterey Fish Prods. Co.*, 195 Cal. 548, 563 (1925) (citations omitted) (holding that state of California had the right to proscribe granting fishing quotas to those who used the captured fish for something other than human consumption); see generally Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife* 35 ENVTL. L. 673 (2005) (describing history of state ownership doctrine).

³⁴ For example, New York grants a variety of licenses for fishing on its public property, including lifetime licenses (see N.Y. Envtl. Conserv. Law § 11-0702) but also restricts size and catch numbers (see N.Y. Envtl. Conserv. Law § 11-1305).

³⁵ United Nations Convention on the Law of the Sea, art. 77(1), (4). This definition may include lobsters although some species can propel themselves in a method akin to swimming.

³⁶ OLRAC valued remediation at \$46,775,150. *Bengis* 631 F.3d 33, 36–37 (2d Cir. 2011).

³⁷ *Id.* at 37 (OLRAC II's value was over \$15 million more than OLRAC I, amounting to \$61,932,630).

³⁸ The U.S. Supreme Court denied defendants' petition for certiorari on May 23, 2011. *Bengis v. United States*, 2011 U.S. LEXIS 3877 (U.S. May 23, 2011).

³⁹ N.Y. Envtl. Conserv. Law § 11-2101(2).

wood illegally logged in Madagascar alone was around \$460,000 per day.⁴⁰ Madagascar could, potentially, seize and sell the illegally logged timber to reinvest into preserving and protecting its forests.⁴¹

Second, such laws allow the U.S. government to push for restitution and greater penalties for defendants than previously allowed under the Lacey Act.⁴² The U.S. government's resources stretch further than those of many countries. The South African government decided against charging the three defendants in *Bengis* because it lacked the resources necessary for an investigation without outside help given the defendants' presence outside South Africa.⁴³ Yet South Africa is relatively affluent for a "wildlife producing" nation, while most others fail to enforce even basic laws due to lack of resources and endemic corruption.⁴⁴ A recent study estimated that Indonesia lost about \$1 billion in forestry taxes in 2006 alone, money that could go toward enforcement and protection of natural resources.⁴⁵ Additionally, Indonesia ranks extremely low on the corruption index despite making good progress in improving its transparency.⁴⁶ The Second Circuit's reasoning in *Bengis*, based in *Pasquantino*, a tax revenue case, would likely consider the lost tax revenue from unlawfully taken timber a property interest that would make the Indonesian government a "victim" for restitution under either the VWPA or the MVRA. Along with other anti-corruption laws, the Lacey Act and restitution provisions are tools to aid enforcement and help eradicate corruption and illegal logging.⁴⁷

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IV. Conclusion

The Second Circuit's ruling in *Bengis* could create a financial incentive to further investigate and punish violations of environmental crime. Restitution for the foreign government could aid global enforcement of laws protecting wildlife and trees and encourage international cooperation. *Bengis* therefore demonstrates that the Lacey Act can help fight wildlife trafficking and illegal deforestation—provided, of course, that the source country's own laws fit into the victim analysis set out by the Second Circuit in *Bengis*. If the decision stands, it creates an important and useful tool in the fight against unlawful trade in wildlife.

⁴⁰ Global Witness & Environmental Investigation Agency, Press Release, *Illegal Malagasy Timber Trade Worth up to \$460,000 a Day*, Dec. 2, 2009, available at <http://www.globalwitness.org/library/illegal-malagasy-timber-trade-worth-460000-day>.

⁴¹ Environmental groups have suggested that the Malagasy government "seize and sell all stocks of illegal timber and put the money into a trust fund for forest protection and rural development," albeit as only a short-term measure, advocating that "future seizures [of illegal timber] should be destroyed." *Id.*

⁴² It should be noted, however, that the United States lags far behind the main importers of tropical logs, with China accounting for more logs imported than the rest of the world combined in 2008. See *UNECE/FAO Forest Products Annual Market Review*, 2008–2009, at 150 (Graph 13.3.1).

⁴³ *Bengis*, 631 F.3d at 36.

⁴⁴ See Kenneth B. Meyer, Note, *Restitution and the Lacey Act: New Solutions, Old Remedies*, 93 CORNELL L. REV. 849, 870 (2008) (arguing that restitution remedies could promote greater cooperation between U.S. federal agencies and foreign states).

⁴⁵ Human Rights Watch, "Wild Money": *The Human Rights Consequences of Illegal Logging and Corruption in Indonesia's Forestry Sector* 20–21 (2009).

⁴⁶ *Id.* at 25–38 (detailing corruption in forestry industry and anti-corruption efforts implemented). Human Rights Watch estimated that the amount lost to illegal logging between 2003 and 2006 was equivalent to the "entire health spending at national, provincial, and district levels combined." *Id.* at 2.

⁴⁷ *Id.* at 9. The same study mentions the Lacey Act and points out that the maximum sentences are \$500,000 for corporations, \$250,000 for individuals, or twice the gain of the transaction and forfeiture of the illicit goods. Under *Bengis*, the amount that the defendants have to pay may be increased further, as demonstrated by the potential \$61 million in restitution owed to the South African government.