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RESTITUTION

The *Bengis* Case: New York Court Orders Substantial Restitution From U.S. Defendants to the Republic of South Africa in Environmental Crime Case



BY SAMUEL WITTEN AND JEREMY PETERSON

On June 14, Judge Lewis A. Kaplan, of the U.S. District Court for the Southern District of New York, ordered three individual criminal defendants to pay approximately \$22.5 million in restitution to the Republic of South Africa for illegally harvesting South Af-

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rican rock lobster.¹ This important decision is the next step in litigation spanning more than a decade where U.S. law enforcement officials, working closely with their South African counterparts, have attempted to obtain redress for South Africa for violation of South African conservation regulations. The district court's new restitution order in *United States v. Bengis* is significant for both its size—it is the largest ever in a prosecution driven by the U.S. Lacey Act—and for the fact that the victim receiving the restitution is a foreign government.

The Facts

During a 14-year period from 1987 to 2001, Arnold Bengis, David Bengis and Jeffrey Noll illegally harvested massive quantities of rock lobster from South African waters through Hout Bay Fishing Industries Ltd. (HBFI), a South African company based in Cape Town.² HBFI, which was chaired by Arnold Bengis, exported rock lobster to the U.S. through Icebrand Seafoods.³ Year after year, HBFI greatly exceeded harvest quotas for rock lobster established by South Africa's regulations and laws such as the country's Marine Living Resources Act.⁴ The defendants repeatedly submitted false export documents to South African authorities,

¹ See *United States v. Bengis*, 2013 WL 2922292 (S.D.N.Y. June 14, 2013) (memorandum). The restitution matter was handled most recently for the U.S. government in the U.S. district court by Assistant U.S. Attorney Daniel W. Levy and for the defendants by Mark A. Berube, of Mishcon de Reya New York LLP. Earlier proceedings for the U.S. government were handled by Marcus Asner, at the time an assistant U.S. attorney in the Southern District of New York and now a partner at Arnold & Porter LLP in New York.

² See *United States v. Bengis*, 631 F.3d 33, 35, 88 CrL 518 (2d Cir. 2011).

³ *Id.*

⁴ *Id.*; Caryn Dolley, *Skipper "told keep two sets of records,"* IOL BUSINESSREPORT (June 19, 2013).

bribed inspectors and took advantage of local black employees in a ploy whereby HBFI acquired and then abused fishing rights.⁵

In May 2001, South African officials seized an HBFI container of illegally harvested seafood bound for the U.S.⁶ Although the South African authorities initially obtained arrest warrants for the Bengis defendants and Noll, they ultimately decided not to charge these individuals, “concluding that defendants’ financial resources and presence outside of South Africa rendered them ‘beyond the reach of South African authorities.’”⁷ Instead, South Africa brought prosecutions against the South African entity HBFI and against several South African nationals who had worked with or accepted bribes in connection with the scheme. As a result of these prosecutions, HBFI paid fines of 40 million Rand—or \$7 million at the 2004 exchange rate.

Instead of bringing charges in South Africa against the three individuals, the South African authorities opted to work with U.S. authorities, who were prepared to bring the case against targets in the U.S. U.S. agents and prosecutors successfully built a case under the Lacey Act, which criminalizes the importation into the U.S. of fish, wildlife or plants, knowing that such fish, wildlife or plants were taken, possessed, transported or sold in violation of foreign law.⁸ The Lacey Act also establishes a misdemeanor if a person imports fish, wildlife or plants that, in the exercise of due care, he or she should have known were taken, possessed, transported or sold in violation of foreign law.⁹

Lacey Act prosecutions often have been brought in the absence of foreign prosecutions, and U.S. authorities building Lacey Act cases have not always had the benefit of assistance from foreign law enforcement.¹⁰ In the *Bengis* case, however, U.S. officials have called the degree of assistance provided by South African authorities unprecedented, and the combined effort may stand as a model for effective cross-border wildlife prosecution.¹¹

The Plea Agreements And Subsequent Proceedings On Restitution Issues

On March 2, 2004, Arnold Bengis and Noll pleaded guilty to felony violations of the Lacey Act and con-

spiracy to violate the Lacey Act; David Bengis pleaded guilty to a misdemeanor conspiracy count. The district court sentenced the defendants to terms of imprisonment of 46 months, 30 months and 12 months, respectively, and ordered them to forfeit a combined \$13.3 million to the U.S.¹² The district court initially deferred the issue of restitution and then, in 2007, denied the government’s requests for restitution under the Mandatory Victims Restitution Act (MVRA) and the Victim Witness Protection Act. (VWPA).¹³ The district court endorsed the magistrate judge’s recommendation that restitution was inappropriate under the MVRA because South Africa lacked a compensable property interest in the illegally harvested lobsters.¹⁴ Separately, the court denied restitution under the VWPA, holding that South Africa was not a “victim” of the defendants’ crimes. The court reasoned that overfishing of rock lobster was not directly related to the defendants’ offense conduct because “[i]t was not necessary for the government to have proved the defendants . . . were the ones who took the fish in violation of South African law.”¹⁵ The court also held that, under the VWPA, the “complexity and prolongation of the sentencing process” associated with fashioning an order of restitution would be such that the difficulty of calculating restitution outweighed the need, rendering restitution under the VWPA inappropriate.¹⁶

In a 2011 opinion that will be important for transnational environmental cooperation, the U.S. Court of Appeals for the Second Circuit reversed both of the district court’s restitution rulings. The Second Circuit held that South Africa had a property interest in the illegally harvested lobsters because it had the authority to seize and sell the lobsters—and restitution was therefore appropriate under the MVRA.¹⁷ For similar reasons, the court held that South Africa was a victim of the defendants’ crimes for purposes of both the MVRA and the VWPA because, “by smuggling the lobsters out of South Africa knowing that they had been harvested unlawfully, defendants deprived the South African government of its right to seize and sell the poached lobsters.”¹⁸ The Second Circuit dismissed the district court’s suggestion that determining the amount of restitution was too com-

⁵ See Caryn Dolley, *Workers want slice of R294m pie*, IOL BUSINESSREPORT (June 19, 2013).

⁶ See *Bengis*, 631 F.3d at 36.

⁷ *Id.*

⁸ See 16 U.S.C. §§ 3372(a)(2)(A); 3373(d)(1)(A); see also Section 3373(a)(4) (attempt provision).

⁹ See Sections 3372(a)(2)(A); 3373(d)(2); see also Section 3373(a)(4) (attempt provision).

¹⁰ In some cases, in fact, foreign officials have testified for the defense, such as in the 2008 trial of Robert Kern, in which a Russian official testified that U.S. citizens hunting moose from a helicopter in Russia “had an exemption from the helicopter hunting ban.” Gary Fields and John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 24, 2011), available at <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html>.

¹¹ See Elinor Colbourn, *U.S. Criminal Fisheries Enforcement: History, Tools, Reasons* (Jan. 13, 2011) available at <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/130111colbourn.pdf>.

¹² See *Bengis*, 631 F.3d at 36.

¹³ See *United States v. Bengis*, 2007 WL 241370, *1 (S.D.N.Y. 2007) (unreported); *United States v. Bengis*, 2006 WL 3735654, *9 (S.D.N.Y. 2006) (unreported) (Peck, M.J.); see also *United States v. Bengis*, 2007 WL 2669315, *1 (S.D.N.Y. 2007) (unreported); *United States v. Bengis*, 2007 WL 1450381, *9 (S.D.N.Y. 2007) (unreported) (Peck, M.J.).

¹⁴ See *Bengis*, 2007 WL 241370 at *1; 2006 WL 3735654 at *9.

¹⁵ See *Bengis*, 2007 WL 233315 at *1.

¹⁶ *Id.* at *2; 18 U.S.C. § 3663(a)(1)(B)(ii). A similar provision exists under the MVRA. See 18 U.S.C. § 3663A(c)(3)(B).

¹⁷ The court did not rule on the primary argument of the U.S.: that South Africa had a *res publicae* property interest in the lobsters before they were caught and a property interest the moment the lobsters were illegally harvested. See Samuel M. Witten and Christopher A. Jaros, “Ruling on Restitution to South Africa for Overharvesting of Lobsters Has Potential Implications for Illegal Taking of Natural Resources,” 88 CrL 577 (2011).

¹⁸ *Bengis*, 631 F.3d at 41.

plex and remanded the case with a directive that the district court do just that.¹⁹

The district court initially referred the case to Magistrate Judge Andrew J. Peck. In its submissions to the magistrate judge, the Department of Justice asked that restitution be awarded to South Africa in the amount of \$54.8 million.²⁰ To obtain this figure, the DOJ drew on an earlier study by Ocean and Land Resource Assessment Consultants (OLRAC)—a group of experts commissioned by the South African Department of Marine and Coastal Management. The OLRAC had estimated the harm to South Africa using two methods: first, by estimating the costs of restoring the rock lobster fishery (Method I) and, second, by estimating the market value

of illegally harvested lobsters (Method II).²¹ The OLRAC Method I estimated South Africa's loss to be \$46.7 million while Method II estimated the loss to be \$61.9 million.²² In its initial request for restitution, prior to the Second Circuit ruling, the DOJ had asked for a restitution award based on the more conservative Method I.²³ Now, noting that the court of appeals had selected Method II, the DOJ asked for restitution on that basis, recommending that the defendants be given a \$7 million credit for fines already paid to South Africa by HBFI, the South African company.²⁴ The magistrate judge essentially accepted the DOJ's view, recommending that the district court order restitution of \$54.8 million.²⁵

²¹ Id.

²² See *Bengis*, 631 F.3d at 36-37.

²³ Id.

²⁴ See memorandum of law in support of the government's application for restitution, No. 1:03-cr-00308, Doc. 196 at 4, 8.

²⁵ See report and recommendation, No. 1:03-cr-00308, Doc. 206, *14 (Aug. 16, 2012) (Peck, M.J.).

Table 1. Breakdown of estimates of restitution based on calculations by OLRAC, the group of experts commissioned by the South African government.²⁶ Method I estimates were based on cost of ecological restoration of rock lobster, while Method II estimates were based on market value.

	OLRAC Method I	OLRAC Method II
South Coast Rock Lobster	**	\$32,436,830
West Coast Rock Lobster	**	\$29,495,800
Total South and West Coast	\$46,775,150	\$61,932,630
Offset for HBFI fines paid	(\$7,049,080)	(\$7,049,080)
Adjusted total (minus HBFI fines)	\$39,726,070	\$54,883,550
Adjusted total—West Coast only	**	\$22,446,720

²⁶ Some amounts are approximate.

The June 14 Decision on Restitution

The district court ordered the defendants to pay \$22.4 million in restitution to South Africa. The court selected this amount using OLRAC Method II (i.e., the market value of the illegally harvested lobster), but it granted restitution only for rock lobster that the government had demonstrated were intended for the U.S. and not for all illegally harvested rock lobster.²⁷ The district court held that, while the MVRA provides for restitution for losses resulting from the defendants' conduct in the course of a "scheme, conspiracy, or pattern of criminal activity," the conduct involved must be illegal under U.S. law—and a scheme to harvest South African rock lobsters in violation of South African law would not be illegal under U.S. law unless the lobsters were imported

into the U.S. or were intended for such import.²⁸ Accordingly, the district court denied the government's request for restitution to the extent the request involved South Coast rock lobster, because the court concluded the U.S. government had failed to prove that the defendants intended to import South Coast rock lobster into the U.S. The district court allowed the defendants a credit for the fines previously paid to South Africa by HBFI. To ensure payment, the district court barred the defendants from depleting money in accounts held in the Channel Islands.

Next Steps and Significance of the Case

Proceedings will continue in the long-running *Bengis* case. The defendants have already given notice that

²⁷ *Bengis*, 2013 WL 2922292 at *5.

²⁸ Id.

they will appeal the district court's decision. That said, in light of the Second Circuit's early consideration of the case, it is likely that the defendants will be required to make substantial restitution to South Africa, even if not the precise amount ordered by the district court.

The restitution amount of \$22.4 million in Kaplan's June 14 order is the largest order of restitution that has been issued in a Lacey Act case.²⁹ Given the size and nature of the restitution award, the *Bengis* case may be viewed by some as another indication of the Lacey Act's increasing significance. Although the Lacey Act is one of the oldest U.S. environmental laws, it traditionally has not been one of the best-known. That has been changing recently. Part of the reason for the Lacey Act's enhanced prominence can be traced to prosecutions such as the *Bengis* case, in which agents and prosecutors have tackled larger-scale illegal operations rather than prosecuting isolated incidents of illegal hunting or fishing—the traditional bread and butter of Lacey Act enforcement.³⁰ Beyond this case, though, the 2008 amendments to the Lacey Act have substantially in-

creased the act's scope, extending its protections to plants and plant products.³¹ The Lacey Act now addresses imports of wildlife, fish, plants and plant products, cutting across multiple sectors.³²

The June *Bengis* decision, combined with the earlier Second Circuit ruling in favor of restitution to South Africa, is significant. The broad restitution award and the court's theory of restitution of property interests by individual defendants to foreign authorities could well encourage foreign authorities to continue to increase their cooperation with the U.S. on environmental matters. The government's increased experience in mounting complex Lacey Act-based prosecutions and the expanded scope of the act also could elevate the statute further as a tool for transnational law enforcement in the area of environmental crimes. Finally, the Second Circuit's endorsement of the use of an outside expert to estimate market value as a basis for restitution may smooth the way for future restitution determinations.

violation of Honduran law. In *McNab*, the court ordered combined restitution of \$1 million, \$500,000 of which was returned to Honduras, and 97-month prison sentences for three of the defendants.

³¹ See 16 U.S.C. §§ 3371 - 3376 (2008).

³² See DOJ press release, *Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations* (Aug. 6, 2012) available at <http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html> (discussing resolution of criminal investigation into allegations that the Gibson Guitar Corp. "violated the Lacey Act by illegally purchasing and importing ebony wood from Madagascar and rosewood and ebony from India").

²⁹ Neither the MVRA nor the VWPA authorizes restitution for substantive Lacey Act counts, but restitution is available under Title 18 conspiracy counts, which are frequently included in Lacey Act-based cases and to which defendants pled guilty in this case.

³⁰ Another significant Lacey Act prosecution was *United States v. McNab*, 2003 WL 21233535 (11th Cir. 2003), in which three U.S. citizens and a Honduran citizen were convicted of smuggling, money laundering and Lacey Act violations associated with a conspiracy to import lobsters into the U.S. taken in