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Restitution and the Lacey Act: New Solutions, Old Remedies

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NOTE

RESTITUTION AND THE LACEY ACT: NEW SOLUTIONS, OLD REMEDIES

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INTRODUCTION

From 1987 until 2001, containers bearing the seemingly legitimate label "seafood" crossed the oceans on ships bound from South Africa for the United States, Hong Kong, and other worldwide destinations.[1] The containers' locked doors, however, concealed millions upon millions of dollars worth of illegally harvested rock lobster and

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1 Indictment at 21–25, United States v. Bengis, S1 03 Cr. 308 (LAK) (S.D.N.Y. 2003) [hereinafter Bengis Indictment].

Patagonian toothfish—more commonly known as Chilean sea bass[2]—destined for sale to restaurants in New York and elsewhere.[3] At the helm of this smuggling scheme was Arnold Bengis, a wealthy U.S. citizen[4] and the owner of one of the largest fishing operations in Cape Town, South Africa.[5] For nearly fourteen years, Bengis and others plundered the seas for illicit aquatic booty. In the process, they devastated these lucrative marine resources, perhaps irrevocably.[6]

While few may know it, Chilean sea bass are heavily overfished.[7] In recent years, an effort to prevent overfishing led twenty-three countries to join the Convention on the Conservation of Antarctic Marine Living Resources, an international effort calling for rational harvesting of fish living in the international waters around Antarctica.[8] In addition to the Convention, several countries have instituted strict regulatory regimes that impose catch limits on fishing vessels operating from their ports.[9] For example, South Africa codified its regulations in the Marine Living Resources Act of 1998 (Marine Act).[10] The Marine Act proscribes, among other things, the harvesting or processing of fish without a permit.[11]

In the United States, the Lacey Act[12] is one of the primary federal conservation statutes. The Act makes it 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 . . . foreign law."[13] In 1981, the Senate explained that the Lacey Act addressed a formidable target:

> In recent years, investigations by agents of the various agencies charged with enforcing wildlife laws have uncovered a massive ille-

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2 Chilean sea bass "is neither from Chile nor a sea bass." Vancouver Aquarium, *U.S.: New Report Gives More Reasons to Pass on Sea Bass*, Sept. 22, 2004, http://www.vanaqua.org/aquanew/fullnews.php?id=1633. The fish found popularity in the United States in the mid-1990s. *See id.*

3 *See* Bengis Indictment, *supra* note 1, at 22, 43.

4 *See* Transcript of Plea at 14, *Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. Mar. 2, 2004) [hereinafter Transcript of Plea].

5 *See* Bengis Indictment, *supra* note 1, at 1–3.

6 *See id.* at 1–3, 12–14.

7 *See* U.S. Dept. of State, Chilean Sea Bass Frequently Asked Questions, http://www.state.gov/g/oes/rls/fs/2002/8989.htm (last visited Mar. 23, 2008).

8 Convention on the Conservation of Antarctic Marine Living Resources art. 2, May 5, 1980, 19 I.L.M. 841, *available at* http://www.ccamlr.org/pu/e/e_pubs/bd/ptl.pdf.

9 *See, e.g.*, PHILIPPE CACAUD, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, FISHERIES LAWS AND REGULATIONS IN THE MEDITERRANEAN: A COMPARATIVE STUDY 9–13 (2005), *available at* ftp://ftp.fao.org/docrep/fao/008/y5880e/y5880e00.pdf.

10 Marine Living Resources Act 18 of 1998, *available at* http://www.info.gov.za/gazette/acts/1998/a18-98.pdf.

11 Combined, sections 13(1) and 58(1)(a)(i) of the Marine Act make it an offense to harvest, process, or possess fish without a permit. *See id.* §§ 13(1), 58(1)(a)(i).

12 16 U.S.C. §§ 3371–78 (2000 & Supp. IV 2004).

13 *Id.* § 3372(a)(2)(A).

> gal trade in fish and wildlife and their parts and products. Evidence indicates that much of this illegal, and highly profitable, trade is handled by well organized large volume operations run by professional criminals. The more sophisticated operations utilize "white collar" crime tactics such as multiple invoicing and other fraudulent documentation to carry out and conceal their illicit activities.[14]

In 2004, defendant Arnold Bengis pled guilty in United States District Court for the Southern District of New York to orchestrating a conspiracy to smuggle approximately $90 million in illegally harvested sea bass and other marine life into the United States and elsewhere.[15] When the shipments arrived in U.S. ports, Bengis and his co-defendants supplied false documentation to U.S. Customs officials.[16] The conspirators unloaded the containers and transported the seafood to Bengis's affiliate companies in Maine and New York.[17] Bengis also smuggled undocumented workers from Cape Town to work for low wages in his Maine processing plant.[18] Bengis and his company, Hout Bay, exploited local South Africans in harvesting South Coast and West Coast rock lobster[19]—two of the world's most sought-after species of lobster.[20] These lobsters inhabit deep ocean waters, typically twenty-four to sixty miles from the South African coast.[21] To maximize its catch allowed under South African law, Hout Bay bought local lobster fishermen's quotas established by the Marine Act and hired those fishermen to work as crewmen on Hout Bay's vessels.[22] These

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14 S. REP. No. 97-123, at 1 (1981).

15 *See* Transcript of Plea, *supra* note 4, at 14; Government's Memorandum of Law in Opposition to Defendants' Joint Motion to Preclude and/or Limit Restitution at 1–2, United States v. Bengis, S1 03 Cr. 308 (LAK) (S.D.N.Y. Oct. 18, 2004) [hereinafter Opposition to Motion to Preclude].

16 *See* Bengis Indictment, *supra* note 1, at 16–17.

17 *See id.* at 2–3, 17.

18 *See id.* at 17–18; Government's Memorandum of Law in Opposition to Defendants' Joint Motion for a Departure from the Applicable Sentencing Guidelines Range at 3, *Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. May 26, 2004) [hereinafter Opposition to Sentencing Guidelines].

19 *See* Government's Memorandum of Law in Opposition to Defendants' Joint Motion for a Departure from the Applicable Sentencing Guidelines Range, Exhibit C, Declaration of Advocate Bruce Morrison at 2–3, *Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. May 26, 2004) [hereinafter Declaration of Bruce Morrison]; Bengis Indictment, *supra* note 1, at 1–2.

20 The South African lobster industry supplies less than two percent of the worldwide demand for lobster. ENVIRO-FISH-AFRICA, AN ECONOMIC AND SECTORAL STUDY OF THE SOUTH AFRICAN FISHING INDUSTRY, VOLUME 3, WEST COAST ROCK LOBSTER 187, *available at* http://www.envirofishafrica.co.za/ess/ESS2000WEBSITE/chapters/wc_rock_lobster.pdf. The industry exports frozen lobster tails, whole frozen lobster, whole cooked lobster, and live lobster to the United States and other countries, generating profits of approximately 200 million Rand. *Id.* That profit figure converts into approximately $24.4 million, based on the March 23, 2008 exchange rate of 1 Rand per 0.1222 U.S. Dollar. *See* Yahoo! Finance Currency Converter, http://finance.yahoo.com/currency (last visited Mar. 23, 2008).

21 *See* Bengis Indictment, *supra* note 1, at 2–3.

22 *See id.* at 8, 12–13. South Africa's MCM quota regime permitted this practice of assigning quotas. *See id.* at 8.

crewmen processed the South Coast lobster while at sea and discarded everything but the tail, which they kept frozen.[23] Upon return to Cape Town, workers at Hout Bay packaged the lobster tails and exported them to the United States.[24] After Hout Bay deducted expenses for catching, processing, and marketing the lobsters, the company agreed to remit profits to the various fishermen in relation to their respective quotas.[25]

In practice, however, the fishermen never saw any of their profits—the defendants simply stole them.[26] In March 2002, Hout Bay contracted for one such quota arrangement with Fullimput, a fishing company based in Cape Town.[27] After a lengthy voyage, Hout Bay refused to pay the Fullimput fishermen their quota profits, amounting to approximately 2,674,780 Rand,[28] or approximately $327,000.[29]

The Government of South Africa instituted civil forfeiture proceedings against Hout Bay in 2001 for violations of the Marine Act and the South African Customs and Excise Act.[30] As a result, Bengis paid approximately $6 million in fines to South Africa, not including the value of his vessels seized by the government.[31] In 2003, a U.S. federal grand jury indicted Bengis for conspiracy to violate the Lacey Act.[32] The federal government prosecuted Bengis and his co-conspirators under the federal conspiracy statute, which makes it unlawful for "two or more persons [to] conspire . . . to commit any offense against the United States."[33]

Although Bengis and his co-conspirators pled guilty in 2004 and have already served their sentences, restitution remains an ongoing issue in their case. The United States has asked the District Court for the Southern District of New York to award restitution to South Africa in the amount of at least $39,726,070—a conservative effort to calculate the actual harm of the defendants' activities on natural marine

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23 *See id.* at 12–13.

24 *See id.*

25 *See* Government's Recommendation Concerning Restitution, Exhibit K, Affidavit of Cameron John Ironside at paras. 6–15, United States v. Bengis, S1 03 Cr. 308 (LAK) (S.D.N.Y. Dec. 22, 2004).

26 *See id.* at para. 16.

27 *See id.* at paras. 6–15.

28 *See id.* at para. 24.

29 This conversion is based on the March 23, 2008 exchange rate of 1 Rand per 0.1222 U.S. Dollar. *See* Yahoo! Finance Currency Converter, http://finance.yahoo.com/currency (last visited Mar. 23, 2008).

30 *See* Declaration of Bruce Morrison, *supra* note 19, at 2–3, 5.

31 *See id.* at. 6; *see also* Transcript of Sentencing at 10, *Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. May 28, 2004).

32 *See* Bengis Indictment, *supra* note 1, at 1–25.

33 18 U.S.C. § 371 (2000).

resources.[34] The United States downgraded this figure from prior estimates of approximately $90 million.[35] In 2007, the district court, after adopting a magistrate's recommendations, denied the government's restitution request.[36] The government has filed a formal notice of appeal with the Solicitor General of the United States. Whether a foreign state can fall within the ambit of the federal statutory regime for restitution[37]—and whether a U.S. court is competent to decide that it does—remains an open question.

Successful conservation, however, requires international cooperation. In some countries, helping to prevent the loss of an endangered species may provide enough incentive to act.[38] But in the world's poorest nations, governments are willing to look the other way when natural resources are decimated.[39] There, a more creative solution is necessary.

As I will argue, the United States can use the federal restitution statutes as a "carrot" to encourage foreign states to assist in conservation efforts. If foreign governments believe that they may receive restitution as a victim, they will have an incentive to cooperate with federal agencies and increase the chances of successful convictions under the Lacey Act. The restitution statutes, however, are silent on whether a foreign state can qualify as a victim. In Part I of this Note, I discuss how courts use the purposive theory of statutory interpretation to navigate around congressional silence. In Part II, I return to the federal restitution statutes. First I examine Congress's stated purpose in passing the Victim Witness Protection Act of 1982.[40] Then I turn to the evolving meaning of the term "victim." Next I discuss Congress's renewed interest in restitution under the 1996 Mandatory Victim Restitution Act[41] and analyze the judicial interpretation of "victim" under

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34 *See* Government's Recommendation Concerning Restitution at 1, *Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. Dec. 22, 2004).

35 *See* Opposition to Motion to Preclude, *supra* note 15, at 1–2, 29–30.

36 *See Bengis*, No. 03 Cr. 0308 (LAK), 2007 WL 2669315, at *1 (S.D.N.Y. Sept. 12, 2007) (denying government's restitution request under the Victim Witness Protection Act); *Bengis*, No. 03 Cr. 0308 (LAK), 2007 WL 241370, at *1 (S.D.N.Y. Jan. 29, 2007) (denying government's restitution request under the Mandatory Victim Restitution Act).

37 *See infra* Part III.

38 *See, e.g.*, William H. Kaempfer & Anton D. Lowenberg, *The Ivory Bandwagon: International Transmission of Interest-Group Politics*, 4 INDEP. REV. 217, 219 (1999), *available at* http://www.independent.org/pdf.tir/tir_04_2_kaempfer.pdf (discussing early-twentieth-century efforts by European colonial powers to create a system of national parks in their African colonies in order to preserve wildlife).

39 *See id.* at 220 (observing that in Kenya, Zambia, and other East African countries, wages as low as $20 to $30 per month combined with minimal law enforcement resources lead to rampant corruption among game wardens in national parks).

40 Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C.).

41 Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227, 1227–41 (codified as amended in scattered sections of 18 U.S.C.).

that act, concluding that courts have read this term expansively. In Part III, I discuss the antitrust, RICO, and wire fraud statutes to illustrate how federal law allows foreign states to qualify as victims in other contexts. Lastly, in Part IV, I argue that allowing foreign states to claim restitution will best promote cooperation with U.S. agencies and further the goals of international conservation.

As I discuss below, neither the restitution statutes themselves nor their legislative history offer any guidance on whether the meaning of "victim" includes foreign nations.[42] At its core, the problem is one of how to deal with congressional silence.

I
APPROACHES TO STATUTORY INTERPRETATION—DEALING WITH CONGRESSIONAL SILENCE

At first glance, it may seem that federal courts can award restitution only according to the strict textual limits of the restitution statutes. Although some judges, most notably Justice Antonin Scalia, champion such a strict textualist approach to statutory interpretation,[43] the Supreme Court often draws on common-law norms to fill in statutory ambiguity.[44]

Federal courts use well-established principles to navigate around congressional silence. As the Supreme Court has made clear, courts have an initial duty to interpret a statute "so as to effect its purpose."[45] But if doubts exist over the purpose or meaning of a statutory term, courts must then look to the common law:

> Congress is understood to legislate against a background of common-law adjudicatory principles. . . . Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident."[46]

It follows, therefore, that unless Congress restricts the common-law remedy of restitution—a remedy that has historically fallen within the equitable powers of courts[47]—federal judges need not view the

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42 *See infra* Part II.

43 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997) ("We do not inquire what the legislature meant; we ask only what the statute means." (quoting Justice Holmes)).

44 *See, e.g.*, Staples v. United States, 511 U.S. 600, 605–06 (1994) (relying on the common-law presumption of mens rea in criminal statutes to hold that the statute in question required mens rea).

45 Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).

46 Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (internal citations omitted) (quoting *Isbrandtsen Co.*, 343 U.S. at 783).

47 *See* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1598–1606 (2002) (discussing the historical roots of restitution in courts of law and equity). Judges have always had broad discretion in deciding whether or not to award restitu-

restitution statutes[48] as limiting their judicial discretion. Rather, judges can utilize the modern theory of "purposive interpretation" to conclude that Congress intended to allow foreign states to seek restitution in federal courts.

During the Progressive era, legal commentators began to champion legislative competence and marginalize judicial discretion.[49] Chief among these commentators was botanist-turned-Harvard Law School Dean Roscoe Pound, who wrote in 1908:

> It is fashionable to preach the superiority of judge-made law. It may be well, however, for judges and lawyers to remember that there is

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tion. For example, in the sixteenth and seventeenth centuries, German courts adopted the "adhesive procedure" (Adhäsionsprozess), which gave judges discretion to grant victims' claims for restitution in criminal cases. *See* Bruce Jacob, *The Concept of Restitution: An Historical Overview, in* RESTITUTION IN CRIMINAL JUSTICE: A CRITICAL ASSESSMENT OF SANCTIONS 45, 48 (Joe Hudson & Burt Galaway, eds., 1975); STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 9 (2d ed. 1970). English courts of the same era demonstrated a similar preference for awarding restitution. *See* Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2718 n.44 (2005) (citing Blackstone for the proposition that English common law authorized judges to issue writs of restitution to robbery victims).

In 1982, the Senate Judiciary Committee made clear, in sweeping language, that the restitution principle "is an integral part of virtually every formal system of criminal justice, of every culture and every time." S. REP. No. 97-532, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2515, 2536. The principle commands that "whatever else the sanctioning power of society does to punish its wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." *Id.*

As history shows, restitution has deep roots in Western civilization. The Code of Hammurabi and the Bible both refer to restitution as a preferred remedy over physical punishment, and they treat restitution as a punishment in itself. *See* Kleinhaus, *supra*, at 2717. Hammurabi's code, for example, required certain criminals to compensate their victims thirty times greater than the damage they caused. *See* Jacob, *supra*, at 46. By the Middle Ages, some Western societies merged the concepts of restitution and punishment. *See* SCHAFER, *supra*, at 5. For example, under Germanic common law, "[t]he 'law of injury' seem[ed] to have been ruled by the idea of reciprocity." *Id.* During this period, a new preference for monetary damages emerged as the remedy for private wrongs. *See id.* at 5–6. By the twelfth century, however, the use of restitution had dwindled as Western monarchies began to see crimes as offenses against the King. *See* Jacob, *supra*, at 47 ("[T]he State's right to punish and exact compensation from the victim superseded the victim's right to recover compensation."). Once states established a monopoly on punishing criminals under developing bodies of criminal law, victims had to look to civil law for restitution. *See id.* (stating that notions of "victim's rights" and restitution "were separated from the criminal law and instead became incorporated into the civil law of torts"). Thus began the development of jurisprudence protecting the rights of the criminal defendant rather than the rights of the victim. *See* David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 35 (1989) ("The [criminal justice] system, as it evolved, protected the rights of the accused with zeal, while ignoring the victim's plight."). As Stephen Schafer notes, "The victim became the Cinderella of the criminal law." SCHAFER, *supra*, at 8. In light of these historical and equitable roots, Congress set out to craft restitution guidelines for federal courts in 1982. *See infra* Part II.

48 *See infra* Part II.

49 *See, e.g.*, Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

> coming to be a science of legislation and that modern statutes are not to be disposed of lightly as off-hand products of a crude desire to do something, but represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focused upon all important details, and hearings before legislative committees.[50]

At this time, courts began to take a slightly more deferential approach that still allowed for judicial discretion.[51] Rather than resisting statutory language in favor of common-law principles, judges embraced statutory text.[52] If necessary, judges departed from that text to give effect to the "purpose" of the legislation.[53] The Supreme Court explained that when the plain meaning of a statute

> has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.[54]

A key supporter of purposive interpretation was Judge Learned Hand. Hand believed that judges needed discretion to legislate beyond statutory text when "slavish" adherence to the text thwarted congressional purpose.[55] Commenting that there is "no surer way to misread any document than to read it literally,"[56] Hand characterized his interpretive process as "'an act of creative imagination' and an 'undertaking of delightful uncertainty.'"[57] In an opinion interpreting tax law, Hand clarified why creativity is essential to purposive interpretation:

> [A]s the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more

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50 *Id.* at 383–84.

51 *See* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 115 (1999) (describing purposive interpretation, where "[t]he dominant practice was to extend statutes to achieve their purpose . . . rather than to limit statutes to preserve the common law").

52 *See id.* Legislative history suddenly "became a competent and reliable source of information about what the legislature was doing." *Id.* at 121. This new approach was significant because "prior judicial practice had excluded evidence of statutory meaning from written legislative materials." *Id.* at 122. In *United States v. American Trucking Associations*, "[t]he court affirmed the importance of the text as evidence of purpose." *Id.* at 132 (citing 310 U.S. 534, 543–44 (1940)).

53 *See id.* at 132.

54 United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)).

55 *See* John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 215 (2001).

56 Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring).

57 Walker, *supra* note 55, at 216–17.

> than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.[58]

I am not suggesting that courts must exercise unbridled discretion to find that foreign states can qualify as victims under the federal restitution statutes. As discussed below, the statutes are silent on whether such entities qualify as victims.[59] But through a purposive reading of the restitution statutes, judges can properly conclude that foreign states may qualify as victims. Here, Learned Hand's words are particularly relevant, as a literal reading of the restitution statutes would surely thwart Congress's goal of championing restitution as a broad-based, fundamental remedy.[60] Thus, courts can remain true to their equitable role[61] while giving effect to congressional intent.

II
WHO QUALIFIES AS A VICTIM UNDER THE RESTITUTION STATUTES

A. The Evolving Meaning of "Victim" in the Victim Witness Protection Act of 1982

Lamenting that federal courts had marginalized restitution to "an occasional afterthought"[62] by the early 1980s, Congress sought to require new "constructive, victim-oriented sentencing practices" to address crime victims' financial losses.[63] This effort resulted in the Victim and Witness Protection Act of 1982 (VWPA).[64]

In the opening provisions of the VWPA, Congress enumerated its purposes:

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58 Helvering v. Gregory, 69 F.2d 809, 810–11 (2d Cir. 1934).

59 *See infra* Part II.

60 *See infra* note 65 and accompanying text.

61 Federal courts remain free to award restitution through their equity jurisdiction independent of any statutory command. Under the Rehnquist Court's canons of statutory construction, separation of powers principles dictate that the judiciary can dispense equitable remedies. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323–25 (1994). Federal courts' equitable jurisdiction has "a background of several hundred years of history," Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944), and "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command," Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). At its essence, equity jurisdiction gives judges the power to fashion flexible remedies on a case-by-case basis. *See Hecht Co.*, 321 U.S. at 329. In passing the mandatory and discretionary restitution statutes, *see infra* Part II, Congress, by "endow[ing] the federal courts with equitable jurisdiction, . . . acts aware of this longstanding tradition of flexibility." California v. Am. Stores Co., 495 U.S. 271, 295 (1990). As Congress has not provided a clear statement indicating that foreign states are never entitled to claim victim status, federal judges should be free to draw on their equitable powers and award restitution to victimized foreign states.

62 S. REP. No. 97-532, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2515, 2536.

63 *Id.* at 31, 1982 U.S.C.C.A.N. at 2537.

64 Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C.).

> (1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;
>
> (2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and
>
> (3) to provide a model for legislation for State and local governments.[65]

Initially, Congress provided little guidance to clarify just who—or what—could constitute a victim. In fact, it included no definition or qualifiers whatsoever.[66] The restitution provision of the VWPA simply reads, "The court, when sentencing a defendant convicted of an offense under this title . . . may order . . . that the defendant make restitution to any victim of the offense."[67]

The legislative history, however, suggests that to a limited extent, Congress acknowledged that "victim" could include nonpersons. The Senate Judiciary Committee explained that federal presentence reports must include a victim impact statement "even in cases where the crime is legally perpetrated against an institution, such as a bank, and there is a human victim such as a bank teller."[68] In addition, the Committee noted that organizations, insurance companies, and state victim compensation programs might qualify as third parties eligible to receive restitution under the VWPA.[69]

The VWPA made clear that restitution is only available to victims of those crimes listed under 18 U.S.C. or under section 902 of the Federal Aviation Act of 1958,[70] implying that Congress did not consider restitution appropriate for *every* conceivable violation of U.S. law. Indeed, the Committee indicated that restitution would not be available in those cases dealing with antitrust, securities, and regulatory violations, all of which trigger "complex issues which are outside the intended scope of Section 3579 such as . . . causation."[71] If Congress feared that restitution proceedings would falter because of difficult causation problems accompanying large-scale, economically-oriented

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65 *Id.* § 2(b), 96 Stat. at 1248–49 (codified as amended at 18 U.S.C. § 1512 note (2000)).

66 *Compare id.* § 5, 96 Stat. at 1253–55 (codified as amended at 18 U.S.C. § 3663) (describing an order of restitution and a procedure for issuance of that order for victims, but not defining the term "victim"), *with id.* § 4, 96 Stat. at 1252 (codified as amended at 18 U.S.C. § 1512) (providing definitions for several terms, including "official proceeding" and "misleading conduct" in different sections amended by the VWPA).

67 *Id.* § 5, 96 Stat. at 1253 (codified as amended at 18 U.S.C. § 3663).

68 S. REP. No. 97-532, at 13, 1982 U.S.C.C.A.N. at 2519.

69 *See id.* at 32–33, 1982 U.S.C.C.A.N. at 2538–39.

70 *See* § 5, 96 Stat. at 1253 (codified as amended at 18 U.S.C. § 3663).

71 S. REP. No. 97-532, at 33, 1982 U.S.C.C.A.N. at 2539.

crimes, Congress may have intended to limit restitution to those victims whose harm was relatively easy to prove.

In 1996, Congress amended the discretionary restitution statute to define "victim."[72] According to the amended statute, a "victim" is

> *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.[73]

Despite statutory language that seems to limit restitution to persons, courts have considerably expanded this definition. Even in cases arising before the 1996 definition, several circuits held that nonpersons fall within the scope of "victim."[74] Specifically, the field of restitution-eligible victims now includes governmental entities[75] and financial institutions.[76]

B. The Mandatory Victims Restitution Act of 1996

In 1996, Congress further demonstrated its commitment to victim restitution[77] by passing the Mandatory Victims Restitution Act

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72 Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended in scattered sections of 18 U.S.C.).

73 *Id.* § 205(a)(1)(F), 110 Stat. at 1227, 1230 (codified as amended at 18 U.S.C. § 3663(a)(2)) (emphasis added).

74 *See* United States v. Durham, 755 F.2d 511, 513–14 (6th Cir. 1985) (concluding that "a non-human entity may be a victim of the offense within the meaning of the Act" but declining to define the "exact contours" of a victim under the VWPA); United States v. Dudley, 739 F.2d 175, 176–78 (4th Cir. 1984) (awarding restitution to United States Department of Agriculture for defendant's food stamp fraud); *see also* Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 524 (1984) (arguing for interpreting the term "victim" expansively despite suggestions in the legislative history that Congress only contemplated that the term included persons).

75 *See, e.g.*, United States v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991) (awarding restitution to both the State of New York and the Internal Revenue Service as victims under the VWPA); United States v. Hand, 863 F.2d 1100, 1102–03 (3d Cir. 1988) (allowing restitution to the Drug Enforcement Agency and United States Attorney's Office); United States v. Sunrhodes, 831 F.2d 1537, 1538–39, 1545–46 (10th Cir. 1987) (awarding restitution to the Indian Health Services Division of the Department of Health and Human Services) (quoting United States v. Ruffen, 780 F.2d 1493, 1496 (9th Cir. 1986)); United States v. Ferranti, 928 F. Supp. 206, 221, 224–25 (E.D.N.Y. 1996) (awarding restitution to the New York City Fire Department).

76 *See, e.g.*, United States v. Kirkland, 853 F.2d 1243, 1246 (5th Cir. 1988) (upholding a restitution award to the Farmer's Home Administration); *Durham*, 755 F.2d at 513 (finding that both an insurance company and a bank qualify as victims under the VWPA).

77 *See* S. REP. NO. 104-179, at 13–14 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 926–27 (outlining the Senate Judiciary Committee's three goals in drafting the mandatory restitution provision: providing full restitution for all identifiable victims of covered offenses; establishing a single set of procedures for issuing restitution orders in federal crimi-

(MVRA).[78] As its name implies, the MVRA makes restitution mandatory in all federal convictions or plea agreements for offenses constituting:

> (i) a crime of violence . . . ; (ii) an offense against property under this title [title 18], including any offense committed by fraud or deceit; or (iii) an offense described in section 1365 (relating to tampering with consumer products); and (B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.[79]

The MVRA incorporated the same definition of victim set forth in the discretionary restitution statute.[80] In clarifying the parameters of the definition, the Senate Judiciary Committee outlined a test for determining whether a person or entity qualifies as a victim.[81] The Committee emphasized that mandatory restitution would apply "only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted."[82]

As under the 1982 Act, Congress declined to adopt a blanket provision making restitution mandatory in *all* federal crimes.[83] Further, the Senate Judiciary Committee made clear that Congress did not intend to disrupt existing restitution regimes contained in other federal statutes: "Regulatory or other statutes governing criminal conduct for which restitution is not presently available historically contain their own methods of providing restitution to victims and of establishing systems of sanctions and reparations that the committee believes should be left unaffected by this act."[84]

C. Judicial Interpretation of "Victim" Under the MVRA

Since the 1996 amendment to the MVRA, courts have continued to interpret the definition of "victim" broadly. Indeed, courts consistently have held that the U.S. government and its agencies can qualify

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nal cases; and consolidating and strengthening procedures for collecting unpaid restitution and unpaid fines).

78 *See* Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended in scattered sections of 18 U.S.C.).

79 *See id.* § 204, 110 Stat. at 1229 (codified as amended at 18 U.S.C. § 3663A(c)(1)(2000)).

80 *Compare id.* § 204, 110 Stat. at 1228 (codified as amended at 18 U.S.C. § 3663A(a)(2)), *with* 18 U.S.C. § 3663(a)(2) .

81 *See* S. REP. No. 104-179, at 19, 1996 U.S.C.C.A.N. at 932.

82 *Id.*

83 *See id.* at 18–19 (describing the list of felonies for which restitution is available and then noting that the new statute preserves then-existing limits on the remedy's availability).

84 *See id.* at 19.

as victims under 18 U.S.C. § 3663A(a)(2).[85] In 2004, the United States Court of Appeals for the Second Circuit addressed this issue as a matter of first impression.[86] In *United States v. Ekanem*, the defendant pled guilty to embezzling funds from the Department of Agriculture's daycare program but challenged the district court's restitution order.[87] He argued that the Dictionary Act[88] controlled the definition of "person," which in turn controlled the meaning of "victim" in § 3663A(a)(2).[89] Under his interpretation, the term "victim" would not include governmental entities.[90] The court, however, held that the Dictionary Act did not control the meaning of "victim" under the mandatory restitution statute because the context of § 3663A(a)(2) "indicates otherwise."[91] Specifically, the court looked to the enforcement provision for both the mandatory and discretionary restitution statutes.[92] That provision states: "In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution."[93] Given this language, it would be impossible for the court to find that "victim" as used in the two restitution statutes did not include the United States.[94] Lastly, the court noted that its holding conformed to Congress's intent under the MVRA to broaden restitution as a remedy.[95]

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85 *See, e.g.*, United States v. Leahy, 464 F.3d 773, 793 (7th Cir. 2006) (explaining that a government agency can be a victim under the MVRA for purposes of restitution); United States v. Senty-Haugen, 449 F.3d 862, 865 (8th Cir. 2006) (holding that the Internal Revenue Service is an eligible victim under the MVRA).

86 *See* United States v. Ekanem, 383 F.3d 40, 41 (2d Cir. 2004) ("[W]e hold, as a matter of first impression in this Circuit, that the Government fits within the meaning of 'victim' under the MVRA.").

87 *See id.* at 41–42.

88 1 U.S.C. § 1 provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2000).

89 *Ekanem*, 383 F.3d at 42.

90 *Id.*

91 *Id.* at 42–43 (quoting 1 U.S.C. § 1). The *Ekanem* Court also cites to *Rowland v. California Men's Colony*, which explains that "context" as used in the Dictionary Act refers to the text of the congressional statute at issue or related acts, but does not "point further afield" to legislative history. 506 U.S. 194, 199–200 (1993).

92 *See Ekanem*, 383 F.3d at 42–44 (interpreting the meaning of "victim" in the MVRA and VWPA).

93 18 U.S.C. § 3664(i) (2000).

94 *Ekanem*, 383 F.3d at 43. The court also noted that its prior cases and those of other circuits holding that the United States was a "victim" within the scope of the VWPA compelled the same finding under the MVRA, as the latter Act was a supplement to the former. *See id.*; *see also* United States v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991) (upholding a restitution award of $1,221,900 in unpaid taxes to the Internal Revenue Service).

95 *See Ekanem*, 383 F.3d at 44 (citing S. REP. No. 104-179, at 12 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 925).

The Supreme Court has not yet granted certiorari to delimit the scope of "victim" under the MVRA definition.[96] Although the Court has ruled that the term "person" under other criminal statutes, such as the Sherman Antitrust Act, does not include states,[97] that interpretation does not control when Congress specifically defines the term. Circuits other than the Second Circuit have also dealt with the question of whether the United States is a victim under the MVRA.[98] Whether the Second Circuit's reasoning in *Ekanem* extends to foreign states is the issue to which I now turn. Because other federal statutes concerning foreign states provide helpful guidance here, I will examine three separate categories: antitrust statutes, federal RICO statutes, and federal wire fraud statutes.

III
How Federal Law Treats Foreign States as Victims in Other Contexts

A. Antitrust Statutes

Foreign states have long had standing to sue in U.S. courts.[99] For example, the Clayton Act is a criminal statute that includes a civil provision allowing plaintiffs to sue for treble damages by alleging that the defendant violated antitrust law.[100] The Act itself has language permitting a foreign state to sue in U.S. federal courts.[101] Although Congress amended the Act in 1982 to give standing to foreign states, the Supreme Court had already held that foreign states could sue under the Clayton Act.[102] In *Pfizer, Inc. v. Government of India*, the Court held that foreign states qualified as "persons" within the Clayton Act's defi-

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96 *See, e.g.*, Balogun v. U.S. Att'y Gen., 425 F.3d 1356 (11th Cir. 2005), *cert. denied*, 547 U.S. 1113 (2006).

97 *See* United States v. Cooper Corp., 312 U.S. 600, 604–05 (1941).

98 *See* United States v. Senty-Haugen, 449 F.3d 862, 865–66 (8th Cir. 2006) (citing *Ekanem*, 383 F.3d at 42–44) (dismissing defendant's argument that the United States is not a "person" and therefore not a "victim" within the meaning of § 3663A(a)(2)); *see also Balogun*, 425 F.3d at 1361 (citing *Ekanem*, 383 F.3d. at 43–44).

99 *See* 28 U.S.C. § 1332(a) (2000) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . a foreign state . . . as plaintiff and citizens of a State or of different States."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964) ("[S]overeign states are allowed to sue in the courts of the United States." (internal citations omitted)); Guar. Trust Co. v. United States, 304 U.S. 126, 134 (1938) (permitting the Soviet government to bring suit in federal court and relaxing the rules of procedure for foreign states).

100 *See* 15 U.S.C. § 15 (2000).

101 *See id.* § 15(b). However, foreign states are limited to "actual damages." *See id.* § 15(b)(1). The Act defines "foreign state" as defined in 28 U.S.C. § 1603(a). *Id.* at § 15(c)(2). Under that provision, a "foreign state . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. §1603(a) (2000).

102 Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 318 (1978).

nition of that word.[103] *Pfizer* is the only case in which the Court has ruled on Congress's use of the term "person" as applied to a foreign state.[104] As I argue that courts should read the MVRA and VWPA's use of the word "person" to include foreign states, the *Pfizer* Court's reasoning is instructive.

In *Pfizer*, India, Iran, and the Philippines sued under 15 U.S.C. § 15, alleging damages from Pfizer's price fixing and market manipulation in its worldwide sales of antibiotics.[105] The Court held that whether or not a foreign state could sue depended on "whether it is a 'person' as that word is used in [15 U.S.C.] § 4."[106] The Court observed that it faced congressional silence on this question.[107] Indeed, as under the MVRA and VWPA definitions of "victim,"[108] "there is no statutory provision or legislative history that provides a clear answer."[109] The Court first looked to the dual purposes of the Clayton Act's civil provision: deterring violators and compensating victims.[110] According to the Court, denying a foreign plaintiff the civil remedy under § 4 would thwart Congress's dual aims.[111] Specifically, when a domestic criminal conspiracy has ripple effects abroad, the threat of suit by a foreign plaintiff furthers deterrence goals:

> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[112]

The same utilitarian reasoning allows a court to award restitution to foreign victim states when defendants commit Title 18 offenses.[113]

The Court then rejected Pfizer's argument that Congress "clearly understood" the word "person" to exclude foreign states when it passed the Sherman Act in 1890.[114] Nineteenth-century case law in-

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103 *See id.* at 318–20.

104 Indeed, the scope of the word "person" was the central issue in *Pfizer*. *See id.* at 311.

105 *See id.* at 309. The district court dismissed one foreign state from the case, and five other nations sued Pfizer in separate actions. *See id.* at 310 n.1.

106 *Id.* at 312.

107 *See id.*

108 *See supra* Part II.

109 *Pfizer*, 434 U.S. at 312.

110 *See id.* at 314.

111 *See id.* at 314–15.

112 *Id.* at 315.

113 *See supra* Part II.

114 *See Pfizer*, 434 U.S. at 315–16.

terpreting contemporaneous statutes reveals that Congress applied the term "person" to governmental bodies[115] in much the same way that courts gave "victim" a broad reading under the VWPA.[116] Drawing heavily on its own reasoning in *Georgia v. Evans*,[117] the Court acknowledged that a foreign state "can be victimized by anticompetitive practices just as surely as a private person or a domestic State,"[118] and therefore "[n]othing in the [Sherman] Act, its history, or its policy, could justify so restrictive a construction of the word 'person.'"[119]

Given the Court's reasoning in *Pfizer*, no reasonable basis exists to conclude that a foreign state can *never* qualify as a victim. Just as *Pfizer* interpreted congressional silence as a license to expand the term "person" to vindicate the legislative goals underlying the Clayton Act, courts should take the same approach when interpreting the federal restitution statutes. By passing the VWPA and MVRA, Congress intended to broaden the age-old restitution remedy existing at common law and ensure that courts apply it consistently.[120] Clear legislative intent and the broader deterrence goals discussed in *Pfizer* justify awarding restitution to foreign states, provided that a defendant's crimes directly and proximately harmed the foreign state.

B. The Racketeer Influenced Corrupt Organizations Act

Like the Clayton Act, the Racketeer Influenced Corrupt Organizations Act (RICO)[121] is a unique federal criminal statute that allows plaintiffs to bring civil suits in U.S. courts for damages resulting from a defendant's predicate RICO offenses.[122] Such predicate offenses include bribery,[123] counterfeiting,[124] immigration-related frauds,[125] and a laundry list of nearly two-dozen other crimes.[126] RICO's civil rem-

115 *See id.* at 315 n.15 (citing Stanley v. Schwalby, 147 U.S. 508, 514–17 (1893); Dollar Sav. Bank v. United States, 86 U.S. (19 Wall.) 227, 239 (1873); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850)).

116 *See supra* notes 75–76.

117 316 U.S. 159, 162–63 (1942) (rejecting argument that "person," as used in antitrust statutes, excludes all sovereign states).

118 *See Pfizer*, 434 U.S. at 318.

119 *Id.* (quoting *Evans*, 316 U.S. at 162–63).

120 *See supra* notes 63–84.

121 18 U.S.C. §§ 1961–68 (2000).

122 *See id.* § 1964(c). For background to the RICO statute and its civil remedy provision, see generally Michael A. Gardiner, Comment, *The Enterprise Requirement: Getting to the Heart of Civil RICO*, 1988 WIS. L. REV. 663 (1988) (reviewing the history of RICO and discussing the lower courts' differing applications of *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)); Faisal Shah, Note, *Broadening the Scope of Civil RICO:* Sedima S.P.R.L. v. Imrex Co., 20 U.S.F. L. REV. 339 (1986) (discussing the history, purpose, and the Supreme Court's interpretation of RICO in the context of a then-recent Supreme Court opinion).

123 18 U.S.C. § 201.

124 *Id.* §§ 471–73.

125 *Id.* §§ 1425–27.

126 *See id.* § 1961(1)(B).

edy provision allows "[a]ny person injured in his business or property" to recover treble damages for a defendant's violations of predicate offenses.[127]

Although Congress did not explicitly state that a foreign state has standing to sue under 18 U.S.C. § 1964(c), it has implied that a foreign state may sue a domestic defendant under RICO.[128] The International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001[129] amended RICO to add additional predicate acts, such as international money laundering.[130] As Senator John Kerry said to Congress when it passed these RICO amendments, "[T]oday [we] clarify that it is the intent of the legislature that our allies will have access to our courts and the use of our laws if they are victims of smuggling, fraud, money laundering, or terrorism."[131] Because Congress seems to acknowledge that foreign states can qualify as victims, it is appropriate here to examine cases, few though they may be, in which foreign states have claimed to qualify as victims under RICO. These cases also illustrate how courts have interpreted the term "person" in a statutory context other than the MVRA.

As a starting point, the RICO statute defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property."[132] Lower courts have held that a foreign state can qualify as a person under RICO's definition.[133] In *Republic of the Philippines v. Marcos*, the Ninth Circuit dismissed defendant Ferdinand Marcos's argument that the Republic was not a "person" under § 1961(3).[134] As the court said, "[t]he foreign nature of the Republic does not deprive it of statutory personhood."[135]

In *European Community v. RJR Nabisco, Inc.*, the district court analyzed the scope of "person" under § 1961(3) in more detail.[136] There,

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127 *See id.* § 1964(c).

128 *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, Title III, 115 Stat. 272, 296–342 (codified in scattered sections of 12, 15, 18, 22, 31 U.S.C.) (incorporating the International Money Laundering Abatement and Financial Anti-Terrorism Act into the Patriot Act).

129 *Id.*

130 *See* 18 U.S.C. § 1956(c)(7).

131 147 CONG. REC. S11028 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry).

132 18 U.S.C. § 1961(3).

133 *See* Republic of the Phil. v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988); European Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d. 456, 487 (E.D.N.Y. 2001). *But see* United States v. Bonanno Organized Crime Family, 879 F.2d 20, 23 (2d Cir. 1989) (holding that the United States cannot be a "person" for purposes of civil RICO suits without "unequivocal expression" of congressional intent).

134 *See Marcos*, 862 F.2d at 1358 (citing Ill. Dep't of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985)).

135 *Id.* (citing Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978)).

136 *See* 150 F. Supp. 2d at 487–88.

several member states of the European Community (EC) sued American tobacco companies under the RICO civil provision, claiming that the defendants engaged in a broad conspiracy to smuggle cigarettes into the EC to avoid paying import duties and other taxes.[137] The court determined that the EC qualified as a "person" under RICO by looking at dictionary definitions, observing in particular that the term "entity" includes "public entity."[138] The court also stressed that Congress chose not to qualify "person" with the adjective "private" when drafting § 1961(3) "despite the use of the phrase 'private persons' in the legislative history."[139] Indeed, as the court observed, finding that a foreign state can bring a civil RICO action "accords fully with Congress' intention that RICO 'not merely compensate victims but turn them into prosecutors . . . dedicated to eliminating racketeering activity.'"[140] Mindful that criminal activities in the United States may have repercussions abroad, the court in *RJR Nabisco* observed that limiting RICO to domestic plaintiffs "would . . . discount the impact on other countries of racketeering activities originating in the United States."[141]

The Second and Eleventh Circuits both held that the common-law revenue rule prevents a foreign state from suing under RICO to recover tax revenue lost through fraud.[142] Neither circuit, however, disputed the conclusion that a foreign state could qualify as a person under the RICO statute, thus allowing the foreign victim state to sue.[143]

In *Marcos*—the only reported case in which a foreign state successfully sued under RICO—the Republic of the Philippines obtained a preliminary injunction against its former dictator and his wife.[144] The Republic alleged that Ferdinand and Imelda Marcos engaged in a RICO enterprise when they transported into the United States vast sums of money they obtained fraudulently from the Republic.[145] By investing in California real estate, establishing California bank accounts, and bringing property worth over $7 million into Hawaii, the Marcoses committed wire and mail fraud, and transported stolen

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137 *See id.* at 460–61.

138 *See id.* at 487 & n.17.

139 *See id.* at 487–88.

140 *Id.* at 489 (alteration in original) (quoting Rotella v. Wood, 528 U.S. 549, 557 (2000)).

141 *Id.*

142 *See* European Cmty. v. RJR Nabisco, Inc., 424 F.3d 175, 182 (2d Cir. 2005); Republic of Hond. v. Philip Morris Cos., 341 F.3d 1253, 1255, 1261 (11th Cir. 2003); Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 106 (2d Cir. 2001).

143 *See RJR Nabisco*, 424 F.3d at 177–83; *Republic of Hond.*, 341 F.3d at 1255–61.

144 *See* Republic of the Phil. v. Marcos, 862 F.2d 1355, 1358, 1364 (9th Cir. 1988).

145 *See id.* at 1358.

property.[146] As the Ninth Circuit explained, this pattern satisfied all elements of a RICO offense:

> The purposes of the acts here alleged are the same—to invest and to conceal fraudulently-obtained booty. The results are the same—the investment of the booty. The principals are the same—the Marcoses. The victim is the same—the Republic. The episodes are not isolated events. They represent a plan and a practice of getting the fruits of fraud out of the Philippines and into the assumed safety of the United States.[147]

Thus, even though federal law viewed the primary victim in *Marcos* as the United States because the Marcoses based their operations in the United States, thereby harming U.S. interstate commerce,[148] the RICO statute still gave judicial recourse to a secondary victim—a foreign state.[149]

As these examples show, the RICO statute provides foreign states with a means to qualify as victims in U.S. courts. Significantly, these cases also show that courts are free to read the term "person" expansively. Judges, therefore, need not adopt a strict textualist approach when interpreting the term as used in the MVRA and VWPA.

C. The Federal Wire Fraud Statute

The federal wire fraud statute, 18 U.S.C. § 1343, creates additional scenarios in which a foreign state can qualify as a victim. It is therefore instructive to examine how courts have considered restitution in the context of that statute. Indeed, Congress "has expressed with notable clarity a policy of mandatory restitution in *all* wire fraud prosecutions."[150]

In *Pasquantino v. United States*, the Supreme Court held that a plot to defraud a foreign government of its tax revenues violated § 1343.[151] The defendants, while in New York, ordered liquor from stores in Maryland by telephone.[152] They then smuggled the liquor into Canada, evading Canadian customs officials and avoiding import duties equivalent to twice the purchase price.[153] The Court concluded that the revenue constituted property that Canada had a right to recover because Canada had a clear economic interest in receiving its tax reve-

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146 *See id.*

147 *Id.* Even the dissent in *Marcos* did not challenge the validity of the Republic's claim. *See id.* at 1364 (Schroeder, J., dissenting) ("I join in the majority's conclusion that there is a well-pleaded RICO claim providing federal subject matter jurisdiction.").

148 *See id.* at 1358–59.

149 *See id.* at 1359, 1363.

150 Pasquantino v. United States, 544 U.S. 349, 383 (2005) (Ginsburg, J., dissenting).

151 *See id.* at 352–53 (majority opinion).

152 *See id.* at 353.

153 *See id.*

nue.[154] According to the Court, the common-law revenue rule, which prohibits one country from enforcing another's tax laws, did not bar conviction[155] so long as the United States brought its case pursuant to a domestic regulatory interest and not purely to enforce foreign laws.[156] Although the district court did not order restitution after the U.S. government recommended against it,[157] the government reversed itself and argued in favor of restitution before the Supreme Court.[158]

After finding that the underlying prosecution in *Pasquantino* served valid domestic interests, the Court implied that a district court could award restitution to Canada if it chose to do so.[159] According to the Court:

> We do not think it matters whether the provision of restitution is mandatory in this prosecution. Regardless, the wire fraud statute advances the Federal Government's independent interest in punishing fraudulent domestic criminal conduct . . . . *The purpose of awarding restitution in this action [pursuant to 18 U.S.C. § 3663A] is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct.*[160]

The Court also stated in dicta:

> [A]ny conflict between mandatory restitution and the revenue rule would not change our holding today. If awarding restitution to foreign sovereigns were contrary to the revenue rule, the proper resolution would be to construe the Mandatory Victims Restitution Act not to allow such awards, rather than to assume that the later enacted restitution statute impliedly repealed § 1343 as applied to frauds against foreign sovereigns.[161]

Significantly, the Court did not decide that the MVRA prohibited such awards,[162] implicitly suggesting that under the MVRA's own command, an award *shall* follow.

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154 *See id.* at 355–57.

155 *See id.* at 364–68.

156 *See id.* at 364.

157 *See id.* at 382 (Ginsburg, J., dissenting); Brief for the United States at 19, *Pasquantino*, 544 U.S. 349 (No. 03-725), 2004 WL 1743937.

158 *See Pasquantino*, 544 U.S. at 382 (Ginsburg, J., dissenting) ("While 'the prosecutor did concede below that restitution was not appropriately ordered,' it is in fact '[t]he position of the United States . . . that restitution under the mandatory statute should be ordered . . . .'" (alterations in original) (quoting Transcript of Oral Argument at 36, *Pasquantino*, 544 U.S. 349 (No. 03-725)).

159 *See id.* at 364–68 (majority opinion).

160 *Id.* at 365 (emphasis added).

161 *Id.*

162 *See id.*

IV
GRANT RESTITUTION TO FOREIGN STATES TO PROMOTE COOPERATION WITH U.S. PROSECUTIONS WHERE DEFENDANT'S ACTIVITIES HARMED A FOREIGN STATE

Creating an incentive for foreign cooperation is both consistent with the original purposes of the Lacey Act and critical to its success. By criminalizing the importation and sale of illegally harvested wildlife, the Lacey Act seeks to eliminate the United States as a "market of the 'pothunter.'"[163] Simultaneously, the Act is intended to augment state and foreign environmental laws and regulations, thereby giving teeth to the federal policy against poaching.[164] As Senator John Chafee made clear, by shutting down the U.S. market to poachers, the Lacey Act is a vital component of international conservation efforts:

> These [foreign] countries are what one could call "wildlife-producing" nations. Their attempts to protect various species can be all but torpedoed by the fact that a wildlife consumer always waits somewhere. While some consumption is justified, other trade violates the efforts both domestically and internationally to preserve species.
>
> This is what the Lacey Act is about. . . .
>
> What the Lacey Act says is that we are willing to close an open door here in this country, so that international conservation goals can be met.[165]

To meet these goals, nations will have to assist each other in enforcing relevant conservation laws. As the Senate made clear, such cooperation is key to the success of the Lacey Act:

> [The Act] is also designed to promote reciprocity. If we assist a foreign country in enforcing its conservation laws by closing our market to wildlife taken illegally in that country, they may in turn help to enforce conservation laws of the United States by prohibiting the sale within their borders of wildlife taken illegally within the United States.[166]

Bengis underscores the need for a cooperative approach to conservation—both importing and exporting countries must ensure that antipoaching efforts are successful. As the U.S. government indi-

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163 H.R. REP. NO. 97-276, at 7 (1981).

164 *See* H.R. REP. NO. 56-474, at 2 (1900) ("This bill is intended to begin where the State laws leave off.").

165 *Amending the Black Bass and Lacey Acts: Hearing Before the Subcomm. on Resource Protection of the Comm. on Environment and Public Works*, 96th Cong. 1 (1979) (statement of Senator John H. Chafee).

166 S. REP. NO. 91-526 (1969), *as reprinted in* 1969 U.S.C.C.A.N. 1413, 1425.

cated, the United States and South Africa both had substantial interests at stake in the prosecution of Arnold Bengis:

> [T]he United States is the world's largest consumer of South Coast rock lobster, purchasing over 80% of [such] lobster harvested off the South African coast. The defendants' activities—in massively overharvesting that resource and dumping large quantities of stolen lobster on the United States market—had a serious impact on the United States market, the long-term health of the rock lobster population, and the United States' long-term rock lobster supply.
>
> . . . .
>
> . . . It likely is no exaggeration to conclude that the defendants' crimes made them rich at the expense of considerable damage to South Africa's natural resources.[167]

Although South Africa has an established legal system and effective law enforcement agencies to combat poaching,[168] many other "wildlife-producing" states do not. For this reason, the cooperative approach to international conservation may fail unless such foreign states have added incentives to assist the United States in Lacey Act prosecutions.

It is here that restitution will likely play a critical role. By allowing foreign states to collect restitution from defendants convicted of Lacey Act offenses, federal judges may be able to promote greater cooperation with U.S. agencies. If foreign states know at the outset that they stand to collect restitution from defendants convicted in U.S. courts, the foreign states have an incentive to help ensure successful prosecutions under the Lacey Act. These foreign states should be more inclined to lift any barriers to cooperation with the United States, be they diplomatic, bureaucratic, or otherwise.

In addition, because a U.S. judge must ultimately decide whether to grant restitution,[169] there is little danger of abuse by foreign states erroneously claiming that they qualify as victims. Under both the MVRA and VWPA definitions of "victim," the United States must show that, at a minimum, the foreign state was "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[170] This statutory test protects against the risk of a foreign state obtaining restitution after making only a colorable claim of victim status.[171]

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167 *See* Opposition to Sentencing Guidelines, *supra* note 18, at 31–32, 36.

168 *See* Marine Living Resources Act 18 of 1998, *available at* http://www.info.gov.za/gazette/acts/1998/a18-98.pdf.

169 *See* 18 U.S.C. § 3663(a)(1)(A) (2000); *id.* § 3663A(a)(1).

170 *Id.* § 3663(a)(2); *id.* § 3663A(a)(2).

171 *See id.* § 3663(a)(2); *id.* § 3663A(a)(2).

CONCLUSION

Combating wildlife poaching and enforcing U.S. conservation laws requires an international cooperative effort. Although federal laws like the Lacey Act allow for prosecutions of offenders who import illegally caught fish and wildlife into the United States, sometimes foreign states may need an added incentive to cooperate in prosecuting such cases.

I have argued that federal courts can provide this incentive by awarding restitution to foreign states that prove they were directly and proximately harmed by defendants' smuggling activities. Although the federal restitution statutes do not explicitly allow courts to make such awards, granting restitution in this manner would be consistent with purposive theories of statutory interpretation. In addition, federal law already allows foreign states to qualify as victims in other contexts. Expanding restitution is consistent with these aims.

Furthermore, federal courts should utilize their traditional powers at equity and grant restitution to foreign states where appropriate. If resistant foreign states know that they stand to collect restitution if a defendant is convicted under the Lacey Act, such states will be more likely to assist the United States. That assistance, in turn, could increase the likelihood of a conviction and further international conservation efforts.