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Comment
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*1051 FROM COMITY TO COMEDY: THE NINTH CIRCUIT'S BLANKET INJUNCTION ON THE SEA SHEPHERD'S SOUTHERN OCEAN ACTIVITIES MAY BE LAUGHING IN THE FACE OF ESTABLISHED INTERNATIONAL LAW

INTRODUCTION

On December 18, 2012, the Court of Appeals for the Ninth Circuit issued a preliminary injunction enjoining whale activist group Sea Shepherd from approaching Japanese whaling vessels ("Whalers")[1] in the Southern Ocean.[2] The decision comes after a bitter two-decade struggle over whaling in and around the Antarctic region. The saga has involved public campaigns, dangerous attacks, and international litigation that seemed to resolve when the Australian Federal Court ("AFC") issued an injunction on whaling in Australian-claimed regions of the Antarctic.[3]

The inclusion of U.S. courts in what otherwise has been a Southern-Hemisphere affair represents a new twist in the story. The Whalers took the legal initiative and brought suit in the U.S. Federal District Court seeking injunctive relief under the Alien Tort Statute.[4] The District Court denied relief for, among other reasons, the doctrine of international comity[5]--a respect for the judgments of foreign courts.[6] On appeal, the Whalers won temporary reprieve pending a decision on the merits.[7]

***1052** The injunction is set to be tested. On February 17, the Sea Shepherd kept up its promise to protect the whales[8] and engaged the Whalers to prevent their hunt of minke whales. In turn, the Whalers have begun a contempt action against Sea Shepherd over an alleged breach of the injunction.[9] What remains to be seen is how the U.S. Court of Appeals will proceed in an area already adjudicated by the Australian Injunction.

I. WHALING IN THE SOUTHERN OCEAN

The hunting of whales became subject to international regulation in 1946 through the International Convention for the Regulation of Whaling.[10] By that treaty, the International Whaling Commission ("IWC") was established with power to set annual catch quotas for each member state. Since 1986, IWC has maintained a "zero catch" limit on commercial whaling.[11] This was subject to certain exceptions; most controversially that states could continue whaling for "scientific" research.[12] The ICW lacks sanctioning power for quota violations, leaving enforcement to the member states.[13]

A. Japanese Whaling Operations

In 1987, Japan enacted the "Japanese Whaling Research Program Under Special Permit in the Antarctic" Act (JARPA),

which licensed the hunting of whales in the Southern Ocean for scientific research purposes.[14] For more than twenty years, Japan's permit holders have killed thousands of whales in the Southern Ocean with little evidence that the killing is necessary to perform any legitimate research.[15] Japan maintains that it need not provide any scientific studies showing the results of its research in order to justify classification as a "research" program.[16]

1053*B. National Intervention: Australia's Whaling Sanctuary

In 1999, the Australian Parliament enacted the "Environment Protection and Biodiversity Conservation Act" (Cth), banning commercial whaling within the Australian Whale Sanctuary (AWS).[17] The AWS is a region of 200 nautical miles off the Australian Antarctic Territory (AAT), a body of coastal land in Antarctica claimed by Australia.[18] Ninety percent of Japanese authorized whaling takes place in the AWS.[19] Regulation of the AWS zone is based upon Australia's claim to sovereignty in Antarctica,[20] and the assertion that the waters adjacent constitute an "exclusive economic zone" (EEZ) under the 1982 United Nations Convention on the Law of the Sea.[21] While the notion of EEZ is accepted under international law, only the United Kingdom, France, Norway, and New Zealand officially recognize Australian sovereignty over the AAT.[22] Several states, including Japan and the United States, decline to recognize any territorial land claims over Antarctica.[23]

C. Litigation in the Australian Courts

The ambiguity of Australian sovereignty has not deterred private actors from taking Whalers to court over actions in the AWS. In the Australian Injunction case, the Humane Society sought an injunction in the AFC against owners of the whaling fleet that had been carrying out Antarctic whaling under the JARPA scientific license.[24] The Whalers refused to ***1054** participate in the proceedings.[25] After an evidentiary hearing, the AFC issued a judgment declaring that the whaling fleet had "killed, injured, taken and interfered with Antarctic minke whales," fin whales, and humpback whales in the AWS in contravention of the legislation, and permanently enjoined such activity.[26] However, owing to the delicate diplomatic situation, neither Australia's courts nor its other arms of government have attempted to enforce the injunction.[27]

D. Role of Private Parties

Over the years, Sea Shepherd has actively intervened in the Southern Ocean to keep the Whalers at bay. Sea Shepherd characterizes its Southern Ocean campaigns as "aggressive protests;" the Whalers characterize them as terrorism.[28] Launching its fleet from Australian ports, Sea Shepherd has engaged in risky tactics in an effort to frustrate the Whalers' efforts. Equally dangerous, the Whalers have implemented risky countermeasures to deter intervention during the whaling season.[29]

II. CURRENT ACTION

In December 2011, the Whalers filed a motion for preliminary injunction in Federal District Court seeking to enjoin Sea Shepherd's tactics. The Whalers claimed that such tactics constituted international piracy and other torts actionable under the Alien Tort Act.[30]

After oral argument on February 16, 2012, the District Court denied the Whalers' request, finding the Sea Shepherd's actions did not constitute ""piracy" under the Alien Tort Act.[31] Further, the court held that an injunction was still not warranted because: (1) plaintiffs had failed to show they would suffer "irreparable harm" absent an injunction, (2) the public interest did not favor an injunction, and (3) plaintiffs came to the court with "unclean ***1055** hands."[32] Notably, as an independent basis, the court also denied injunctive relief under the doctrine of international comity.[33] The Whalers appealed.

In an apparent back flip from the District Court's deference to international comity, the Ninth Circuit issued a preliminary injunction against Sea Shepherd on December 18, 2012.[34] However, the injunction was issued pending a decision on the merits. The decision enjoins Sea Sheperd from approaching the Whalers on "open sea."[35] The injunction's vague language does not indicate whether or not it applies to activity in the AWS. If it does, the Ninth Circuit may have taken the first step to clarify the murky waters of international comity.

III. APPLICATION OF COMITY

There is no treaty between the United States and any other country requiring the recognition of foreign judgments, decrees, or orders (collectively "judgments") in the United States. Moreover, there is neither a constitutional basis nor federal statute requiring a foreign court's judgment to be given full faith and credit.

In *Hilton v. Guyot*, the U.S. Supreme Court treated the enforceability of foreign judgments as a matter of "comity of nations," concluding that comity called for enforcement of judgments rendered in another state in favor of a citizen of that state against a non-citizen on the basis of reciprocity.[36] The *Hilton* Court declined to enforce the judgment of a French court against two U.S. citizens on the ground that French courts, if the facts were reversed, would not enforce the judgment of a U.S. court. Notwithstanding that decision, the great majority of courts in the United States have since rejected the requirement of reciprocity.[37]

If an American court is reasonably convinced that a foreign judgment comports with the American concept of due process, comity will be afforded.[38] The factors suggesting that a United States court will recognize and enforce a foreign court's judgment derive from *Hilton* and include: a demonstrated opportunity for a full and fair trial abroad; trial before a court of competent jurisdiction; court engaged in regular proceedings; jurisdiction over the parities was established by a "minimum contacts" test; and the system of jurisprudence is likely to secure the impartial administration of justice between litigants of different countries with no showing of prejudice in the court or system of laws, nor any fraud in procuring the ***1056** judgment.[39] Further, a foreign court's judgment will not be enforced if it violates U.S. public policy. This "standard is high, and infrequently met."[40]

However, the *Hilton* factors do not represent a test per se, and there is little guidance on how lower courts should apply the doctrine. Because the United States has not enacted any federal legislation with respect to enforcing foreign judgments, and because the nation has not acceded to any treaties with other nations concerning judgment-recognition or enforcement, the recognition and enforcement of judgments issued by foreign courts is governed by the laws of the various states. The result: a legal minefield that has left circuit courts to interpret as they see fit.

A. The AWS Is Australian Territory; Therefore, Any Judgments Rendered Should Be Recognized As Legitimate Sovereign Action

The Whalers rely on the argument that the United States does not recognize the AWS.[41] Recognition, however, is not the test of sovereignty under international law.[42] Under customary international law, acquisition of sovereignty over territory that does not already belong to another state is established by effective occupation of the territory.[43] The decision of the Permanent Court of International Justice in the Legal Status of Eastern Greenland (1933) PCIJ Series A/B No 53 stated:

> [A] claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.
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> ....
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> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly ***1057** true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

Despite the general lack of recognition by other states, Australia has established territorial sovereignty in Antarctica under international law through effective occupation of the coastline surrounding its three permanent Antarctic bases.[44]

B. Even If the AAT Is Not Recognized, The Australian Court Order Arguably Satisfies the Hilton Factors

1. Appropriate forum is furnished in the AFC

The *Hilton* factors to determine deference to comity of foreign judgments focuses on a fair tribunal, notice, and an opportunity to be heard. In *Vedatech K.K. v. Crystal Decisions, Inc.*, the federal district court in California's northern district enforced an English injunction under principles of comity where the party was given, over the course of ten years, ample opportunity to make an adequate presentation in the English forum.[45] Because no genuine arguments were made that the procedures afforded by the English court were deficient or fundamentally unfair in any way, or that the judges of the English court did not undertake a detailed and careful inquiry into the merits of the claims, the court found no reason to disturb the judgment.[46]

Arguably, the appropriate impartial forum was provided for in the Australian Injunction Case. Although the Whalers did not participate in the proceedings, it was their decision not to do so. The Whalers were afforded notice and a default judgment was not entered in their absence.[47] Rather, the Humane Society was required to prove their case before the injunction was issued. The case was under the jurisdiction of the AFC and can be appealed in the Australian courts.

2. Recognition of the Australian injunction is not contrary to American public policy

The Ninth Circuit held in *Yahoo! Inc. v. La Ligue Contre Le Racisme* that "[g]eneral comity concerns include ... whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just."[48] When defining "repugnant," the court held:

> Under the repugnancy standard, American courts sometimes enforce judgments that conflict with American public policy or are based on foreign law that differs substantially from American state or federal law .... ***1058** Inconsistency with American law is not necessarily enough to prevent recognition and enforcement of foreign judgment in the United States.[49]

Recognition of the AAT injunction does not conflict with American public policy, but rather supports it. In December 2010, the United States joined several other countries in opposing whaling in the Southern Ocean. Further, the United States reaffirmed its commitment to the global moratorium on commercial whaling.[50]

C. Alternatively, Despite Sovereignty, Without a 'True Conflict' the Ninth Circuit May Deny All Comity Claims

While the *Hilton* factors have been applied in all comity analyses, some courts require a "true conflict" as a predicate requirement in comity scenarios. In *Hartford Fire Insurance Company v. California*, the U.S. Supreme Court considered the applicability of comity in the context of conflicting legislation.[51] The matter related to exercising Sherman Act antitrust claims filed against British reinsurers, who themselves are heavily regulated under British law. The defendants argued the conduct alleged was perfectly consistent with British law and policy.[52] The Court explained that comity was only implicated in cases where a defendant must comply with two conflicting legislative acts.[53]

The Ninth Circuit interprets *Hartford Fire's* true conflict language as requiring a true conflict test for *all* comity analyses.[54] In contrast, the Eleventh Circuit has not focused on conflicts principles in its adjudicatory comity analysis. Conflating adjudicatory comity with federal abstention case law, the Eleventh Circuit described comity in a recent case as a doctrine that can be applied either "retrospectively" or "prospectively."

> When applied retrospectively, domestic courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings. When applied prospectively, domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government, and the international community in resolving the dispute in a foreign forum.[55]

In that case, the Eleventh Circuit did not focus on whether there was a conflict, but instead "appeared to expand a conflict principle into a broader abstention doctrine, and delineated the factors it would consider in a prospective application: the interests of the United States ***1059** government, those of the foreign government, and those of the international community in resolving the dispute in a foreign forum."[56]

In the case at hand, it is entirely possible for the Sea Shepherd to comply with both Australian and U.S. law. Nothing in the Australian injunction requires them to approach the Whalers' vessels. The Sea Shepherd is not an Australian government entity nor is it contracted by the Australian government to protect its sovereignty. Moreover, the Ninth Circuit's preliminary injunction does not grant the Whalers a right to enter Australian sovereign territory or to hunt whales.

CONCLUSION1 The *Sea Shepherd* case has wide-ranging implications on the impact of foreign judgments on domestic law, the applicability of the Alien Tort Statute in a modern context, and ultimate sovereignty in the Antarctic region. The debate is the subject of a multination lawsuit that sets to test the International Court's analytical limits. It is the involvement of the U.S. courts; however, that has disturbed judges and scholars alike.[57] In the ever-increasing globalization of this planet, corporations may be tempted to forum shop for a profit, with the environment picking up the tab. Further, with multiple jurisdictions ruling over the same territory, confusion could only result. It is for these reasons comity has maintained its usefulness as a judicial tool.

Sea Shepherd's recent foray with the Whalers has prompted the Japanese litigants to return to the Ninth Circuit and instigate contempt proceedings against the activity in the AWS. The court is now presented with the position of either redefining the parameters of the much litigated ATS, determining Australian Antarctic sovereignty, or exploring the murky waters of adjudicatory international comity. The implications for all three options are great; however, the lack of litigation surrounding comity presents the court with a ""free hand" to conclusively adopt a clear-cut test. An inclusive approach to foreign judgments could catapult U.S. courts onto the global stage, increase litigation, and fuel a debate to reformulate personal jurisdiction. Alternatively, adopting comity in the United States only under a narrow set of circumstances will likely cause difficulties in enforcing American rulings abroad. More importantly, it would be against a foundational principle in one of the most expansive areas of the legal world--international law.

Footnotes

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1 The Plaintiffs are the Institute of Cetacean Research (a Japanese foundation), Kyodo Senpaku Kaisha Ltd. (a Japanese corporation that charters whaling vessels and sailors to the Institute), and the masters of the two whaling vessels. For the purposes of this article, "Whalers" refers to any Japanese whaling entity operating under a Japanese whale research permit.

2 Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 702 F.3d 573 (9th Cir. 2013).

3 Humane Soc'y Int'l, Inc v. Kyodo Senpaku Kaisha Ltd., (2008) 165 FCR 510, 525-26 (Austl.) [hereinafter "Australian Injunction"].

4 Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 860 F.Supp. 2d 1216, 1216 (W.D. Wash. 2012).

5 *Id.* at 1242.

6 Asvesta v. Petroutsas, 580 F.3d 1000, 1010 (9th Cir. 2009).

[7] *Inst. of Cetacean Research*, 702 F.3d at 573.

[8] Andrew Darby, *Whalers Win Injunction Against Sea Shepherd*,SYDNEY MORNING HERALD, Dec. 18, 2012, *available at* http:// www.smh.com.au/environment/whale-watch/whalers-wininjunction-against-sea-shepherd-20121218-2bkrx.html.

[9] Andrew Darby, *Whale Taken onto Factory Ship After 5 Hour Standoff*,THE AGE, Feb. 17, 2013, *available at* http:// www.theage.com.au/environment/whale-watch/whale-taken-onto-factoryship-after-fivehour-standoff-20130216-2ejjh.html.

[10] International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 361.

[11] *Id.* Sch. 10(e).

[12] *Id.* art. VII.

[13] Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 223 (1986) (noting that because of the IWC's inability to enforce its own quota, Congress enacted the Pelly Amendment to the Fishermen's Protective Act of 1967).

[14] Gov't of Japan, *Plan for the Second Phase of the Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA II) -- Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources* (2005), *available at* http://www.icrwhale.org/eng/SC57O1.pdf.

[15] Casey Watkins, Note, *Whaling in the Antarctic: Case Analysis and Suggestions For the Future*, 25 N.Y. INT'L L. REV. 49, 59 (2012).

[16] Amanda M. Caprari, Note, *Lovable Pirates? The Legal Implications of the Battle Between Environmentalists and Whalers in the Southern Ocean*, 42 CONN. L. REV. 1493, 1501 (2010).

[17] *Environment Protection and Biodiversity Conservation Act of 1999* (Cth) (Austl.), *available at* http:// www.comlaw.gov.au/Details/C2012C00801/Html/Volume_1#_Toc340213705 (regulating the taking defined species in Australian territory as defined in § 24 (a)); List of defined species *Environement Protection and Biodiversity Conservation Act of 1999 Amendment* (Cth) (Austl.), *available at* http:// www.comlaw.gov.au/Details/C2004A00849

[18] The Australian Antarctic Territory (AAT) was proclaimed by Australia in 1936 as a result of a transfer of title from the United Kingdom and the pioneering work of Australians in the area of Antarctica directly to Australia's south and southwest. The AAT covers a large sector (42%) of the Antarctic mainland lying south of 60***o***S latitude (to the South Pole) and between 45oE to 136oE and 142oE to 160oE longitude.

[19] See *Australian Court Orders Japan to Stop Whaling*,THE HUMANE SOCIETY (Jan. 15, 2008), *available at* http://www.hsi.org/news/news/2008/01/.

[20] The AAT is an external Territory of Australia as a matter of Australian domestic law. Section 17 of the Acts Interpretation Act 1901 (Cth) defines "External Territory" to mean "a Territory, not being an internal Territory, for the government of which as a Territory provision is made in any Act". The Australian Government declared the AAT to be a Territory under the authority of Australia on the commencement of the Australian Antarctic Territory Acceptance Act 1933 (Cth) in 1936. The Australian Antarctic Territory Act 1954 (Cth) provides for the government of the AAT and applies Australian law to the AAT.

[21] *See* Part V, Art. 55.

[22] Chris McGrath, Australia Can Lawfully Stop Whaling Within Its Antarctic EEZ, Seminar paper delivered at the Australian National University, 5 (May 6, 2008), *available at* http://www.envlaw.com.au/whale24.pdf.

[23] *Id.*

[24] *Australian Injunction Case*, 165 FCR at 525-26 (Austl.).

[25] Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 860 F.Supp. 2d 1216, 1242 (W.D. Wash. 2012).

[26] *Australian Injunction Case*, 165 FCR at 525--26 (Austl.).

[27] *See* Natalie Klein, *Whales and Tuna: The Past and Future of Litigation Between Australia and Japan*, 21 Geo. Int'l. Envt'l. L. Rev. 143, 180-81 (2009) (noting that the judge considered the impact of the case on international relations between Australia and Japan in the court's 2005 denial of Humane Society International's application for leave to serve process in Japan).

[28] *Sea Shepherd Conservation Soc'y*, 860 F.Supp. 2d at 1242.

[29] *See generally Sea Shepherd Conservation Soc'y*, 860 F.Supp. 2d at 1223-25. The Sea Shepherd tactics consist of launching glass projectiles with paint or butyric acid, hurling flares and smoke bombs, pointing high powered lasers, towing lines across the bow of whaling ships, and intentionally piloting its vessels to collide with the whaling ships. Japanese fleets have adopted a variety of countermeasures, including using high-powered water cannons, launching concussion grenades, and using long-range acoustic devices to produce loud, disabling sounds.

[30] *Id.* at 1216.

[31] *Id.* at 1233.

[32] *Id.* at 1243.

[33] *Id.* at 1242.

[34] *Inst. of Cetacean Research*, 702 F.3d at 573.

[35] *Id.* (Sea Shepherd was "enjoined from physically attacking any vessel engaged by Plaintiffs ... or from navigating in a manner that is likely to endanger the safe navigation of any such vessel. In no event shall defendants approach plaintiffs any closer than 500 yards when defendants are navigating on the open sea.")

[36] Hilton v. Guyot, 159 U.S. 113, 202 (1895).

[37] *See*De la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375 (D. Del. 1991).

[38] *See, e.g.*, Kohn v. Am. Metal Climax, Inc., 458 F.2d 255, 303-05 (3d Cir. 1972).

[39] *Hilton*, 159 U.S. at 202-03 (Justice Gray stated, "[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the

defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh ....").
39. *Id.* at 202.

40 Ackerman v. Levine, 788 F.2d 830, 841 (2d Cir. 1986).

41 Brief for Petitioner-Appellant at 39, Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 702 F.3d 573, 573 (9th Cir. 2013) (No. 12-35266).

42 *See* McGrath, *supra* note 22, at 5.

43 *Id.* (citing Legal Status of Eastern Greenland (1933) PCIJ Series A/B No. 53, pp 45-46).

44 *Id.*; *See also*AUSTRALIAN ANTARCTIC DIVISION, http:// www.antarctica.gov.au/living-and-working/stations (last visited Feb. 14, 2013) (describing the Mawson, Davis, and Casey permanent bases).

45 Vedatech K.K. v. Crystal Decisions, Inc., 2009 WL 1151778, at *5 (N.D. Cal. 2009).

46 *Id.*

47 Brief for Defendant at 42, Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 702 F.3d 573, 573 (9th Cir. 2013) (No. 12-35266).

48 433 F.3d 1199, 1215 (9th Cir. 2006).

49 *Id.*

50 Press Release No. 2010/1788, U.S. Dep't of State, Joint Statement on Whaling and Safety at Sea Governments of Australia, the Netherlands, New Zealand and the United States Call for Responsible Behavior in the Southern Ocean (Dec. 10, 2010), http://www.state.gov/r/pa/prs/ps/2010/12/152656.htm.

51 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 769 (1993).

52 *Id.* at 789-99.

53 *Id.* at 799.

54 *See*Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1211-12 (9th Cir. 2007) (confirming that "general principles of international comity" are "limited to cases in which there is in fact a true conflict between domestic and foreign law").

55 Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1238 (11th Cir. 2004)

56 *Id.*

[57] *See Sea Shepherd Conservation Soc'y*, 860 F. Supp. 2d at 1242 (Judge Jones remarked, "The court's concern is that the whalers ask a United States court to issue an injunction that would help them engage in the very conduct that an Australian court has enjoined.").