Ninth Circuit Rules Antiwhaling Group Engaged in Piracy

In February 2013, the U.S. Court of Appeals for the Ninth Circuit held in *Institute of Cetacean Research v. Sea Shepherd Conservation Society*[1] that Sea Shepherd Conservation Society (Sea Shepherd), an Oregon nonprofit corporation, engaged in piracy when it interfered with Japanese vessels licensed by the Japanese government to conduct whaling. Writing for the panel, Chief Judge Alex Kozinski observed:

> You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.[2]

The Institute of Cetacean Research (Cetacean) hunts whales in the Southern Ocean, purportedly for research purposes, under an authorization from the Japanese government issued pursuant to the International Convention for the Regulation of Whaling.[3] For several years, Cetacean's whaling ships have been harassed on the high seas by smaller vessels operated by Sea Shepherd. Cetacean sued Sea Shepherd for injunctive and declaratory relief under the Alien Tort Statute,[4] which establishes federal court jurisdiction for claims involving "a tort . . . committed in violation of the law of nations or a treaty of the United States."[5] Cetacean alleged that Sea Shepherd's actions "amount to piracy and violate international agreements regulating conduct on the high seas."[6]

The U.S. District Court for the Western District of Washington had denied Cetacean's request for a preliminary injunction and dismissed its piracy claims. In an opinion highly critical of the court below,[7] the Ninth Circuit reversed, affirmed an injunction that it had previously issued against Sea Shepherd,[8] and remanded for further proceedings before another district judge.[9]

The court of appeals first considered whether Sea Shepherd's actions constituted piracy.

> "[T]he definition of piracy under the law of nations . . . [is] spelled out in the UNCLOS, as well as the High Seas Convention," which provide almost identical definitions. *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012); *see* United Nations Convention on the Law of the Sea ("UNCLOS"), art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397; Convention on the High Seas, art. 15, Apr. 29, 1958, 13 U.S.T.2312, 450 U.N.T.S. 82. The UNCLOS defines "piracy" as "illegal acts of *violence* or detention, or any act of depredation, committed for *private ends* by the crew or the passengers of a private ship . . . and directed . . .

[1] Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099 (9th Cir. 2013), *amended by* 2013 U.S. App. LEXIS 10717 (9th Cir. May 24, 2013).

[2] *Id.* at 1101.

[3] International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 UNTS 74.

[4] 28 U.S.C. §1350.

[5] *See U.S. Supreme Court Unanimously Rejects Alien Tort Statute Jurisdiction in* Kiobel, this issue.

[6] *Cetacean Research*, 708 F.3d at 1101.

[7] "The district judge's numerous, serious and obvious errors identified in our opinion raise doubts as to whether he will be perceived as impartial in presiding over this high-profile case." *Id.* at 1106.

[8] Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 702 F.3d 573 (9th Cir. 2012).

[9] *Cetacean Research*, 708 F.3d at 1106.

> on the high seas, against another ship . . . or against persons or property on board such ship." UNCLOS art. 101 (emphasis added); *see also* Convention on the High Seas art. 15.[10]

As the court of appeals noted, the district court had dismissed Cetacean's piracy claim based on narrow interpretations of the terms "commi[ssion] for private ends" and "violence."[11] The lower court had interpreted "private ends" as restricted to financial enrichment.[12] The court of appeals disagreed, ruling that "'private ends' include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public."[13]

The court of appeals also rejected the lower court's view "that Sea Shepherd's conduct is not violent because it targets ships and equipment rather than people."[14]

> This runs afoul of the UNCLOS itself, which prohibits "violence . . . against another ship" and "violence . . . against persons or property." UNCLOS art. 101. Reading "violence" as extending to malicious acts against inanimate objects also comports with the commonsense understanding of the term, *see Webster's New Int'l Dictionary* 2846, as when a man violently pounds a table with his fist. Ramming ships, fouling propellers and hurling fiery and acid-filled projectiles easily qualify as violent activities, even if they could somehow be directed only at inanimate objects.[15]

The court of appeals reversed the lower court's denial of a preliminary injunction against Sea Shepherd, finding that all of U.S. law's four requirements for an injunction were met.[16] First, it found that Cetacean was likely to succeed on the merits, concluding that Sea Shepherd's actions violated the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA),[17] the UNCLOS, and the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS).[18] As to the SUA, the court of appeals pointed to "uncontradicted evidence that Sea Shepherd's tactics could seriously impair" Cetacean's ability to navigate.[19] Further, "the record discloses that it has rammed and sunk several other whaling vessels in the past."[20]

The Ninth Circuit likewise reversed the lower court's rejection of claims based on the UNCLOS[21] (but without discussing that the United States is not party to the convention or

[10] *Id.* at 1101.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1102.
[14] *Id.*
[15] *Id.*
[16] *Id.* ("A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest" (quoting Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).).
[17] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. No. 101-1 (1989), 1678 UNTS 222.
[18] Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 UST 3459, 1050 UNTS 18.
[19] *Cetacean Research*, 708 F.3d at 1103.
[20] *Id.*
[21] *Id.*

addressing other potentially relevant treaties or customary principles defining piracy). As to the COLREGS, the court described their function:

> The COLREGS state obligatory and universal norms for navigating ships so as to avoid collision. *Crowley Marine Services, Inc. v. Maritrans, Inc.*, 530 F.3d 1169, 1172–73 (9th Cir. 2008). Sea Shepherd deliberately navigates its ships dangerously close to Cetacean's ships. The district court's finding that this is likely a violation of the COLREGS is adequately supported by the record.[22]

Next, the court of appeals found likelihood of irreparable harm.

> Sea Shepherd itself adorns the hulls of its ships with the names and national flags of the numerous whaling vessels it has rammed and sunk. *See* Appendix. The district court's observation that Cetacean hasn't yet suffered these injuries is beside the point. . . . Cetacean's uncontradicted evidence is that Sea Shepherd's tactics could immobilize Cetacean's ships in treacherous Antarctic waters, and this is confirmed by common sense . . . .[23]

The Ninth Circuit agreed with the lower court's assessment that the balance of the equities favored Cetacean.[24] Finally, it concluded that the public interest warranted an injunction, finding that U.S. law allows for whaling where it is permitted by the Whaling Convention and reflects a strong public interest in safe navigation at sea.

> Our laws defining the public interest in regards to whaling are the Whaling Convention Act and the Marine Mammal Protection Act, both of which permit whaling pursuant to scientific permits issued under the Whaling Convention. 16 U.S.C. §1372; 16 U.S.C. §916c. Cetacean's activities are covered by such a permit and thus are consistent with congressional policy as to the marine ecosystem.
>
> Our laws also reflect a strong public interest in safe navigation on the high seas. As already discussed, Sea Shepherd's activities clearly violate the UNCLOS, the SUA Convention and the COLREGS. As such, they are at loggerheads with the public interest of the United States and all other seafaring nations in safe navigation of the high seas.[25]

The court of appeals disputed the district court's acceptance of Sea Shepherd's comity and "clean hands" arguments against an injunction. These arguments rested upon the fact that Cetacean was in breach of an Australian court's default judgment against it; that judgment was founded upon Australia's claims to jurisdiction over Antarctic coastal waters.[26] In rejecting these arguments, the court of appeals noted, inter alia, that the United States does not recognize Australia's jurisdictional claims.[27] The court further noted that "the rights to safe navigation and protection from pirate attacks . . . flow automatically from customary international law and treaties. Nor is there anything remotely inequitable in seeking to navigate the sea lanes without interference from pirates."[28]

[22] *Id.* at 1103–04 (citation omitted).
[23] *Id.* at 1104 (citation omitted).
[24] *Id.*
[25] *Id.* (citation omitted).
[26] *Id.* at 1104–05.
[27] *Id.* at 1105.
[28] *Id.* at 1105–06.