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# Survey of International Law

# SURVEY OF INTERNATIONAL LAW

This survey provides brief digests of cases that represent a variety of aspects of international law that have appeared in the United States Supreme Court, Court of Appeals for the Fourth Circuit and D.C. Circuit, the federal district courts of Maryland, Virginia, and the District of Columbia, and the Court of International Trade. The cases are grouped in topical categories and references are given for further research.

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## I. CRIMINAL LAW

A CONVICTION DUE TO A TREATY VIOLATION DOES NOT QUALIFY AS A CONTINUING WRONG EXCEPTION WHICH WOULD DEFEAT THE PROHIBITIONS OF THE ELEVENTH AMENDMENT. *The Republic of Paraguay, Et Al. v. George Allen, Governor of Virginia, Et. Al.*, 1996 U.S. Dist. LEXIS 19006 (E.D.Va. 1996).

In 1993, Angel Breard, a citizen of Paraguay, was convicted of rape and murder for which he received the death sentence in Virginia state court. The Republic of Paraguay, its Ambassador, and its Consul General to the United States, the plaintiffs in this case, filed an action in United States District Court for the Eastern District of Virginia for alleged treaty violations associated with Breard's arrest and conviction. The plaintiffs assert that the state of Virginia violated both the Vienna Convention on

Consular Relations of 1970[1] and the United States-Paraguay Treaty of Friendship, Commerce, and Navigation[2] by failing to notify them of Breard's arrest and failing to give them a meaningful opportunity to provide Breard with legal representation during the proceedings against him. The redress requested by the plaintiffs included declaratory and injunctive relief: declarations by the court that Virginia violated and continues to violate the treaties and that Breard's conviction be void and an injunction to prevent the state from taking any further action based on the conviction. In response, the state of Virginia filed motions to dismiss for lack of subject matter jurisdiction and on the ground that the plaintiffs' claims were non-justiciable.

The court first addressed the question of whether it had subject matter jurisdiction in light of the limits placed on it by the Eleventh Amendment. Finding it well established that the amendment bars suits by a foreign government against a state government in federal court, the court examined whether the case at hand qualified for a narrow exception to this rule crafted in *Ex Parte Young*.[3] When a party at risk of or suffering from a violation of federally protected rights satisfies two criteria established by *Young*, the court may exercise its jurisdiction to grant injunctive relief despite the prohibitions of the Eleventh Amendment. The plaintiffs must show 1) that they seek a remedy for a continuing violation of federal law and 2) that the relief is prospective. Taking up the first of these criteria, the court determined that Paraguay was not the victim of a continuing violation and was thus ineligible for the *Young* exception. The court arrived at this conclusion by stressing that the plaintiffs' complaint did not contain an allegation that the state of Virginia continued to deny them access to Breard. Although chastising the state for its initial failure to abide by the treaties, the court rejected the plaintiffs' argument that Breard's death sentence constituted a continuing violation, calling it instead a "tragic consequence" of Virginia's failure but not a continuing wrong. As a result, the court ruled to dismiss the plaintiffs' complaint for lack of subject matter jurisdiction.

Despite disposing of the case on this point, the court also commented on the defense of non-justiciability raised by the state of Virginia. The latter argued that Paraguay had no standing to sue for treaty violations because the treaties do not provide for a cause of action on which to sue. While the court conceded that the treaties do not confer rights of action on private individuals in the absence of explicit language to this

1. 21 U.S.T. 77, 596 U.N.T.S. 261 (April 24, 1963).
2. 12 Stat. 1091 (Feb. 4, 1859).
3. 209 U.S. 123 (1908).

effect, it felt that Paraguay's status as a signatory to the treaty distinguished it from private individuals and gave it standing to sue on the treaties.

Lastly, the court dealt with the defendants' argument that declaratory relief would not be available to the plaintiffs even if there were subject matter jurisdiction because the treaties were no longer being violated at the time of trial. The court reminded the defendants that in the case of voluntary cessation of illegal conduct, they carried the burden of showing that they would not repeat the wrong. As they had not done so, the case would have been suitable for declaratory relief. *Significance*: The Eleventh Amendment prohibition of suits by a foreign government against a state government in federal court is subject to a narrow exception requiring a showing of a continuing wrong which cannot be satisfied by proof of a conviction resulting from a treaty violation which has ceased to occur.

## II. ADMIRALTY

FOREIGN FORUM SELECTION CLAUSES IN CONTRACTS GOVERNED BY THE FEDERAL CARRIAGE OF GOODS BY SEA ACT ENJOY A PRESUMPTION OF VALIDITY IN FEDERAL COURTS SITTING IN ADMIRALTY. *Blaise G. A. Pasztory v. Croatia Line, Malta Cross Shipping Co., Ltd., and Security Storage and Van Company of Norfolk, Virginia, Inc.*, 918 F. Supp. 961 (E.D.Va. 1996).

This case came before the United States District Court for the Eastern District of Virginia on a joint motion to dismiss filed by the defendants. Sitting in admiralty, the court granted the motion.

Blaise Pasztory, plaintiff, contracted to have $80,000 worth of furniture and other personal goods shipped to him from Italy to Norfolk in a vessel owned by Defendant Malta Cross and operated by Defendant Croatia Line. Alleging that these goods sustained more than $50,000 of damage en route, the plaintiff brought suit under Virginia state law and the federal Carriage of Goods by Sea Act (COGSA),[1] which is modeled on a convention of international law. In response, the defendants argued principally that a forum selection clause in the shipping contract required that the plaintiff pursue his claims in the District Commercial Court in Rijeka, Croatia.

Since its decision in *M/S Bremen v. Zapata Off-Shore Co.*,[2] the Su-

1. 46 U.S.C. § 1300 et seq. (1988).
2. 407 U.S. 1 (1972).

preme Court has endorsed a presumption in favor of enforceability of forum selection clauses in federal courts sitting in admiralty. This point was not lost on the district court which began its discussion by emphasizing that this presumption in favor of enforceability created for the plaintiff the difficult burden of "clearly showing" that the forum selection clause should not be enforced.

The court then turned to the more recent Supreme Court decision in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*,[3] a case which upheld the enforceability of a foreign arbitration clause in a COGSA-governed shipping contract, for help in deciding on the motion to dismiss. Equating the two types of clauses was justifiable since neither type of clause resulted in the harm that COGSA was designed to minimize. Namely, neither clause has the effect of lessening the potential liability of carriers subject to claims under COGSA.

In response to the plaintiff's argument that the forum selection clause nonetheless results in significant procedural inconveniences to it when pursuing claims under COGSA, the court said that these concerns were outweighed by the importance of promoting international comity and predictability in global business transactions.

The last point the court had to address in deciding the motion was whether the substantive law to be applied by the Croatian judiciary would fulfill the minimal threshold guarantees of COGSA. The court found that the plaintiff had not met his burden on this issue in light of his conclusory allegations as compared with the defendants' offer of persuasive legal authority that Croatia recognizes and enforces the Hague Rules upon which COGSA was modeled. Having disposed of the federal claim under COGSA, the court declined to exercise supplemental jurisdiction over the state law claims, leaving for another day whether these common law claims might actually be preempted by a plaintiff having opted to bring a claim under COGSA. *Significance*: Foreign forum selection clauses in shipping contracts governed by the Carriage of Goods By Sea Act are extended the same presumption of validity as has been enjoyed by foreign arbitration clauses.

FAILURE TO SATISFY THE "MINIMUM CONTACTS" REQUIREMENT OF PERSONAL JURISDICTION PERMITS THE ATTACHMENT OR ARREST OF SHIPS. *Nikko Shipping Co. V. M/v Sea Wind*, 941 F.Supp. 587 (D. Md. 1996).

In late February 1996, a dispute over a charter party agreement between the Nikko Shipping Company ("Nikko") and Kite Maritime, Inc.

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3. 132 L. Ed. 2d 462, 115 S. Ct. 2322 (1995).

("Kite"), erupted over the ship named M/V Sea Wind ("Sea Wind"). By March 1996, with each party asserting sizable debts owed by the other, their claims were submitted to arbitration in London. Nikko moved to have Kite post security to guarantee payment for possible judgments. This did not happen, and Nikko then filed against the Sea Wind, on August 30, 1996, a "Verified Complaint for Arrest and Attachment" pursuant to the Federal Rules of Civil Procedure Supplement Rules for Certain Admiralty and Maritime Claims. At this time, the Sea Wind was unloading cargo at the Port of Baltimore and Kite's counsel quickly filed a general appearance on the matter to prevent service of process to arrest the ship. After posting a $250,000 security pending the adjudication of Nikko's claim, the Sea Wind was allowed to leave Baltimore.

*Held*: In addressing Nikko's complaint, Judge Davis for the U.S. District Court for Maryland examined both Rules B and C of the Supplemental Rules. Rule B(1) permits the attachment of a maritime lien on assets as a way of obtaining jurisdiction over a defendant who "shall not be found within" the district in which the claim arises. The court applied a three-part "minimum contacts" test to determine jurisdiction, but found Nikko's Rule B claim proper. Kite counsel's attempt to encourage in personam jurisdiction by filing a general (as opposed to special) appearance was held to be an insignificant contact with the District of Maryland. The court further found Nikko's Rule C claim was proper, authorizing in rem actions to enforce the maritime lien. Over Kite's objections, Judge Davis held that the charter party agreement's lack of a choice of law provision, implicating either English or U.S. law, permitted the application of American law. *Significance:* This case turns on its head the common rule that a general appearance filed by counsel will permit in personam jurisdiction, as opposed to a special appearance which does not. The *Nikko* decision is likely to be reviewed by the Fourth Circuit concerning this controversial ruling.

## III. INTERNATIONAL TRADE AND COMMERCIAL LAW

IMPORTED ARTICLES THAT ARE LESS-THAN-EXACT REPLICAS OF REAL VEHICLES AND ARE USED AS TOYS WILL NONETHELESS BE CLASSIFIED AS MODELS WITH DUTY-FREE STATUS FOR TARIFF PURPOSES. *Mattel, Inc. v. United States*, Nos. 92-08-00546, Slip Op. 96-194, 1996 WL 720816 (Ct. Int'l Trade 1996).

In this action, which the court characterized as a "test case," plaintiff Mattel, Inc. was disputing the tariff classification for two of its imported doll-sized cars, which were sold as accessories to its line of Barbie dolls. One of the cars looked like the 1957 Chevrolet Bel-Air

convertible and was roughly two feet long; the other car was a replica of the Ferrari GTS 328 and was about 20 inches long. The U.S. Customs Service had classified both cars as "toys other than models" under Subheading 9503.90.60 of the Harmonized Tariff Schedules of the United States ("the HTSUS"). The cars were therefore not eligible for special duty-free treatment under the Generalized System of Preferences ("the GSP"). The plaintiff claimed, however, that the cars should have been classified "other models" under Subheading 9503.90.70 of the HTSUS.

The question before the court, then, was whether both cars were "models" under Sub-heading 9503.90.70 and therefore qualified for duty-free status under the GSP. *Held: Plaintiff's Claim for Classification Granted.* Plaintiff's doll-sized cars should have been classified by the U.S. Customs Service as "other models" under Subheading 9503.90.70 of the HTSUS and given duty-free status.

The court began its discussion by noting that Mattel's claim was unaffected by the fact that Mattel sought the "models" classification only after it found out that products from Mexico were going to lose their duty-free status under Subheading 9503.90.60. The court then summarized the government's position to be that models *inter alia* must be highly detailed and must not be used as toys. In support of this position, defendant's expert witnesses had testified that models must possess "near perfection in proportion and detail," and may not be used as "objects of play or for amusement."

Despite this "impressive" testimony, the court concluded that the plaintiff's evidence and testimony better reflected its legal precedents. The court heavily relied on a prior case in which the plaintiff unsuccessfully sought to prevent its metal sailing ships from being classified as "other models" under Item 737.15 of the Tariff Schedules of the United States (the TSUS").[1] In the *Lohzin* case, the court held that "an article need not be an exact or accurate representation of something in existence" to be a model; rather, a model is "more than a crude form of a class of articles and recognizably represents an article that existed in fact or legend."[2]

After finding that the plaintiff's doll-sized cars satisfied the *Lohzin* court's definition of "models," the court examined the validity of existing tariff law which stated that models do not have to be exact and can be used as toys or non-toys. The court concluded that the tariff law in question was still valid based on its findings that: 1) the term "scale" as defined in the Customs Harmonized System Handbook did not necessa-

1. Lohzin & Born, Inc. v. United States, 79 Cust. Ct. 34 (1977)
2. *Id.* at 41.

rily mean exactness of scale, and 2) it is possible that the articles which fall under the HTSUS provisions governing toys can be considered both toys and models.

The court held that the plaintiff's doll-sized cars constituted models and accordingly fell under Subheading 9503.90.70.205, which encompasses all models other than "model airplanes, model boats, or other models, made to a scale of the actual article at a ratio of one to eighty-five or smaller." *Significance:* An imported article of model-like size will be treated as a model for purposes of tariff classification and therefore deserves special duty-free treatment even if the article is not an exact replica of a real vehicle and is used for play purposes as a toy.

CONGRESS CAN LIMIT ANY GRANT OF AUTHORITY IN THE AREA OF FOREIGN COMMERCE THAT IT HAS DELEGATED PREVIOUSLY TO THE PRESIDENT. *Libas, Ltd. v. United States*, 944 F. Supp. 938 (Ct. Int'l Trade 1996).

The plaintiff, Libas, Ltd., brought action challenging the Customs Service's classification of fabric as machine-loomed, not hand-loomed. The plaintiff imported 32 bales of cotton fabric from India accompanied by a certificate issued by the government of India indicating that the fabric was hand-loomed. Customs first classified the fabric as hand-loomed based on the certification. Later, Customs requested that Libas redeliver the fabric in order for Customs to perform laboratory tests to verify that the fabric was loomed by hand. Having conducted the necessary tests, Customs notified Libas that the fabric was reclassified as machine-loomed and subject to a tariff of 11.4% ad valorem, which is much higher than the 6% tariff applied to hand-loomed fabric. Moreover, machine-loomed fabric, unlike hand loomed, is also subject to quotas.

Libas instituted this suit to challenge the reclassification, arguing that cotton fabric imported from India is exclusively regulated by the Agreement Relating to Trade in Textiles and Textile Products between India and the United States of February 6, 1987. Therefore, Customs went beyond its authority when it reclassified the fabric as machine-loomed in spite of the Indian government stamp, because the Agreement provides that the United States will admit Indian fabric imports if they are properly certified by the Indian government. *Held: Affirmed.* Since the Constitution grants Congress alone the power to regulate foreign commerce, Congress can limit any grant of authority in the area foreign commerce that has previously delegated to the President. When Congress delegates power to the President to regulate imports under the Trading with Enemy Act, it does not abdicate its power to regulate foreign commerce; it may recall or limit the delegated power at any time. In interpreting international agreements and statutory authority, the court will put them in har-

mony if possible. In this case, it is impossible to reconcile the two because the statute, 7 U.S.C. Section 1854, imposes a requirement that the fabric be actually made on a hand-loom. In this case, Congress enacted the statute after it granted the President power to enter into an agreement with India. Therefore, the statute overrides the U.S.-India Agreement when the two are in conflict. Customs has, accordingly, authority to test the fabric to determine if it was hand-loomed. *Significance*: Even if the President was authorized to negotiate and sign a trade agreement with a foreign country, its terms are still subject to congressional alteration, if a statute is enacted later. This may put the President at a disadvantage when he negotiates with foreign countries, because those countries may not be sure what Congress will or will not do even if the President has made a commitment during negotiation.

SECTION 280 OF THE BRITISH COPYRIGHT, DESIGNS AND PATENTS ACT OF 1988 WILL NOT BE HONORED IN THE INTEREST OF COMITY WHERE THE COMMUNICATIONS TOUCH BASE WITH THE UNITED STATES OR WHERE THE FOREIGN LAW UNDERMINES UNITED STATES PUBLIC POLICY. *Odone v. Croda International PLC.*, Civil Action No. 94-2808 (D.D.C. 1997).

Plaintiff, Mr. Augusto Odone, brought a motion pursuant to Fed. R. Civ. P. 37(a), to compel the defendant, Croda International, to release documents exchanged between the defendant and its British patent agent. Mr. Odone claimed that the documents would provide evidence relating to his being named as an inventor in the original patent application. The defendant opposed the motion asserting the communications are privileged, not based on the federal common law attorney-client privilege, but rather pursuant to section 280 of the British Copyright, Designs and Patent Act of 1988, which accords attorney-client privileges to communications between patent agents and their clients. The defendant argued that in the interest of comity and because the communications do not "touch base" with the United States, the British patent agent "attorney-client" privilege should be honored.

In certain circumstances, federal courts have given deference to foreign statutes and applied the principle of comity if the foreign law is not contrary to the public policy of the forum. However, the common denominator of the cases in which the federal courts afford comity to foreign statutes governing the privileges of patent agents is that the communications related solely to activities outside the United States. Where the patent application involves persons or activities related to the United States, where the communications "touch base" with the United States, U.S. law applies.

The court found that it would be nonsensical to find that the documents in question do not touch base with the United States. Furthermore, the court found that the British statute contravenes the public policy of the United States as enunciated in the Federal Rules of Civil Procedure and in the decisions of the federal courts. Having found that the communications touch base with the United States, the court applied U.S. law to determine if the documents were properly withheld pursuant to the common law attorney-client privilege. As the defendant had not made the requisite showing, neither the attorney-client privilege nor any other common law privilege was applicable to the communications between the patent agent and his client. *Significance*: In determining whether U.S. or British confidentiality privileges apply in a particular matter, British law will not be honored in the interest of comity, where the relevant communications touch base with the United States or where the law undermines United States public policy.

DEPARTMENT OF COMMERCE MAY NOT COUNTERVAIL CERTAIN DEDUCTIONS BY FOREIGN EXPORTERS; HOWEVER, THE DEPARTMENT MAY INCLUDE COMPANY-SPECIFIC AND BIA RATES IN ITS COUNTRY-WIDE AVERAGE RATES. *Kajaria Iron Castings Pvt. Ltd. v. United States*, Nos. 95-09-01240, Slip Op. 97-10, 1997 WL 38126 (Ct. Int'l Trade 1997).

In 1991, the U.S. Department of Commerce (hereinafter "Commerce") conducted an administrative review of a countervailing duty order, which Commerce originally issued in 1980. The order was directed at certain iron metal castings (e.g. manhole covers and frames, clean-out covers and frames, and catch basin grates and frames) exported from India to the United States. After its 1991 administrative review, Commerce amended the countervailing duty rates that had been assigned to fourteen Indian companies that exported the subject iron castings to the United States during 1991.

This action concerned four issues initially raised during the 1991 administrative review period. The court stated that its analysis in an earlier case governed its disposition of the first three issues.[1]

The first issue before the court was whether Commerce impermissibly double-counted the Indian government's Cash Compensatory Support (CCS) over-rebate when Commerce countervailed not only charges for services refunded to plaintiffs from the Indian government but also section 80HHC of the Indian tax code. Plaintiffs did not dispute Commerce's determination that "some CCS payments made to plaintiff ex-

1. *Crescent Foundry Co. Pvt. Ltd. v. United States*, Nos. 95-09-01239, Slip. Op. 96-200, 1996 WL 743436 (Ct. Int'l Trade 1996).

porters refunded charges for services, not indirect taxes." While indirect taxes are generally not countervailable, the refunded service charges constituted an over-rebate for 1991 to the plaintiffs, on which Commerce assessed a countervailable subsidy. Plaintiffs argued that Commerce should not have treated the section 80HHC deduction as a subsidy since Commerce had already imposed a subsidy on the over-rebates from the CCS payments. *Held: Remanded*: first, to determine whether Commerce's refusal "to countervail an income tax exemption for a similar over-rebate" in a prior case is still its current policy; and, second, to re-examine whether countervailing the section 80HHC deduction double-counts the CCS subsidy to plaintiffs.

Second, the court considered whether Commerce had impermissibly countervailed the section 80HHC deduction taken by the plaintiffs under the International Price Reimbursement Scheme (IPRS). IPRS payments to the plaintiffs would have been deductible under section 80HHC of the Indian tax code, but Commerce found that the plaintiffs did not receive any such payments and therefore could not take a deduction. Plaintiffs contended that Commerce should not have subjected the section 80HHC deduction attributable to the IPRS payments to its countervailing duty order. *Held: Remanded,* for Commerce to recalculate the subsidy on the section 80HHC deduction without taking into account the alleged IPRS payments, which none of the plaintiffs received in 1991.

The third issue was whether Commerce should have included the "significantly higher subsidy rates" of three of the fourteen Indian companies in its computation of the country-wide countervailing duty rate, which Commerce only assigned to the other eleven Indian companies. The plaintiffs contended that Commerce should not have included the significantly higher company-specific rates determined for three companies to much lower country-wide average of the other eleven countries. *Held: Sustained.* Commerce correctly included the significantly different rates of the three Indian companies in its country-wide average for the reasons stated in *Crescent Foundry.*

The fourth issue, which had not been before the court in *Crescent Foundry*, concerned whether Commerce could include "best information available" (BIA) rates in its calculation of country-wide averages of the benefit received by exporters from national subsidies. Plaintiffs contended that even if Commerce correctly included the significantly higher, company-specific rates in the 1991 country-wide average, Commerce should not have included the BIA rate for one of the fourteen Indian companies which did not submit requested shipping loan information to Commerce in the country-wide average applied to the other Indian companies. In support of this contention, the plaintiffs argued that the BIA's inclusion penalized the other companies that had complied with Commerce re-

quests. *Held: Sustained.* Commerce may include a BIA rate in its calculation of the country-wide average provided its decision is reasonable and in accordance with the law. Because the BIA rate was not unfair when applied to the company that failed to submit the requested loan information to Commerce, the court found that "its effect on the country-wide rate did not unfairly penalize [the] cooperating companies." Further, neither did the BIA rate's much higher percentage than the country-wide average make its inclusion unfair. *Significance*: The U.S. Department of Commerce's methodology for computing counter-vailing duty rates for foreign exporters to the United States will be given broad discretion by the courts.

MEN'S AND WOMEN'S OUTERWEAR IMPORTED FROM AUSTRALIA AND TREATED WITH PETROLATUM CAN BE CLASSIFIED AS "IMPREGNATED" FOR PURPOSES OF DETERMINING IMPORT TARIFFS UNDER THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES. *Foxfire, Inc. v. United States*, 941 F. Supp. 1258 (Ct. Int'l Trade 1996).

This case reached the Court of International Trade after a trial de novo, wherein plaintiff's protests before the United States Custom Service ("Customs") regarding liquidation of its merchandise were denied. Customs classified the merchandise under subheadings 6202.12.2010 (other women's raincoats), 6202.92.2061 (other women's cotton anoraks), and 6211.32.0070 (men's cotton vests) of the Harmonized Tariff Schedule of the United States ("HTSUS"). The plaintiff, Foxfire, argues that this merchandise is more properly classified under heading 6210 and 5907 of the HTSUS which "encompasses garments made of fabrics . . . impregnated, coated or covered." Significantly, heading 5907 requires that the coating be visible to the naked eye. Under these classifications, Foxfire would be paying 6.6% ad valorem on the raincoats and 7.6% on the anoraks and vests as opposed to 9.5% and 8.6% respectively. *Held: Reversed.* The coating on the merchandise was visible to the naked eye rendering the proper classification to be "impregnated" for purposes of tariff duties.

According to the explanatory notes accompanying heading 5907, garments treated with starch, sizing, or similar dressings do not fall under this tariff scheme because the treatments are not visible to the naked eye. The initial determination of a fabrics status is made by a Customs official. The fabric is subjected to close examination which may include inspection under a microscope to confirm that the "fabrics interstices have been filled and whether the fabric's fiber or weave is in fact blurred or

obscured, or that the surface is definitely leveled or smoothed."[1]

Judge Pogue determined that the impregnation was clearly visible to the naked eye on this merchandise giving it both a "waxy appearance and sheen."[2] The impregnation waterproofs the fabric and gives it the appearance of rugged durability. Therefore, Foxfire's request for classification under heading 6210 and 5907 of the HTSUS is the appropriate classification for purposes of levying custom's duties on the merchandise. *Significance:* The Court of International Trade does not routinely give blind deference to the determinations of the Custom's officials regarding tariffs on imported merchandise but rather makes independent factual determinations irrespective of Custom's findings.

## IV. IMMIGRATION

RECENT AMENDMENT TO THE IMMIGRATION AND NATIONALITY ACT ("INA"), RENDERS THE STATE DEPARTMENT'S CONSULAR VENUE POLICY UNREVIEWABLE. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, Nos. 94-5104, 95-5425, and 96-5058 (D.C. Cir. 1997).

In the 1980's, over 50 nations, including the United States, entered into an international agreement known as the Comprehensive Plan of Action ("CPA"). The CPA was promulgated in an effort to deal with the overwhelming number of migrants that were fleeing from Vietnam and Laos to other countries in Southeast Asia. Under the CPA the migrants who land in other countries are screened by local officials to determine refuge status. Those migrants "screened out," those not deemed refugees, are repatriated. A repatriated migrant may then apply for an immigrant visa from his own country.

In 1994, two Vietnamese migrants, their sponsors in the United States, and a non-profit legal rights organization, challenged the State Department's consular venue policy under Section 202 of the INA, 8 U.S.C. § 1152 (a), which prohibits United States consular officials from discriminating on the basis of nationality in the issuance of immigrant visas. The district court granted the State Department's motion for summary judgment. A divided panel of the U.S. Court of Appeals reversed, holding that the consular venue policy violated 8 U.S.C. § 1152 (a)(1) because the State Department had drawn a distinction between

1. *Foxfire*, 941 F. Supp. at 1259, 1260.
2. *Id.* at 1261.

Vietnamese and Laotian nationals and nationals of other countries.[1]

On September 30, 1996, shortly before the Supreme Court was to hear oral argument in LAVAS, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRA") (enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996)). Section 633 of the IIRA amends the INA by adding the following to 8 U.S.C. § 1152(a)(1): "(B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed." The Supreme Court requested supplemental briefing on the effects of section 633, vacated the Court of Appeals decision in LAVAS, and remanded the case to the appellate court for "further consideration in light of Section 633."[2]

Plaintiff's claim raises the question whether the case is governed by the law in effect at the time the Secretary enacted the new consular venue policy or the law as amended by section 633. In Landgraf v. USI film Products,[3] the Supreme Court concluded a statute has a retroactive effect if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already complete."[4] Applying the principles of Landgraf, the court concluded the application of section 633 would not raise retroactivity claims.

Having concluded that section 633 applies, the court agreed with the State Department that plaintiffs' statutory claim was unreviewable because consular venue policy determinations are entrusted to the discretion of the State Department. The court held that in light of the lack of guidance provided by the statute and the complicated factors provided in consular venue determinations, the plaintiffs' claims were unreviewable because there was "no law to apply." *Significance*: The court's suggestion that State Department policies may be deemed unreviewable if they fall within an area entrusted to the discretion of the executive branch, leaves open the possibility that restrictions on immigration policy may merely be glossed over by the judicial branch.

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1. Legal Assistance for Vietnamese Asylum Seekers v. Department of State, Bureau of Consular Affairs, 45 F.3d 469, 473 (D.C. Cir. 1995) ("LAVAS").

2. LAVAS, 117 S. Ct. 378 (1996) (per curiam).

3. 511 U.S. 255 (1994).

4. *Id.* at 280.

DISTRICT OF COLUMBIA CIRCUIT COURT SEES U.S.C. § 1182 AS A POTENTIAL DEFENSE AGAINST DEPORTATION PURSUANT TO § 1326. *United States v. Idowu*, 1997 WL 47182 (D.C. Cir).

On October 15, 1985, appellant Rasheed Adeshina Idowu was deported from the United States because of his conviction for mail fraud. After spending over five years out of the country, Idowu returned to the U.S. via John F. Kennedy International Airport. Idowu was admitted after receiving a stamp on his passport which stated "U.S. Immigration" and the date of his entry. Idowu left again and returned in 1992. His passport was once again stamped. In March of 1995, Idowu again arrived at Kennedy Airport; however, this time he was notified by immigration officers that he was named on a computerized lookout system as being ineligible for entry into the U.S. Despite this, the immigration officers admitted him.

Several days later, Idowu sent a letter to the United States Department of State asking to be removed from "lookout" status. The State Department replied to his letter and asked Idowu to come to the Department for a meeting. When Idowu arrived for the meeting, he was arrested by an agent of the Immigration and Naturalization Service.

At trial, Idowu plead guilty to a violation of 8 U.S.C. § 1326(a) and (b)(1) which states that if an individual has been deported and thereafter enters or tries to enter, or is at any time found in the United States, unless he has prior written consent from the Attorney General or unless he is able to show that he is not required to gain prior consent, shall be fined or imprisoned according to the language of the statute. Idowu later attempted to withdraw his plea. The District Court denied his request.

*Held: Reversed and remanded.* On appeal to the United States Court of Appeals for the District of Columbia Circuit, Idowu's counsel cited 8 U.S.C. § 1182(a) which sets forth a list of alien classes who are ineligible for admission into the United States. Section 1182 (a)(6)(B) specifically refers to aliens who have been arrested and deported. "Any such alien who seeks admission *within 5 years* of the date of such removal ... is excludable." (emphasis added). Appellant argued that once an alien has been deported from the United States, he or she is not allowed readmittance *unless* the alien has remained outside of the United States for at least five consecutive years. Because appellant had, in fact spent more than five years outside of the United States, he was not, according to appellant's argument in violation and should therefore be allowed to withdraw his guilty plea.

The court found that § 1182(a)(6)(B) could have given Idowu a complete defense to the § 1326 charge and, because the government would not be prejudiced by the delay in judgment, and because there was

such confusion regarding the effect of the five-year-rule, it would be best to remand the case to resolve the issue. *Significance:* A defendant may use the fact that he or she has been outside of the United States for five years or more as a possible complete defense against deportation pursuant to § 1326.

ASYLUM APPLICANT'S STATUS AS A JUVENILE DID NOT REQUIRE A DIFFERENT STANDARD OF PROOF FOR DETERMINING ASYLUM ELIGIBILITY. *Cruz-Diaz v. United States Immigration and Naturalization Serv.*, 86 F.3d 330 (4th Cir. 1996).

Petitioner Carlos Cruz-Diaz is a citizen of El Salvador who entered the United States without inspection on September 22, 1992, at the age of 15. He was intercepted by the Immigration and Naturalization Service ("INS") near Brownsville, Texas, and subsequently released to the custody of his sister in Washington, D.C. Cruz-Diaz conceded deportability and sought either asylum under 8 U.S.C § 1158(a) of the Immigration and Nationality Act or, in the alternative, to leave the United States voluntarily. The immigration judge found that Cruz-Diaz, although honest and credible, had not met the objective requirements for refugee status because he had not established past persecution or a well-founded fear of persecution on account of actual or imputed political opinion. Moreover, he did not meet any of the other grounds of the act for which asylum may be granted.[1] Cruz-Diaz sought review, pursuant to 8 U.S.C. § 1105(a), of the decision arguing that the immigration judge erred by holding him to the same objective standard as an adult when it failed to find a well-founded fear of persecution, and by failing to find an imputed political opinion as a predicate for a well-founded fear of persecution.

On appeal, the United States Court of Appeals for the Fourth Circuit *Held: Petition Denied.* The Fourth Circuit found no error in applying the same standard of review for refugee status to both adults and minors. The court reasoned that absent statutory intent to apply a different standard for a juvenile, and in light of the reasonable interpretation by the INS that the standard as stated takes into consideration the petitioner's age, it was not at liberty to substitute a different interpretation. Furthermore, the court determined that under the current objective standard Cruz-Diaz had failed to establish that either the guerrillas or the army will persecute him because of his political opinion. The opinion of the persecutors or general violence incident to the civil war in El Salvador is

1. "Race, religion, nationality or membership in a particular social group." *Cruz-Diaz*, 86 F.3d at 331.

not enough to meet the standard.[2] *Significance:* Minors are afforded no extra protections under the Immigration and Naturalization Act, 8 U.S.C. § 1158. Therefore, unstable conditions in El Salvador, alone, will not result in a grant of asylum for minors.

## V. CIVIL PROCEDURE AND CONFLICTS OF LAW

INTERNATIONAL COMITY REQUIRING BALANCING OF COMPETING INTERESTS BETWEEN SOVEREIGNS AND PARTIES INVOLVED CULMINATES IN MAINTAINING THE INTEGRITY OF THE DISCOVERY PROCESS. *In re Honda American Motor Co., Inc. Dealership Relations Litig.*, 168 F.R.D.535, (1996).

The instant case involved automobile dealership relations where plaintiff pursuant to an action against Honda Japan, a Japanese automobile manufacturer, moved to have four nationals associated with Honda Japan deposed. Honda Japan then moved to quash notices of a deposition naming Japanese nationals as deponents and requested a protective order.

The United States District Court for the District of Maryland *held* that: (1) compelling depositions of Japanese nationals in United States did not violate Japanese sovereignty; (2) general manager of public relations of manufacturer was a managing agent of the corporation; but (3) former president of the American division of foreign manufacturer was not managing agent of the corporation. The defendant Honda Japan's motion to quash deposition notices is granted as to Testuo Chino, but is otherwise denied.

The Court arrived at its decision to compel discovery of three of the nationals by examining principles of international comity, discovery, and antitrust laws. The Court writes that international comity is neither a matter of absolute obligation, nor of mere courtesy and good will. It is the recognition which one nation allows within its territory to legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[1]

Honda Japan argues that Japan disdains the United States system of open discovery and compulsory depositions; defendant's arguments, how-

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2. In M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990), the Fourth Circuit held that "well-founded fear requires an examination both of the subjective feelings of the applicant for asylum and the objective reason for the applicant's fear. This necessarily includes consideration of age."

1. In re Honda American Motor Co., Inc. Dealership Relations Litigation, 168 F.R.D. 535, citing Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

ever, failed to persuade the Court that Japanese judicial sovereignty would be violated if managing agents and Japanese nationals were deposed in Baltimore, Maryland. The Court notes that many countries have passed blocking statutes in an attempt to prohibit its nationals from complying with American discovery requests, particularly in antitrust litigation. These laws are insufficient in and of themselves for a district court to restrain its power to compel discovery. Ultimately, the Court recognizes that the integrity of the adversary system is maintained through an open discovery process ensuring that facts necessary for a proper and just adjudication are disclosed.

The Court also states that the case at bar also involves questions arising under the antitrust laws and central U.S. policy concerning economic regulation and freemarket competition. Antitrust laws have been considered the cornerstones of this nation's economic policies and are as important to the preservation of economic freedom and free-enterprise as the Bill of Rights is to the protection of fundamental personal freedom.[2] The subject matter of this lawsuit is the American anti-trust laws. It implicates both U.S. public policy interests and well-established foreign antagonism to those laws. Consequently, the United State's concerns with its own judicial sovereignty outweighs Japan's inconvenience and dislike for the American discovery system. *Significance*: The instant case safeguards the vitality of the American open discovery process in the face of an international comity dispute. Foreign nationals cannot always hide behind the cloak of international comity to elude the justice system of the United States.

A FOREIGN NATIONAL SEEKING RELIEF IN U.S. COURTS IS ENTITLED TO REASONABLE DISCOVERY WHEN FACED WITH A MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION; ALSO, DEFENDANT MOVING FOR FORUM NON CONVENIENS MUST PRESENT SUFFICIENT EVIDENCE THAT THERE IS A SUITABLE ALTERNATIVE FORUM FOR LITIGATION. *El-Fadl v. Central Bank of Jordan, et al.*, 75 F.3d. 668 (D.C. Cir. 1996).

Appellant Hassan El-Fadl, a Jordanian national, was an employee at PIBC, a subsidiary of Petra Bank in Jordan. In August 1989, the Central Bank of Jordan placed Petra Bank in receivership because it had uncovered financial improprieties. One month later, the Deputy Governor terminated El-Fadl's employment. Jordanian authorities arrested him in October 1989 as part of their investigation of the Petra Bank scandal. According to El-Fadl, the military police detained and tortured him for

2. *Honda American Motor Co.*, 168 F.R.D. at 539, citing United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

five days. He was prosecuted and found innocent in April 1992. In July 1993, El-Fadl filed a wrongful termination of employment claim against Petra International Banking Corporation ("PIBC") and several tort claims against the Central Bank of Jordan, its Governor and Deputy Governor, and Petra Bank in the Superior Court of the District of Columbia. The Central Bank of Jordan removed the case to federal district court and moved to dismiss. The district court dismissed all claims, ruling that 1) the Central Bank, the Governor and Deputy Governor were immune from liability under the Foreign Sovereign Immunities Act ("FSIA"), 2) the court had no personal jurisdiction over Petra Bank, and 3) El-Fadl had an adequate forum for his wrongful termination claim against PIBC in Jordan. El-Fadl appealed.

On appeal to the United States Court of Appeals, District of Columbia Circuit, El-Fadl alleged that the court erred in 1) dismissing his claims against the Deputy Governor, 2) dismissing, prior to the completion of discovery, his claims against Petra Bank for lack of personal jurisdiction, and 3) finding that he had an adequate alternative forum available to sue PIBC in Jordan. *Held: Affirmed in part; reversed and remanded in part.* The Court rejected El-Fadl's claim that the district court had jurisdiction over the Deputy Governor in that the Deputy Governor was not acting in his official capacity. Rather, the Court held that the Deputy Governor's activities in managing PIBC were in fact undertaken on behalf of the Central Bank and thus fell within the purview of the FSIA. Second, the Court reversed and remanded the pre-discovery dismissal for lack of personal jurisdiction over Petra Bank to allow El-Fadl further discovery of jurisdictional facts. Even though El-Fadl's jurisdictional allegations were insufficient at the time of the hearing, the Court found it was possible that El-Fadl could supplement them through additional discovery. The Court was concerned that a defendant could defeat jurisdiction of a federal court by "withholding information on its contacts with the forum." Third, the Court reversed and remanded the forum non conveniens dismissal of the claims against Petra Bank and PIBC because defendants failed to demonstrate that El-Fadl's claims could be filed in the Jordanian courts. The Court ruled that if El-Fadl did not have access to the judicial system in Jordan on the specific claims in his complaint, then dismissal on forum non conveniens grounds is inappropriate. *Significance:* Consistent with the requirement that a court consider pleadings and affidavits in light most favorable to the plaintiff when a foreign defendant has moved for dismissal for lack of personal jurisdiction, a plaintiff is entitled to conduct reasonable discovery before a court can grant a motion to dismiss. And, before a court will dismiss based on forum non conveniens, a defendant must show that there is an alterna-

tive, more convenient forum in which to resolve the specific allegations in the complaint.

THE WARSAW CONVENTION PERMITS AIRPLANE CRASH VICTIMS COMPENSATION ONLY FOR LEGALLY COGNIZABLE HARM DEFINED BY THE FORUM'S DOMESTIC LAW. WHEN THE FORUM IS UNITED STATES, DEATH ON THE HIGH SEAS ACT APPLIES, NO LOSS-OF-SOCIETY DAMAGE IS RECOVERABLE. *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S. Ct. 629 (1996).

Petitioners, Marjorie Zicherman (Zicherman) and Muriel Mahalek, Kole's sister and mother, respectively, sued respondent Korean Air Lines Co., Ltd. ("KAL") in the United States District Court for the Southern District of New York. Kole's death was caused by the crash of Korean Air Lines Flight KE007, *en route* from Anchorage, Alaska, to Seoul, South Korea, when it strayed into air space of the former Soviet Union and was shot down over the Sea of Japan.

At issue here is only the Warsaw Convention count, in which petitioners sought judgment against KAL for their pecuniary damages, for their grief and mental anguish, for the loss of the decedent's society and companionship, and for the decedent's conscious pain and suffering. The lower court awarded petitioners pecuniary damages as charged including loss-of-society damage, but respondent moved for determination that the United States statute, the Death on the High Seas Act ("DOHSA"),[1] prescribed the proper claimants and the recoverable damages, and that it did not permit damages for loss-of-society.

Article 17 of the Warsaw Convention, as set forth in official American translation of the governing French text, provides as follows: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The provision however, falls short to define what law should be used to define "damage." *Held: Affirmed in part and reversed in part.*

The first issue the Court addressed was what law governs the category of damages subject to reparations. The Court held that the post-ratification conduct of the contracting parties displays the understanding that the damages recoverable — so long as they consist of compensation for harm incurred — are to be determined by domestic law. Some countries, including England, Germany, and the Netherlands, have adopted

1. 41 Stat. 537 (1988 ed.), 46 U.S.C.A. § 761 et seq.

domestic legislation to govern the types of damages recoverable in a Convention case.

Having concluded that compensable harm is to be determined by domestic law, the next question the Court turned is that of which sovereign's domestic law. But this issue was not addressed because both petitioners and respondent agreed that if the issue of compensable harm is unresolved by the Convention itself, it is governed by the law of the United States.

The Court then turned to the final issue: which particular law of the United States provides the governing rule? The Court rejected the lower court's holding that general maritime law governs causes of action under the Convention, whether the accident out of which they arise occurs on land or on the high seas. The Court reasoned that the Convention itself contains no rule of law governing the present question, nor does it empower the Court to develop some common-law rule — under cover of general admiralty law or otherwise — that will supersede the normal federal disposition. The Court however, found that DOHSA should be the governing rule because the death at issue falls within the literal terms of its provision, and it is well established that those literal terms apply to airplane crashes.[2] Since the dictionary meaning of the term "damage" embraces harms that no legal system would compensate, it must be acknowledged that the term is to be understood in its distinctively legal sense to mean only legally cognizable harm.

DOHSA provides that the recovery in suit under section 761 shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. Thus, petitioners cannot recover loss-of-society damages under DOHSA. Moreover, where DOHSA applies, neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages. This is consistent with the history of many signatory nations. Czechoslovakia, Denmark, Germany, the Netherlands, the Soviet Union, and Sweden did not, even many years after the Warsaw Convention, recognize a cause of action for non-pecuniary harm such as loss-of-society resulting from wrongful death. This is also consistent with many wrongful death cases in United States lower courts. *Significance*: Warsaw Convention permits compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules. Where an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law. Because

2. See Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 263-64 (1972).

DOHSA permits only pecuniary damages, no loss-of-society damage is recoverable.