Maryland Journal of International Law

Volume 23 | Issue 1 Article 13

Survey of International Law & Trade

SURVEY OF INTERNATIONAL LAW & TRADE

This survey provides brief digests of cases that represent a variety of aspects and issues pertaining to international law and trade that have appeared in the different court systems throughout the United States. The cases are grouped in topical categories and references are given for further research. The surveys were submitted by Staff Members of the *Maryland Journal of International Law and Trade.* The Survey Editor was Alexis E. Kramer.

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CONGRESS' ENACTMENT OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT AND THE INCLUDED DESIGNATION OF LIBYA AS A STATE SPONSOR OF TERRORISM DID NOT RESULT IN AN UNCONSTITUTIONAL DELEGATION OF POWER. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2nd Cir. 1998).

On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland killing all 259 persons on board and eleven people on the ground. Libyans Lamen Khalifa Fhima and Abdel Baset Ali Al-Megrahi, named as individual defendants in the case at bar, have been indicted in both the United States and the United Kingdom for their connection with the bombing. At present, negotiations are in progress between the U.S., the U.K. and Libya to hold a criminal trial at The Hague at which the defendants would be tried under Scottish law for their alleged perpetration of the bombing. In 1994 some of the plaintiffs involved in the present suit brought claims which maintained that Libya and its agents were responsible for the destruction of Pan Am Flight 103. In response to this action Libya moved to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA) and other applicable law. At the time the suit was brought in 1994 there was no provision of the FSIA which would strip Libya of its sovereign immunity. Accordingly, the U. S. Dis-

trict Court for the Eastern District of New York dismissed the suit for lack of subject matter jurisdiction.

However, in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) amended the FSIA to include 28 USC § 1605(a)(7). Under this amendment, those foreign states that have been identified as state sponsors of terrorism are denied immunity from damages for personal injury or death which result from the sabotage of aircraft. After passage of this exception to the FSIA, the plaintiffs in the original suit re-filed substantially the same claims against Libya and its agents that had previously been dismissed by the District Court. The defendants once again moved to dismiss for lack of subject matter jurisdiction and lack of personal jurisdiction and to dismiss part of the plaintiffs' claims for failure to state a claim on which relief could be granted. As to its subject matter motion, the defendants asserted that the 1996 amendment to the FSIA was unconstitutional and as such this amendment could not create the requisite jurisdiction over Libya. The motion to dismiss for lack of personal jurisdiction was based on due process and the theory of minimum contacts.

On February 26, 1998, the District Court denied the defendants' motions to dismiss. Judge Platt held the following: (1) that the court had both subject matter and personal jurisdiction over the defendants; (2) that the amendments to the FSIA were constitutional; (3) that pendent jurisdiction existed over the plaintiffs' claims for battery and other common-law torts; and (4) that no portion of the suit should be dismissed for failure to state a claim. Libya appealed this ruling.

Held: Affirmed in part and dismissed in part. The responsibility of the Court of Appeals was to determine whether the District Court had jurisdiction to hear the claims brought by the numerous plaintiffs representing those killed in the bombing of Flight 103. The Court of Appeals concluded that it lacked jurisdiction to consider any of the appealed issues other than the defense of sovereign immunity to Libya's subject matter jurisdiction claim. In making its decision, whether the District Court had jurisdiction, the Court of Appeals went into a detailed discussion on the procedural requirements necessary to maintain jurisdiction over a party. These procedural issues, however, will not be examined here; instead, attention will be paid to the Court of Appeals' review of the District Court's decision that: "§ 1605(a)(7) does not unconstitutionally delegate legislative power by allowing the existence of subject matter jurisdiction over foreign sovereigns to depend on the State Department's determinations of whether particular foreign states are sponsors of terrorism." Before turning to the Court of Appeals' holding, it is first necessary to set forth the provisions of § 1605(a)(7). This section essentially abrogates the sovereign immunity of states in damage actions for personal injury or

death arising out of, *inter alia*, acts of aircraft sabotage, provided that the defendant has been designated a state sponsor of terrorism under 50 U.S.C. App. § 2405(j) or 22 U.S.C. § 2371. The designations under these statutes are made by the Secretary of State for the purpose of regulating exports and foreign aid; and since the passage of § 1605(a)(7) the State Department's designations additionally affect sovereign immunity. Libya contended that the Secretary of State's designation resulted in an unconstitutional delegation of a core legislative power—the power to determine the subject matter jurisdiction of the federal courts.

The Court of Appeals dismissed Libya's contention that there was an unconstitutional delegation of power based on its conclusion that there was in fact no such delegation. The court found that at the time that § 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism and hence no decision of the Secretary of State was required to create jurisdiction over Libya. The jurisdiction, the court asserted, existed the moment that the AEDPA amendment became law, and that in effect the subjection of Libya to jurisdiction was manifestly made by Congress itself. Upon its finding that the jurisdiction over Libya was created directly by Congress and without an intervening decision by another body, the Court of Appeals accordingly held that there was no unconstitutional delegation of power.

Significance: The most obvious significance of this decision is that Libya and its agents are now subject to suit in a federal district court of the United States for its actions in the downing of Pan Am Flight 103. However, this case is also significant for certain issues which the Court of Appeals does not address. In its finding that there was no unconstitutional delegation of power to the Secretary of State, the Court of Appeals writes that such unconstitutionality might be presented, if another foreign sovereign, which was not identified as a state sponsor of terrorism when the amendment to the FSIA was passed, was then placed on the list by the State Department. Additionally, the court noted that such a challenge might be raised if a state on the list when the amendment was enacted was later dropped from the state sponsored terrorism list.

Kimberly S. L. Essary

FINANCIAL LOSS INCURRED IN THE UNITED STATES BY AN AMERICAN PLAINTIFF, IF IT IS THE IMMEDIATE CONSEQUENCE OF A FOREIGN STATE'S COMMERCIAL ACTIVITY ABROAD, CONSTITUTES A DIRECT EFFECT SUPPORTING JURISDICTION UNDER THE THIRD CLAUSE OF THE FSIA. *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998).

The plaintiff, Voest-Alpine Trading USA Corporations (Alpine), a New York corporation with its principal place of business in Houston,

Texas, agreed to sell 1,000 metric tons of styrene monomer to the Jiangyin Foreign Trade Corporation (JFTC) for USD $1,000 per metric ton. The shipment was to be delivered to the Port of Zhangjiagang, China by July 1995. The defendant, Bank of China, an instrumentality of the People's Republic of China, issued an irrevocable letter of credit as security for performance of JFTC's payment obligation. On July 6, 1995, the Bank of China's Jiangyin Sub-Branch issued the letter of credit for USD $1.2 million. The letter provided that upon proper presentation of all documents and drafts the Bank of China would pay Alpine the appropriate amount.

On July 22, 1995, Alpine delivered 997.731 metric tons of styrene monomer to the Port of Zhangjiagang, China. Shortly after arrival at the port in China the shipment was seized by Chinese customs. Alpine provided its bank, the Texas Commerce Bank (TCB) with the necessary documents for presentment to the Bank of China. On August 3, 1995, TCB forwarded the documents to the Jiangyin Sub-Branch. On August 11, 1995, the Bank of China telexed TCB alleging the documents contained several discrepancies and stating it was contacting JFTC to see if the discrepancies could be waived. On October 4, 1995, after various communications between Alpine, Bank of China and JFTC, the Bank of China telexed TCB that JFTC insisted on refusal of payment and that the documents would be returned.

On October 20, 1995, Alpine filed action against the Bank of China in the U. S. District Court for the Southern District of Texas in Houston seeking damages for breach of the letter of credit. The Bank of China argued for a motion for judgment on the pleadings under the Federal Rules of Civil Procedure 12(c), asserting lack of jurisdiction and improper venue. The Bank of China maintained that under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2), it is immune from suit in any federal or state court in the United States unless one of the enumerated exceptions to the FSIA applies. Bank of China argued that because none of the exceptions apply the action should be dismissed. Alpine countered that the "commercial activity" exception applied because its action was based upon commercial activity conducted by the Bank of China (or its agents) in the United States and upon commercial activity by the Bank of China outside the United States that caused a direct effect in the United States. On June 30, 1997, the District Court denied the Bank of China's motion. The court held the lawsuit fell within the scope of the third clause of the commercial activity exception. Therefore, judgment on the pleadings dismissing the case would be inappropriate. The Bank of China appeals.

Held: Affirmed. Under the FSIA, foreign states and their agencies or instrumentalities are generally immune from suit in the courts of the

United States. The court focused on whether the Bank of China's failure to pay occurred in the United States or caused a direct effect in the United States. The Bank of China argued that its failure to pay on the letter of credit did not have a direct effect in the United States because it did not engage in any legally significant act in the United States. The court stated that the Fifth Circuit unlike some of the other circuits has not adopted the requirement of a "legally significant act" in order to have a direct effect. The court based its reasoning on Supreme Court precedents where the Court expressly admonished the circuit courts not to add "any unexpressed requirement[s]" to the third clause. The legally significant act requirement is not expressed in the third clause.

The court found Alpine to be an American corporation that suffered a nontrivial financial loss in the United States in the form of funds not remitted to its account at a Texas bank. Had the Bank of China not found it necessary to refuse payment, it would have wired the money directly to Alpine's Texas bank account. The court stated the Bank of China's failure to pay on the letter of credit caused a direct effect in the United States, which was Alpine's nonreceipt of funds in its Texas bank account and which followed as an "immediate consequence" of the Bank of China's actions.

Significance: A financial loss incurred in the United States, by an American plaintiff, as an immediate consequence of a foreign state's commercial activity abroad, will constitute a direct effect within the scope of the third clause of the commercial activity exception to the FSIA.

Trish L. Hessel

THE "DIRECT EFFECT" REQUIREMENT OF THE COMMERCIAL ACTIVITY EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT CAN BE SATISFIED EVEN IF THE DEFENDANT NEVER EXPRESSLY AGREED TO A CONTRACTUAL PERFORMANCE IN THE UNITED STATES. *Hanil Bank v. PT. Bank Negara Indonesia,* 148 F.3d 127 (2nd Cir. 1998).

PT. Bank Negara Indonesia (BNI), the defendant, issued a letter of credit to an Indonesian manufacturer of car radios, which provided that "upon receipt of documents in conformity with the terms of this credit we will reimburse the negotiating bank according to their instruction." The letter of credit was presented to Hanil Bank (Hanil), a Korean bank, for payment. Hanil forward the letter of credit documents to BNI and instructed payment to be made to a bank account in New York. BNI refused payment.

In response, Hanil filed a breach of contract action against BNI in the New York State Supreme Court. The action was then removed to fed-

eral court where defendant BNI moved to dismiss under F.R.C.P. 12(b)1 and 12(b)2. BNI claimed immunity from suit in United States courts under the Foreign Sovereign Immunities Act (FSIA), based on the fact that the Indonesian government owns the bank. BNI claimed that under the FSIA, the federal district court lacked subject matter jurisdiction and lacked personal jurisdiction because service of process was insufficient under the Act. After the District Court denied the motion, BNI appealed.

The Second Circuit focused on the "commercial activity" exception to the FSIA which provides three scenarios in which a foreign state will not be immune from suit. Specifically at issue in this case was the third type of act, which was "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." BNI conceded that the issuance of the letter of credit and subsequent failure to make payment was a commercial activity that occurred outside of the United States. The court was then left to decide whether the act had a "direct effect" in the United States.

Held: Affirmed. Since BNI's obligation required that funds be remitted to a New York bank, their failure to send those funds had a "direct effect" in the United States, even though BNI had never expressly agreed to make payment to a United States bank account. The court relied on the Supreme Court's most recent discussion of "direct effect" in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), where the Court explained that an effect is direct if "it follows as an immediate consequence of the defendant's activity" and the court also relied on a subsequent Second Circuit case, *Commercial Bank of Kuwait v. Rafidian Bank*, 15 F.3d 238 (2nd Cir. 1994). BNI, however, attempted to distinguish those cases because in *Weltover* the defendant had agreed to a U.S. location as a possible place of performance and in *Rafidian* the defendant had made previous payments to a U.S. account before the breach took place. The court rejected these distinctions by reasoning that if the result of the contract required them to send money into the U.S. and they failed to do so, there is necessarily an effect in the United States.

Significance: The court has given a very broad meaning to the third part of the commercial activity exception to the FSIA. This will allow a greater number of cases to be brought against defendant foreign states upon a showing that regardless of the consent or previous actions of the state, any effect from their commercial activities that touches the United States will make them amenable to the jurisdiction of the United States.

Christina M. Salerno

II. INTERNATIONAL LAW AND TRADE

ASSERTING JURISDICTION OVER LEADERS OF FOREIGN POLITICAL PARTIES UNDER THE ALIEN TORT CLAIMS ACT. *Jane Doe I, et al. v. Islamic Salvation Front and Anwar Haddam*, 993 F. Supp. 3 (D.C.C. 1998).

In 1991, the Islamic Salvation Front (FIS) won the first free elections in Algeria since gaining its independence from France. The Algerian military declared the elections invalid and banned the FIS. Since that time civil war has plagued Algeria. The court explains that "scores of innocent civilians, mostly women and children, are being killed, raped, butchered, dismembered, burned, tortured, and treated in other vicious and inhumane ways. So far, tens of thousands of lives have been extinguished." Exactly who is responsible for these acts is not clear, but the military and FIS are suspected.

This case was brought by the Rassemblement Algerien de Femmes Democrates, an organization of Algerian women and eight anonymous French and Algerian citizens. Plaintiffs allege that the defendants conspired to commit crimes against humanity, war crimes, summary executions, rapes, mutilations, sexual slavery, murders, and numerous other violations of international law.

Defendant Anwar Haddam won a seat in the Algerian parliament in 1991. However, when the military banned the FIS party, Haddam fled and sought political asylum in the United States. Since that time he has served as a spokesperson for the FIS in their office in Washington D.C. In his capacity as a spokesperson, Mr. Haddam issued newsletters, communiqués, declarations and other statements. The plaintiffs contend that he also conspired, aided and abetted in the violent activities of the FIS.

The action was brought under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350. The ATCA states that the "district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Plaintiffs contend that since the allegations constitute violations of international law the court has jurisdiction over this proceeding. Haddam filed a motion to dismiss contending, in part, that there is no personal jurisdiction, no subject matter jurisdiction, and that the issue is not justiciable.

Held: Motion denied. The District Court held that it does have jurisdiction to hear the case. The opinion examined the connection between the defendant, the forum and the litigation. It concluded that the suit arose out of Haddam's connection with FIS. The activities that Haddam conducts on behalf of FIS are what gave rise to the cause of action.

There are three prerequisites to bring a suit under the ATCA. First, the Plaintiff must be an alien; second, the cause of action must be for a tort; and third, the tort must be committed in violation of the law of nations or a treaty of the United States. The court determined that all three of these conditions were met. Haddam argued that the law of nations required that the action be committed under actual or apparent authority of a foreign state, and that international law only applies to state actors not private ones. The court rejected this argument saying that the acts of the FIS alleged by the plaintiffs are prohibited by international law against both state and private actors.

The court then turned its attention to jurisdiction under the TVPA. The TVPA states that an "individual who, under actual or apparent authority . . . of any foreign nation [subjects an individual to torture or to extrajudicial killing shall] be liable for damages." The court asserted that certain private groups may be considered a *de facto* state and thus can be sued under the TVPA. The court reserved judgment on whether FIS is a *de facto* state noting that facts were insufficient to make this determination.

Thirdly, Haddam argued that the court cannot determine whether FIS is a *de facto* state without infringing upon the domain of the legislature and executive branches. The court determined that since it was not making this assessment yet, that question too would have to wait, but the court could claim jurisdiction under the ATCA.

Significance: The decision expands the scope of actions that can be brought under the ATCA. The defendant has spent the last seven years in the United States and has not been in Algeria where most of the atrocities have taken place. Here, the defendant is not accused of committing atrocities himself, or ordering others to do so on his behalf, but rather encouraging others to do so from a distance. Other cases under the ATCA have not gone this far but have claimed jurisdiction over government officials or terrorists who have actually been involved in committing violations of international law.

Roya M. Hanna

SEEKING REDRESS FOR U.S. VIOLATIONS OF INTERNATIONAL TREATIES IN U.S. COURTS. *Breard v. Greene*, 523 U.S. 371 (1998).

In 1993, Angel Breard, a citizen of Paraguay, was charged with attempted rape and capital murder. At his jury trial, Breard took the stand and confessed that he had killed the victim, but had done so because he was under a satanic curse. He was found guilty and was sentenced to death. The Supreme Court of Virginia affirmed both the conviction and

the sentence. The U. S. Supreme Court denied *certiorari.* In 1996, Breard filed a *habeas corpus* motion in District Court. He claimed that his rights under the Vienna Convention on Consular Relations (Vienna Convention) were violated since he was not informed of his right to contact the Paraguayan Consulate when he was arrested. The District Court dismissed the petition stating that since Breard did not raise the issue at trial he defaulted on the claim, and furthermore, Breard did not show cause or prejudice for the default. The Republic of Paraguay filed a separate action against a few Virginia officials, claiming its rights under the Vienna Convention were also violated. The District Court dismissed Paraguay's claim for lack of subject matter jurisdiction. The Court of Appeals affirmed both of these decisions.

Paraguay then filed suit in the International Court of Justice (ICJ) against the United States, alleging that the U.S. violated the Vienna Convention when Breard was arrested. The ICJ ordered the U.S. to "take all measures" to ensure Breard is not executed before the ICJ has the opportunity to make its ruling. Breard filed a *habeas corpus* petition and a stay application seeking to enforce the ICJ ruling. Paraguay also filed a motion for leave to file a bill of complaint with the Supreme Court citing the Court's original jurisdiction over all matters affecting Ambassadors and Consuls.

Held: *Denied.* In a *per curiam* opinion, the Court denied Breard's *habeas corpus* motion saying that Breard had procedurally defaulted on the claim since he did not raise it in the state courts. Breard and Paraguay argued that since the Vienna Convention is the "supreme law of the land" it trumps the procedural default doctrine. The Court rejected this argument on two grounds. First, the procedural rules of the forum govern the implementation of the treaty; and second, if a statute and a treaty contradict, then the most recent one (in this case the statute) will control. The Court cited the Antiterrorism and Effective Death Penalty Act, which provides that a *habeas corpus* petitioner who claims he is held in violation of international treaties must develop the factual basis of the claim in state courts before he is given a hearing. The Court concluded that this rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him. Furthermore, it is unlikely that such a violation should result in overturning the conviction.

The Court then turned its attention to Paraguay's suits. The Court found that there was no right under the Vienna Convention for Paraguay to bring an action to set aside a criminal conviction. In addition, the Court ruled that a violation of the Vienna Convention is not a continuing wrong and thus Paraguay could not bring suit under an exception to the Eleventh Amendment. The Consulate General for Paraguay also argued that he could bring the action under 42 U.S.C § 1983 which provides "a

cause of action to any person within the jurisdiction of the United States for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The Court held that Paraguay is not a person as used in § 1983; moreover, Paraguay is not within the jurisdiction of the United States.

The Court rejected the requests of both Breard and Paraguay for a stay of execution, noting that it was the decision of the Governor of Virginia, and the Court would not interfere with his decision. Breard was executed that evening.

Significance: This case is among the first cases in which a foreign government is seeking redress for American violations of international law in American courts. It establishes the Court's position that "absent a clear and express statement to the contrary," U.S. courts should apply their own rules with regard to procedure. Furthermore, unless the treaty provides for a private action in the United States, foreign governments will not be allowed to bring suit in U.S. courts to set aside convictions or sue government officials under the exceptions to the Eleventh Amendment. This will make it difficult for foreign governments to seek redress for violations of international treaties in U.S. courts. Finally, as Secretary of State Albright feared, the Court's decision and the subsequent execution of Breard may send a message to the international community that the U.S. does not abide by the International Court of Justice's rulings.

Roya M. Hanna

IMPORTERS ARE COVERED UNDER THE "FIRST SALE DEFENSE" OF THE COPYRIGHT ACT OF 1976. *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 118 S.Ct. 1125 (1998).

L'anza Research International, Inc. (L'anza), a California based manufacturer of copyrighted hair care products, heavily marketed and distributed its products in the United States as high end products. All U.S. distributors were authorized by L'anza to sell its products pursuant to strict contractual agreements. The foreign market for L'anza's products, however, was not a high end one and the prices for its products were considerably less in these foreign markets. L'anza's foreign distributors were therefore not subject to the contractual agreements that their U.S. counterparts were. In 1997 a United Kingdom distributor sold a shipment of L'anza's product to another foreign distributor who in turn, imported them back into the United States, selling them at the lower foreign prices and distributing them to unauthorized U.S. dealers. L'anza filed suit against the importer, Quality King Distributors, Inc. (Quality King) in U.S. District Court for Central California. The suit charged Quality King with importing its copyrighted products into the U.S. in violation of the

Copyright Act, 17 U.S.C.A. § 602. Section 602a describes the "unauthorized importation of copyrighted materials as an infringement of the exclusive right to distribute under § 106."

The District Court entered an injunction against Quality King. The Ninth Circuit upheld the injunction and Quality King successfully petitioned for a *writ of certiorari*. Quality King's argument on appeal was that the lower courts interpretation of § 602a was flawed and that importers of lawfully purchased copyrighted products were protected by § 109a of the Act, which enabled all subsequent owners of copyrighted products to resell them without the restrictions of the copyright holder. Quality King's theory was that

> "106 granted copyright holders the exclusive right to vend" their products. The court previously interpreted the right "to vend" as extending only to the first sale of the product. Once the product entered into the stream of commerce, subsequent owners of the products were not subject to the copyright in terms of resale. This is why L'anza entered into contractual agreements with its U.S. distributors so they would sell only to authorized dealers. This is known as the "first sale" doctrine and is codified in the Act under § 109a. The effect of § 109a's limitation on a copyright is to create a defense to copyright infringement actions against these subsequent owners.

L'anza urged the Supreme Court to follow the lower court rulings that importers were not covered under the first sale defense of § 109a. L'anza asserted that § 602a would have no meaning if the first sale defense was given to importers since § 602a expressly restricts importers from infringing on a copyright holder.

Held. Reversed. The Court refused to accept the lower courts' and L'anza's interpretation of the Copyright Act and agreed with Quality King's contention that importers were covered by the "first sale" doctrine. The Court reasoned that despite the fact that § 602a specifically restricted importers, § 602a and § 109a are inextricably linked. Because § 602a incorporates the § 106a definition of a copyright holder's rights, which includes by reference, the "first sale" doctrine, importers are able to raise this as a defense.

The question still remained as to the meaning of the § 602a language. Acknowledging the fundamental judicial principle that every part of a statute should be given meaning, the Court phrased the relevant question to be what was the meaning of "unauthorized importation" in § 602a if it did not mean that all imports not authorized by the copyright holder were an infringement. To answer this question the Court relied on

congressional testimony regarding revisions to the Act to conclude that § 602a was meant to cover products that had U.S. copyrights but were actually made under foreign laws. The testimony referred to the problems in the publishing industry where a work is copyrighted in the U.S., but the publisher also enters into an agreement with foreign publishers who purchase the foreign distribution rights and actually publish or manufacture the book in that country. Section 602a is meant to exclude the foreign publisher from importing the foreign edition into the United States. These entities that legally publish or manufacture U.S. copyrighted material in foreign markets are restricted from using the "first sale" doctrine to make imports because the language of § 109a permitting the unrestricted sale of "lawfully" made copies, applies only to products made under U.S. law. Therefore, an item copyrighted under U.S. law could be authorized for manufacture and distribution in a foreign country. If this occurs, those products would not have been made under the (copyright) laws of the United States. The purpose of § 602a is to control the unauthorized importation of these products. All of L'anza's products had been made in the U.S., and thus its copyrights were all subject to the limitations of the first sale doctrine.

Significance. In the future, manufacturers of goods who rely heavily on marketing allocation and distribution must protect themselves with contractual rights against foreign distributors in addition to U.S. distributors. There is no broad protection under U.S. copyright laws against the reintroduction of cheaper, copyrighted goods into the U.S. market.

Michelle Harrison-Davis

VECTOR SUPERCOMPUTERS FROM JAPAN ARE A "LIKE PRODUCT" BEING SOLD AT "LESS THAN FAIR VALUE" IN THE UNITED STATES; HOWEVER, THE INTERNATIONAL TRADE COMMISSION INCORRECTLY DETERMINED THAT THIS THREATENED TO CAUSE THE UNITED STATES' PRODUCERS MATERIAL INJURY. *NEC Corp. and HSNX Supercomputers, Inc. v. Dep't of Commerce & U.S. Int'l Trade Comm.*, No. 97-11-01967, 1998 Ct. Int'l Trade LEXIS 167 (Ct. Int'l Trade 1998).

In 1996 Cray Research, Inc. filed a petition with the Department of Commerce (Commerce) alleging that vector supercomputers from Japan were being sold, or were likely to be sold in the United States at "less than fair value" (LTFV), and that such imports were materially injuring or threatening material injury to an industry in the United States. Commerce published a final determination concluding that vector supercomputers were being sold at LTFV in the United States. In 1997 the International Trade Commission (Commission) promulgated its final injury determination, concluding that there was no present injury, but the do-

mestic industry was threatened by material injury by reason of LTFV imports of vector supercomputers from Japan.

In determining whether an industry in the United States was materially injured or threatened with material injury, by reason of certain imports, the Commission first had to define the "domestic like product" and the "industry" producing the product. Title 19 U.S.C. § 1677(10) defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." "Industry" is defined in 19 U.S.C. § 1677(4)(A) as the "producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." In its final determination the Commission listed the products under investigation as "all vector supercomputers" further defining a vector supercomputer as "any computer with a vector hardware unit as an integral part of its central processing unit boards."

The Commission based its decision primarily on four factors: (1) the differences in physical characteristics between vector-supercomputers and non-vector supercomputers; (2) the difficulty in modifying software applications "optimized" for vector supercomputers and for similar optimal use in non-vector supercomputers; (3) customer and producer perceptions; and, (4) price differences. The Commission found that the domestic like products were vector supercomputers only, rather than all supercomputers.

After making its like product determination, the Commission then moved on to an injury determination. To make such a determination, the Commission was mandated by the relevant anti-dumping statute to find a causal connection between the LTFV goods and the threatened material injury. The Commission found that the domestic industry producing vector supercomputers was threatened with material injury by reason of the LTFV imports from Japan. The Commission based its finding in part on a "vulnerability analysis" in which the industry was rendered weakened by a series of factors that made it particularly vulnerable to the adverse effects of dumped imports. Plaintiffs, NEC Corporation, HSNX Supercomputers, Inc. and Fujitsu, Ltd. challenged all of the Commission's findings as to its like product determination and its positive finding of the threat of material injury.

Held: Sustained in part and remanded in part. The court found, based on the evidence offered, that the Commission reasonably determined that the domestic like product consists only of vector supercomputers; and that it could not be concluded that the Commission made the requisite determination that the LTFV imports themselves made a material contribution to the threatened material injury. Therefore, the court re-

manded the Commission's threat determination for further explanation or reconsideration.

Significance: So long as the product decision is supported by substantial evidence, the court will uphold the Commission's initial determination. In deciding material injury in this case, a threat of material injury analysis is inherently less amenable to quantification than the material injury analysis. However, a showing that economic harm to the domestic industry is likely to occur when LTFV imports are also on the market is not enough to show that the imports will likely cause a material injury. Accordingly, a finding of threatened material injury could not be upheld.

Claudia F. Rozenberg

DOES A TAX WHICH IS DETERMINED BY THE VALUE OF THE GOODS BEING SHIPPED FROM THE PORT VIOLATE THE EXPORT CLAUSE OF THE U.S. CONSTITUTION? *United States v. U.S. Shoe Corp.*, 118 S. Ct. 1290 (1998).

The Court significantly limited Congress' power to tax importers and exporters under the Export Clause of the U.S Constitution in *U.S. Shoe Corp.* The Court found that a tax levied *ad valoreum* under the Harbor Maintenance Tax (HMT), 26 U.S.C. § 4461(a), to all goods loaded for export at U.S. ports violates the Export Clause. The Court concludes that because the tax, as applied, failed to fairly approximate the extent of the exporters use of the port, a proper Congressional taxing purpose, it violated the Export Clause of the Constitution.

The HMT places a fee on all goods exiting and entering the country through U.S. ports. Enacted in 1986 as part of the Water Resources Development Act, 26 U.S.C. §§ 4461-4452, the fee is determined by calculating 0.125 percent of the goods' value. It is levied upon "exporters, importers, and domestic shippers" at the time of either loading or unloading at the U.S. port. The Customs Service collects the fee and deposits it in the Harbor Maintenance Trust Fund. Congress may then use these funds for the care and maintenance of U.S. harbors.

In this case, U.S. Shoe Corporation sought reimbursement of the HMT fees they paid while exporting goods from April to June 1994. Claiming that the tax violated the Export Clause of the Constitution, U.S. Shoe first brought its claim with the U.S. Customs Service (Customs). Customs responded with a letter stating that "the HMT is a statutorily mandated fee assessment on port users, not an unconstitutional tax on exports." U.S. Shoe Corporation then filed its action against the Government in the Court of International Trade (CIT) in November, 1994.

The CIT ruled in favor of U.S. Shoe. It held that U.S. Shoe properly invoked CIT's jurisdiction under 28 U.S.C. § 1581(i). It also sided with U.S. Shoe and concluded that the HMT constitutes a tax, not a user fee,

because it is "assessed *ad valoreum* directly upon the value of the cargo itself" and, thus, it violates the Export Clause.

The Court of Appeals for the Federal Circuit affirmed CIT's ruling. It agreed that because HMT is set only by the value of the goods, and not the exporters' use of the port facility, it is a tax that violates the Export Clause. Because HMT was being hotly contested in several cases at the CIT, and the Court of Federal Claims, the Supreme Court granted *certiorari*.

Held: After ruling in favor of CIT's invoking jurisdiction, the Supreme Court held that HMT, as applied, was unconstitutional. In its reasoning, the Court invoked language from its decision in *I.B.M. Corp. v. United States*, 517 U.S. 843 (1996), in which the Court held that "the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit." Thus, the issue of whether HMT operates like a tax proves central to determining its constitutionality.

The Court continued its reasoning by applying the test it established in *Pace v. Burgess*, 92 U.S. 372 (1875). According to this historic test created in *Burgess*, a Congressionally imposed fee must (1) act as compensation for services rendered; (2) bear "no proportion whatever to the quantity or value" of the good; and (3) not be excessive. Thus, the nexus between the service the Government is rendering and the fee it imposes for this service becomes the pivotal point of constitutionality under the Export Clause as applied to exports.

The Court delineates certain factors that could be the basis for a user fee. They include, "the size and tonnage of a vessel, the length of time it spends in port, and the services it requires." However, here, because the HMT is determined solely by the value of the good, not the exporter's actual use of a port, the nexus is too attenuated. Therefore, the tax should not stand under the Export Clause as applied to exports.

Significance: This ruling proves significant because it tightens the constraints on Congress' taxing power of exporters in U.S. ports. By requiring the tax to be closely connected to an exporter's use of a port, rather than the value of the goods being shipped from the port, this holding emphasizes the restrictive nature of the Export Clause. Finally, it will create a precedent to settle the many disputes over this clause that exporters claim in courts today.

Kelly L. Shubic

APPELLATE DETERMINATION OF MANUFACTURING PROCESSES "INCIDENTAL TO ASSEMBLY" FOR CUSTOMS DUTIES OUGHT TO BE MADE DE NOVO AND WITHOUT DEFERENCE TO CUSTOMS REGULATIONS OR GUIDES. *Levi Strauss & Co. v. United States*, 156 F.3d 1345 (Fed. Cir. 1998).

Levi Strauss & Co. (Levi) would manufacture denim fabric in the United States, cut it to shape, and ship it to Guatemala for assembly into jeans, or more specifically, into boys "stonewashed" jeans. After the denim became jeans in Guatemala, the completed jeans were shipped back to the United States for miscellaneous work and eventually distributed to retailers for sale. Following the Harmonized Tariff Schedule of the United States, officials from the U.S. Customs Service (Customs) classified the returning denim product as boys' one hundred percent cotton trousers and imposed the applicable 17.7% duty on the imported jeans. Levi disagreed with Customs' duty imposition claiming it was entitled to a partial duty exemption reflecting the cost of the fabric production in the United States.

According to the Harmonized Tariff Schedule, a partial duty exemption is granted when articles are assembled abroad from materials made in the United States so long as (i) the fabricated components were exported from the U.S. ready for assembly without any further fabrication, (ii) the components have not lost their physical identity, and (iii) the value or condition of the components remains unimproved *except by operations incidental to the assembly process* such as lubricating, cleaning, and painting (emphasis added).

Customs denied Levi's protest because, in it's view, the "stonewashing" operation was not incidental to the assembly process as contemplated in the U.S. Tariff Schedule. Not only did Customs find "stonewashing" an important and value-adding operation, but their official regulations even list, chemical treatment to impart new characteristics, as an example of what would not be considered incidental to the assembly process. The U. S. Court of International Trade found otherwise, reversed the Customs' determination, and ruled in favor of Levi's request for partial duty relief.

Held: Affirmed. The Court of Appeals agreed with the U.S. Court of International Trade finding that re-evaluation of Customs' regulations and decisions was appropriate, and that at the appellate level, *de novo* review was indeed required for questions of law. Specifically, the Court of Appeals made their own review of the facts (as determined by the lower court) and of the law and found that the lower court's ruling was not clearly erroneous. The court's opinion first attacked the government's contention that deference ought to be given to Customs' determinations. The court found that it never had nor ever should be influenced by what

Customs determines; on the contrary, the court held that appellate courts should decide questions of law for themselves. The court concluded that the lower court did not err by its non-deferential stance, and that its finding that the "stonewashing" process was indeed incidental to the assembly process was not clearly erroneous; thus, it was upheld.

Significance: An unequivocal non-deferential standard has been set regarding appellate review of Customs' determinations.

Philip M. Wright

III. IMMIGRATION LAW

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION CANNOT BE INVOKED BY A RESIDENT ALIEN TO AVOID A REAL AND SUBSTANTIAL FEAR OF FOREIGN PROSECUTION. *United States v. Aloyzas Balsys,* 118 S. Ct. 2218 (1998).

The Office of Special Investigations of the Criminal Division of the United States Department of Justice (OSI) was created to institute deportation hearings against suspected war criminals who participated in Nazi persecution. Respondent, Balsys, a resident alien, was suspected of such activity despite his representations to the contrary contained in his visa application. The OSI issued an administrative subpoena to question Balsys about his wartime activities. At his deposition he refused to answer any questions beyond his name and address. He invoked the Fifth Amendment privilege against self-incrimination contending that answering such questions would subject him to criminal prosecution in several foreign jurisdictions.

OSI petitioned the Federal District Court to compel Balsys to respond to its questions. The District Court granted OSI's petition holding the Fifth Amendment inapplicable to incrimination in a foreign jurisdiction. The Court of Appeals for the Second Circuit vacated the judgment of the District Court, holding that respondent could assert the Fifth Amendment privilege even though his real and substantial fear of prosecution involved a foreign jurisdiction, rather than a domestic jurisdiction. The Supreme Court granted *certiorari.*

Held: Reversed and remanded. The fear of foreign prosecution is beyond the scope of the Fifth Amendment privilege against self-incrimination. The Court first held that the respondent, as a resident alien, was considered a person under the Fifth Amendment and was entitled to its protection, just as any citizen would be. If Balsys had been asserting the Fifth Amendment privilege against self-incrimination to avoid prosecution in the jurisdiction of either the federal government or one of the states, he would have been entitled to invoke the privilege.

The Court then considered the Fifth Amendment's broad reference to "any criminal case." Respondent argued that this phrase should be interpreted to mean any criminal case anywhere, and therefore, that foreign jurisdictions fall within the contemplation of the amendment. The Court held that the more logical interpretation of the amendment was that the phrase in question simply serves to indicate that the privilege against self-incrimination is not categorically limited in the way that the amendment requires a grand jury indictment "for a capital, or otherwise infamous crime." The Court also pointed out that since the Fifth Amendment was incorporated into the Fourteenth Amendment, the privilege against self-incrimination has been binding on both state jurisdictions and the national government. A review of precedents confirmed the principle that the privilege applies only to the sovereign that created it and, therefore, not foreign jurisdictions.

The Court next rejects respondent's argument that the cooperative federalism that is espoused in caselaw supports a doctrine of cooperative internationalism by analogy. Adopting a doctrine of cooperative internationalism would upset the established balance between private and governmental interests. The Court found that the judiciary would not be able to recognize the fear of foreign prosecution while preserving the current policy of exchanging testimony for immunity, because such immunity could not be enforced overseas.

Finally, the Court points out that there may come a time in the future when an assertion of the Fifth Amendment privilege against self-incrimination to avoid foreign prosecution may be upheld. First, however, there would have to be enactment of substantially similar codes for the criminal prosecution of international offenses in several different nations, including the United States. Although the Court recognizes this as a future possibility, the respondent cannot now assert the privilege to avoid foreign prosecution.

Significance: Even though the United States, as be shown by the facts of this case, has an interest in foreign prosecution, the creation of the OSI and treaties to help seek out Nazi persecutors, does not establish a relationship with any foreign nations which would give rise to a doctrine of cooperative internationalism. Thus, the Fifth Amendment privilege against self-incrimination cannot be invoked even when there is a real and substantial fear of subsequent foreign prosecution.

Rebecca A. Fleming

A FEDERAL COURT OF APPEALS WILL NOT INVALIDATE A BOARD OF IMMIGRATION APPEALS' DECISION BASED ON SUBSTANTIAL EVIDENCE. *Morales-Canales v. U.S. Immigration & Naturalization Serv.*, No. 98-1092, 1998 U.S. App. Lexis 32557 (4th Cir. 1998).

Lesly Licett Morales-Canales, a native and citizen of Honduras, was raped and beaten by military men in Honduras. She sought asylum in the United States but the Board of Immigration Appeals (Board) denied her application and issued a deportation order. After exhausting her administrative remedies, Morales-Canales appealed to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the Board's findings. The Fourth Circuit, in line with well-settled precedent, gave all possible deference to the Board's conclusions. In the court's words, "we must uphold the Board's determination that Morales-Canales is not eligible for asylum if the determination is 'supported by reasonable, substantial and probative evidence on the record considered as a whole.' " (*quoting* 8 U.S.C. § 1105(a)(4) (1994)).

In order to qualify for asylum, an applicant must show that she is a "refugee" within the meaning of the Immigration and Nationality Act (Act). The Act defines a "refugee" as a person who is unwilling or unable to return to her native country "because of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." (*quoting* 8 U.S.C. §1101(a)(42)(A) (1998)). Although Morales-Canales testified that she was raped and beaten because of her family's political activities, the Board did not find her testimony credible. Morales-Canales furnished documentation corroborating the rape from the medical doctor who treated her the same day of the attack. She testified that the rapists wore military uniforms and bags on their heads. Morales-Canales reported the rape to the authorities in Honduras, but no action was taken against her assaultors. She testified that one of the men who raped her told her that they were seeking vengeance because of her father's political activities. According to Morales-Canales, the military disliked her father's participation in the "Liberal Party" and his efforts to promote human rights and assistance to the poor. She testified that her father was detained for six months by the military in 1994 because of his party affiliation and he disappeared after his release.

Held: Affirmed. The Board found Morales-Canales' testimony not to be credible, and the Fourth Circuit affirmed its finding because Morales-Canales could not conclusively identify her attackers as members of the military. The Board also found it remarkable that Morales-Canales and her husband differed in their testimony as to their marriage date and where they lived after they married. Additionally, Morales-Canales initially lied to INS officials about her nationality and the whereabouts of

her husband. However, she explained that she lied about her husband's presence in the United States because she did not want him deported as well. Most importantly, the Board found it implausible that Morales-Canales' father would have been imprisoned for his political activities during the time when the "Liberal Party" was in power. Also, information provided by Morales-Canales' psychologist, showed that Morales-Canales' father appeared to be involved in embezzlement activities. A statement by one of the rapists also suggested that the attack occurred because of a personal vendetta against Morales-Canales' father. Thus, the Board concluded that Morales-Canales' persecution was of a personal nature and not because of political persecution. The former, naturally, is not protected by the Act.

The Board failed to explain why it is "incredible" to believe that members of a political party would persecute other members of their own party. Members of the same political party may not share the exact same political views and these differences could be significant at times. Also, the discrepancies in Morales-Canales testimony do not appear sufficiently related to her fear of future political persecution. The Fourth Circuit found the reasons supplied by the Board to constitute "substantial evidence" in support of its credibility findings.

Significance: Where the Board of Immigration Appeals' determination as to asylum is based on reasonable, substantial and probative evidence, a federal court will not overturn the Board's decision when the "specific reasons" are provided.

Hebba M. Hassanein

IV. CIVIL PROCEDURE

THE COURT OF INTERNATIONAL TRADE DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE IRS AND, THEREFORE, CANNOT JOIN THE IRS AS AN INDISPENSABLE PARTY UNDER FRCP RULE 19 EVEN WHEN DIFFERENT OBLIGATIONS ARE IMPOSED ON IMPORTERS BY DIFFERENT REGULATORY AGENCIES. *United States v. Shabahang Persian Carpets, Ltd.*, 27 F. Supp.2d 229 (Ct. Int'l Trade 1998).

Defendant Shabahang Persian Carpets, Ltd. (Shabahang) imported carpets from Iran between March 6, 1984 and November 4, 1987 to Milwaukee, Wisconsin. The U.S. Customs Service (Customs) alleges that Shabahang intentionally understated the value of consumption entries, on the Customs 7501 forms, to avoid import duties. Shabahang allegedly supported its entry declarations with false invoices that stated the total value of the carpets to be $1,862,612.00. Shabahang reported on its tax returns for the years 1987 to 1990 that the value of the same rugs was

substantially higher than the value that was reported to Customs, based on the defendant's inventory records. An audit by the Internal Revenue Service (IRS) found that Shabahang owed additional tax liability for those years because the defendant improperly decreased its tax liability when it reported the value of the rugs from its inventory records, rather than the value reported on the Customs 7501 forms. In April 1995 the IRS and Shabahang reached a settlement agreement to dispose of the additional tax liability. Another audit of Shabahang's taxes for the years 1989 and 1990 carried similar results. The IRS imposed additional penalties and taxes in the amounts of $258,504.00 and $214,103.00. No settlement has been reached as to these figures yet.

In this action the plaintiff, the United States, on behalf of the Customs, is seeking penalties from the defendant for the alleged undervaluing of carpets between the years 1984 and 1987. Defendant claims that the IRS must be added as an indispensable party to this action to prevent the imposition of double liability and inconsistent obligations resulting from the same set of transactions.

Held: The court found that since it does not have subject matter jurisdiction over the IRS, defendant's motion to join the IRS as an indispensable party under Federal Rule of Civil Procedure 19 must be denied. As an initial matter, the court pointed out that the claims involving the years 1987 and 1988 are moot. Since the claims had been previously settled the court could not review them, even if the IRS could be joined. The rest of the opinion, therefore, pertained only to the years 1989 and 1990.

First, the court found that it does not have original jurisdiction under 28 U.S.C. § 1340 to hear the IRS claims that have been brought against the defendant. Section 1340 confers original jurisdiction over "any civil action arising under acts of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade." Therefore, the district courts have original jurisdiction over internal revenue matters, unless Congress expressly confers such jurisdiction to the Court of International Trade, which was not the case here.

The court then denied the existence of jurisdiction under the Administrative Procedures Act (APA). Defendant's assertion that 5 U.S.C. § 702 provides a jurisdictional basis because monetary relief is not what is being sought is rejected by the court. It is well settled in caselaw that the APA cannot serve as an independent basis for subject matter jurisdiction.

Finally, the court finds that even if there was an adequate basis for jurisdiction, the conditions of Rule 19 were not satisfied in this case. The court held that both Customs and the defendant have been provided the possibility of attaining complete relief. In addition, inconsistent obliga-

tions will not be imposed on the defendant. The fact that different obligations are imposed by several regulatory agencies on a party who imports merchandise from abroad, does not automatically lead to the conclusion that such obligations are inconsistent simply because they are different. More importantly, in this case the IRS and Customs required consistent reporting by the importer. It was the defendant's reporting practice itself that must be blamed for any "inconsistent" liability rather than the requirements of the two agencies.

Significance: The Court of International Trade recognized that different obligations are imposed on importers by different agencies, but that these differences would not result in inconsistent obligations as defined by Rule 19.

Rebecca A. Fleming

THE THIRD CIRCUIT HAS ADOPTED A VERY NARROW APPLICATION OF THE *CALDER* "EFFECTS TEST" TO BUSINESS TORTS. *Imo Industries, Inc. v. Kiekert AG,* 155 F.3d 254 (3d Cir. 1998).

Plaintiff, Imo Industries (Imo), a multinational corporation with its principal place of business in New Jersey, filed suit in New Jersey against a German corporation, Kiekert AG (Kiekert), claiming that the defendant committed an intentional business tort against it which resulted in an injury to the plaintiff in the forum state. The alleged tortious conduct involves Kiekert's interference with Imo's attempt to sell one of its wholly owned subsidiaries, an Italian company to a French company. After the District Court dismissed the complaint, holding that there was no personal jurisdiction over Kiekert, Imo appealed.

The Supreme Court in *Calder v. Jones,* 465 U.S. 783 (1984), found personal jurisdiction to be proper over non-resident defendants who commit an intentional tort outside the forum, but the unique effect of the tort caused damage to the plaintiff within the forum. The Third Circuit extracted a three-prong test from the *Calder* opinion which required that: (1) the defendant must have committed an intentional tort; (2) the plaintiff must have felt the brunt of the harm caused by that tort in the forum, so that the forum is the focal point of the harm; and (3) the defendant must have expressly aimed his tortious conduct at the forum, so that the forum was the focal point of the tortious activity.

Imo alleges that Kiekert's interference in negotiations for the sale of their Italian subsidiary caused them the loss of $20 million in profits from the sale and a $10 million favorable tax ruling based on the completed transaction. Imo contends that these losses were necessarily felt most severely in New Jersey because that is their primary place of business. Imo further alleged that letters that Kiekert sent to the subsidiary in

Italy and the investment bank firm in New York were expected to be forwarded to the New Jersey company and therefore constituted conduct expressly aimed at the forum state. Imo also relied on telephone conversations that it initiated to the German company as additional contacts with the forum state.

Held: Affirmed. The Third Circuit denied Imo's claim that Kiekert expressly aimed its tortious conduct at New Jersey. Instead, the court adopted a narrow application of *Calder* to business torts, relying on decisions from the First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits. The court rejected an assumption that the effects of a business tort would per se be felt most severely in the principal place of business, and required proof that the brunt of the injury was felt in the forum state and that the defendant knew or should have known that the effects of the tort would have an unique effect in the forum state. The court said that there needs to be a clear showing that the defendant was targeting the defendant in the forum, not just targeting the defendant in general.

Significance: The *Calder* "effects test" will only succeed in very unique situations where the plaintiff has a relationship to the forum state that almost precludes the possibility that injury to the plaintiff would be felt anywhere else. In sum, if the plaintiff cannot demonstrate that the defendant expressly aimed its tortious conduct at the forum state, the plaintiff cannot rely on the *Calder* "effects test" to confer personal jurisdiction.

Christina M. Salerno

V. ADMIRALTY

THROUGH THE DEATH ON THE HIGH SEAS ACT, WHICH LIMITS RECOVERY BY SURVIVING RELATIVES TO PECUNIARY LOSSES, CONGRESS PROVIDED THIS ACT TO BE THE EXCLUSIVE RECOVERY FOR DEATHS THAT OCCUR ON THE HIGH SEAS. *Dooley v. Korean Air Lines Co., Ltd.*, 542 U.S. 116 (1998).

On September 1, 1983, Korean Air Lines Flight KE007, which was en route from Anchorage, Alaska to Seoul, South Korea, flew into the airspace of the former Soviet Union and was shot down over the Sea of Japan. All 269 persons on board were killed. Petitioners, Philomena Dooley *et al.*, the personal representatives of three of the passengers, brought lawsuits against the respondent Korean Air Lines (KAL), in the United States District Court for the District of Columbia. After trial, a jury found that KAL had committed "willful misconduct," which thus removed the Warsaw Convention's $75,000 cap on damages. In a subsequent verdict the jury awarded $50 million in punitive damages. The

Court of Appeals for the District of Columbia upheld the finding of willful misconduct, but vacated the punitive damages award on the ground that the Warsaw Convention does not permit the recovery of punitive damages. The Judicial Panel on Multidistrict Litigation (JPML) remanded all of the individual cases to the district courts in which they had been filed for damages' trials.

In the case of the present petitioners who sought damages for decedents' pre-death pain and suffering based on a general maritime action, KAL moved for a pretrial determination that the Death on the High Seas Act (DOHSA) provides the exclusive source of recoverable damages. DOHSA provides in relevant part: "Whenever the death of a person shall be caused by a wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State . . . or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative . . . . The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." KAL argued that in a case of death on the high seas DOHSA provides the exclusive cause of action and does not permit damages losses for survivors' grief, and decedents' pre-death pain and suffering. In response to KAL's motion, the District Court held that because the petitioners' claims were brought pursuant to the Warsaw Convention, DOHSA could not limit the recoverable damages. However, while the damages suit was pending, the Supreme Court reached a contrary holding in a case arising out of the same incident. In *Zicherman v. Korean Air Lines, Co.*, 516 U.S. 217 (1996), the Supreme Court held that the Warsaw Convention, "permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules," and that where "an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law."

After this decision, KAL again moved to dismiss all of the petitioners' claims for non-pecuniary damages. The District Court granted this motion holding that American law (not South Korean law) governed these cases; that DOHSA provides the applicable United States law; and that DOHSA does not permit the recovery of non-pecuniary damages. Petitioners appealed arguing that although DOHSA does not permit recovery for pre-death pain and suffering that such recovery is provided under general maritime law. The Court of Appeals rejected this argument and affirmed the decision of the District Court. The Court of Appeals stated that even if there is a survival cause of action under general mari-

time law it is not available when the death is on the high seas. The court based its decision on its finding that Congress had decided, through DOHSA, who was to have standing and for what causes of action. Essentially, the Court of Appeals deferred to the judgment of Congress. The Supreme Court granted *certiorari* to resolve a circuit split concerning the availability of a general maritime survival action in cases of death on the high seas.

Held: Affirmed. The Supreme Court, in reaching its decision, focuses on the language of the Death on the High Seas Act and the intent of Congress in the drafting of this piece of legislation. Justice Thomas, in delivering the opinion for a unanimous court, exercised great deference to the intentions of Congress. Essentially, the Court held that the DOHSA is exhaustive on the subject of damages which can be recovered by a decedent's representatives. Justice Thomas writing for the Court dismisses the petitioners' contention that because DOHSA is a wrongful death statute—providing surviving relatives with a cause of action—that such a statute has no bearing on the availability of a separate survival action. In his rejection of the petitioners' general maritime action Justice Thomas writes, "DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas." The Court stresses that Congress, by creating express limitations, did not intend for the judiciary to enlarge the class of beneficiaries or the recoverable damages. Finally, Justice Thomas points to the comprehensive nature of DOHSA as evidenced by its survival provision which limits recovery to the pecuniary losses suffered by surviving relatives. Justice Thomas concludes that "because Congress has chosen not to authorize a survival action for a decedent's pre-death pain and suffering, there can be no general maritime survival action for such damages."

Significance: In its affirmation of the Court of Appeals decision, the Supreme Court shows great deference to the Congressional legislation establishing and limiting the viable recovery for death on the high seas. Moreover, this case demonstrates the Court's unwillingness to "fill the gaps" in Congressional mandates when it is apparent on the face of the statute that Congress had certain objectives in mind—in this case limiting the damages which a decedent's representatives may seek for death on the high seas.

Kimberly S. L. Essary

THE EXPANSION OF THE CRIMINAL JURISDICTION FROM THREE TO TWELVE MILES BY THE "ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT" DOES NOT AFFECT THE DEFINITION OF "TERRITORIAL WATERS" AS USED IN THE GAMBLING SHIP ACT. *United States v. One Big Six Wheel*, No. 98-6028, 1999 WL 38384 (2nd Cir. 1999).

The defendant *in rem*, Big Six Wheel, was a gambling device on board the Liberty I, a seagoing vessel owned and operated by Bay Casino, LLC. The Liberty I operated gambling cruises that left from Sheepshead Bay in Brooklyn, New York and proceeded more than three—but less than twelve nautical miles from the coastline of the United States, to a spot at which the boat operates as a casino until the return voyage to the Bay.

In August 1997, the U.S. Attorney for the Eastern District of New York notified Bay Casino that its operations were in violation of the Gambling Ship Act (GSA). The State of New York claimed that the Liberty I was not cruising far enough from the shoreline of the United States before the gambling activity began. The GSA prohibits offshore gaming except on certain voyages beyond the territorial waters of the United States. Under the GSA the territorial waters of the United States end after three nautical miles. However, a law enacted subsequent to the GSA, the Antiterrorism and Effective Death Penalty Act (AEDPA), expanded the United States federal criminal jurisdiction from three to twelve nautical miles. Bay Casino commenced a federal action seeking declaratory relief, construing the GSA to incorporate the original three mile territorial boundary and an injunction against the United States refraining it from interfering with the gambling activities. Upon the request of the district court, both parties recast their dispute as a civil forfeiture proceeding by the United States against the defendant *in rem*, Big Six Wheel. The district court concluded that the effect of the AEDPA on the GSA's exception for vessels upon which gambling takes place more than three nautical miles was uncertain. Therefore, it applied the rule of lenity and dismissed the claim on behalf of Bay Casino. The government appealed to the U. S. Court of Appeals for the Second Circuit.

Held: Affirmed. The Second Circuit explored the history and purpose of the AEDPA. It determined that there was no indication that Congress created the statute to prohibit shipboard casinos to the fullest extent of the nation's territorial reach. To the contrary, amendments to the GSA illustrate the desire of Congress to narrow the previously absolute prohibition of offshore gambling by defining geographical boundaries where such activity would be legal. The court cited § 901(a) of the AEDPA that referenced Presidential Proclamation 5928, which in 1988 extended the United States territorial waters to twelve nautical miles for the limited

purpose of conforming to the territorial limits of international law. The proclamation declared that "[n]othing in this proclamation . . . extends or otherwise alters existing federal or state law or any jurisdiction, rights, legal interests, or obligations derived therefrom . . . . " The court concluded that the AEDPA did not bar Bay Casino from conducting offshore gambling beyond three, but less than twelve, nautical miles from low tide of the United States shoreline. As a result, the court dismissed the government's civil forfeiture claim.

Significance: This case turns on the observation that AEDPA's extension of the United States territorial boundary is solely for the purpose of federal criminal jurisdiction and does not define the substantive requirements of any criminal offense. By coming to this conclusion, the court maintained the integrity of the GSA and similar statutes that rest on the definition of "territorial waters." The twelve nautical mile construction of "territorial waters" under the AEDPA will not affect any of those statutes.

Essentino A. Lewis, Jr.

VI. ARBITRATION

WHEN DOES THE ARBITRATION BY A FOREIGN COUNTRY BECOME FINAL SO THAT IT CAN BE ENFORCED BY THE U.S. COURT SYSTEM? *Europcar Italia, S.P.A. v. Maiellano Tours, Inc.*, 156 F.3d 310 (2nd Cir. 1998).

Europcar Italia (Europcar), an Italian car rental business, entered into an agreement with Maiellano Tours, Inc. (Maiellano), an American travel agency, to provide rental car services in Italy for the agency's customers. The agreement included an arbitration clause which mandated that if a dispute were to arise, it would be submitted to and decided in final by an arbitration panel of three. One member of the panel was to be appointed by each of the opposing parties and a third chosen by an agreement between the two chosen arbitrators. Such arbitration would be governed pursuant to the rules set forth in the Italian legal system as "*arbitrato irrituale in equita*" (*arbitrato irrituale*), (informal arbitration on equitable grounds).

A dispute arose as to which party was entitled to certain value-added tax refunds that had been remitted by the Italian tax authority to Maiellano. After written submissions and hearings, the selected panel issued an award in favor of Europcar. The company then sought to confirm the arbitration award and to obtain an order for payment by filing a claim in the Italian court system. Maiellano countered the suit by commencing a collateral action to have the award set aside, claiming that the arbitrators' decision was based on a February 20, 1979 agreement that contained a forged signature. The Tribunal of Rome consolidated the ac-

tions and ruled in favor of Europcar. The Tribunal found that because Maiellano had not raised the forgery issue to the arbitrators and that the ruling was based primarily on the parties' ten-year business relationship, the result of the arbitration would stand. Maiellano appealed to the Roman Court of Appeals. While the matter was still pending, Europcar filed an action in the Eastern District of New York, seeking recognition and enforcement of the arbitration award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) and 9 U.S.C. § 207. Maiellano opposed enforcement, arguing that the district court lacked subject matter jurisdiction because *arbitrato irrituale* is not covered by the Convention and, in the alternative, that the district court defer decision pending the outcome of the trial in the Tribunal of Rome. Europcar's motion for summary judgment was granted and a judgment entered in the amount of $1,102,283 with interest and costs.

On appeal to the United States Court of Appeals for the Second Circuit, Maiellano argued that the arbitration awards were not binding under the Convention because the Italian rules known as *arbitrato irrituale*, which controlled the arbitration, were only an informal, extra legal process, lacking procedural safeguards. According to Maiellano, confirming the award would afford the informal system much more weight than the Italian court system ever would. Maiellano also argued that the parties did not intend to be bound by the arbitral award. Instead, the proceeding was to be a "contractual advisory" rather than a final determination of any claim. In addition, Maiellano argued that the award was based on the allegedly forged 1979 agreement, nullifying any subsequent claims made in reliance. Finally, Maiellano stated that the district court proceedings should have been adjourned or suspended until the appeal pending in the Tribunal of Rome had been decided.

Held: Vacated and remanded. Whether or not the *arbitrato irrituale* is enforceable under the Convention is not a decision that the court needs to make at this time. Because the arbitration agreement entered into by the two parties included the word "final" when discussing the disposition of the arbitrator's decision, Maiellano did in fact intend to be legally bound by decisions reached in accordance with the agreement. The allegedly forged 1979 document would not have any bearing on the Court of Appeals' decision because the contract that was the subject of the dispute did not rely on the allegedly forged document and because Maiellano did not raise the issue during the course of the arbitration, the issue is considered waived.

The court listed several factors that should be considered when weighing whether a court should stay a proceeding pending the outcome of litigation in a foreign country. The court should consider the general objectives of the arbitration, the status of the foreign proceeding (whether

it was brought to enforce or set aside an award, timing of the commencement of the proceeding, who initiated the proceeding, whether the proceeding was initiated with the intent to hinder or delay the resolution of the dispute), whether the award sought to be enforced would receive greater scrutiny in the foreign proceedings under a less deferential standard of review, characteristics of the foreign proceeding, the balance of the possible hardships to each of the parties, and any other circumstances that could tend to shift the balance in favor of or against adjournment. In the case *sub judice*, the court found that the district court based its decision on the general objectives underlying the arbitration of disputes, but failed to adequately consider the objectives listed above.

Significance: The exact weight that the U.S. federal courts are to assign "*arbitrato irrituale*" is still an unanswered question. However, the factors to be evaluated as to whether to enforce arbitral decisions pending the outcome of foreign proceedings has been thoroughly explored in this case. The factors listed by the court are as complete an examination of the subject as has ever been provided by a federal court and may provide a framework from which a judgment can be entered.

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VII. ADMINISTRATIVE LAW

ZERO QUOTAS SET BY THE U.S. FISH AND WILDLIFE SERVICE ARE APPROPRIATE AND WILL BE UPHELD IF FOUND TO BE REASONABLE UNDER THE REQUIREMENTS OF "CITES." *Prima v. Dep't of the Interior*, No. CIV.A.96-3578, 1998 U.S. Dist. Lexis 2203 (E.D. La. 1998).

Plaintiffs contested the setting of a zero quota for the export of box turtles by the U.S. Fish & Wildlife Service (Service) and the consequent denial of plaintiffs' export permits as arbitrary and capricious. Specifically, plaintiffs argued that the Service's decision was not rationally decided since it was not based on the "best available biological information derived from professionally acceptable wildlife management practices" as required by law. Plaintiffs further contended that the mandating of a "management plan" was beyond the scope of the Service's authority. Plaintiffs filed a motion for summary judgment. The Department of the Interior (Interior) asserted that the Convention of International Trade in Endangered Species of World Fauna and Flora (CITES) mandates an affirmative finding of non-detriment before an export permit can be issued. Based on information gathered and information submitted by Louisiana, the Service concluded that such a finding could not be made. This left the Service with no choice but to set the quota at zero with all pending permits being denied. Defendants filed a cross motion for summary judgment.

Under CITES official export permits must accompany all specimens listed on any of its three appendices (I, II or III). The box turtles in the present lawsuit are listed in Appendix II of CITES. International trade in Appendix II species is permitted only if the shipments are accompanied by an export permit. The Scientific Authority of each nation must monitor the export of Appendix II species continuously to ensure that the export level remains well below that which might make the species eligible for inclusion on Appendix I. In the United States, the Department of the Interior has been designated as both the Scientific Authority and the Management Authority. The authority for administering the permit program for Appendix II species was delegated to the U.S. Fish & Wildlife Service under article IV of CITES. Article IV, § 2(a) states that an export permit will be issued only if the "Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of the species." The Service has interpreted this to mean that exportation will only be permitted on an affirmative finding of non-detriment. If there is not an affirmative finding of non-detriment, the quota must be set at zero and any pending permits denied.

Held: Plaintiffs' motion for summary judgment was denied and the defendants' motion for summary judgment was granted. Pursuant to the Administrative Procedure Act, a court cannot set aside administrative decisions made by Interior unless they are "arbitrary, capricious, an abuse of discretion, or otherwise, not in accordance with law." Where the challenged decision implicates substantial agency expertise, the scope of judicial review is narrow and the court is not permitted to substitute its own judgment for that of the administrative decision-maker. In *Baltimore Gas & Electric Co. v. National Resource Defense Council, Inc.*, 462 U.S. 87 (1983), the Court stated that the test should be whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

In this case, plaintiffs presented two arguments in support of their motions. First, plaintiffs argued that the Service did not base its decision to set a zero quota on the "best available biological information derived from professionally accepted wildlife management practices" as required by 16 U.S.C. §1537a(c). Second, plaintiffs asserted that the Service's mandating of a "management plan" was *ultra vires*. On the cross motion for summary judgment, defendants contended that the Service was simply fulfilling its duties under CITES.

In analyzing this case, the court noted that the law that it administers binds an agency. Specifically, pursuant to CITES, 16 U.S.C. § 1537a(a), the U.S. Fish and Wildlife Service is granted the authority to carry out the functions of the Convention consistent with its purposes. Furthermore, § 1537a(b) grants the Secretary discretion to "do all things

necessary and appropriate" to carry out these management functions and § 1537a(c) gives the Service the same discretion in making all scientific determinations. Considering a ruling on who has the "best available biological information" to be out of the court's domain of judicial review, the court limited itself to an inquiry as to whether or not the Service's findings were rational.

In their argument, plaintiffs claimed that only Louisiana could provide the "best available biological information" through its report prepared by the Louisiana Department of Wildlife & Fish, since that agency is responsible for the management of the turtles as a state resource. The court disagreed by noting that CITES states that the definition of what is "professionally accepted wildlife management practices" lies precisely within the Service's discretion. After a review of the numerous comments received by the Service from respected professionals with varying degrees of expertise in turtle biology and wildlife management concerning the State of Louisiana's report, the court noted that the State's report was inconclusive and incomplete.

Significance: The setting of export quotas by the U.S. Fish and Wildlife Service will be upheld as long as the decision is based on a permissible construction of CITES and is reasonable.

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