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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories and references are given for further research.

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I. INTELLIGENCE DISCLOSURE

CENTRAL INTELLIGENCE AGENCY EXEMPTED FROM DISCLOSURE OF ITS RECORDS UNDER THE FREEDOM OF INFORMATION ACT. *Hunt v. Central Intelligence Agency*, No. 92-16548 (2d Cir., Dec. 30, 1992).

Joe Hunt, on trial in California state court for the murder of an Iranian national, filed a request with the Central Intelligence Agency (CIA) under the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA), for records pertaining generally to the victim's political involvement in Iran and with the United States.¹ The CIA denied the request and refused to confirm or deny the existence of any such records.² Upon review

1. Hunt's request included, among other things, records of the interaction between the United States Embassy and/or State Department and the victim, records dealing with the victim's involvement in various political associations which opposed the Khomeini regime, records relating to the victim's attempted assistance of the United States, and copies of all correspondence, tapes, meetings, or reports the CIA had regarding the victim.

2. A CIA refusal to confirm or deny the existence of intelligence records has come to

in the United States District Court for the Northern District of California, the District Court held that the CIA's claimed exemptions to the FOIA failed to allege a specific injury resulting from disclosure and ordered the CIA to disclose whether it possessed the records requested by Hunt and to submit such records to the court for in camera inspection.³

On Appeal to the United States Court of Appeals for the Ninth Circuit *Held: Reversed*. The CIA Director's broad authority under the National Security Act to protect intelligence information qualifies as a statutory exemption to disclosure under the FOIA. Relying on the National Security Act, the court noted that the Director of the CIA is "responsible for protecting intelligence sources and methods from disclosure." 50 U.S.C. § 402(d)(3). Read in conjunction with exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), which covers information that is "specifically exempted from disclosure by statute" the court held that section 403 must be construed as a statutory exemption to disclosure. *Significance*: As recognized by both the District Court and the Court of Appeals, this decision comes close to exempting nearly all CIA records from disclosure under FOIA, arguably contrary to Congressional intent.

II. COMITY AMONG NATIONS

UNITED STATES COURTS DEFER TO STATUTE OF DEMOCRATIC FOREIGN GOVERNMENT, GRANTING THAT GOVERNMENT EXCLUSIVE STANDING TO REPRESENT VICTIMS OF A MASS TORT OCCURRING WITHIN ITS OWN BORDERS. *Bano Bi v. Union Carbide Chemicals and Plastics Co.*, Nos. 253, 254, 92-7325, 92-7337 (2d Cir., Jan. 26, 1993).

On March 29, 1985, India enacted the Bhopal Gas Leak Disaster Act ("the Bhopal Act"), which granted its government the exclusive right to represent the victims of the 1984 Union Carbide disaster in Bhopal, India. Pursuant to its authority under the Bhopal Act, the Indian government brought suit on behalf of all claimants in the District Court of Bhopal. Litigation between Union Carbide and India continued for more than two years, until in 1989 India accepted a 470 million dollar settlement for the benefit of all the victims.

be known as "Glomar response" after the case of *Phillippi v. CIA*, 546 F.2d 1009, 1011 (1976) which upheld the CIA's refusal to acknowledge records regarding the activities of a ship named the *Hughes Glomar Explorer*.

3. As an alternative basis for its holding, the District Court held that the CIA Information Act, 50 U.S.C. § 431, permits a Glomar response only when the FOIA request relates to a covert activity. The court dismissed this ground in stating that Congress showed no intention in either the terms of the act or in its legislative history to limit the CIA's ability to use a Glomar response.

In 1990 two class actions were filed in Texas state courts seeking compensation for injuries arising out of the Bhopal disaster.⁴ Transferred to District Court for the Southern District of New York, the case was dismissed based on federal forum non conveniens law. On appeal to the United States Court of Appeals for the Second Circuit *Held: Affirmed*. The court noted that the stated purpose of granting exclusive standing to India's government under the Bhopal Act was to ensure that claims arising out of the Bhopal gas leak disaster are dealt with "equitably and to the best advantage of the claimants." Under the Act of State doctrine, the court found that to pass judgment on the legislative decisions of another state would not only impede that state's progress, but could threaten international harmony. The court stressed that India is a democracy. The court noted, moreover, that its decision to respect the terms of the Bhopal Act was especially compelling because almost all of the victims were citizens of India. *Significance*: A statute of a democratic foreign government that reserves exclusive standing to represent the victims of a mass tort occurring within its own borders is to be given comity in United States federal and state courts.

III. DISCOVERY

FOREIGN LITIGANT SEEKING DISCOVERY IN UNITED STATES COURT IS REQUIRED TO SHOW THAT THE INFORMATION SOUGHT IS DISCOVERABLE IN THE FOREIGN JURISDICTION. *In re Application of Asta Medica, S.A.*, Nos. 92-1663, 92-1726, 92-1729 (1st Cir., Dec. 4, 1992).

Appellant, Pfizer, Inc., sued four pharmaceutical companies in France, England, Belgium, and the Netherlands for patent infringement in manufacturing the antibiotic doxycycline. The pharmaceutical companies filed an ex parte application under 28 U.S.C. § 1782 in the United States District Court for the District of Maine requesting a subpoena to compel a retired employee of Pfizer to testify by deposition and to produce documents relevant to the suit. Pfizer moved to quash the subpoena on the ground that the companies failed to show that the requested information was discoverable in the foreign jurisdiction, as required under section 1782.⁵ The District Court issued an order vacating the Magis-

4. The class actions argued that India's settlement was not binding on them because the Indian government suffered a conflict of interest as part owner of Union Carbide and because the party received inadequate notice and representation in the proceedings.

5. In an affidavit, Pfizer maintained that the requested information was not discoverable in the foreign jurisdiction because in France, Belgium, England, and the Netherlands there is no pretrial availability of information from nonparty witnesses.

trate Judge's decision to quash the subpoena. The District Court held that section 1782 did not require an applicant to make a threshold showing that the information sought is discoverable in the foreign jurisdiction, because to do so would limit judicial discretion and place too onerous a burden on both applicants and judges. The court held that section 1782 requires only that the subject matter be generally pertinent so as to minimize unnecessary expense, delay, or harassment.

On appeal, the United States Court of Appeals for the First Circuit *Held: Reversed*. A litigant requesting assistance from United States courts in obtaining discovery for use in foreign proceedings must show that the information sought would be discoverable in the foreign jurisdiction. The court based its holding on the recognition that United States discovery rules are far more liberal than most other nations and foreign countries may be offended by the use of United States procedure to circumvent their own rules of discovery. *Significance*: A litigant in a foreign lawsuit is required to show that information sought in a United States court in pretrial discovery would be discoverable in the foreign jurisdiction.