Vanderbilt Journal of Transnational Law

Volume 26
Issue 5 *Issue 5 - January 1994*

Article 6

1-1994

Case Digest

Journal Staff

CASE DIGEST

This Case Digest provides brief analyses of cases that represent current aspects of international law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped by topic and include references for further research.

TABLE OF CONTENTS

I. AID TO FOREIGN TRIBUNALS

DISCOVERY RULES OF THE REQUESTING STATE DO NOT LIMIT DISCOVERY GRANTED PURSUANT TO THE ASSISTANCE TO FOREIGN INTERNATIONAL TRIBUNALS ACT, *Application of Gianoli*, 3 F.3d 54 (2d Cir. 1993), *cert. denied, Foden v. Aldunate*, 114 S.Ct. 443 (1993).

On May 22, 1992, the Third Civil Court of Chile provisionally declared Ciro Gianoli Martinez, an eighty-six year old businessman, mentally incompetent. The court appointed Ciro's daughter and grandson, appellees in this case, to be Ciro's provisional guardians, and ordered these guardians to prepare an inventory of Ciro's assets. Ciro possessed substantial assets outside Chile, including holdings in the United States controlled by Maria Luisa de Castro Foden, the daughter of Ciro's second wife.

On October 27, 1992, the guardians requested a discovery order from the United States District Court for the District of Connecticut, pursuant to 28 U.S.C. § 1782 (1966), a statutory provision entitled Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals.[1] The guardians sought information about Ciro's assets from the Fodens. The district court issued a discovery order and the Fodens moved to vacate, arguing that the statute did not permit a district court to order discovery unattainable under Chilean law. The district court denied this motion. On appeal, the United States Court of Appeals for the Second Circuit *Held: Affirmed.* Section 1782 does not require proof that discovery sought in the United States would be available under the laws of the foreign jurisdiction seeking the information.

Section 1782 permits a United States district court to order a party living within the court's jurisdiction to provide testimony or documents for use in a foreign tribunal. The court noted that the statute's history and present language gave the law broad applicability.

The Fodens argued that even broad application of Section 1782 did not allow discovery of material that would not be discoverable in a foreign jurisdiction. They argued that other United States Circuit Courts of Appeal have found such a discoverability requirement in the statute.[2] These circuits have held that a district court cannot issue a discovery order under this statute until the requesting party proves that the foreign tribunal would permit the same discovery.

The Second Circuit ruled that these holdings imposed "extra-statutory barriers" to discovery. The court noted that the statute's plain language does not suggest that the foreign tribunal's discovery rules determine whether the United States court can issue a discovery order.

The court indicated that it enjoys wide discretion in answering requests made under Section 1782. It held that a district court may consider the foreign state's discovery rules when deciding whether to comply with the discovery request. Foreign discovery rules alone, however, should not dictate whether a United States court should order discovery.

The Second Circuit further held that the district court in this case did not abuse its discretion by granting discovery. It

---

1. 28 U.S.C. § 1782 (1966). This statute permits United States courts to assist litigants before foreign and international tribunals.

2. The appellants cited decisions from the First, Third, Eleventh, and D.C. Circuits to support their argument.

found the established purpose of the statute to be the promotion of mutual cooperation between states and that the lower court had acted in accordance with this purpose. The district court found that, in this case, Chilean law would permit the guardians to use any means of discovery legal in the state where discovery was sought. Thus, the district court acted not in disregard of Chilean law, but in furtherance of international cooperation.

Significance: In the Second Circuit, a party requesting discovery under 28 U.S.C. § 1782 need not make an initial showing that the same material would be discoverable under the laws of the requesting state.

APPLICATION OF USE IMMUNITY AND FOREIGN TESTIMONIAL PRIVILEGES LIMITED BY THE TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, *In re Erato*, 2 F.3d 11 (2d Cir. 1993).

In accordance with the Treaty on Mutual Assistance in Criminal Matters,[3] the Netherlands requested United States assistance in deposing Mary Erato, an eighty-year-old resident of Long Island, New York. John Erato, the son of Ms. Erato, was the target of a criminal investigation in the Netherlands Antilles. Officials in the Netherlands believed that as part of an embezzlement scheme, Erato had transferred real estate and other property to his mother for an amount far below actual market value.

The Assistant United States Attorney complied with the request and subpoenaed Ms. Erato's testimony. Ms. Erato initially refused to testify, asserting both the Fifth Amendment privilege against self-incrimination and the Dutch parent-child privilege. After both the Netherlands and the United States granted Ms. Erato use immunity, the District Court for the Eastern District of New York ruled that she could no longer assert these privileges. Ms. Erato continued to refuse to testify and as a result, the district court held her in contempt. On appeal, the United States Court of Appeals for the Second Circuit *Held: Vacated and Remanded.* When prosecutors grant a witness use immunity, the district court can compel that witness to testify, despite the fact that the testimony is to be used in a criminal procedure in another state. Further, the Treaty on Mutual Assistance in Criminal Matters precludes the assertion of a foreign parent-child privilege in the United States.

---

3. Treaty on Mutual Assistance Matters, June 12, 1981, U.S.-Neth., T.I.A.S. No. 10,734.

The Treaty on Mutual Assistance in Criminal Matters permits the United States to order witnesses within the United States to give testimony for use in a foreign criminal prosecution. Ms. Erato argued that even with the grant of immunity by United States and Dutch officials, a United States court could not compel her to testify, because her testimony would be used in a foreign tribunal. She contended that the United States immunity statute[4] only applied to proceedings in the United States. Although Ms. Erato's testimony was to be used in the Netherlands, the Second Circuit reasoned that, because Dutch officials had requested assistance from United States courts, the testimony would be before a United States court. Therefore, for the purposes of the immunity statute, Ms. Erato's testimony would be given in a proceeding before a United States court. Having received use immunity, she could no longer refuse to testify by asserting her Fifth Amendment privilege.

In regard to the Dutch parent-child privilege, the Second Circuit refused to recognize its effect within the United States. The court found that the Treaty expressly eliminated recognition of the privilege when Dutch officials sought information from another state.[5] Although 28 U.S.C. § 1782 provides that a person cannot be compelled to give testimony in violation of a legal privilege, Section 1782 does not give force to the Dutch parent-child privilege in this case. The Second Circuit held that the treaty between the United States and the Netherlands effectively limited the use of privileges in requests for assistance under the Treaty. Thus, the court narrowed the application of Section 1782 in situations governed by the Treaty. Because the United States does not recognize a parent-child privilege, Ms. Erato could no longer legally refuse to testify.

The Second Circuit ultimately vacated the contempt order because the Treaty did not clearly give Dutch officials the authority to request Ms. Erato's testimony. The court remanded the case for a determination of whether the Dutch officials were the appropriate parties to invoke the Treaty.

Significance: Under the Treaty on Mutual Assistance in Criminal Matters, a district court can compel a witness granted immunity by the requesting state to testify, despite the fact that only the requesting state will use the testimony. Furthermore,

---

4. 18 U.S.C. § 6002 (1985).

5. Article 5 of the Treaty states that when State A is seeking evidence or information from a witness in State B, that witness can be compelled to give information in accordance with the laws of State B. Any testimonial privilege that a witness may have in the requesting state does not apply to requests under this Article.

the Treaty does not permit a witness in the United States to assert a privilege that only exists in the requesting state.

II. TRADE

NO NEED TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE NORTH AMERICAN FREE TRADE AGREEMENT: PROPOSING LEGISLATION DOES NOT CONSTITUTE A FINAL AGENCY ACT, *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 685 (1994).

Public Citizen and other environmental organizations brought suit against the Office of the United States Trade Representative (OTR) arguing that, according to the National Environmental Policy Act (NEPA), the OTR needed to prepare an environmental impact statement (EIS) for the North American Free Trade Agreement (NAFTA). The district court held for the plaintiffs and ordered the OTR to prepare an EIS for the proposed treaty. On appeal, the United States Court of Appeals for the D.C. Circuit *Held: Reversed.* The final draft of NAFTA, however, did not constitute a final act of a governmental agency subject to judicial review under the Administrative Procedure Act.

Because NEPA did not create a private right of action, Public Citizen sought judicial review of agency action pursuant to the Administrative Procedure Act (APA). The APA permits those adversely affected by agency action to seek judicial review of that action.[6] The D.C. Circuit held that NAFTA, however, did not represent a final agency action. Following the reasoning in *Franklin v. Massachusetts*,[7] the court found that the harm alleged by the plaintiffs would result only if Congress enacted NAFTA. The President, not the OTR, submits the draft treaty to Congress for consideration. The court reasoned that the final draft of NAFTA, however, did not constitute a final act that would harm the plaintiffs, because the President could choose to renegotiate portions of the treaty or could choose not to submit it to

---

6. 5 U.S.C. § 702 (1977).

7. _____ U.S. ____, 112 S.Ct. 2767. In *Franklin*, the plaintiffs challenged the way in which the Secretary of Commerce calculated the 1990 census. After the Secretary had tabulated the total population of the states, she reported those numbers to the President. In turn, the President informed Congress of the number of representatives to which each state was entitled. The Supreme Court held that the APA did not allow judicial review of the Secretary's report, because it was not the final act that would cause the plaintiffs alleged harm. The plaintiffs would be harmed, if at all, by the President's report to Congress, not by the Secretary's report to the President. The President is not an agency; therefore, the APA does not permit judicial review of his actions.

Congress. As a result, only a final act of the President, not the OTR, could cause the anticipated harm to the plaintiffs. Because the President is not an agency, the APA does not permit judicial review of his final actions.

The court stated that the unenforceability of the EIS requirement in this instance did not mean that the requirement is never enforceable. The D.C. Circuit held that the ruling of *Franklin* only applied to cases in which the President is constitutionally or statutorily responsible for the action that will affect the parties. In the case of NAFTA, only the President can submit the trade agreement to Congress. Accordingly, the President's involvement is essential to the trade negotiation process. The court indicated that when the President's role is not essential to the process, the APA may permit judicial review of otherwise final agency actions.[8]

In a concurring opinion, Judge Randolph expressed concern over the court's attempt to limit *Franklin*. He also noted that if Congress is concerned about the environmental impact of NAFTA, it could require an EIS before making any decision on the treaty.

Significance: Proposing draft legislation does not constitute a final agency action under the APA when the President is responsible for submitting the draft to Congress. In accordance with the Supreme Court's ruling in *Franklin*, this proposed draft legislation is not subject to judicial review.

III. TREATIES

A STATUTE REQUIRING THE SECRETARY OF STATE TO DEVELOP TREATIES WITH OTHER STATES VIOLATES SEPARATION OF POWERS, *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993).

Earth Island Institute, an environmental protection organization, brought suit against the Secretary of State and the Secretary of Commerce to enforce compliance with statutory provisions designed to protect the sea turtle.[9] The district court dismissed the action for lack of subject matter jurisdiction. On

---

8. The concurring opinion suggests that this will be the case when the President alone is not responsible for reporting or proposing legislation to Congress. Judicial review may be allowed when the agency itself makes the proposal to Congress. In such a case, a final act of the agency would cause the plaintiff's alleged harm.

9. Sea turtles frequently drown when they are caught in nets used for commercial shrimp trawling.

appeal, the United States Court of Appeals for the Ninth Circuit *Held: Affirmed.* The statute constituted an embargo under the exclusive jurisdiction of the Court of International Trade. By ordering the President to negotiate a treaty on a specific issue, the statute infringed upon the exclusive foreign affairs power of the executive branch, and for the court to enforce such an order would violate separation of powers.

Congress passed 16 U.S.C. § 1537 to encourage international protections for the sea turtle. Earth Island Institute sought enforcement of two provisions of the statute. The first required the Secretary of State to negotiate with other states and to develop treaties to protect the sea turtle. The second limited the import of shrimp from states that do not use devices to protect the sea turtle. The court found that the second provision fell within the definition of embargo established by the Supreme Court in *K Mart v. Cartier, Inc.*[10] Although the purpose of the limitation was to protect the environment rather than to affect trade policy, the limitation constituted an embargo because it was a governmental ban on the import of shrimp. As a result, any lawsuit arising from an application of that provision would fall within the exclusive jurisdiction of the Court of International Trade.[11]

The court also refused to enforce the first statutory provision on the grounds that it violated separation of powers principles. The Constitution gives the President the power to make treaties, with the advice and consent of the Congress.[12] Based on this language, the court stated that the President has the exclusive power to negotiate treaties with other states. Congress possesses no authority in this area. The court, therefore, would not enforce a statute that directed the conduct of foreign relations, a realm exclusive to the executive branch. Plaintiff's request to enforce this section of the statute was not justiciable in a federal court.

Dissenting in part, Judge Brunette argued that the Court of International Trade had exclusive jurisdiction over both parts of the plaintiff's claim and that the majority erred in splitting the issues. A future plaintiff would have to split his claim, raising the embargo issue before the Court of International Trade and all

---

10. 485 U.S. 176, 108 S.Ct. 950, 99 L.Ed. 2d 151 (1988). In *K Mart*, the Supreme Court broadly interpreted the scope of the Court of International Trade's jurisdiction. The Court found that an embargo could be imposed for purposes other than trade. The Court of International Trade has the power to hear all issues relating to an embargo, regardless of its purpose, as long as the embargo is imposed by the government.

11. Pub. L. No. 96-417, 94 Stat. 1727, § 1581(i) (1980).

12. U.S. CONST. art. II, sec. 2, cl. 2.

other issues before a district court. Judge Brunette would let the Court of International Trade decide the entire matter.

Significance: Any cause of action to enforce an embargo must be brought before the Court of International Trade. In addition, no federal court will enforce a statute that directs the executive branch to negotiate treaties on a specific subject.

IV. IMMIGRATION

INS AGENTS HAVE AUTHORITY TO ACT OUTSIDE THE UNITED STATES. *United States v. Chen*, 2 F.3d 330 (9th Cir. 1993).

On September 19, 1991, a federal grand jury indicted nine defendants for activities related to the smuggling of Chinese aliens into the United States. The indictment resulted from an undercover investigation that the Immigration and Naturalization Service (INS) had conducted in international waters. Defendants moved for dismissal. The district court held that the INS did not have the authority to carry out such an investigation more than one hundred miles offshore and dismissed the indictment. On appeal, the United States Court of Appeals for the Ninth Circuit *Held: Reversed.* Authority delegated by the Attorney General empowered the INS to act in international waters.

In July 1991, the INS received a tip that the defendants were attempting to transport a group of Chinese aliens into the United States. The INS investigated the tip and worked with an informant who had chartered a boat for the defendants. The Department of Justice Undercover Operations Review Committee authorized the INS to include undercover agents on the crew of the boat, knowing that the boat would be operating in international waters. As a result of the investigation, a federal grand jury indicted the defendants for conspiracy to smuggle aliens into the United States. The district court dismissed the indictment and the government appealed.

The Ninth Circuit reviewed de novo the district court's finding that the INS was acting outside its jurisdiction. The INS has broad statutory authority to conduct warrantless searches without probable cause,[13] but these searches must take place within one hundred air miles of the boundaries of the United States.[14] The appellate court held that the territorial limit only applied to INS power to conduct warrantless searches; therefore,

13. 8 U.S.C. § 1357 (Supp. 1993).
14. 8 U.S.C. § 287.1(a)(2) (1991).

the district court could not restrict all INS power to these boundaries.

The court noted that the Attorney General has the power to give criminal immigration laws extraterritorial effect and that Congress intended to grant her the power to enforce these laws outside the United States. Thus, the Attorney General had the power to conduct this investigation on her own. The court found the fact that the investigation had been conducted by the INS, to which Congress has not expressly granted extraterritorial enforcement powers, to be of no consequence. The court found that the Attorney General had delegated her authority in this area to the Commissioner of the INS, and that the INS can act pursuant to authority granted by the Attorney General. Its powers are not limited to those found in 8 U.S.C. § 1357.

Significance: The INS can act pursuant to power delegated by the Attorney General. Accordingly, its investigative powers are limited only by the limits on the Attorney General's power.