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Law Review Staff

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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. These cases are grouped in topical categories and references are given for further research.

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I. SOVEREIGN IMMUNITY

THE USE OF TRADE SECRETS OBTAINED IN TRANSACTION IN THE UNITED STATES BY A GOVERNMENT-OWNED CORPORATION IS SUFFICIENT ACTION BASED UPON COMMERCIAL ACTIVITY IN THE UNITED STATES FOR PURPOSES OF THE EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITY ACT. *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218 (6th Cir. 1991).

Plaintiff Gould, Inc. (Gould), a manufacturer of electrolytic copper foils, brought suit against Mitsui Mining and Smelting Co. (Mitsui) and two French government-owned corporations, Pechiney Ugine Kuhlmann and Trefimetaux, for alleged misappropriation of trade secrets. Specifically, the plaintiff alleged that the defendants were using information transferred to them either directly from Dale C. Danver, a former Engineer in plaintiff's foil division, or indirectly via Mitsui. The defendants moved for dismissal of the claims under the Foreign Sovereign Immunity Act (FSIA). The District Court for the Northern District of Ohio denied the defendants' motion, which they appealed to the Court of Appeals for the Sixth Circuit. *Held: Affirmed.* For purposes of an exception to the Foreign Sovereign Immunity Act, the evidence that corporations owned by the French government used trade secrets obtained in transactions in

the United States in their French manufacturing facility sufficiently established that the action for misappropriation of trade secrets was based upon commercial activity in the United States.

Jurisdictional immunity of a foreign state is restricted to suits involving its public acts and does not extend to commercial or private activities. The FSIA is designed to facilitate suits in courts in the United States arising from the commercial or private acts of foreign states. The issue presented to the Court of Appeals was based upon a conclusion by the district court that jurisdiction can be grounded upon the first clause of Title 28 of the United States Code section 1605(a)(2). Based on this clause, and in conjunction with other sections of the statute, a foreign state will not be immune from jurisdiction if the plaintiff bases an action upon a regular course of commercial conduct or a particular commercial transaction or act carried on by a foreign state, having substantial contact with the United States. Specifically, the defendants questioned the district court's determination that the plaintiff's claim was "based upon" the commercial activity that the defendants carried on with Danver in the United States.

The court observed that the "based upon" requirement of section 1605(a)(2) requires a connection between the commercial activity sought to be proved for jurisdictional purposes and the activity upon which the lawsuit is predicated. The court held that proof of the defendants' involvement in other commercial activities unrelated to the conduct giving rise to plaintiff's cause of action would not suffice. According to the court, although the plaintiff was not required to prove every element of its case on the merits in order to satisfy the jurisdictional proof requirements of the statute, it must satisfy the court that its claim was based upon a commercial activity having substantial contact with the United States. In the present case, the predicate for the plaintiff's claim was the defendants' dealings with Danver, which involved substantial contact with the United States.

According to the court, the plaintiff was required to produce evidence that the defendants made use of the plaintiff's trade secrets, which they had obtained improperly either directly from Danver or indirectly through Mitsui as part of a continuing course of conduct that included the Danver transaction. The district court found jurisdiction under the first alternative based on the evidence provided, and a review of the material leading the district court to its conclusion brought the appellate court to a similar conclusion. Accordingly, the court affirmed the lower court's decision granting jurisdiction over the defendants. *Significance*—The use of trade secrets by foreign states obtained through transactions in the United States is sufficient basis for the establishment of

subject matter jurisdiction under the FSIA.

THE DETENTION OF UNITED STATES CORPORATIONS' AIRCRAFT BY FOREIGN AIRPORT AUTHORITIES AT THE FOREIGN AIRPORT DOES NOT CAUSE "DIRECT EFFECT IN THE UNITED STATES" WITHIN MEANING OF FOREIGN SOVEREIGN IMMUNITY ACT'S COMMERCIAL ACTIVITY EXCEPTION, EVEN IF THE CORPORATION WAS FORCED TO TRANSFER FUNDS FROM ONE ACCOUNT TO ANOTHER WITHIN THE UNITED STATES TO FREE AIRCRAFT. *Antares Aircraft v. Federal Republic of Nigeria*, 948 F.2d 90 (2d Cir. 1991).

Appellant Antares Aircraft, L.P. (Antares), a Delaware limited partnership with its principal place of business in New York, brought the underlying action in the United States District Court for the Southern District of New York to recover damages for the alleged conversion of its aircraft in Nigeria. Appellant claimed that the Nigerian Airports Authority (NAA) wrongfully detained its aircraft in Nigeria until Antares paid certain airport parking and landing fees that its lessee allegedly owed to the NAA. The NAA is a Nigerian corporation established pursuant to governmental decree and is responsible for the operation and management of all airports in Nigeria. Antares paid the fees using funds from its New York bank account. While many of the funds were transferred to NAA's agent in Nigeria, one payment was deposited into a California bank account belonging to Antares' local Nigerian counsel. Antares attributed the NAA's conduct to the Federal Republic of Nigeria (FRN) by arguing that the NAA is not truly a separate entity, but is owned and operated by the FRN essentially as its agent. The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunity Act (FSIA) on the grounds that neither the "commercial activity" exception nor the "expropriation" exception applied. Antares appealed the district court's decision to the United States Court of Appeals for the Second Circuit. *Held: Affirmed.*

The first issue decided in the case involved the "commercial activity" exception of the FSIA, which provides United States courts with subject matter jurisdiction over foreign states in cases "in which the action is based . . . upon 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." 28 U.S.C. § 1605(a)(2). While both parties agreed that the detention of the aircraft in Nigeria and collection of the allegedly outstanding fees were commercial activities undertaken by the NAA, whether this activity caused a "direct effect in the United States" was a primary issue of contention. More precisely, the issue was whether the effect of the defendants' conduct was suffi-

ciently "direct" and sufficiently "in the United States" that Congress would want the case to be litigated in United States courts. Antares claimed that a direct effect occurred in the United States because it suffered economic loss as a result of the aircraft's detention and was forced to transfer funds out of its New York bank account to free the aircraft, which forced the court to decide whether a financial loss to a United States business entity in the United States as a result of conduct of a foreign state constituted a "direct effect in the United States."

Citing *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), the court held that to determine where the effect of a foreign state's conduct is felt directly, a court often must look to the place where legally significant acts giving rise to the claim occurred. In the present case, the legally significant act—the detention and alleged conversion of the aircraft—occurred in Nigeria. In addition, all negotiations concerning the fees took place in Nigeria, and the bulk of the payments to the NAA were wired directly to the NAA's agent in Nigeria. The court agreed with the district court that the direct effect of detaining the planes was the loss of the use of the aircraft. Thus, the court held that although Antares is a United States partnership, the effect of the defendants' conduct abroad was felt directly in Nigeria, not in the United States.

The court held that the transfer of funds out of Antares' New York bank account and the resulting financial loss to the partnership were not, by themselves, sufficient to place the effect of the defendants' conduct "in the United States" within the meaning of the FSIA. The court also found the transfer of funds to a third party's account, even at the direct request of the defendants, to have an insufficiently direct effect in the United States to satisfy the "direct effect" test. Accordingly, the court held that absent some legally significant act occurring in the United States, mere financial loss suffered by a United States plaintiff as a result of a defendant's conduct abroad is insufficient by itself to cause "a direct effect in the United States" within the meaning of the statute.

The court then considered the "expropriation" exception of the FSIA, which grants subject matter jurisdiction to United States courts when a property right of a United States plaintiff is taken in violation of international law by a foreign sovereign engaged in commercial activity related to such property in the United States. 28 U.S.C. § 1605(a)(3). The appellate court agreed with the district court's finding that the plaintiff had failed to allege facts that would support an inference that the NAA engaged in commercial activity in the United States. Furthermore, the court found the plaintiff's unsupported assertion that, by its very nature, the NAA must engage in commercial activity in the United States, even if taken as true, insufficient to support a finding of commercial activity in

the face of NAA's sworn affidavit to the contrary.

The last issues addressed by the court were the alleged agency relationship between NAA and FRN and the alleged consequences of that relationship with regard to the "commercial activity" requirement of the "expropriation" exception of the FSIA. According to Antares, the FRN's commercial activities in the United States should have been attributed to the NAA because the NAA was owned and controlled by the FRN and was, in effect, an agent of the FRN. In response to that claim, the court cited the specific references made by the statute to the activities of the "agency or instrumentality of the foreign state" and to the specific requirements set forth by the statute in this regard. The court held that while the term "foreign state" encompasses its agencies and instrumentalities, the reverse is not the case. Since no property at issue was present in the United States in connection with FRN's commercial activity, the plain language of the statute focuses the inquiry on the commercial activity of the "agency or instrumentality" and not on the commercial activity of the foreign state. Additionally, the court could see no reason to depart from the legal maxim that governmental instrumentalities established as juridical entities distinct and independent from their sovereign normally should be treated as such. Finally, even assuming that the NAA was an agent of the FRN, as opposed to an independent corporate entity, the court found it inappropriate to attribute the FRN's commercial activity in the United States to the NAA for purposes of establishing subject matter jurisdiction under the FSIA. The court held as a general principle of agency law that, although the jurisdictional contacts of an agent may be imputed properly to the principal, the reverse can not be the case. *Significance*—When the conduct of a foreign state has not caused a direct effect in the United States and the foreign state's agent is not engaged directly in commercial activity in the United States concerning the property in question, neither the commercial activity exception nor the expropriation exception of the FSIA will apply to confer subject matter jurisdiction upon the United States courts.

THE ACT OF A FOREIGN OFFICIAL IN ACCEPTING CAVEATS AGAINST PROPERTY OF A FOREIGN CORPORATION CONTROLLED BY A UNITED STATES CITIZEN IS NOT "COMMERCIAL ACTIVITY" FOR PURPOSES OF AN EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITY ACT, PRIMARILY BECAUSE THE ACCEPTANCE OF AND SUBSEQUENT REFUSAL TO REMOVE CAVEATS ARE ACTS THAT ARE EXTRINSICALLY GOVERNMENTAL IN NATURE. *Fickling v. Commonwealth of Australia*, 775 F. Supp. 66 (E.D.N.Y. 1991).

Plaintiffs, John Fickling and the Estate of Florence Fickling, brought an action against defendants, the Commonwealth of Australia, the State

of Victoria, and Tony Lyons, the Registrar of Titles of the Victorian Government, alleging, *inter alia*, that defendants' acceptance of caveats on the property of a corporation controlled by the plaintiffs constituted a taking, nationalization, expropriation, or seizure of plaintiffs' property without compensation in violation of international law. The defendants brought a motion to dismiss for lack of jurisdiction and the non-justiciability of the action under the act of state doctrine to the District Court for the Eastern District of New York. *Held: Motion granted.*

The FSIA provides the sole source of subject matter jurisdiction over foreign sovereigns in suits brought in the United States. The FSIA confers original jurisdiction on district courts only if it is determined, based on the application of one of the specific exceptions contained within sections 1605 or 1607 of the Act, that a foreign state is not entitled to immunity. Once it is established that the defendants constitute a "foreign state" as defined by section 1603 of the FSIA, the burden shifts to the plaintiffs to come forth with proof to allow the court to find an exception within the Act applicable to the case at hand.

The plaintiffs first argued that the defendants had waived immunity as provided under section 1605(a)(1) of the FSIA by acknowledging that section 110 of the Transfer of Land Act of 1958, enacted by the Parliament of the State of Victoria, enables a party to bring an action for recovery of damages against government officials in their official capacity. The court rejected this argument, however, in favor of one posed by the defendants and refused to equate a sovereign government's submission to suit in its own courts with a waiver of immunity in the courts of the United States. Based on previous case law, the court held both implicit and explicit waiver of immunity to be subject to narrow interpretation. Relying upon an examination of legislative history of the FSIA, the court revealed three examples of implied waiver: (1) when a foreign sovereign agrees to arbitrate in another state; (2) when a foreign sovereign agrees that the law of another state governs a particular contract; and (3) when a foreign sovereign fails to raise the defense of sovereign immunity in its responsive pleadings. The court could not find any of these exceptions applicable in the present case.

The plaintiffs then attempted to establish jurisdiction based on the "commercial activity" exception of section 1605(a)(2) of the FSIA, contending that the activity surrounding the caveats were commercial in nature as defined by section 1603(d). The court rejected this argument because it believed that the acceptance of and subsequent refusal to remove the caveats were acts intrinsically governmental in nature. According to the court, while the act of filing notices can, at times, fall within the commercial sphere, in this case the public filings were related inextrica-

bly to acts unquestionably governmental in nature. Accordingly, the court found that the acts in question were not commercial for purposes of the FSIA.

The plaintiffs then argued that subject matter jurisdiction existed under section 1605(a)(3), which involves the property rights seized in violation of international law. The court held, however, that jurisdiction under that section is limited to cases in which the property in question, or the property exchanged for the property in question, is either "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or "owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Because the plaintiffs had failed to set forth sufficient facts that could lead the court to conclude that the defendants operated or controlled the property in question, or otherwise engaged in any commercial activity related to this action, the court found that neither of the jurisdictional requirements had been met.

Similarly, the court rejected the application of sections 1605(a)(4) or 1605(a)(5) of the FSIA. Section 1605(a)(4) provides jurisdiction in cases in which rights in property in the United States acquired by succession or gift or rights of immovable property situated in the United States are in issue. The plaintiffs argued that the defendants' actions resulted in the expropriation of rights in property that John Fickling acquired by succession from Florence Fickling's estate. Because no rights to any property located in the United States were claimed in the present case, section 1605(a)(4) did not apply. This determination was strengthened because at no time had the defendants asserted that they actually owned or controlled any of the plaintiffs' property. The court also refused to apply section 1605(a)(5) because the alleged tort, under which jurisdiction was claimed, did not take place in the United States, but occurred exclusively in Australia. Having found none of the exceptions to the FSIA set forth by plaintiffs applicable in this case, the court granted the defendants' motion to dismiss for lack of subject matter jurisdiction. *Significance*—The court found the exceptions provided by the FSIA subject to narrow construction and refused to equate a foreign state's submission to suits in its own jurisdiction to similar suits brought in the United States courts. The court also refused to equate commercial acts that were governmental or public in nature with acts referred to in the FSIA as "commercial activity."

II. ALIEN TORT STATUTE AND EXTRATERRITORIALITY

WHEN SUBJECT MATTER JURISDICTION IS BASED ON THE ALIEN TORT STATUTE, THE COURT MUST ENGAGE IN A MORE SEARCHING PRELIMINARY REVIEW OF MERITS THAN IS REQUIRED IN DETERMINING SUBJECT MATTER JURISDICTION IN A CASE ARISING UNDER LAWS OF THE UNITED STATES. THE RESOURCE CONSERVATION AND RECOVERY ACT DOES NOT APPLY EXTRATERRITORIALLY AND THEREFORE DOES NOT PROVIDE FOREIGN CORPORATIONS AND THEIR AGENTS IN THE UNITED STATES WITH A CAUSE OF ACTION AGAINST UNITED STATES CORPORATIONS. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991).

Plaintiffs Wath, a United Kingdom corporation, and its agent Amlon, a New York corporation, brought an action against the defendant, FMC Corporation, a Delaware corporation, for alleged violations of the Alien Tort Statute and the Resource Conservation and Recovery Act (RCRA). Specifically, plaintiffs alleged: (1) the defendant misrepresented the composition and characteristics of copper residue shipped to Wath for drying and other processing; (2) the defendant failed to disclose the presence and concentration of organic chemicals in the material on a number of occasions, both before and after the material arrived in England; and (3) the material may present imminent and substantial danger to human health and to the environment. In addition to the RCRA and Alien Tort Act claims, the complaint alleged common law fraud, strict liability, breach of expression and implied warranty, and negligence. The defendant moved to dismiss the first two claims concerning the RCRA and the Alien Tort Statute. The District Court for the Southern District of New York found: (1) no subject matter jurisdiction under the Alien Tort Statute, and (2) that RCRA did not apply extraterritorially to give United Kingdom corporation and its agent in the United States cause of action against Delaware corporation. *Held: Motion to dismiss claims granted.*

The court first reviewed the defendant's motion to dismiss for lack of subject matter jurisdiction with regard to the Alien Tort Statute. Citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the court found that other tribunals facing a motion to dismiss in similar claims had engage typically in a more searching preliminary review of the merits than was required, utilizing, on occasion, the more flexible "arising under" formulation. The court then held that an allegation of conduct constituting a treaty violation or a violation of international law was a threshold jurisdictional requirement under the Alien Tort Statute. Because the court could find no allegations by the plaintiffs that the defendants had violated a treaty, it determined that the threshold for jurisdiction was not satisfied. Similarly, the court held that the facts alleged by the plaintiffs

as constituting a violation of international law did not establish a violation of such law under the Alien Tort Statute. Again citing *Filartiga*, the court stressed that “[i]t is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern by means of express international accord, that a wrong generally recognized becomes an international violation within the meaning of the statute.” *Filartiga, id.* at 888. The court deemed the plaintiffs’ reliance on the Stockholm Principles misplaced because they did not set forth any specific proscriptions, but instead referred only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders.

The court then proceeded to decide the RCRA claim. The plaintiffs claimed that they were entitled to relief because potentially toxic chemicals could evaporate from or leak out of containers in which the copper residue was stored, thus posing an imminent and substantial danger to workers nearby and the community at large if the chemicals polluted the local water supply. 42 U.S.C. § 6972. The defendant moved to dismiss the case for failure to state a claim upon which relief can be granted. The defendant argued that the RCRA cannot be applied extraterritorially, pointing to the well-established principle that federal legislation is meant to apply only within the territorial jurisdiction of the United States, unless a contrary intent is apparent.

As support for their contrary position, the plaintiffs cited *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), in which the court observed that: “when, as here, there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.” *Id.* at 1334.

The court engaged in an in-depth analysis of the structure and language of the RCRA, as well as the statute’s legislative history. The court could not find, however, the type of evidence present in *Leasco* to support extraterritorial application. Accordingly, the court also granted the defendant’s motion to dismiss the plaintiffs’ claim for relief under the RCRA. *Significance*—To establish jurisdiction under the Alien Tort Statute, there must be an alleged breach of international law specifically related to a cause of action under the statute. Absent clear evidence of congressional intent to the contrary, a statute such as the RCRA is applicable only within the territorial jurisdiction of the United States.

