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## Case Digest

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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.

## TABLE OF CONTENTS

I. WARSAW CONVENTION/AIRLINE SECURITY .....	723
II. EXPORT CONTROLS .....	724
III. SOVEREIGN IMMUNITY/AGENCY .....	725
IV. REFUGEES .....	726

### I. WARSAW CONVENTION/AIRLINE SECURITY

AIRLINE'S FAILURE TO DETECT A HIDDEN BOMB RESULTING IN THE DEATH OF FOUR PASSENGERS AND INJURIES TO OTHERS HELD NOT TO CONSTITUTE WILLFUL MISCONDUCT UNDER ARTICLE 25 OF THE WARSAW CONVENTION. *Ospina v. Trans World Airlines, Inc.*, 1992 U.S. App. LEXIS 20717 (2d Cir. Sept. 3, 1992).

On April 2, 1986, a bomb exploded onboard Trans World Airline (TWA) Flight 840 as it approached Athens. Plaintiff Alberto Ospina, who was seated in close proximity to the bomb, was killed as a result of the blast. Plaintiff Mohsen Youssef was among the many passengers who suffered injuries. Plaintiffs sought compensatory damages from TWA and argued that article 17 of the Warsaw Convention, which limits carrier liability to \$5,000 per claimant, was not applicable in the case since TWA's failure to detect the bomb constituted "willful misconduct" as outlined in article 25 of the same treaty.

The United States District Court for the Eastern District of New York held that there was sufficient evidence to support the jury's finding of willful misconduct. The Court of Appeals for the Second Circuit *Held: Reversed*. TWA's failure to adhere to the Federal Aviation Ad-

ministration (FAA) requirement that airline employees search the cabin and cockpit areas to uncover hidden weapons as well as its abandonment of an unwritten policy of redundant preboarding screening of passengers did not constitute willful misconduct under article 25 of the Warsaw Convention. The court noted perfunctorily that although TWA violated a specific FAA requirement in failing to search the cabin for weapons, it was not the only omission of TWA that explicitly violated an FAA requirement. In addition, it was conceded that no other airline routinely followed the FAA mandate.<sup>1</sup> *Significance*: The Warsaw Convention shields a carrier from liability despite the carrier's failure to utilize FAA-mandated measures in searching the cabin.

## II. EXPORT CONTROLS

THE EXPORT ADMINISTRATION ACT OF 1979 HELD NOT TO VIOLATE THE NONDELEGATION DOCTRINE. *U.S. v. Ognian Bozarov*, 1992 U.S. App. LEXIS 18034 (9th Cir. Aug. 10, 1992).

On November 3, 1983, Ognian Bozarov, an international trade official from Bulgaria, was indicated for conspiracy to violate the Export Administration Act of 1979 (EAA), 50 U.S.C. § 2401 et seq. Under the EAA, the executive branch is authorized to impose export controls via the issuance of validated licenses for purposes of national security, foreign policy, or domestic short supply. Bozarov was subject to the terms of the EAA when he negotiated with a Dutch company, which then contracted with a United States company, for the purchase of computer disc manufacturing equipment, a commodity covered under the EAA for its national security implications.

The United States District Court for the Central District of California dismissed the indictment on the grounds that the EAA was unconstitutional under the nondelegation doctrine in that it impermissibly delegated legislative authority to control exports to the Secretary of Commerce and precluded judicial review of the Secretary's actions. On Appeal to the United States Court of Appeals for the Ninth Circuit *Held: Reversed*. Relying on precedents such as *Mistretta v. United States*, 488 U.S. 361 (1989), the court held that the nondelegation doctrine is satisfied so long as Congress articulates an intelligible principle to direct the executive agency. According to the court, Congress articulated an intelligible principle in creating the crime of exporting goods

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1. The court refrained from detailing those aspects of the case that involved "sensitive airline security information." According to the court, "due to the unusual circumstances of this case, a detailed explanation of the probity of the record evidence might, in the wrong hands, endanger the traveling public." 1992 U.S. App. LEXIS 20717, at \*4.

without a valid license and setting penalties for the crime. Conversely, the Secretary of Commerce is merely responsible for determining which commodities will require a license. The court noted the traditional deference given to the Executive Branch in matters of foreign affairs: "The Supreme Court has consistently emphasized that broad delegations are appropriate in the foreign policy area because of the political nature of the decisions and the compelling need for uniformity." *Significance*: The Secretary of Commerce's powers under the EAA to require export licenses and to impose criminal sanctions for failure to comply remains free from judicial review.

### III. SOVEREIGN IMMUNITY/AGENCY

**INSTRUMENTALITY OF FOREIGN GOVERNMENT INVOLVED IN COMMERCIAL ACTIVITY WITHIN THE UNITED STATES NOT IMMUNE FROM LIABILITY UNDER THE FSIA.** *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 1992 U.S. App. LEXIS 15285 (2d Cir. July 8, 1992).

This suit arose after President Corazon Aquino of the Philippines established the Presidential Commission of Good Government (PCGG) to recover any ill-gotten gains from the ousted Marcos regime. The plaintiff, a United States corporation in the business of aircraft brokerage and resale, bought from the PCGG a Falcon 50 jet aircraft that previously had been leased to a pro-Marcos Philippines corporation. When the owner and lessor of the plane, Faysound, Ltd., a Hong Kong corporation, learned of the disposition of its property, it brought suit in federal district court against the plaintiff to obtain title to the aircraft, and was successful. The plaintiff then commenced an action against the PCGG and the Republic of the Philippines alleging breach of the contractual indemnity clause, breach of warranty of title, and requesting a declaration of the parties' rights under the deed of sale. Both defendants moved for dismissal claiming sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). The Republic also asserted that it could not be held liable for the acts of its instrumentality, the PCGG.

The United States District Court of the Northern District of Texas denied the defendant's motion to dismiss and held: 1) the Republic may be sued for the acts of the PCGG since the PCGG constituted the "alter ego" of the Republic, and, 2) the PCGG was not immune from liability since it fell within the commercial-activities exception to the FSIA. The Court of Appeals for the Fifth Circuit *Held: Affirmed as to the PCGG, reversed and remanded as to the Republic of the Philippines.*

Relying on the lodestar case of *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) [hereinafter

*Bancec*], the court explained that instrumentalities are presumed to retain their separate juridical status and thus the burden of proving an agency relationship necessarily falls upon the plaintiff. The court stressed that while agency status may be assessed via the five factors outlined in *Bancec*,<sup>2</sup> a determination to hold the Republic liable under an agency theory was "highly fact-found" and could not be reduced to any "mechanical formula." Thus, the court remanded for further factfinding regarding the extent of involvement of the Republic in the affairs of the PCGG.

Confronting the immunity argument of the defendants, the court employed the *Texas Trading* test and found that the sale of the aircraft qualified as commercial activity as it was "of a type that a private person would customarily engage in for profit." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981). The court rejected the defendant's argument that because the transaction was founded in the Republic's desire to recover property implicated by the Marcos regime, it was a sovereign act as opposed to a commercial one. *Significance*—This decision reflects the balancing of interests involved in extending jurisdiction over foreign governments and their instrumentalities.

#### IV. REFUGEES

EXECUTIVE ORDER PERMITTING THE UNITED STATES COAST GUARD TO RETURN HAITIAN REFUGEES FOUND ON INTERNATIONAL WATERS DIRECTLY TO HAITI HELD TO VIOLATE IMMIGRATION AND NATIONALITY ACT. *Haitian Centers Council v. McNary*, 969 F.2d 1350 (5th Cir. 1992)

On May 23, 1992, President George Bush issued an executive order which permitted the United States Coast Guard to intercept boatloads of Haitian refugees in international waters and to return them directly to Haiti. The narrow issue decided by the court was whether the implementation of the executive order comported with section 243(h)(1) of the Immigration and Nationality Act (INA). 8 U.S.C. § 1253(h)(1).

The United States District Court for the Eastern District of New York denied the plaintiff's motion to preliminarily enjoin the defendants

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2. The five factors include: "1) the level of economic control by the government; 2) whether the entity's profits go to the government; 3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; 4) whether the government is the real beneficiary of the entity's conduct; and 5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations." 1992 U.S. App. LEXIS 19285, at \*14, n.7.

from returning Haitian refugees. On appeal, the United States Court of Appeals for the Second Circuit *Held: Reversed and Remanded.*

Section 243(h) of the INA provides that: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such aliens' life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1). Interpreting the literal meaning of the terms "return" and "any alien," the court rejected the government's contention that section 243(h), or article 33 of the Refugee Convention by analogy, prohibits the return only of the refugees who have actually entered the territory of the contracting state. Rather, the court held that the plain language of the Act dictates that all aliens, regardless of their location, are protected under section 243(h). Moreover, according to the court, the whole object and purpose of the INA and the Refugee Convention to protect refugees from being put into the hands of those who would persecute them would be thwarted by any contrary reading.

The court cited *Youngstown Sheet & Tube Co. v. Sawyer* for the proposition that "when the President takes measures not compatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." 343 U.S. 579, 637 (1952). Because the President's order did not specifically address a foreign policy concern,<sup>3</sup> and because Congress had already spoken directly on the question at issue, the President was found to have acted wholly without authority in violating section 243(h)(1) of the INA. *Significance:* The President of the United States has no express or implied authority to order the forcible interception and return of Haitian refugees.

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3. The order provides that it was "intended only to improve the internal management of the Executive Branch." Exec. Order 12,807, 57 Fed. Reg. at 23,134.

