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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.

I. ALIEN TORT STATUTE

ALIEN TORT STATUTE GRANTS FEDERAL COURT SUBJECT MATTER JURISDICTION OVER FOREIGN SOVEREIGN FOR TORT COMMITTED IN CLEAR VIOLATION OF INTERNATIONAL LAW, AND FOREIGN SOVEREIGN IMMUNITIES ACT IS NOT EXCLUSIVE JURISDICTIONAL GRANT OVER SOVEREIGN—*Amerada Hess Shipping Corp. v. Argentina Republic*, 830 F.2d 421 (2nd Cir. 1987).

On June 8, 1982, during the Falklands War, Argentine aircraft without warning fired air-to-surface rockets and dropped bombs on the Liberian flag oil tanker *Hercules* as she steamed in international waters roughly 600 nautical miles off the Argentina coast. The *Hercules* had embarked from the Virgin Islands for Alaska via the southern tip of South America as part of a time charter agreement entered into in 1977 between the ship owner, United Carriers, Inc. (United) and Amerada Hess Shipping Corporation (Amerada). Prior to the attack the United States Maritime Administration telexed to Argentina and the United Kingdom information concerning U.S. shipping interest passage through the South Atlantic (including that of the *Hercules*). The Argentine attack rendered the *Hercules* useless, and the ship was scuttled at a total loss of over \$11,000,000.

After unsuccessful attempts to recover for the loss in an Argentine court, Amerada and United filed suit against Argentina in United States district court claiming that Argentina destroyed the oil tanker on the high seas in violation of international law. United and Amerada asserted jurisdiction exists under the Alien Tort Statute, which grants district courts jurisdiction over actions brought by an alien for a tort committed in violation of international law. 28 U.S.C. § 1350 (1982). The district court granted Argentina's motion to dismiss for lack of subject matter

jurisdiction holding that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1330, 1602-1611 (1987), is the exclusive means of jurisdiction over a foreign sovereign and that under the FSIA no jurisdictional grant exists. 638 F. Supp. 73 (1986).

On appeal, Amerada and United argued that both the Alien Tort Statute and the FSIA provide subject matter jurisdiction. The Second Circuit Court of Appeals *held: reversed*, (1) the FSIA is not the exclusive basis upon which a court may exercise jurisdiction over a foreign sovereign; and (2) the Alien Tort Statute provides subject matter jurisdiction where an alien sues a foreign sovereign for a tort committed in violation of international law. Applying the Alien Tort Statute to the facts of this case, the court stated Amerada Hess and United were Liberian corporations, and the claim was for the tort of bombing a ship without justification, which also clearly violates international law.

Argentina argued that the United States recognized absolute sovereign immunity in 1789 when Congress enacted the Alien Tort Statute and thus Argentina enjoyed absolute immunity; however, the court of appeals viewed the Alien Tort Statute as a jurisdictional grant based on a modern, evolving standard of international law. The court stated that under the modern view of international law, sovereigns do not enjoy immunity for violations of international law. Although Argentina claimed the FSIA provides the exclusive basis for jurisdiction over sovereigns and that Argentina is immune from suit under the FSIA, the court of appeals stated that the FSIA must be given a construction if possible consistent with international law, which denies immunity, and that the court would construe the FSIA to grant immunity only if Congress clearly expressed such an intent. The court then stated that neither the FSIA nor its legislative history contains a clear intention to bar jurisdiction under the Alien Tort Statute. In fact, the court found that the central premise of the FSIA, as expressed in the legislative history, was that "decisions on claims made by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law." Thus the court concluded that, although Congress did not expressly focus on suits for violations of international law when it passed the FSIA, it clearly expected courts to apply the international law of sovereign immunity (which by implication includes actions allowed under the Alien Tort Statute). A dissent filed by Judge Kearse agreed with the district court and rejected the majority's conclusion that the Alien Tort Statute provides jurisdiction over a foreign sovereign and found the FSIA is the exclusive jurisdictional basis for suits against a sovereign. *Significance*—The Second Circuit Court of Appeals establishes a minority position that the Alien Tort Statute pro-

vides a jurisdictional basis over foreign sovereigns for torts committed against aliens in violation of international law notwithstanding the prevailing view that jurisdiction over a foreign sovereign exists exclusively through the FSIA.

