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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. INTERNATIONAL LAW

PRIVATE CITIZENS DO NOT HAVE A CAUSE OF ACTION TO ENFORCE JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE—*Committee of United States Citizens in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988)

In 1986, the International Court of Justice (ICJ) held that United States military support of the Nicaraguan Contras violated both customary international law and a treaty between the United States and Nicaragua. The ICJ further determined that the United States had a duty to refrain from additional violations. *See Military and Paramilitary Activities In and Against Nicaragua (Nica. v. U.S.)* 1986 I.C.J. 14. The United States, however, continued to allocate funds for the activities that the ICJ found illegal. The plaintiffs then brought suit in the United States District Court for the District of Columbia seeking declaratory relief as well as an injunction against continued funding of the Contras. The plaintiffs alleged that the funding violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1982), the first and fifth amendments to the United States Constitution, article 94 of the United Nations Charter, and customary international law.

The district court ruled that the case involved a nonjusticiable political question and dismissed the complaint in its entirety. While the United

States Court of Appeals for the District of Columbia Circuit found the claims justiciable, it determined that they warranted dismissal under Fed. R. Civ. P. 12(b)(6) because the complaint failed to state a claim upon which relief could be granted.

The court of appeals reasoned that the district court's blanket use of the political question doctrine was an inappropriate reason for dismissal because not every issue touching on foreign relations is beyond the power of courts. The court then addressed the specifics of the claims presented and determined that each should be dismissed. The court held that the judicial branch lacks the power to intervene when Congressional action is inconsistent with either an international treaty or a rule of customary international law. Consequently, the court could not grant relief for such claims. Moreover, private citizens initiated this suit to force specific action by their government in response to an ICJ decision. The court of appeals found that the ICJ is designed to resolve disputes between national governments and should not be used as a weapon by private citizens to force action by their own government. As to the plaintiffs' fifth amendment claims, the court held that the plaintiffs did not establish a causal link between the violations of international law and their injuries. The court, however, was careful not to foreclose the validity of a future claim by private citizens that Congressional action in pursuit of foreign policy constitutes deprivation of liberty or property without due process of law. *Significance*—The importance of the decision lies in its extensive treatment of the interrelationship between international and domestic law.

II. FOREIGN SOVEREIGN IMMUNITY

THE FOREIGN SOVEREIGN IMMUNITIES ACT PRECLUDES DOMESTIC COURT JURISDICTION OVER A CAUSE OF ACTION ARISING OUT OF A PLANE CRASH IN A FOREIGN COUNTRY WHEN THE AIRPLANE IS OWNED BY AN INSTRUMENTALITY OF THE FOREIGN GOVERNMENT—*Compania Mexicana de Aviacion v. U.S. Dist. Court*, 859 F.2d 1354 (9th Cir. 1988).

Plaintiffs commenced an action in the United States District Court for the Central District of California on behalf of ninety-six Mexican nationals who were killed when *Compania Mexicana de Aviacion* flight 940 crashed near Mexico City shortly after takeoff on March 31, 1986. The defendant moved for dismissal, claiming both foreign sovereign immunity and forum non conveniens. When the district court denied the motion, the defendant petitioned the Court of Appeals for the Ninth Circuit for a writ of mandamus. The court of appeals held that denial of a

motion to dismiss for foreign sovereign immunity is a collateral order entitled to immediate appeal. The court then construed the mandamus petition as notice of appeal.

In addressing the merits of the motion to dismiss, the Ninth Circuit held that the defendant is an agent of the Mexican Government and therefore a foreign state for the purpose of foreign sovereign immunity. Under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-11 (1982), United States courts must dismiss suits brought against foreign sovereigns unless the defendant satisfies one of the exceptions provided in the FSIA. Although the defendant airline had signed a waiver with the United States Department of Transportation (DOT) to gain DOT permission to fly into the United States, the court found that this did not constitute a waiver of immunity under the FSIA. The court reasoned that the DOT waiver was intended to gain jurisdiction over the airline in cases having substantial contact with the United States. The court held that no contact existed in the instant case because the passengers had purchased their tickets in Mexico for travel within Mexico. No action taken by the defendant occurred "under [the] permit" issued by the DOT. The action also did not fit within the commercial activity exception to the FSIA because no causal connection existed between the cause of action and any commercial activity in the United States. *Held: Reversed* and remanded to the district court with an order to dismiss the action pursuant to the FSIA. *Significance*—Even though an instrumentality of a foreign government may consent to suit in the United States, it cannot be brought into a domestic court against its will for activities wholly unconnected to the United States.

III. FOREIGN ACCESS TO UNITED STATES COURTS

Two recent cases reached different results on the issue of whether an instrumentality of a foreign government not formally recognized by the United States Government can gain access to United States courts for the purpose of bringing suit against American defendants. Although the cases came to opposite conclusions on the basic issue, each can be justified on its specific facts.

AN UNRECOGNIZED PANAMANIAN REGIME LACKS STANDING TO INTERVENE IN AN ACTION BROUGHT BY THE RECOGNIZED PANAMANIAN GOVERNMENT TO ENJOIN THE TRANSFER OF PANAMANIAN GOVERNMENT FUNDS OUT OF AMERICAN BANKS—*Republic of Panama v. Citizens & Southern International Banks*, 682 F. Supp. 1544 (S.D. Fla.

1988).

Banco National de Panama (BNP) and the unrecognized government of Panama headed by General Manuel Noriega moved to intervene in an action brought by the legitimate Panamanian Government to freeze Panamanian funds held in United States bank accounts. The case concerned the issue of whether the funds in the American bank accounts belong to the recognized Delvalle Government or to the unrecognized government of General Noriega.

On March 1, 1988, the United States District Court for the Southern District of Florida entered a preliminary injunction against the disbursement of funds from the American bank accounts. In ruling on the subsequent motions to intervene made by BNP and the Noriega Government the court *Held: Denied*. The court ruled that the executive branch has the exclusive power to "recognize and legitimize" foreign governments and that a decision not to recognize a foreign government is binding on the courts. Because an unrecognized government is denied access to United States courts, the Noriega regime had no standing to intervene in the case. With respect to BNP's motion to intervene, the court held that the agent of an unrecognized foreign government can also be denied access to United States courts. While BNP would have standing if it were a purely private enterprise, the court considered it an arm of the illegitimate government and thus denied its motion to intervene in the action.

AN INSTRUMENTALITY OF AN UNRECOGNIZED FOREIGN GOVERNMENT HAS STANDING TO BRING SUIT IN A UNITED STATES COURT IF THE EXECUTIVE BRANCH CONSENTS—*National Petrochemical Co. v. M/T Salt Sheaf*, 860 F.2d 551 (2d Cir. 1988).

This suit arose after President Carter severed diplomatic relations with Iran in response to the detention of fifty-two American hostages following the 1979 Iranian revolution. The plaintiff, a wholly-owned subsidiary of the National Iranian Oil Company, an instrumentality of the Iranian Government, attempted to circumvent the ban on sale of American products to Iran by contracting with middlemen in Hamburg and Rotterdam. When the products did not reach Iran, the plaintiff sought to bring suit in the United States. The primary issue was whether the plaintiff could bring suit in the United States or whether such suit was precluded because the United States Government did not recognize the Iranian Government.

The United States District Court for the Southern District of New York held that the plaintiff lacked standing and dismissed the case. The Court of Appeals for the Second Circuit *Held: Reversed*. The case was reinstated and remanded to the district court for trial. At the outset the

court noted that to answer the issue “in this shoal strewn area of the law, it is wise for courts to have in mind . . . that they must ‘first, do no harm.’” 860 F.2d at 552. In holding that the plaintiff could bring its claim, the court did not overturn the rule that in order to benefit from the grant of diversity jurisdiction, the foreign government of the instrumentality must be formally recognized by the United States Government. Rather, the court reasoned that a break in diplomatic relations does not warrant automatic denial of access to United States courts. The court noted that the executive branch retains the exclusive power to recognize or refuse to recognize a foreign government. The court nevertheless proceeded to hold that the executive department may cut off diplomatic relations without intending to preclude access to United States courts. Similarly, the executive department may recognize a government for the limited purpose of allowing access to courts.

In the instant case, the executive department filed a statement of interest with the court stating: “It is the position of the Executive Branch that the Iranian government and its instrumentality should be afforded access to our courts for purposes of resolution of the instant dispute.” 860 F.2d at 555. The court found that a dichotomy of recognition is required by the current state of foreign relations for two reasons. First, the practice of extending formal recognition is not as frequently given as in the past because it has been misinterpreted as approval of all of the actions of the foreign government. Second, the executive branch needs flexibility to conduct foreign relations, which includes the power to allow access to United States courts even if the government is not formally recognized.

Significance—Read together, these two decisions indicate that access to United States courts is evolving from the strict principle of “no formal recognition, no access” to a policy-based political decision by the executive department; therefore, questions of access to United States courts will be decided on a case-by-case basis.

