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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 apply established legal principles to new and different factual situations. The cases are grouped in topical categories, and references are given for further research.

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### I. ADMIRALTY

APPLICATION OF UNITED STATES LAW TO A FOREIGN SEAMAN'S SUIT DEPENDS UPON THE SUBSTANTIALITY OF THE FOREIGN DEFENDANT'S CONTACTS WITH THE UNITED STATES—*Szumlicz v. Norwegian America Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983).

Plaintiff, a Polish citizen who sustained injuries aboard the *Vistafjord*, sued the defendant shipowner, a Norwegian corporation, and its agent for unseaworthiness and sought damages under the Jones Act, 46 U.S.C. § 688. The United States District Court for the Southern District of Florida, finding that the criteria in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970), did not apply, concluded that United States law controlled because the defendant conducted substantial business in United States ports and the plaintiff received medical treatment in the United States while employed by the defendant aboard the *Vistafjord*. The Eleventh Circuit affirmed, holding that the district court did not err when it applied United States law and exercised jurisdiction despite defendant's *forum non conveniens* contentions. Although the Eleventh Circuit acknowledged defendant's *Lauritzen* arguments, the court followed the reasoning in *Rhoditis* by holding that the application of United States law to a foreign seaman's suit depends upon the

substantiality of the foreign defendant's contacts with the United States. The court concluded that the use of a United States base of operations for shipping activities and revenue collection by the vessel and its owner, together with other United States contacts, justified the choice of United States law rather than Norwegian law. *Significance*—This court applied a new hierarchy of factors to a choice of law issue in an admiralty case.

RECOVERY PURSUANT TO THE FISHERMEN'S PROTECTIVE ACT FOR LOSSES RESULTING FROM SEIZURE OF VESSELS FISHING IN DISPUTED WATERS IS NOT LIMITED TO CITIZENS AND RESIDENT ALIENS OF THE UNITED STATES—*Cruz v. Zapata Ocean Resources, Inc.*, 695 F.2d 428 (9th Cir. 1982).

As a result of the Republic of Ecuador seizure of four vessels while their crews were fishing for tuna approximately 100 miles off the Ecuadorian coast, fifteen nonresident alien crew members of those vessels brought suit against and collected from the parent corporation of the four corporations that owned the vessels. The parent and subsidiary corporations then brought a third-party claim against the United States for reimbursement pursuant to a guarantee agreement authorized by the Fishermen's Protective Act, 22 U.S.C. § 1977. The district court granted summary judgment for the United States, concluding that the claim was barred by a regulation promulgated by the Secretary of State which disallowed consideration of claims by nonresident aliens. The Ninth Circuit reversed and remanded, finding that nothing in the language of the statute or in the purpose behind its enactment limits the recovery by crew members to either United States citizens or aliens legally domiciled in the United States. The court held that the regulation was inconsistent with the Act and did not reflect the purpose of the Act, which is to encourage United States fishing vessels to continue operating in disputed waters in order to advance the claim of free access to these waters made by the United States pursuant to international law. Denial of compensation to nonresident alien crew members of seized vessels would discourage fishing in disputed waters and thereby reduce the effectiveness of the Act. *Significance*—This decision established the right of all crew members, regardless of nationality, to receive compensation under the Fishermen's Protective Act.

UNITED STATES SUPPORT OF CANADIAN SEARCH OF UNITED STATES VESSEL ON THE HIGH SEAS DID NOT VIOLATE DEFENDANT'S FOURTH

AMENDMENT RIGHTS—*United States v. Hensel*, 699 F.2d 18 (1st Cir. 1983).

The United States Coast Guard pursued defendant's boat into Canadian waters and notified Canadian officials, who seized the boat after a search uncovered drugs. On trial in the United States, the defendant contended the evidence obtained in the search must be suppressed because it was seized by Canadian officials in violation of his Fourth Amendment rights. The Court of Appeals affirmed the trial court's holding that the exclusionary rule does not require suppression of the evidence, even though the search on the high seas violated international law and was not authorized by statute or Coast Guard regulations. The court reasoned that because United States courts are unlikely to influence foreign police conduct, the exclusionary rule does not require suppression of evidence obtained in a search by foreign authorities. The court asserted that the Coast Guard's participation in the search was supported by probable cause and that a search warrant was not required. Moreover, the court believed that international law provisions barring searches of foreign vessels on the high seas did not automatically compel suppression of the evidence seized by the Canadians because international law protects the rights of foreign sovereigns and not the privacy rights of ship captains. *Significance*—This decision allows the Coast Guard greater freedom in enlisting the aid of foreign nations to conduct searches of United States ships on the high seas and reaffirms the principle that private defendants cannot assert violations of sovereign rights.

WARRANTLESS SEARCH AND SEIZURE OF FOREIGN FISHING VESSEL DOES NOT VIOLATE FOURTH OR FIFTH AMENDMENT RIGHTS—*United States v. Kaiyo Maru No. 53*, 699 F.2d 989 (9th Cir. 1983).

Plaintiffs, owners of a Japanese fishing vessel seized by the Coast Guard in the Fishery Conservation Zone off the western part of the Aleutian Islands pursuant to the Fishery Conservation and Management Act, brought suit against the United States alleging that certain provisions of the Act that authorized warrantless searches and seizures violate the Fourth and Fifth Amendments of the Constitution. The court of appeals affirmed the district court by holding that the Coast Guard's actions involved no constitutional violations. Noting that the appropriate inquiry

in Fourth Amendment cases is the reasonableness of the Act and recognizing that the judiciary has generally been more tolerant of warrantless inspections of purely commercial property, the court held that the particular enforcement needs incorporated into the Act and the awareness of each vessel owner that his vessel is subject to inspections made the Coast Guard's search reasonable. The court also rejected the claimant's argument that the shore-side arrest of the vessel violated due process rights. The court reasoned that the deprivation of plaintiff's property occurred when the vessel was seized at sea and the on-shore arrest of the vessel involved no additional deprivation of claimant's property rights. *Significance*—This decision supports strict enforcement of United States fishing regulations and recognizes less stringent constitutional oversight of situations in which strictly commercial property is involved.

## II. FOREIGN RELATIONS

REAL PROPERTY OWNED AND USED BY FOREIGN EMBASSIES IN THE UNITED STATES IS EXEMPT FROM LOCAL TAXATION EVEN ABSENT TREATY LANGUAGE UNAMBIGUOUSLY PREEMPTING SUCH LEVIES—*United States v. County of Arlington, Virginia*, 702 F.2d 485 (4th Cir. 1983).

Arlington County sued to collect taxes assessed on an apartment building owned by the German Democratic Republic (GDR). Because the Fourth Circuit had ruled that a 1979 United States-GDR treaty exempted the housing for embassy personnel from taxes levied on or after May 4, 1979, Arlington County sought only the taxes levied before that date. Examining that treaty as well as earlier ones for indications of federal intent to preempt the local property tax, the taxing authority and the Department of State offered conflicting interpretations of the complex agreements. In addition, the Department of State argued that the 1979 treaty formalized an existing diplomatic understanding under customary international law. The Fourth Circuit affirmed for the United States, holding that the Department of State's position prevailed when the litigants presented conflicting and equally plausible interpretations of the treaties. The court of appeals reasoned that the nation's interest in maintaining friendly international relations outweighed Arlington County's need for the taxes assessed. *Significance*—The Fourth Circuit found the diplomatic property exempt from the local levies even

absent treaty language unambiguously preempting such taxation.

**UNITED STATES INVOLVEMENT IN EL SALVADOR HAS NOT YET VIOLATED THE WAR POWERS RESOLUTION OR THE FOREIGN ASSISTANCE ACT OF 1961—*Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982).**

Plaintiffs, twenty-nine members of the United States Congress, sought declaratory judgments, a writ of mandamus, and injunctions against President Ronald Reagan, Secretary of Defense Caspar Weinberger, and Secretary of State Alexander Haig for supplying monetary aid and military equipment to the government of El Salvador, alleging violation of article I, section 8, clause 11 of the Constitution (the War Powers Clause), the War Powers Resolution (WPR), 50 U.S.C. §§ 1541-1548, and the Foreign Assistance Act of 1961, 22 U.S.C. § 2304. The plaintiffs argued that the WPR had been violated because the Administration failed to submit a report to Congress within forty-eight hours after United States military advisers in El Salvador were introduced into the "imminent involvement of hostilities" and because the Administration maintained those military forces in El Salvador for more than sixty days without specific congressional authorization. Furthermore, the plaintiffs argued that providing security assistance to a government engaged "in a consistent pattern of gross violations of internationally recognized human rights" violated the Foreign Assistance Act of 1961. The district court held that the WPR issue was nonjusticiable because it was a political question, and found that no judicially discoverable and manageable standards were available to resolve the case because of the difficulty in gathering evidence about United States military operations in El Salvador and the sensitive nature of that information. Moreover, the court noted that no constitutional confrontation existed between the executive and legislative branches because Congress had not taken any action concerning the situation. Having already disposed of the WPR issue, the court nevertheless discussed the application of the WPR to the instant facts. For WPR purposes, the district court distinguished the current El Salvador situation from United States military involvement in Vietnam on the basis of the number of troops concerned and casualties incurred, stating that military operations in Vietnam certainly constituted the "introduction into hostilities" of United States personnel. The court also said in dicta that the WPR legislative scheme precluded a court from sanctioning the withdrawal of United States

personnel without the court first triggering congressional involvement pursuant to the WPR. The court exercised its equitable discretion and dismissed the plaintiffs' Foreign Assistance Act claim, reasoning that judicial restraint was warranted because the plaintiffs' dispute was primarily with congressmen who had authorized aid to El Salvador with knowledge of its human rights situation. The court refused to provide mediation of an interbranch dispute which would have circumvented the democratic governmental process. *Significance*—The War Powers Resolution is not fully self-executing, and thus requires congressional action to trigger the Act's automatic termination provision of troop involvement when a report is not timely filed by the Executive.

### III. INTERNATIONAL TAXATION

UNITED STATES-CANADA TAX CONVENTION PERMITS THE UNITED STATES INTERNAL REVENUE SERVICE TO OBTAIN INFORMATION REQUESTED BY CANADA FOR A CIVIL TAX AND CRIMINAL INVESTIGATION—*United States v. Manufacturers Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983).

The Canadian Department of National Revenue (Revenue Canada) imposed civil tax liability on one of the intervenors for transferring assets out of Canada to the defendant United States bank. Subsequently, the intervenor declared bankruptcy in Canada, leading the Canadian authorities to begin a criminal investigation. Revenue Canada requested that the Internal Revenue Service (IRS) provide information on the transactions between the spouse of the bankrupt intervenor and defendant bank pursuant to Article XIX of the United States-Canada Tax Convention of 1942, 56 Stat. 1399, which provides for the sharing of information between Revenue Canada and the IRS for use in assessing taxes. Article XXI, section 1, empowers the IRS to furnish all information "as the Commissioner is entitled to obtain under the revenue laws of the United States." The IRS summoned defendant bank records and sought to enforce the summons in district court pursuant to 26 U.S.C. § 7602 (1976). The intervenors argued that Article XXI, section 1, which empowers the IRS to furnish information, incorporates all domestic law governing IRS power to enforce summons, including the United States Supreme Court rule that the IRS cannot use its summons power for criminal investigations. The Western District of New York refused to enforce the summons. Finding that Revenue Canada would share

the requested information on defendant bank with the Royal Canadian Mounted Police, the court held that the IRS exercised bad faith by not following the United States Supreme Court limitation on its power over summons information. The Second Circuit Court of Appeals reversed, holding that Article XIX, not the domestic law of summons, provided the standard governing Revenue Canada's request. The court reasoned that if Revenue Canada requests the information for determining income tax liability, the request meets the fundamental prerequisite for the IRS to use its summons power. The court further supported its interpretation by noting both the potential international implications if the IRS could not grant Revenue Canada's request and that United States policy should not apply to Canadian criminal prosecutions. *Significance*—By enforcing IRS summons power even when another country will subsequently use the information in criminal prosecutions, the court's decision supports the United States policy of sharing tax related information with other governments in an attempt to thwart international tax evasion and related criminal activities.

#### IV. JURISDICTION AND PROCEDURE

BURDENSOME DIFFICULTY IN THE INTERPRETATION AND APPLICATION OF FOREIGN LAW CANNOT BY ITSELF JUSTIFY DISMISSAL OF A CASE IN FAVOR OF A FOREIGN FORUM—*Transamerica Interway, Inc. v. Commercial Union Assurance Co. of S. Africa*, 97 F.R.D. 419 (S.D.N.Y. 1983).

A New York corporation brought suit to collect unpaid claims on marine insurance policies from two South African insurers. The defendants challenged the district court's jurisdiction on the ground that one of the South African insurers had filed an action in the courts of England for declaratory relief from the New York corporation's claim. The district court ordered discovery strictly limited to the jurisdictional issue, but both defendants refused to participate. Subsequently, plaintiff moved for an order declaring that the court had in personam jurisdiction over the defendants on the ground that but for the defendants' refusal to participate in discovery, jurisdiction would have already been established. The defendants argued that the district court should defer to the English courts because the English action was commenced prior to the instant action and also because the choice of law clause in the insurance policies specified that the "law of the United King-



dom" should govern. The district court found that although the English action had been filed first, nothing had occurred on the merits in that case because the South African insurer had not pursued the action and because the English court had already stated its intention to delay proceedings until the district court disposed of the instant case. The court then held that the law of New York clearly did not apply but found itself competent to apply the "law of the United Kingdom" despite the complex interpretive questions presented: marine insurance law differs among the United Kingdom countries, England, Scotland, Wales, and Northern Ireland. The district court also found the defendants' contacts with New York sufficient because portions of the insurance negotiations occurred in New York, the plaintiff's records were located in New York, and defendants' employees had visited the plaintiff's New York office. Finding jurisdiction, the court ordered the defendants, under threat of a default judgment, to answer the plaintiff's original complaint within ten days. *Significance*—This decision by the Southern District of New York indicates the extent to which courts consider themselves competent to interpret and apply complex foreign law.

COMMERCIAL ACTIVITIES OF A FOREIGN STATE ARE DEEMED TO BE CARRIED ON IN THE UNITED STATES FOR PURPOSES OF DENYING FOREIGN SOVEREIGN IMMUNITY IF ESSENTIAL PARTS OF THE NEGOTIATIONS OF THE CONTRACT ESTABLISHING SAID COMMERCIAL ACTIVITIES OCCURRED IN THE UNITED STATES—*Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982).

Two United States citizens brought suit in federal district court under the Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. § 1605(a)(2)(i), against an industrial development entity of the Republic of Ireland for losses associated with a breach of contract between the parties. The contract, key parts of which were negotiated in the United States, called for plaintiffs to move to Ireland in order to establish and manage, as co-owners with the Irish government, a manufacturing concern. Section 1605(a)(2)(i) grants federal jurisdiction over a case, and thereby denies immunity to foreign sovereigns, if the act sued upon is connected to a commercial activity of a foreign state that is "carried on in the United States," even if the act sued upon itself occurred wholly outside the United States. The foreign state moved to dismiss the action for lack of a statutory source of subject matter jurisdiction on the basis that the foreign state had not engaged in a commer-

cial activity carried on in the United States. The district court held that when a portion of a contract's negotiation occurred within the United States, and when that portion was essential to the formation of the contract, and despite the fact that the contract was finalized and performed outside the United States, and despite the lack of any other connection between the United States and the foreign state's commercial activity, the foreign state had carried on a commercial activity in the United States by participating in the essential United States-based negotiations which resulted in a contract. The court analogized this holding to state long-arm cases, holding that essential contract negotiations within the jurisdiction are sufficient to bring the entire transaction within the reach of the jurisdiction's courts. The district court's second basis for holding that the activity was carried on in the United States was a portion of the contract that not only required plaintiffs to move their residences to Ireland, but also provided that the plaintiffs would purchase United States machinery for equipping the Irish facility. The court based this alternative ground on a statement in the legislative history that foreign transactions involving purchases from United States concerns might be transactions "carried on in the United States." *Significance*—Although this decision changes none of the standards for denying foreign sovereign immunity, this court's application of those standards to these facts indicates this court's participation in the current trend toward expansively construing the ambiguous and plaintiff-oriented exceptions to foreign sovereign immunity in the FSIA.

