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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARGENTINE REPUBLIC, Petitioner V. AMERADA HESS
SHIPPING CORPORATION, ET AL.

CASE NO: 87-1372

PLACE: WASHINGTON, D.C.

DATE: December 6, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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ARGENTINE REPUBLIC, :

Petitioner :

v. : No. 87-1372

AMERADA HESS SHIPPING :

CORPORATION, et al. :

-----x

Washington, D.C.

Tuesday, December 6, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 o'clock a.m.

APPEARANCES:

BRUNO A. RISTAU, ESQ., Washington, D.C.; on behalf of the Petitioner.

CHARLES FRIED, ESQ., Solicitor General, Department of Justice, Washington, D.C.; as Amicus Curiae supporting the Petitioner.

DOLGLAS R. BURNETT, ESQ., New York, New York; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1372, Argentine Republic v. Amerada Hess Shipping Corporation.

Mr. Ristau, you may proceed whenever you're ready.

ORAL ARGUMENT OF BRUNO A. RISTAU

ON BEHALF OF THE PETITIONER

MR. RISTAU: Mr. Chief Justice, and may it please the Court.

This case tenders for review by this Court the issue whether an American court is competent to hear tort claims asserted by aliens against a foreign state for a claimed infraction of international law committed by the foreign state's armed forces on the high seas in the course of hostilities with another state. The issue is unprecedented in this Court and, for that matter, unprecedented in any municipal court anywhere in the world.

The predicate facts are taken from the allegations of the complaint because the case was dismissed on motion by the United States District Court for the District -- Southern District of New York.

Respondents United Carriers and Amerada Hess

1 are two Liberian corporations. United Carriers was the
2 owner of a tanker registered in Liberia and flying the
3 Liberian flag. Amerada Hess was the charterer of the
4 tanker. The tanker was engaged in transporting crude
5 oil from Alaska around the Cape to a refinery located in
6 the Virgin Islands.

7 During the Malvinas/Falkland Island war
8 between the Petitioner and the United Kingdom, it is
9 alleged that aircraft of the Argentine Republic attacked
10 the tanker in the South Atlantic causing damages. The
11 tanker thereafter diverted to a Brazilian port where it
12 was found that an undetonated bomb was lodged in one of
13 the holds of the tanker. After remaining for about six
14 weeks off the coast of Brazil, the owners of the tanker
15 decided to scuttle the vessel in the mid-Atlantic along
16 with its load of bunker oils belonging to Amerada Hess.

17 QUESTION: Was there any loss of life, Mr.
18 Ristau?

19 MR. RISTAU: No, sir. No injury, no loss of
20 life.

21 Three years later in 1985 both Respondents
22 brought suit against Argentina in the district court in
23 New York. United Carriers sued for the value of the
24 tanker which --

25 QUESTION: Wasn't -- wasn't there interim

1 litigation in the courts of Argentina?

2 MR. RISTAU: No, sir.

3 QUESTION: Do I get a misimpression from
4 reading the briefs as to the --

5 MR. RISTAU: There was no interim litigation
6 in the courts of Argentina, Justice Blackmun. The
7 attorneys in their affidavits made of record in this
8 Court assert one of them sought to retain Argentine
9 counsel, but they were turned down because of conflicts
10 that Argentine counsel perceived. They were also
11 representing Argentina.

12 The other set of attorneys met with the legal
13 adviser of the Argentine foreign office, and the
14 reference to that, Your Honor, is in our -- in the Joint
15 Appendix, page JA 87. The legal adviser in March of
16 1985 rendered the opinion that they ought to bring suit
17 in Argentina. The legal adviser further advised them
18 that the statute of limitations in his view was 10
19 years.

20 Two months later the Respondents resolved that
21 they probably would not get an adequate remedy in
22 Argentina. They came New York, filed their suit under
23 the so-called Alien Tort Act invoking the jurisdiction
24 of the Alien Tort Act which provides an essential --

25 QUESTION: Let me see if I understand that,

1 that there was a determination there was not an adequate
2 remedy in Argentina?

3 MR. RISTAU: By the attorneys for the
4 Respondents, Your Honor.

5 QUESTION: Do you have any suggestion as to
6 where they might go for a remedy?

7 MR. RISTAU: To begin with, my suggestion is,
8 Your Honor, they should have tried to bring suit as they
9 were advised by the Argentine official in the courts of
10 Argentina.

11 If, on the other hand, it were to turn out
12 that no remedy can be obtained under the domestic law of
13 Argentina as, as Your Honor knows, under analogous
14 circumstances, it couldn't be obtained against the
15 United States in the courts of the United States under
16 the Federal Tort Claims Act, then since they are
17 nationals of a foreign state of Liberia, they ought to
18 try the traditional international route of having
19 Liberia espouse their claims against the Republic of
20 Argentina. But they ought not to be able to bring these
21 claims into a domestic forum of a third country where
22 there is absolutely no connection between the underlying
23 cause of action, the parties and the foreign state.

24 QUESTION: I understand your position. Where
25 would Liberia assert its claim then on behalf of the

1 shipowners?

2 MR. RISTAU: Liberia presumably, Your Honor,
3 is -- has diplomatic relations, as I do know they do
4 with Argentina, and they communicate that kind of an
5 espousal through channels of diplomacy, the time-honored
6 channels, in which states assert claims against each
7 other.

8 QUESTION: So, you would relegate them then to
9 diplomatic channels entirely.

10 MR. RISTAU: I would relegate them to
11 diplomatic channels and such remedies as are obtainable
12 under preexisting, traditional, and customary
13 international law between two sovereign states.

14 Now, the Alien Tort Act --

15 QUESTION: I'm trying to avoid the cynicism of
16 your answer, but go ahead.

17 MR. RISTAU: I apologize, Your Honor, if you
18 -- if it came through badly.

19 The Alien Tort Act provides in relevant part
20 that the district courts have jurisdiction to hear suits
21 by an alien only -- by an alien for a tort only
22 committed in violation of the Law of Nations or a treaty
23 of the United States. The Respondents invoked that
24 jurisdiction as the predicate for their suit in the
25 Southern District.

1 One of them, Amerada Hess, also asserted that
2 the district court could hear their claim under
3 traditional admiralty jurisdiction, and in the further
4 alternative, they claimed that the court could hear the
5 case under some notion of universal jurisdiction, the
6 universal jurisdiction which in their view any municipal
7 court possesses in order to redress egregious violations
8 of International law committed anywhere in the world by
9 anybody.

10 Both Respondents expressly disclaimed reliance
11 on the 1976 Foreign Sovereign Immunities Act as the
12 jurisdictional basis for their suit, although both of
13 them used the Foreign Sovereign Immunities Act's
14 built-in service provisions to serve the summons and
15 complaint on the Minister of Foreign Affairs of
16 Argentina in Buenos Aires.

17 On motion by Argentina, the district court
18 dismissed the cases on the grounds that the Foreign
19 Sovereign Immunities Act was the exclusive
20 jurisdictional basis for suits brought in the courts of
21 this country against foreign states.

22 QUESTION: Was that the only basis for the
23 motion?

24 MR. RISTAU: That was the basis for the
25 motion, Your Honor.

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QUESTION: The only basis.

MR. RISTAU: That of subject matter jurisdiction and personal jurisdiction under the Foreign Sovereign Immunities Act.

QUESTION: That -- that was the only ground upon which they sought dismissal.

MR. RISTAU: That is correct, Your Honor.

The district court held that under the Foreign Sovereign Immunities Act, a foreign state was absolutely immune from the jurisdiction of federal and state courts unless the claim fell within one of the specific exceptions of the Act. The only exception that could arguably be drawn an issue here was the tort claims exception of the FSIA, but that required that both the tort and the damages occur in the United States. Here the tort occurred on the high seas thousands of miles away from United States territory, and the damages in all likelihood -- that they did not occur on the high seas. The financial damages occurred in Liberia where the corporations were incorporated.

On appeal, a divided panel of the Second Circuit reversed. The majority held that the Foreign Sovereign Immunities Act was not the jurisdictional -- sole jurisdictional basis for suits against foreign states where, as here, aliens complained that the

1 military forces of a foreign state violated established
2 norms of international law by attacking a commercial
3 vessel on the high seas, the 1976 Foreign Sovereign
4 Immunities Act was inapplicable.

5 Rather, the majority reached back to the
6 200-year old Alien Tort Statute and construed it as
7 authorizing these suits. The majority held that even
8 though suit against a foreign state under the Alien Tort
9 Statute may not have been possible 200 years ago when
10 the Alien Tort Statute was enacted as part of the first
11 Judiciary Act, today the evolving standards of
12 international law govern who is within the statute's
13 jurisdictional grant. And the majority concluded that
14 under present day norms of public international law, a
15 foreign state could be subjected to suit in the
16 municipal courts of other states for violations of
17 international law.

18 The dissenting judge pointed out that although
19 international law is part of the common law of the
20 United States, subject matter jurisdiction in our
21 courts, in federal courts, is not a matter of common
22 law. Rather, jurisdiction exists only to the extent
23 that Congress has expressly bestowed it. The governing
24 jurisdictional statute here, the dissenter said, was
25 manifestly the 1976 FSIA and under that Act, Argentina

1 was absolutely immune from suit.

2 I submit to the Court that the dissenting
3 judge was absolutely correct, and that the majority's
4 opinion cannot withstand analysis.

5 The Foreign Sovereign Immunities Act clearly
6 provides in Section 1602 that claims of foreign states
7 to immunity should henceforth, meaning after 1976, the
8 effective date of the Act, be decided by all United
9 States courts in conformity with the principles of
10 immunity set forth in that Act. The legislative history
11 of the Act is replete with references that the FSIA was
12 intended to preempt any and all other statutes dealing
13 with the suability or potential suability of foreign
14 states.

15 Only five years ago this Court unanimously in
16 Verlinden v. Central Bank of Nigeria, in 461 U.S., held
17 that the Act contains a comprehensive and all-embracing
18 set of legal standards governing claims to immunity in
19 every civil action against a foreign state. The
20 majority below disregarded the explicit language of the
21 statute, its clear and unequivocal legislative history,
22 the unanimous decision of this Court in Verlinden in
23 holding that there was some vestige of jurisdiction
24 against foreign states under the 200 year old Alien Tort
25 Statute. This, I submit, was clear error.

1 QUESTION: I take it you would say that even
2 absent the Foreign Sovereign Immunities Act, there
3 wouldn't have been jurisdiction under the alien
4 provision.

5 MR. RISTAU: That's correct, sir.

6 QUESTION: But do you rely on that ground now?
7 Do we have to get to the reach of the Foreign Sovereign
8 Immunities Act?

9 MR. RISTAU: Well, it is my contention -- it's
10 my principal submission, Justice White, that regardless
11 of what the -- what the law may have been prior to 1976
12 --

13 QUESTION: What do you think it was before
14 1976?

15 MR. RISTAU: Clearly before 1976 a foreign
16 state was not subject to suit in the municipal courts
17 under the circumstances of this case.

18 QUESTION: Was that the Act of State Doctrine
19 or --

20 MR. RISTAU: No, that was not the Act of State
21 Doctrine. **Both under the traditional sovereign
22 immunity doctrine, the absolute immunity doctrine, which
23 this Court embraced as late as 1926 in its famous case
24 of Veritzi Brothers v. The Steamship Pizarro, the law in
25 this country, as expounded by this Court, was absolute

1 immunity.

2 QUESTION: So, this was a novel construction
3 of the Jurisdictional provision the court of appeals
4 relied on.

5 MR. RISTAU: It clearly was a novel
6 construction of the jurisdictional provision, Your Honor.

7 QUESTION: That being the Alien Tort Statute.

8 MR. RISTAU: That is correct, sir.

9 Now, the majority's further holding that the
10 Foreign Sovereign Immunities Act, which incorporates the
11 international doctrine -- the international restrictive
12 doctrine of foreign sovereign immunity, did not touch
13 this case because the restrictive doctrine only dealt
14 with the commercial activities of a state.

15 That holding of the Second Circuit is bottomed
16 on a fundamental misunderstanding of the whole
17 restrictive theory of sovereign immunity because the
18 restrictive theory too starts out with the general
19 predicate that a foreign sovereign is -- is not subject
20 to the jurisdiction of the municipal courts, and it then
21 carves out certain exceptions to that absolute immunity.
22 That is also the fundamental rule spelled out in Section
23 1604 of the Foreign Sovereign Immunities Act.

24 And the reason the restrictive theory deals
25 with commercial activities primarily is because those

1 are the exceptions to immunity, but the other leg of the
2 restrictive theory that a foreign state for any other
3 action is absolutely immune for governmental actions,
4 sovereign actions, what is known in international law as
5 activities *Jure imperii*, exertions of the sovereign
6 power, including where the exertion of the sovereign
7 power may conceivably have violated international law.
8 The remedy is not a lawsuit in the municipal courts of
9 the state.

10 The FSIA, Your Honors should know, had a very
11 long gestation period. It was the result of the most
12 careful scrutiny by officials in the Departments of
13 State and Justice over a period of some eight years. It
14 was reviewed by several advisory groups of distinguished
15 international lawyers and scholars, as well as
16 representatives of the bar.

17 At no time during this long review was there
18 even the remotest suggestion by anyone that there was
19 jurisdiction -- conceivable jurisdiction against a
20 foreign state under the old Alien Tort Statute. The
21 only statute on the books then that specifically
22 referred to suits against foreign states was the then
23 version of the Diversity Statute. Congress expressly
24 amended the Diversity Statute by taking out the language
25 permitting suits against foreign states in diversity and

1 making it absolutely clear that the sole jurisdictional
2 predicate hereafter shall be the Foreign Sovereign
3 Immunities Act, and under that Act, the Republic of
4 Argentina is manifestly immune from suit for acts
5 performed by its armed forces in the South Atlantic
6 during the Malvinas conflict.

7 I'd to reserve five minutes for rebuttal, Mr.
8 Chief Justice.

9 QUESTION: Thank you, Mr. Ristau.

10 General Fried, we'll hear now from you.

11 ORAL ARGUMENT OF CHARLES FRIED

12 AS AMICUS CURIAE SUPPORTING THE PETITIONER

13 MR. FRIED: Thank you, Mr. Chief Justice, and
14 may it please the Court.

15 First let me say that the recourse to
16 diplomatic means to which reference was made in answer
17 to a question by Justice Blackmun is by no means
18 unavailing. To cite two recent examples, the United
19 States has agreed to make compensation as a result of
20 such representations as a result of the shooting down of
21 the Iran airplane over -- over the Persian Gulf, and the
22 Republic of Iraq has agreed, as a result of such
23 representations, to make compensation to the United
24 States as a result of the Stark Incident. So, these are
25 regularly invoked and often quite effective measures.

1 In any event, the Foreign Sovereign Immunities
2 Act in terms closes the doors of any United States
3 courts to this action. As Judge Kearse said below,
4 immunity is the premise. That's Section 1604. And
5 there is jurisdiction only if the action is grounded in
6 one of the specified numbers of private or commercial
7 acts.

8 Military action in wartime is, of course, a
9 quintessentially public act. And as this Court said --

10 QUESTION: Mr. Fried? Mr. Fried, but for the
11 Foreign Sovereign Immunities Act, do you think that
12 jurisdiction might have been appropriate under the old
13 Alien Tort Statute?

14 MR. FRIED: We do not. First, because prior
15 to the Act and at the time of the Alien Tort Statute and
16 throughout our history, the general rule of our law as
17 the law of all nations is that sovereigns are immune for
18 this kind of action. And it was only in 1952 with the
19 Tate letter that we drew back from that for private and
20 commercial acts.

21 But moreover, we do not believe that it is
22 appropriate to awaken like Rip Van Winkle a statute of
23 200 years' age and which had been rarely, if ever, used
24 until about 1980 to a use which it is most unlikely and
25 to circumstances which it is most unlikely the draftsmen

1 of that statute contemplated.

2 It is not a constitution we are construing
3 there. It is a statute. And that statute probably was
4 intended to cover acts for -- to give aliens a forum for
5 acts which the United States is responsible or for which
6 the Congress, as in the case of piracy, has decided to
7 assume responsibility and not to allow acts by strangers
8 against strangers for acts taking place in foreign
9 ports. So, in our view the Alien Tort Statute would not
10 provide jurisdiction for this -- for this lawsuit for a
11 number of reasons.

12 But in any event --

13 QUESTION: So, this isn't a case of partial
14 repeal.

15 MR. FRIED: Well, I think that Judge Carter in
16 the district court -- or perhaps it was Judge Kearse
17 -- got that just right. This is not a case of -- of
18 repeal by implication. This is a case of a narrowing of
19 jurisdiction at worst, and at best this is a case where,
20 in fact, there was no jurisdiction to begin with. And
21 there's a codification of what was understood to be the
22 law of the United States and of every civilized nation
23 prior to that time.

24 Now, the Foreign Sovereign Immunities Act, in
25 addition to making a distinction between private or

1 commercial acts and public acts, also sought to -- in
2 order, as this Court said in Verlinden, to prevent our
3 courts from becoming international courts of claims,
4 which is, of course, precisely what plaintiffs are
5 seeking to do here, has required in this Court's words
6 some substantial contact with the United States. Of
7 course, some substantial contact is entirely absent here.

8 So, Congress did think of this kind of claim
9 and in general terms precluded it. To say they did not
10 focus on this is like saying that a mathematician who
11 speaks of all prime numbers had not focused on 43. I
12 think that's a prime number. And it frustrates
13 Congress' evident intent to prolong this litigation by
14 what Judge Carter below called inventive arguments to
15 invoke the Act's specified exceptions in far-fetched
16 ways, such as suggesting that this was an act of piracy.

17 The United States condemns violations of
18 international law. But we are troubled by the course on
19 which the Court of Appeals for the Second Circuit has
20 embarked. International relations are characterized by
21 reciprocity. And as we do unto foreign nations in our
22 courts, so very shortly we will be done unto in the
23 courts of other countries.

24 Moreover, the Department of State is seeking
25 to persuade foreign sovereigns voluntarily to submit to

1 the jurisdiction of our courts under the Foreign
2 Sovereign Immunities Act. That is a project which will
3 not prosper if they can hope to encounter surprising
4 and, I must say, eccentric legal rulings completely out
5 of line with international practice and the plain words
6 of our own legislation. It is striking, after all, that
7 a -- that the United States itself would not be liable
8 for these actions because the -- the Federal Tort Claims
9 Act specifically excludes liability for actions in
10 combatant activities by our armed forces.

11 We suggest that this lawsuit should terminate
12 and that the evident intention of Congress should be
13 respected.

14 If there are no further questions, I thank the
15 Court for its attention.

16 QUESTION: Thank you, General Fried.

17 We'll hear now from you, Mr. Burnett.

18 ORAL ARGUMENT OF DOUGLAS R. BURNETT

19 ON BEHALF OF THE RESPONDENTS

20 MR. BURNETT: Mr. Chief Justice, may it please
21 the Court.

22 My opponents have omitted facts which
23 decisively affect the outcome of this case. This ship
24 was involved in the U.S. domestic water-borne trade. It
25 traded exclusively between Valdez, Alaska and the U.S.

1 Virgin Islands. The only commodity carried by this ship
2 was Alaskan crude oil, a commodity which by law is
3 prohibited from export. The products refined from this
4 crude oil were consumed at least 83 percent in the
5 continental United States and 17 percent were purchased
6 directly by the United States government.

7 The warning message by the United States
8 government of June 3, 1982 to both belligerents, the
9 United Kingdom and to the Republic of Argentina, advised
10 the belligerents that the Hercules was a neutral ship
11 engaged in this country's domestic water-borne trade.
12 It advised the belligerents that her neutral status was
13 to be respected. It gave its course, speed and
14 estimated time of arrival. In the same message were
15 listed U.S. flag merchant ships in the South Atlantic.

16 Argentina's acts were directly responsible for
17 bringing the ship to her destruction. On the prior
18 voyage where the master of the ship deviated from his
19 course to look for survivors from the torpedoed
20 Argentine cruiser, General Belgrano, at that time
21 indirect contact with the Argentine naval forces, there
22 was no indication that on his following voyage the ship
23 would be in danger.

24 The master, not content to rely on the
25 official messages of the United States government, also

1 sent out on a daily basis on the AMVER, the
2 international lifesaving distress frequency, the ship's
3 position, its course, its speed and its destination.
4 Even on the day of the fatal attacks, two messages were
5 sent to the Argentine Republic. The messages were
6 acknowledge. Had at any time the Petitioner advised the
7 master that his ship would be in danger, this event
8 would never have occurred for although a warship captain
9 may earn his pay by sailing into harm's way, the captain
10 of a merchant ship earns his pay by avoiding harm's way
11 and safely delivering the cargo entrusted to his care.

12 QUESTION: Mr. Burnett, what does all this
13 have to do with jurisdiction? I mean, it may show great
14 negligence, greater negligence. It may show, you know,
15 gross negligence, but what does it have to do with
16 jurisdiction?

17 MR. BURNETT: Your Honor, my opponent
18 indicated that there was no injury occurring in the
19 United States. Under Section 1605 --

20 QUESTION: Radio messages -- repeated radio
21 messages show injury occurring in the United States.

22 MR. BURNETT: The domestic trade certainly
23 shows that. The AMVER station which coordinates the
24 messages in the United States -- and we have indicated
25 that in our brief on pages 58 and 59.

1 The Argentine motive for the attack is unknown
2 because the district court made no inquiry. It may be
3 that the intention of Argentina was to take the Hercules
4 as a prize. That would be the logical interpretation of
5 the message following the third attack ordering the ship
6 to come to course 270 and make for Argentine port or be
7 subject to yet another attack. In such a case in an
8 Argentine prize court, Argentina would have no immunity.
9 It would stand in the shoes of an ordinary litigant.

10 It may well be that the attack was an
11 unprovoked on a neutral ship on the high seas without
12 warning in the same light as those acts for which
13 Admirals Rader and Doenitz were convicted at Nuremberg
14 and for which international law affords no immunity.

15 QUESTION: Excuse me. Could I -- what do you
16 mean Argentina would have no immunity in Argentine prize
17 court? Could it have been held liable or could it
18 simply have been denied the prize?

19 MR. BURNETT: The law which we have set out on
20 page 40 -- Argentina would have no immunity in its own
21 domestic prize court. That's the answer to the
22 question, Your Honor.

23 QUESTION: I don't think it is. Would
24 Argentina have been held liable for damages for having
25 towed it into port, or would it simply be denied the

1 prize?

2 MR. BURNETT: Under the Law of Nations, which
3 the Argentine prize court would be bound to **pride,
4 Argentina could well be held liable for damages. There
5 have been numerous cases by this Court, by numerous
6 other courts around the world applying the Law of
7 Nations. Even the United States would have no immunity
8 for acts for which Argentina is here before this Court.

9 QUESTION: Well, then why did you feel the
10 remedy in Argentine courts was inadequate?

11 MR. BURNETT: Well, it's inadequate because
12 Argentina -- first of all, the decision of the Argentine
13 Supreme Court of September 27, 1983, judgment 85-528
14 which appears in the record before the Second Circuit at
15 page A-192 indicates that result. In this decision by
16 Argentina's highest court, it states that under its
17 present constitution it has no jurisdiction over acts of
18 the armed forces arising out of the Malvinas war.

19 This with an opinion from Argentine counsel,
20 one of six we attempted to retain, convinced us of the
21 futility of pursuing the remedy in Argentina. And
22 contrary to my colleague, there is, as is indicated on
23 page 9 of our brief a reference to a official
24 communication by the Ministry of Foreign Affairs dated
25 May 24, 1984 returning the claim of Amerada Hess. And

1 the Argentine attorney commented there is no doubt after
2 this the matter remains in a dead way. We exhausted our
3 remedies in Argentina.

4 Argentina, under the Laws of Nations, was the
5 proper forum to bring the suit. That is a customary
6 element of International law. There is nothing to stop
7 belligerents from engaging in war, and in wars neutral
8 ships do get sunk or damaged or lost. But the
9 belligerent also has the obligation to convene a prize
10 court or other suitable mechanism to redress the claims
11 of the neutral litigants.

12 This Court, for example, in its history has
13 decided 192 cases of prize. One hundred and twenty of
14 these cases were decided before 1830. The predecessor
15 of this Court, the Committee on the Case of Appeal and
16 the federal Court of Appeals, decided 117 cases, all of
17 them involving violations of the Law of Nations
18 involving torts committed on the high seas. And the
19 United States is not alone. As we indicated on page 40
20 of our brief, historically Argentine prize courts had
21 exercised prize jurisdiction in a manner comporting with
22 the customary Law of Nations.

23 Argentina's complaints about jurisdiction in
24 this country are simply unfounded. Their presence in
25 the U.S. court is self-inflicted. Not only did they

1 refuse to convene a prize court, agree to a private
2 arbitration such as France did with the Rainbow Warrior,
3 such as the United States did in 1933 in the case where
4 the U.S. Coast Guard sank a Canadian vessel accused of
5 running run, but they have avoided the diplomatic
6 initiatives by the Republic of Liberia. As we indicated
7 on page 8 of our brief -- and the record reflects that
8 fact -- the Republic of Argentina has declined,
9 rebuffed, the initiatives of the Republic of Liberia to
10 pursue this matter diplomatically. We have no qualm
11 that if diplomacy would resolve this dispute, we would
12 be satisfied customary international would have been
13 upheld.

14 QUESTION: The Republic of Liberia is not a
15 party to this case.

16 MR. BURNETT: No, Your Honor. They have filed
17 a amicus brief.

18 QUESTION: What does that have to do with this
19 case?

20 MR. BURNETT: Just I wanted to bring to the
21 Court's attention that diplomatic initiatives were
22 exhausted as well before we resorted to litigation.

23 Chief Judge Feinberg's opinion was correct
24 when he states that jurisdiction lies under the Alien
25 Tort Statute and, as indicated in footnote 3 to his

1 opinion, Jurisdiction is also consistent with Section
2 1605(a)(5) of the Foreign Sovereign Immunities Act.

3 Section 1605 provides recovery for a claim of
4 loss or injury occurring in the United States. However,
5 the definition of the United States, as it's stated in
6 Section 1603 and which is discussed at pages 50 and 53
7 of our brief --

8 QUESTION: Are those set forth at pages 50 and
9 53 -- those sections?

10 MR. BURNETT: The section, no, Your Honor.
11 Our discussion of those sections is. The sections are
12 set forth in the appendix.

13 The United States, as defined in Section 1603,
14 states includes all territory and waters, continental
15 and insular, subject to the jurisdiction of the United
16 States. This language --

17 QUESTION: Where in the appendix are they set
18 forth?

19 MR. BURNETT: On page 2a at the end of the
20 appendix.

21 QUESTION: Of your brief?

22 MR. BURNETT: Yes, Your Honor.

23 QUESTION: Thank you.

24 MR. BURNETT: The words "and water,
25 continental and insular" indicate that the high seas are

1 to be included as historically they have always been
2 included in the jurisdiction of the federal courts.
3 Even before this country was established under the
4 general maritime law, this was clearly included.

5 In a similar case, which is discussed in our
6 brief, *Cunard v. Mellon*, which was a decision of this
7 Court in 1922 --

8 QUESTION: Excuse me. Why do they have -- why
9 do they have "continental or insular" in there if -- if
10 they mean the high seas? "All territory and waters,
11 continental or insular, subject to the jurisdiction of
12 the United States."

13 MR. BURNETT: That indicates the seas that
14 surround the United States, continental and insular,
15 including the high seas.

16 QUESTION: Oh, I see. That's to make it clear
17 that they mean seas that -- that surround land as
18 opposed to --

19 MR. BURNETT: Yes, Your Honor.

20 QUESTION: It doesn't make any sense at all.

21 QUESTION: That's a strange construction.

22 QUESTION: It would make some sense if you
23 think it means, you know, the territorial portion around
24 an island or around the continent, that is, the normal
25 territorial jurisdiction. But to think --

1 MR. BURNETT: Well --

2 QUESTION: -- it means the high seas is very
3 strange.

4 MR. BURNETT: Well, Your Honor, I think what
5 may be helpful in considering these words was the
6 holding of the Court in *Cunard v. Mellon*, a case in 1922
7 where this Court was called upon to construe language in
8 the Eighteenth Amendment, as well as two prohibition
9 statutes, in a maritime context involving eight foreign
10 ships and two American ships. And the language in the
11 amendment, as we have set forth at our brief on the
12 pages I indicated, page 50 to 53, that amendment only
13 provided for jurisdiction in the United States territory
14 subject to its jurisdiction. The Court concluded that
15 "territory," that word, includes the three-mile
16 territorial limit. Therefore, Congress -- we feel it
17 was logical for Congress to ensure that the high seas
18 were included to add those extra words regarding
19 waters. And the --

20 QUESTION: But -- but the Mellon -- the Mellon
21 case found only that marginal lands up to three miles --

22 MR. BURNETT: That's correct, Your Honor.

23 QUESTION: -- were within. And your case
24 certainly is different from that.

25 MR. BURNETT: That's correct, Your Honor.

1 QUESTION: And we do have other statutes, do
2 we not, that use the phrase "high seas"?

3 MR. BURNETT: We have a multitude of statutes
4 that use high seas. Congress has enacted over seven or
5 eight statutes extending jurisdiction on to the high
6 seas, which is one more point which would indicate that
7 it would be unusual for Congress through silence to
8 disenfranchise American citizens as well as foreign
9 citizens of their historic rights under the general
10 maritime law.

11 QUESTION: But the section doesn't say high
12 seas. Other statutes do talk about the high seas, don't
13 they?

14 MR. BURNETT: Some statutes use the word "high
15 seas," and there are other statutes that use the word
16 "waters."

17 The consequences of -- of accepting the
18 Petitioner's extreme argument that all jurisdiction
19 under the FSIA stops at the three-mile limit are
20 alarming. It cuts off the rights of U.S. citizens, as
21 well as aliens. If the Hercules was a U.S. flag ship and
22 on a voyage from Philadelphia to New York, it was
23 attacked by Argentine armed forces four miles off the
24 coast and those U.S. sailors -- those U.S. shipowners,
25 having gone to Argentina, having exhausted their

1 remedies in Argentina, under the Petitioner's theory,
2 they would then be denied their historic remedies,
3 including those existing under flag jurisdiction, under
4 the general maritime law.

5 QUESTION: Mr. Burnett, doesn't the United
6 States in some cases claim further than three miles?
7 Don't they claim 200 miles in some cases?

8 MR. BURNETT: In terms of territorial waters,
9 no, Your Honor. The official recognition of U.S. waters
10 is three miles for U.S. water. We recognize foreign
11 state claims to 12 miles. We have an economic zone
12 analysis which in certain economic areas confers upon
13 this Court -- upon the United States an interest in
14 waters out to 200 miles. But that is not territorial
15 water. And the Geneva Convention on the High Seas,
16 which is ratified by this country, makes it perfectly
17 clear that the waters beyond the territorial sea, which
18 for the United States is three miles, is the high seas.

19 QUESTION: Mr. Burnett, I -- I find it
20 difficult to -- to find it so shocking that the United
21 States would not allow suit in United States courts
22 against a foreign country in these circumstances when it
23 appears that the United States would not allow suit
24 against the United States itself in United States courts
25 in these circumstances.

1 What would have happened if this plane were a
2 United States plane in similar circumstances in a
3 wartime situation and had -- and had on the high seas,
4 or whatever you want to call continental or insular
5 seas, sent down a ship? Would suit -- would suit have
6 been allowed against the United States under the Federal
7 Tort Claims Act?

8 MR. BURNETT: Well, Your Honor, not under the
9 Federal Tort Claims Act.

10 And the Solicitor General and the Petitioner
11 are dead wrong on the law. The appropriate statute is
12 the U.S. Prize Statute and in particular, 10 U.S.C.
13 7652(b) because Argentina and the United Kingdom were at
14 war. The United States, when it is at war, when its
15 naval forces commit torts on the high seas involving
16 seizures of merchant ships, that statute provides
17 jurisdiction. In particular, Section B provides
18 jurisdiction where the ship is lost, destroyed or
19 otherwise unable to come into **court. So, the United
20 States --

21 QUESTION: After seizure. Before seizure?
22 You mean you sink a ship and that's -- that's a prize?

23 MR. BURNETT: It's not -- prize is the act of
24 seizure, Your Honor. It is -- in rem may also be
25 present, but the statute makes it clear right in its

1 words. It is divided into three sections. Section A is
2 in rem. Section B is jurisdiction when the ship has been
3 destroyed, lost or unable to come into port. Section C
4 is a situation where the prize is in the port of a
5 co-belligerent.

6 QUESTION: I always thought destroyed, lost or
7 unable to come into port means after you've -- you've
8 taken charge of the ship and it has been lost and being
9 towed in or it -- it has been destroyed in a storm after
10 you've taken possession of it. But you -- you think
11 sinking a ship is taking a prize.

12 MR. BURNETT: It triggers prize jurisdiction,
13 Your Honor, because the act of seizure is what triggers
14 prize jurisdiction.

15 QUESTION: I'm not talking seizure. I'm
16 talking putting a torpedo into a ship and sinking it.
17 Is that a seizure.

18 MR. BURNETT: (Inaudible), Your Honor, the
19 neutral has a claim under customary international law
20 for compensation to its ship. Customary --

21 QUESTION: In prize court?

22 MR. BURNETT: Yes, Your Honor. That is the
23 appropriate proceeding for that to proceed in.

24 QUESTION: You -- you have cases on that?
25 That surprises me.

1 MR. BURNETT: Well, Your Honor, yes, we do.
2 In 1806, Maley v. Shattuck. This was a case where the
3 U.S. Navy attacked a ship, caused its loss, judgment
4 against the United States. There is The Amiable Nancy.
5 The Marlanna Flora is another case. The United States
6 Navy, the U.S. Frigate Alligator, in which a ship was
7 attacked unjustly by the United States. Compensation
8 was ordered.

9 As we have indicated, Justice Story in his
10 Principles and Practices of Prize Law make it perfectly
11 clear that if the ship is destroyed in the process of
12 attempting to capture it or seize it -- if that occurs,
13 the captor is liable and, in fact, a under customary
14 international law, the burden becomes that much more
15 severe on the captor because under customary
16 international law, he's to board the ship, carry out an
17 examination of the ship to determine if there is kind of
18 a maritime equivalent of probable cause.

19 QUESTION: Are you limiting your -- your
20 principle now to when it sunk in the process of trying
21 to seize it? Is that the principle you're saying? It
22 has to be --

23 MR. BURNETT: Your Honor, if the United States
24 engages in war, if the armed forces --

25 QUESTION: Do you have any case where -- where

1 the United States was not trying to seize a ship, but
2 just trying to sink it, where an action in prize court
3 was allowed?

4 MR. BURNETT: Del Col v. Arnold is a case in
5 which the ship was lost as a result of a seizure. The
6 Imalone was an arbitration with Canada in which the
7 Coast Guard sank a ship and which compensation was
8 awarded.

9 QUESTION: Trying to seize it or not trying to
10 seize it?

11 MR. BURNETT: Your Honor, under customary
12 international law, you can't go around sinking neutral
13 ships on the high seas. And if you do so, the remedy
14 under customary international law is you have to convene
15 a prize court. The neutral has a right to transit the
16 high seas.

17 QUESTION: Do you have any case where, without
18 trying to seize a ship, a ship has been intentionally
19 sunk -- no desire to seize it -- intentionally sunk
20 where there has been a remedy in prize court? Yes or
21 no? Do you know a case like that?

22 MR. BURNETT: I don't have a case on that
23 point, Your Honor.

24 QUESTION: Could -- could Iran have sued the
25 United States under the Foreign Sovereignities Act or

1 under any other -- the Alien Tort Law for the sinking of
2 the plane?

3 MR. BURNETT: well, in terms of jurisdiction,
4 obviously the Foreign Sovereign Immunities Act would not
5 be applicable. Jurisdiction would technically lie under
6 the Alien Tort Statute and under the general maritime
7 law because the seizure of the aircraft took place on
8 the high seas.

9 QUESTION: Well, then it's a -- you define
10 seizure very broadly. Shooting down a plane is a
11 seizure.

12 MR. BURNETT: The destruction is a seizure,
13 yes, Your Honor. That is -- Lord Stowell, when he cited
14 the rule in 1819, England's greatest admiralty rule, he
15 said if a captor destroys a neutral ship, the captor or
16 his government is answerable.

17 QUESTION: The captor, yes.

18 MR. BURNETT: Argentina was the captor.

19 QUESTION: If he -- if he has taken possession
20 of it and then sinks it. But if just goes out to sink
21 it, that's a different question. And you tell us you
22 have no case of that sort.

23 MR. BURNETT: The customary international law
24 permits no destruction of neutral ships, and if there is
25 a destruction of neutral ships, a prize court must be

1 convened. That is the rule under customary
2 international law.

3 QUESTION: But you -- you have no cases.

4 MR. BURNETT: I gave several cases to the
5 Court.

6 QUESTION: Involving -- involving destruction
7 without seizure, without intended seizure or seizure.

8 MR. BURNETT: Well --

9 QUESTION: I mean, you keep saying it again
10 and again, but in fact the only authority you have is
11 that if you try to capture a ship and sink it or you
12 capture it and then it sinks while you're towing it to
13 port, you have an action in prize court.

14 MR. BURNETT: Well, I would just refer the
15 Court once again to the prize statute. It says for any
16 seizure of the United States, and if the ship is lost or
17 destroyed --

18 QUESTION: Well --

19 MR. BURNETT: -- by the armed forces of the
20 United States in the process of seizing the vessel or at
21 whatever point you want to draw the line, the United
22 States would have no immunity for that.

23 And in the case of the Vincennes incident in the
24 Persian Gulf, the -- the nice thing about admiralty and
25 events on the high seas is there has been a tremendous

1 history of Jurisprudence. And the Marianna Flora,
2 decided in 1830, is squarely on all fours with a
3 possible suit under -- in that situation. And in that
4 case, the Court, this Court, held that where the warship
5 commander was acting in a reasonable belief to defend
6 his ship and his crew, there is no violation of
7 international law. So, although Iran may conceivably
8 have jurisdiction, the customary international law
9 certainly provides an adequate method for this Court to
10 handle the situation. And what is more important, Iran
11 would never be denied access to the courts to bring the
12 claim.

13 And that is what makes this case stand out.
14 It's not so much that another ship had been sunk in the
15 course of a naval war, but to our review, this was the
16 only case we could find of such outlaw behavior where a
17 belligerent has refused to convene a prize court on
18 international agreement, diplomatically done nothing.
19 You can do a whole host of things to satisfy your
20 obligation.

21 QUESTION: Supposing there were no -- you say
22 there is some United States connection here because the
23 ship was transporting oil from the North Slope of Alaska
24 to the Virgin Islands. Supposing that the same cast of
25 characters, but they -- they had no connection whatever

1 with the United States. They were transporting oil from
2 one foreign country to another. Would that make any
3 difference in the way you analyze the case?

4 MR. BURNETT: Yes, It would, Your Honor.
5 Although Jurisdiction would technically exist because,
6 once again, there is a tort violation on the high seas,
7 the United States would have no substantial relationship
8 which would warrant this Court making an Inquiry into it.

9 This Court has an interest in protecting the
10 U.S. domestic trade. And if it's a voyage between --

11 QUESTION: Well, this Court -- this Court has
12 --

13 MR. BURNETT: -- Kuwait and Japan and that --

14 QUESTION: Just -- just -- just a minute, Mr.
15 Burnett. This Court doesn't have any -- any interest
16 other -- in doing other than what Congress has said.
17 Maybe you mean the United States has an interest.

18 MR. BURNETT: Well, Your Honor, I would submit
19 that this Court has an obligation to construe these
20 statutes so as not to violate neutral trade. And that
21 was the holding of this Court in The Charming Betsey.
22 And what we have at stake are those issues. But just
23 because there's a violation of international law around
24 the world does not mean that these Court -- or this
25 Court is going to have anything beyond Jurisdiction.

-1 The scenarios which the Solicitor General
2 would like to paint on this Court do not bear up to
3 scrutiny. First of all, most of the scenarios they would
4 envision are going to occur in foreign territory. There
5 the plaintiff has a significant obstacle in the Act of
6 State Doctrine. The Act of State Doctrine does not
7 apply on the high seas because it's not foreign
8 territory, it is the territory of all nations.

9 There must be a strong U.S. relationship.
10 Here we have an overwhelming U.S. relationship. We have
11 injury occurring in the United States in New York City.
12 In most of those cases there will not be that substantial
13 U.S. interest.

14 Third, there must be denial of even procedural
15 justice by the country involved. As I indicated, that
16 is an exceedingly rare situation in many situations.

17 Forum nonconvenience would also apply in many
18 of these cases.

19 And finally, it must be remembered, as Chief
20 Judge Feinberg indicated in his opinion, the Alien Tort
21 Statute, just as it was in its day, was for those
22 special cases of violations of the Law of Nations. Not
23 every violation of international law arises to that
24 level of the Laws of Nations wherein you have
25 jurisdiction under the Alien Tort Statute.

1 QUESTION: May I just clarify something? The
2 Act of State Doctrine applies only if a state acts
3 within its domestic borders?

4 MR. BURNETT: That is correct, Your Honor.

5 QUESTION: And what's the cite? And what's
6 your authority for that?

7 MR. BURNETT: It's just -- I believe we've
8 addressed it. I don't have a citation, but the Act of
9 State Doctrine -- I think in Sabbatino it was also
10 discussed -- only applies --

11 QUESTION: So that when the United States acts
12 on the act of -- on the high seas, it -- it is not
13 protected by the Act of State Doctrine.

14 MR. BURNETT: No, Your Honor. The Act of
15 State Doctrine applies for an inquiry by a court in
16 activities which occur in a foreign country's
17 territory. I think it's very illustrative --

18 QUESTION: Even if the decisions are made
19 within the domestic limits and the consequences of the
20 acts are felt outside the jurisdiction?

21 MR. BURNETT: Well, if you'll look at the case
22 of KL 707, there the tort occurred over Russian
23 territory, and the Court applied the Act of State
24 Doctrine. That's an example of an event which may be a
25 violation of international law, maybe reprehensible, but

1 wherein the Act of State Doctrine applied because it
2 occurred in the foreign territory.

3 Whether the Court applies the Act of State
4 Doctrine is a -- is a consideration which is not before
5 this Court because we submit the law is consistent that
6 it must be in a foreign territory.

7 In the very first Attorney General's letter,
8 which dealt with the Alien Tort Statute in 1795,
9 certainly suggests this result. In that opinion letter
10 by Attorney General William Bradford which involved a
11 complaint against the United States for aiding and
12 abetting an attack on the high seas which plundered an
13 English settlement, there the Attorney General said that
14 under the Alien Tort Statute, there would be no
15 jurisdiction for events or activities which occur in the
16 foreign territory. However, to the extent that they
17 occurred on the high seas, there would be jurisdiction
18 under that statute.

19 The Alien Tort Statute was primarily designed
20 as a supplement to maritime jurisdiction. Oliver
21 Ellsworth, when he drafted the Alien Tort Statute, as
22 his notes indicate, was concerned with that statute in
23 the maritime context. And as it exists in the maritime
24 context, it is consistent with the Foreign Sovereign
25 Immunities Act with 1605.

1 QUESTION: Mr. Burnett, what American interest
2 was injured here?

3 MR. BURNETT: Your Honor, the interests which
4 were injured were the disruption of the energy policies
5 of the United States, the --

6 QUESTION: The politics of the United States?

7 MR. BURNETT: The energy policies of the
8 United States whereby it --

9 QUESTION: The policy.

10 MR. BURNETT: -- has rights to utilize its
11 natural resources.

12 QUESTION: The only thing that was injured was
13 the policy.

14 MR. BURNETT: No, Your Honor. We had also the
15 charter hire payment which was paid in New York City.
16 We had the bunkers which were purchased in New York
17 City, delivered in St. Croix. We had disruption to the
18 Alaskan pipeline. This ship didn't make the voyage
19 obviously --

20 QUESTION: That would obstruct the Alaskan
21 pipeline?

22 MR. BURNETT: The Hercules is the sea
23 component link of an ocean transportation system which
24 furnishes Alaskan crude oil to the eastern United
25 States. It's analogous to a pipeline. It is the

1 maritime component of that system. And the disruption
2 of that system disrupted the refinery.

3 QUESTION: That -- that affects the Liberians,
4 doesn't it?

5 MR. BURNETT: It certainly affects the
6 Liberians, but it also affects the United States.

7 QUESTION: But the Liberians are **not part of
8 the United States.

9 MR. BURNETT: That's correct, Your Honor.
10 They are not.

11 QUESTION: That's right.

12 MR. BURNETT: But it certainly -- I would
13 disagree with Your Honor that it affects the United
14 States.

15 QUESTION: So, we'd **hear of every injury on
16 the high seas can come into our courts. You're going to
17 rewrite all the law.

18 MR. BURNETT: Your Honor, the injuries which
19 occur on the high seas which are torts on the high seas
20 -- by definition this Court held in The Belgenland that
21 a tort, if it occurs in the high seas, this Court has
22 jurisdiction. Whether the Court exercises its
23 jurisdiction is another question. And there you have
24 the question of forum nonconvenience or various other
25 activities. But on the high seas, the United States has

1 as much right as any other country to exercise its
2 judicial jurisdiction to protect its national interests
3 as those --

4 QUESTION: (Inaudible) could be nothing.

5 MR. BURNETT: Well, Your Honor, every interest
6 --

7 QUESTION: Could be.

8 MR. BURNETT: I believe that every country has
9 an interest in the safe preservation of transportation
10 on the high seas. It is our position that that is why
11 customary international law has evolved on this
12 situation. It's not that --

13 QUESTION: Only -- it only applied to some
14 countries?

15 MR. BURNETT: All countries, Your Honor.

16 QUESTION: I thought international law did
17 apply to all countries.

18 MR. BURNETT: Yes, Your Honor. And all
19 countries have equal rights on the high seas.

20 QUESTION: So, you went to Argentina and you
21 couldn't win, so you come here.

22 MR. BURNETT: Your Honor --

23 QUESTION: If you don't win here, where will
24 you go next?

25 MR. BURNETT: Your Honor, this is the court of

1 last resort. Argentina will not consent to jurisdiction
2 in the World Court.

3 when you indicated that we would not win in
4 Argentina, on the merits we should win. We can't get a
5 court. The national court says they have no
6 jurisdiction for acts of the Malvinas. Six of the top
7 firms in Argentina say they cannot bring the court. The
8 Ministry of Foreign Affairs sent back the claim. The
9 diplomatic initiatives of Liberia have failed.

10 Now, this was the court of last resort. If we
11 had brought this suit without going to Argentina, a
12 simple motion of forum nonconvenience would send us
13 down to Buenos Aires because, once again, under
14 customary international law, the proper forum is the
15 captor's court. There is no ambiguity in international
16 law on that point.

17 QUESTION: (Inaudible) federal court. Right?

18 MR. BURNETT: Yes, there's jurisdiction.

19 QUESTION: Including **?

20 MR. BURNETT: Well, yes, Your Honor.

21 Well, I -- I would like to comment on the
22 Solicitor General's position with respect to foreign
23 policy. It has flip-flopped several times since 1980.
24 In 1980 in the Filartiga case, the Solicitor General
25 stated that as an example of the type of action which

1 could be brought under the Alien Tort Statute was the
2 individual shipowner's right for compensation for
3 destruction of his ship on the high seas.

4 They have now backed off from that. They now
5 indicate that foreign policy is a predominant concern --

6 QUESTION: Excuse me. They -- they didn't say
7 that that suit could be brought against a foreign
8 sovereign under the Alien Tort Claims Act.

9 MR. BURNETT: Who else but the sovereign, as
10 we've indicated, would be involved? When you destroy a
11 ship on the high seas --

12 QUESTION: Only sovereigns can destroy ships
13 on the high seas?

14 MR. BURNETT: Well, with the limited exception
15 of pirates.

16 QUESTION: I didn't know there was that rule.

17 MR. BURNETT: Well, it's just logic, Your
18 Honor. By principal analogy and reason, the principal
19 violators of neutrality are going to be sovereigns
20 either through their navies or by privateers acting
21 under their letters of mark.

22 QUESTION: Thank you. Thank you, Mr. Burnett.
23 Your time has expired.

24 Mr. Ristau, you have one minute remaining.

25 REBUTTAL ARGUMENT OF BRUND A. RISTAU

1 MR. RISTAU: Thank you, Mr. Chief Justice. I
2 would just like to try to answer your question, Your
3 Honor.

4 The United States would not be subject to suit
5 under the Federal Tort Claims Act with respect to the
6 incident that happened over the Gulf for the simple
7 reason, as this Court has many times declared, the
8 Federal Tort Claims Statute does not apply to torts
9 committed by the United States extraterritorially.

10 QUESTION: May I ask if there would have been
11 prize court jurisdiction if instead of just sinking the
12 ship, they had tried to capture the ship and pulled it
13 into port, and then it was sunk on way into port?

14 MR. RISTAU: Under traditional prize law,
15 Justice Stevens, yes. But you'll recall we haven't had
16 any prize courts in this country since before the First
17 World War. Argentina hasn't had any prize courts --

18 QUESTION: There would have been no claim of
19 sovereign immunity on those facts. Is that right?

20 MR. RISTAU: That's correct. Traditionally,
21 prize courts were established by belligerent powers to
22 determine the lawfulness of a capture. The sine qua
23 non, as Justice Scalia indicated, was the res, that the
24 thing be brought, either the vessel or the cargo to be
25 adjudicated as a lawful prize of war. Absent the res,

1 no prize court jurisdiction.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Ristau.

4 The case is submitted.

5 (Whereupon, at 11:02 o'clock a.m., the case in
6 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-1372 - ARGENTINE REPUBLIC, Petitioner V. AMERADA HESS SHIPPING CORPORATION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman
(REPORTER)

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