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RECENT DECISIONS

ADMIRALTY—WORKMEN'S COMPENSATION—RECEIPT OF BENEFITS UNDER STATE WORKMEN'S COMPENSATION ACT CONTAINING EXCLUSIVE REMEDY PROVISION DOES NOT BAR SUBSEQUENT ACTION AGAINST EMPLOYER FOR UNSEAWORTHINESS

Plaintiff, a longshoreman, was injured while working aboard defendant's vessel in the navigable waters of Alaska. After collecting state workmen's compensation benefits,[1] plaintiff brought an action[2] against his employer-shipowner, alleging negligence[3] and that the vessel was unseaworthy.[4] Defendant's motion for summary judgment in the trial court was sustained on the ground that Alaska's workmen's compensation statute provides an exclusive remedy[5] that precludes further recovery from an employer.[6] On

1. Plaintiff received $1606.84 in workmen's compensation benefits.

2. Plaintiff brought this maritime action in a state court, relying on the "saving to suitors" clause, which permits state courts to entertain in personam actions in admiralty. Judiciary Act of 1789, 28 U.S.C. § 1333 (1970). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1013, at 33 (1957).

3. Plaintiff's complaint also contained an allegation of negligence, but on appeal plaintiff acknowledged that the trial court properly dismissed the count for negligence, conceding that because negligence is not a peculiarly maritime tort his right of recovery for negligence was merged in the workmen's compensation judgment.

4. The duty to provide a seaworthy vessel for seamen, first announced in The Osceola, 189 U.S. 158 (1903), has been expanded considerably. Today the doctrine of seaworthiness imposes on a shipowner a nondelegable absolute liability, neither predicated on negligence nor satisfied by the exercise of due diligence, which extends to the vessel, her crew and her gear. "If a defective condition of the ship proximately causes the individual's injury the ship is unseaworthy as to him no matter how sound or staunch she may be in every other respect." 2 M. NORRIS, THE LAW OF SEAMEN § 612, at 167 (3d ed. 1970). *See generally* G. GILMORE & C. BLACK, *supra* note 2, § 6, at 38-44; Kolmeyer, *The Warranty of Seaworthiness: To Whom Is It Owed?*, 7 CALIF. WESTERN L. REV. 109 (1970).

5. ALAS. STAT. § 23.30.055 (1972) provides in part: "Exclusiveness of liability. The liability of an employer prescribed in § 45 of this chapter [employer's liability for workmen's compensation] is exclusive and in place of all other liability of the employer and any fellow employee to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employees at law or in admiralty on account of the injury or death. . . ."

6. Most state workmen's compensation acts contain an exclusive remedy pro-

appeal to the Supreme Court of Alaska, *held*, reversed. Receipt of benefits under a state workmen's compensation statute containing an exclusive remedy provision does not bar a subsequent action against the employer for unseaworthiness. *Barber v. New England Fish Co.*, 510 P.2d 806 (Alas. 1973).

In *Southern Pacific Co. v. Jensen*,[7] the United States Supreme Court invalidated a state workmen's compensation award to a stevedore because his injury occurred on navigable waters. The Court ruled that state workmen's compensation benefits stop at the water's edge: injuries that occurred on shore were within the reach of state compensation acts while injuries arising on navigable waters were within the exclusive domain of federal admiralty jurisdiction. Harsh results were inevitable in the absence of a federal compensation act.[8] Within the next decade the Court twice invalidated congressional efforts to legitimize the application of state statutes to maritime injuries as unconstitutional encroachments on federal admiralty jurisdiction.[9] In *Grant Smith-Porter Ship Co. v. Rohde*,[10] the Court tempered the rigid exclusivity of the *Jensen* rule by announcing the "local concern" doctrine.[11] Under this doctrine state compensation acts governed maritime injuries if the injured party was engaged in matters of "local concern" and the use of the local remedy would not "materially prejudice" the general maritime law. Thus in *Grant Smith* the Court held that

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vision. *See, e.g.*, CAL. LABOR CODE § 3601 (West 1971); N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965); TEX. REV. CIV. STAT. art. 8306, § 3 (1967).

7. 244 U.S. 205 (1917).

8. *See* Smith, *On the Waterfront at the Pier's Edge: The Longshoremen's and Harbor Workers' Compensation Act*, 56 CORNELL L. REV. 114, 116 (1970).

9. *E.g.*, Knickerbocker Ice Co. v. Stewart, 235 U.S. 144 (1920). In *Washington v. Dawson & Co.*, 264 U.S. 219 (1924), Justice McReynolds, writing for the majority, stated: "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States." 264 U.S. at 227.

10. 257 U.S. 469 (1922).

11. "[T]he purpose of the local concern doctrine was entirely one of enlarging, not diminishing, the range of remedies available to waterfront workers. In the absence of a valid compensation act for waterfront workers injured on navigable waters before 1927, the courts did the best they could to soften the absoluteness of the doctrine of maritime uniformity by carving out the local concern exception." Larson, *Conflicts Between Seamen's Remedies and Workmen's Compensation Acts*, 40 FORD. L. REV. 473, 510 (1972).

the state act's "exclusive remedy" provision superseded a carpenter's right to recover against his employer in admiralty for injuries sustained on navigable waters because the employment contract was nonmaritime and the workman's activities bore no direct relation to commerce or navigation. Similarly, in *Millers' Indemnity Underwriters v. Braud*,[12] the Court held that recovery under Texas' compensation act supplanted a diver's right to sue under general maritime law.[13] Although the local concern doctrine restored state compensation acts to some waterfront activities, many longshoremen and harbor workers still had no statutory remedy for occupational injuries that occurred aboard ship.[14] In 1927, Congress attempted to fill this gap by enacting the Longshoremen's and Harbor Workers' Compensation Act (LHWCA),[15] which created a federal remedy for injuries arising on navigable waters, *provided* claimant was not covered by state law under the local concern doctrine. Initially, therefore, federal and state remedies were mutually exclusive. This jurisdictional scheme was modified considerably, however, when the Supreme Court adopted a "twilight zone" conceptualization of federal jurisdiction in admiralty within which state jurisdiction existed alongside federal jurisdiction.[16] The "twilight zone" was not spatially delimited; rather, it created a rebuttable presumption that allowed plaintiff to maintain his action regardless of the statutory source of plaintiff's remedy.[17] Then, in *Calbeck v. Travelers Ins. Co.*,[18] the Supreme Court expressly recog-

12. 270 U.S. 59 (1926).

13. Plaintiff sought to recover against her deceased husband's employer in general federal maritime law. The employer argued that plaintiff could not maintain a maritime action because benefits had been recovered under the Texas Workmen's Compensation Act, which provided the exclusive remedy against an employer. The Supreme Court accepted defendant's argument on the grounds that decedent wes engaged in a matter of local concern and that state regulation of this activity would not prejudice materially the general maritime law. 270 U.S. at 64.

14. *See* Smith, *supra* note 8.

15. 33 U.S.C. §§ 901 *et seq.* (1970).

16. In Davis v. Dep't of Labor & Indus., 317 U.S. 249 (1942), the Court defined the "twilight zone" as "that shadowy area within which, at some undefined and undefineable point, state laws can validly provide compensation." 317 U.S. at 253.

17. Practically speaking, plaintiffs had a choice of remedies, since they were generally permitted to maintain actions under whichever statute they sought recovery.

18. 370 U.S. 114 (1962).

nized the concurrent jurisdiction of LHWCA and state compensation acts over injuries sustained on navigable waters. Engrafted onto the history of statutory compensation schemes for maritime injuries is the post-World War II rise of the doctrine of unseaworthiness.[19] In *Seas Shipping Co. v. Sieracki*,[20] the Supreme Court first held that a shipowner's duty of seaworthiness extends to any longshoreman injured aboard ship while performing ship's work. And in 1963, in *Reed v. The Yaka*[21] the Court went further and held that despite the LHWCA's explicit exclusive remedy provision,[22] a longshoreman eligible for benefits under the Act is not barred from suing his employer for breach of the duty to provide a seaworthy vessel. The rise of the doctrine of unseaworthiness also resurrected the jurisdictional questions that the Court had attempted to resolve in *Calbeck*. Thus in *Pope & Talbot v. Hawn*,[23] the Court noted that an action sounding in unseaworthiness states a substantial claim exclusively controlled by federal maritime law that cannot be abrogated by state law.[24] The extent to which this maritime tort concept is available to longshoremen was established recently in *Victory Carriers Inc. v. Law*,[25] in which the Supreme Court held that state law, rather than the maritime duty of seaworthiness, protected a longshoreman whose injury arose on land while using a stevedore's forklift to load defendant's vessel. Under federal law, therefore, the water's edge is once more pre-eminent. Whether recovery under a *state's* exclusive remedy statute can preclude a subsequent suit for unseaworthiness, however, had not been decided until the decision in the instant case.

In the instant case, the court recognized that plaintiff's claim for

19. *See generally* G. GILMORE & C. BLACK, *supra* note 2, at 248-394; Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 CORNELL L.Q. 381 (1954).

20. 328 U.S. 85 (1946).

21. 373 U.S. 410 (1963).

22. 33 U.S.C. § 905 (1970): "The liability of an employer prescribed in [section 4] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ."

23. 346 U.S. 406 (1953).

24. "[W]hile states may sometimes supplement federal maritime policies, states may not deprive a person of any substantial maritime rights." 346 U.S. at 409-10.

25. 404 U.S. 202 (1971).

unseaworthiness invoked federal maritime principles that controlled the case.[26] Noting the paucity of recent authority on the question before it, the court explained that *Grant Smith-Porter Ship Co. v. Rohde*,[27] which involved an exclusive remedy provision of a state compensation act, was distinguished by the criteria that brought it under the "local concern" doctrine, which was controlling when that case was decided in 1922.[28] The case of *Millers' Underwriters v. Braud*[29] also was limited to its facts and the state of general maritime law existing in 1926. Nevertheless, the court concluded that *Grant Smith* and *Millers'*, although factually distinguishable from the instant case,[30] stand for the proposition that state limitation of federal maritime rights in some instances does not violate the supremacy clause.[31] The court then documented a recent trend in case law reflecting a diminution of state jurisdiction in admiralty,[32] but concluded that the judiciary's role is to

26. The court briefly examined the duty of a state court to apply federal maritime law in admiralty cases brought under the "saving to suitors" clause. 510 P.2d at 808. *See* note 2 *supra*.

27. 257 U.S. 469 (1922). *See* notes 10 and 11 *supra* and accompanying test.

28. In *Grant Smith*, the Supreme Court found that the employee's contract was nonmaritime and that his work had no direct relation to navigation or commerce. 510 P.2d at 809.

29. 270 U.S. 59 (1926). *See* notes 12 and 13 *supra* and accompanying text.

30. The court pointed out that the work of a longshoreman has a recognized direct relation to commerce, citing Employers' Liability Assurance Corp. v. Cook, 281 U.S. 233 (1930). 510 P.2d at 812.

31. 510 P.2d at 809. The court also rejected the persuasiveness of Alcoa Steamship Co. v. Rodriquez, 376 F.2d 35 (1st Cir.), *cert. denied*, 389 U.S. 905 (1967), which held that a longshoreman's recovery under the Puerto Rico workmen's compensation act barred subsequent suit for unseaworthiness. The court pointed to the unique position of Puerto Rico in American admiralty created, in part, by § 8 of the Jones Act, 48 U.S.C. § 749 (1970), which authorized the Puerto Rican legislature to supplant all federal maritime law with local law, except where Congress has expressly stated otherwise.

32. *See* Moragne v. States Marine Lines, 398 U.S. 375 (1970) (plaintiff, whose husband died on Florida's territorial waters, could maintain a wrongful death action in general federal maritime law despite Florida's refusal to recognize unseaworthiness as a basis for recovery under its wrongful death statute); Kossick v. United Fruit Co., 365 U.S. 731 (1961) (Ohio's statute of frauds on verbal agreements inapplicable in steward's action for maintenance and cure); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) (New York's common law distinction between licensee and invitee inapplicable in an admiralty action for negligence); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (Texas' statute of limitations inapplicable to an action for unseaworthiness combined with an action for negligence under the Jones Act).

accommodate federal and local interests in areas in which concerns of both overlap.[33] To effect this accommodation, the court in the instant case adopted the test of whether barring plaintiff's unseaworthiness claim because of his recovery under the state workmen's compensation act would "materially prejudice the characteristic features of the federal law and interfere with the uniformity of that law,"[34] by making the availability of an unseaworthiness claim depend on a plaintiff's nonacceptance of a state remedy or whether the federal system could accommodate the prohibition of the unseaworthiness claim. Relying on the history of the exclusive remedy provision of LHWCA, the court concluded that material prejudice would result if the state exclusive remedy provision were allowed to control. Had plaintiff recovered benefits under LHWCA, his subsequent action for unseaworthiness would be allowed. The court reasoned by analogy that plaintiff's recovery under a state statute should not produce a different result. Moreover, since the federal judiciary refused to allow LHWCA's exclusive remedy provision to preclude an action for unseaworthiness, by implication, a state court's failure to follow this precedent would materially prejudice maritime law.

The instant case is the first to hold that state workmen's compensation benefits merely supplement[35] a longshoreman's right to recover against his employer for unseaworthiness. To reach this conclusion the court was required not only to strike down the exclusive remedy provision of the state act but also to limit two ostensibly controlling Supreme Court decisions to their particular facts and historical significance. In reaching its decision, the court was sensitive to the functional interplay between the rise of the exclusively federal remedy based on unseaworthiness and the judiciary's ever-changing posture on state jurisdiction over maritime activities. Since neither *Grant Smith* nor *Millers'* have been expressly overruled, the court easily could have invoked stare decisis to thwart plaintiff's attempt to recover in unseaworthiness after he had availed himself of state compensation benefits. The court recognized, however, that a contemporary application of *Grant Smith*

33. 510 P.2d at 811.

34. 510 P.2d at 811.

35. The court explained that the amount plaintiff received under the state act would be credited to his employer's obligation should plaintiff succeed in obtaining a judgment against his employer for unseaworthiness. 510 P.2d at 813 n.39.

or *Millers'* requires an accommodation of the liberal maritime remedy of unseaworthiness. Consequently, the court very adroitly adopted the test established in *Grant Smith, i.e. whether application of local law would materially prejudice the uniformity of the general maritime law* and emerged with the desired result. The decision is salutary for at least two reasons. First, it reflects the expanding movement in American admiralty to extend uniformly the concept of liability based on the duty of seaworthiness to longshoremen injured while working aboard ship. The decision prevents longshoremen in Alaska from forfeiting a demonstrably valuable maritime right merely by accepting comparatively nominal benefits under state law. Secondly, the court's methodology is commendably straight-forward. Rather than relying on a simplistic *Jensen*-type argument to oust state jurisdiction,[36] the court judiciously adopted the *Grant Smith* doctine of "material prejudice." Having established these guidelines, the court correctly analogized to the Supreme Court's dismantling of LHWCA's exclusive remedy provision, thereby permitting longshoremen to seek recovery for unseaworthiness. Thus the court engaged in a process of state-federal accommodation, rather than decision by mechanical formula.[37] The material prejudice test is both more administratively durable and jurisprudentially honest.

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36. *See* note 8 *supra* and accompanying text.

37. In Pope & Talbot Inc. v. Hawn, 346 U.S. 406 (1953), the Supreme Court held that an action for unseaworthiness is based on a "maritime tort, a type of action which the Constitution has placed under national power to control. . . ." 346 U.S. at 409; *see* note 24 *supra.*

COMMON MARKET—COUNCIL REGULATIONS—REGULATIONS TAKE PRECEDENCE OVER PROVISIONS OF MEMBER STATES' CONSTITUTIONS

A request for a preliminary interpretation of Council Regulations 1975/69 and 2195/69[1] was submitted to the Court of Justice of the European Communities by the local court of Lonato, Italy as a result of a suit pending in that court between Orsolina Leonesio, an Italian farmer, and the Ministry of Agriculture and Forestry of the Republic of Italy relating to the premiums granted by those Regulations to farmers for slaughtering their dairy cows. Relying on the announcement by the Italian authorities that the subsidy would be paid subject to the adoption of the statutory provisions approving the necessary funds by the Italian Parliament, Signora Leonesio had slaughtered five cows in 1970 and received a conditional authorization for payment. In November 1971, Signora Leonesio sued for her subsidy in the local Italian court. The Italian authorities contended that the Regulations had no direct effect in Italy and did not grant a right to payment until the Parliament had appropriated the necessary funds as required by the Italian Constitution.[2] Signora Leonesio claimed that the Regulations were legally complete and directly applicable in Italy according to article 189 of the European Economic Community Treaty[3] and that article 10 of Regulation 1975/69 prohibits nations from attaching additional conditions to premiums without the Commission's consent. She argued further that a member state cannot subject a

1. Because of growing surpluses in the milk and dairy products sector of the European Economic Community (EEC), the Council of Ministers set up a system of premiums to induce farmers to reduce their stock of milk cows by slaughtering. Regulation 1975/69 established the premium system. Article 10 of this Regulation allows member states to set up additional conditions to payment of the premiums if certain procedures, which included EEC approval, were followed. Implementing provisions for Regulation 1975/69 were contained in Regulation 2195/69. Article 10 of Regulation 2195/69 states that the payment must be made within two months after proof of slaughtering. Leonesio v. Italian Ministry of Agriculture and Forestry, 2 CCH COMM. MKT. REP. ¶ 8175, at 8339, 8344-45 (1972).

2. Article 81 of the Italian Constitution states that every law resulting in public expenditures must indicate the source of the necessary funds.

3. Article 189 provides: "Regulations shall have general application. They shall be binding in every respect and directly applicable in each Member State." Treaty Establishing the European Economic Community, Jan. 1, 1958, art. 189, 298 U.N.T.S. 3, in 2 CCH COMM. MKT. REP. ¶ 4901 (1973) (authentic English text) [hereinafter cited as EEC Treaty].

financial obligation under Community law to national constitutional appropriation requirements since to do so would create the possibility of discrimination between nationals of member states, thereby endangering the very existence of the EEC. The Italian court referred two questions to the Court of Justice: (1) were the Regulations directly applicable and, if so, did they create individual rights for the nationals of member states; and (2) if the answer to the first question is affirmative, was the claim subject to national constitutional requirements on the time of payment, assuming all conditions imposed on the owner of the cattle are met. In the Court of Justice, *held*, Community regulations produce direct effects in member states subject only to those conditions required by the regulations themselves; they also create individual rights for nationals that cannot be compromised by constitutional budgetary requirements of the member states. *Leonesio v. Italian Ministry of Agriculture and Forestry*, 2 CCH COMM. MKT. REP. ¶ 8175 (1972).

Relying on articles 5[4] and 189[5] of the EEC Treaty, the Court of Justice has taken the position that regulations produce a direct effect in member states by creating rights in the nationals of the member states which the national courts have an obligation to protect. This position has produced a great deal of litigation questioning the status of regulations and other Community acts in a member state's legal system.[6] The Court of Justice developed the concept of the supremacy of Community law over subsequent national law in a series of cases, and various theories have been cited

4. Article 5 provides: "Member States shall take all appropriate measures, whether general or particular, to ensure their obligations arising out of this Treaty as resulting from actions taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." EEC Treaty, art. 5, 1 CCH COMM. MKT. REP. ¶ 181.

5. *See* note 3 *supra*.

6. A conflict between a regulation and a rule of national law of an earlier date has caused no problems because all EEC countries recognize the principle of *lex posterior derogat legi priori* (a later statute removes the effect of a prior conflicting one). Problems arising from a conflict between a regulation and a national law of a later date, however, are affected by the manner in which member states view the relationship between international and national law. The most serious challenges to the supremacy of Community law have come from states, such as Germany and Italy, that adhere closely to the dualist theory of international law. R. LAUWAARS, LAWFULNESS AND LEGAL FORCE OF COMMUNITY DECISIONS 14-27 (1973).

in support of the concept.[7] In *Costa v. E.N.E.L.*,[8] the Court based its holding that a Community regulation takes precedence over later national laws on the theory that by accepting the EEC Treaty the member states created a new binding legal order to which they transferred certain powers, thus limiting their sovereignty in certain specified areas. The Court also emphasized the reciprocity[9] argument and the need for uniformity[10] to safeguard Community aims. Later cases, such as *Politi*,[11] which declared that article 189 bars the application of all prior or subsequent legal actions that cannot be reconciled with the regulations' provisions, and *Salgoil*,[12] which held that the Treaty provisions that impose a duty to act and grant no discretion to the local government are directly applicable to member states, have refined these approaches.[13] In addition, the Court of Justice and the courts of the member states recently have been faced with the ultimate supremacy question, *i.e.* the conflict between Community law and a national rule of law of constitutional rank. Belgium,[14] Luxembourg[15] and the Nether-

7. The Court of Justice and the leading commentators on the legal structure of the EEC have cited various reasons for the supremacy of EEC law without labeling any particular theory as decisive: (1) new binding legal order; (2) limitation of competence; (3) transfer of power; (4) reciprocity; (5) principle of uniformity, safeguarding community goals; and (6) specific original nature. *See* A. PARRY & S. HARDY, EEC LAW 132-51 (1973).

8. 2 CCH COMM. MKT. REP. ¶ 8023 (1964).

9. "This incorporation into the law of each members country of provisions of Community origin, and the letter and spirit of the Treaty in general, have as a corollary the impossibility for the states to assert as against a legal order accepted by them on a reciprocal basis a subsequent unilateral measure which could not be challenged by it." 2 CCH COMM. MKT. REP. ¶ 8023, at 7390.

10. "The preeminence of Community law is confirmed by Article 189, under which regulations are 'binding' and 'directly applicable in each member state.' This provision, which contains no reservation, would be meaningless if a Member State could unilaterally nullify its effects through a legislative act that could be asserted as against the Community texts." 2 CCH COMM. MKT. REP. ¶ 8023, at 7390-91.

11. Politi v. Italian Ministry of Finance, 2 CCH COMM. MKT. REP. ¶ 8159 (1971).

12. Salgoil v. Ministry of Foreign Trade, 2 CCH COMM. MKT. REP. ¶ 8072 (1972).

13. *See also* Walt Wilhelm v. Bundeskartellant, 2 CCH COMM. MKT. REP. ¶ 8056 (1969) (conflicts between the Community rule and national rules on competition should be resolved in favor of the supremacy of Community rules).

14. *See* Minister for Economic Affairs v. Fromagerie Franco-Suisse "Le Ski,"

lands[16] appear to be willing to accept the supremacy of Community law. The position of French courts remains unclear because there has been no definitive statement made by the courts and the French constitution is subject to various interpretations on the matter.[17] The strongest statement is found in the *Internationale Handelsgesellschaft*,[18] a German case in which the Court of Justice concluded that a Community regulation could not be challenged on the basis that it affected basic constitutional rights or principles protected by a member state because to allow such a challenge would impair the unity and effectiveness of Community law. In response to this ruling, the German court[19] maintained that since the EEC has no written constitution, fundamental national rights protected by a state's constitution must continue to be observed and referred the case to the German Constitutional Court, which has yet to reach a decision. The Italian Constitutional Court apparently has retreated from its position in the *Costa v. E.N.E.L.*[20] case, *i.e.* that the EEC Treaty had only the status of ordinary law and thus could not prevail over later national law. In the *San Michele*[21] case, the Court declared that the European Coal and Steel Community Treaty,[22] the forerunner of the EEC Treaty, created a new separate legal order, and that the Treaty's provisions thus were not subject to the Italian Constitution. The breadth of

9 COMM. MKT. L. REV. 229 (1972) (Community law takes precedence over later national law).

15. *See* Chambre de Metiers v. Pagani, Pas. Lux. XVI 150 (1954), *discussed in* A. PARRY & S. HARDY, *supra* note 7, at 155 (internatonal treaties take precedence over national legislation).

16. The Netherlands constitution was revised in 1956 in anticipation of the development of Community law. It provides that the constitutionality of a treaty may not be challenged and that a treaty may preempt certain constitutional provisions as well as prior or subsequent national laws. Constitution, arts. 60(3), 63, 66 (1953, amended 1956) (Netherlands).

17. *See* R. LAUWAARS, *supra* note 6, at 15-17.

18. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 2 CCH COMM. MKT. REP. ¶ 8126 (1970).

19. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 9 COMM. MKT. L. REV. 177 (1972).

20. Costa v. E.N.E.L., 3 COMM. MKT. L. REV. 425 (1964).

21. Societa Acciaierie San Michele v. High Authority, 6 COMM. MKT. L. REV. 160 (1967).

22. Treaty Establishing the European Coal and Steel Community, in W. FRIEDMANN, ANTI-TRUST LAW 579 (1956).

this decision is unclear because the Court stated that certain constitutional rights still could be considered supreme. In addition, other court decisions and the Italian Government's position in later cases indicate that this question is far from settled.[23]

In the instant case, the Court first examined article 189 of the Treaty and reaffirmed its earlier rulings that the direct applicability of regulations produces immediate effects in each member state and grants individual rights that the national courts must protect. The Court noted, however, that the legal effect of a regulation depends somewhat on whether the regulation leaves some discretion to the national authorities in its implementation.[24] The Court then examined Regulations 1975/69 and 2195/69 and found that they left little discretion to the national government and that this discretion had been exercised by establishing the premium system in Italy. Therefore, since Signora Leonesio had met all the requirements, her right to payment was absolute. This conclusion was reinforced by the failure of Italy to utilize the procedure expressly provided by Regulation 2195/69 whereby the individual state could impose additional conditions on payment and also by the specific recital that it was necessary for all payments to be made within two months after proof of slaughtering.[25] The Court rejected the constitutional defense by citing article 5 of the Treaty and the reasoning of the *Salgoil* and *Politi* cases for the proposition that the Italian claim would discriminate against Italian farmers and thereby destroy Common Market economic policy which relies on the uniform application of all regulations within the member countries.

In this decision, the Court of Justice forcefully reaffirmed its position that EEC regulations take precedence over the constitutional law of the member states. Examined by itself, the narrow holding of the case relating to constitutional budgetary requirements is reasonable and essential for the effective functioning of the EEC. The Italian Government clearly cannot be given the equivalent of a veto power over EEC activities by what could be termed an administrative requirement of its constitution. One

23. For an analysis of recent conflicting Italian court decisions, see Bebr, *Community Regulations and National Law*, 10 COMM. MKT. L. REV. 87, 88-96 (1973).

24. 2 CCH COMM. MKT. REP. ¶ 8175, at 8342, 8347.

25. *See* note 1 *supra*.

must take note, however, of the Court's reasoning relating to the doctrine of the absolute supremacy of Community law, which was dealt with more explicitly in *Internationale Handelsgesellschaft*.[26] These two decisions are the culmination of the trend developed in the *Costa, Salgoil* and *Politi* cases, which held that various regulations and treaty provisions take precedence over subsequent national law of a rank lower than constitutional.[27] They also, however, represent a quantum leap in the Court's reasoning that is certain to provoke continued controversy within the Common Market.[28] This expected controversy is the result of the method of adoption of the EEC Treaty in the member states[29] and the fact that just as the Treaty fails to state explicitly the supremacy of Community laws over the municipal law of the member nations, it also fails to provide clearly for many of the safeguards guaranteed by those instruments.[30] In response to these challenges, the Court of Justice has stated that the general principles of Community law comprise fundamental rights and that the Court is required to safeguard these rights.[31] This line of reasoning is reinforced by *Internationale Handelsgesellschaft*, in which the Court refused to allow EEC regulations to be tested against member states' constitutions and insisted that the Court would insure the respect for fundamental rights within the framework of the EEC. It was noted that the fundamental rights that are to be protected

26. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 2 CCH COMM. MKT. REP. ¶ 8126 (1970).

27. For a detailed discussion of this development see Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695 (1966).

28. For detailed analysis of the conflict between Community law and national law of a constitutional rank see C. MANN, THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION 25-46, 349-60, 417-32 (1972).

29. The EEC was adopted in member states as a treaty. Thus, the effect of the Treaty and through that the supremacy of community law are determined by the place of international treaties in the individual member states legal systems. *See* note 6 *supra*. For example, article 66 of the Netherlands Constitution provides that any provision of municipal law is overridden by a prior or subsequent treaty and article 60(3) states that the constitutionality of a treaty may not be challenged. On the other hand, while article 24(1) of the Basic Law of Germany provides for the transfer of sovereign powers to intergovernmental institutions, the supremacy of Community laws over fundamental German constitutional principles is far from clear. *See* A. PARRY & S. HARDY, *supra* note 7, at 152-55.

30. *See* Zuleeg, *Fundamental Rights and the Law of the European Communities*, 8 COMM. MKT. L. REV. 446 (1971).

31. Stauder v. City of Ulm, 9 COMM. MKT. L. REV. 112, 119 (1969).

by the Court of Justice will be derived from the common constitutional traditions of the member states if these guarantees are reconcilable with the goals and purposes of the Community. Several members of the EEC, as evidenced by the Italian Government's position in this case and the recent referral to the German Constitutional Court of the *Internationale Handelsgesellschaft* case, however, seem to have serious reservations about the Court of Justice's innovative policy on behalf of European integration. This reluctance definitely presents a situation that will require much cooperation among the member states to protect the effectiveness of the EEC and to reach a solution to this problem that is feasible from the points of view of both the legal and the political systems in which the European Communities must operate.

Jeffery R. Rush

DISCOVERY—AID TO FOREIGN OR INTERNATIONAL TRIBUNALS —UNITED STATES COURTS CAN COMPEL TESTIMONY ONLY ON BEHALF OF FOREIGN OR INTERNATIONAL TRIBUNALS EMPOWERED TO MAKE BINDING ADJUDICATIONS

A Canadian Commission[1] of Inquiry presented letters rogatory to the District Court for the Northern District of California requesting assistance in obtaining the testimony of plaintiff[2] pursuant to 28 U.S.C. § 1782, which provides the procedures for the rendering of assistance to foreign or international tribunals by United States courts. The court issued an *ex parte* order appointing three commissioners[3] to execute the letters rogatory and issued a subpoena to plaintiff to compel his testimony before the Commission. Plaintiff moved to quash the subpoena on the ground that 28 U.S.C. § 1782 authorizes the court to compel testimony only before foreign or international tribunals with adjudicative powers, and that the Commission, therefore, was not a "tribunal" within the meaning of section 1782. Counsel for the Commission opposed the motion on the ground that adjudicative power is not a requirement for qualification as a tribunal under the 1964 amendment to section 1782.[4] In the District Court for the Northern District of

1. The Commission was created to investigate all aspects of the Pas Forestry and Industrial Complex Project and report its findings to the legislature and the Executive. The Pas Project was a program pursuant to which the Government of Manitoba loaned substantial sums of money to private companies for the development of timber resources in northern Manitoba. Routine inspections concerning this project disclosed that Government loans on the project had been misappropriated and that the bulk of the monies advanced had been removed from Canada. Part V of the Manitoba Evidence Act, R.S.M., C.E. 150, and Order in Council No. 94/71 authorized the investigation.

2. James L. Ziegler is a United States citizen residing in Tiburon, California. Ziegler is a former employee of Arthur D. Little, Inc., a management consulting firm intimately connected with the Pas Project throughout its history.

3. As is the practice in cases involving letters rogatory from a foreign tribunal, the commissioners appointed by the district court to depose plaintiff were those requested by the foreign tribunal in its letters. *See* Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1013 (1965).

4. 28 U.S.C. § 1782 (1970), *amending* 28 U.S.C. § 1782 (1964). Section 1782 was amended in 1964 to change substantially United States procedure for rendering judicial assistance to foreign agencies. It now provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pur-

California, *held*, motion to quash granted. 28 U.S.C. § 1782 authorizes a United States District Court to compel testimony on behalf of a foreign or international "tribunal," which, within the meaning of the Act, includes only those bodies empowered to make binding adjudications of fact or law affecting litigants in concrete cases. *In Re Letters of Request to Examine Witnesses From the Court of Queens Bench for Manitoba, Canada*, 59 F.R.D. 625 (N.D. Cal. 1973), *aff'd*, No. 73-1978 (9th Cir., Nov. 21, 1973).

The 1949 version of section 1782[5] provided for United States judicial assistance[6] in obtaining testimony for use in a "judicial proceeding"[7] in a foreign country.[8] Motivated by the volume of international litigation and aware of the problems in obtaining evidence under the 1949 provision,[9] Congress sought to streamline

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suant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . ."

5. The first act passed by Congress to render assistance to foreign litigants was the Act of March 2, 1855, 10 Stat. 630, which provided for executing foreign letters rogatory. Later the Act was amended to authorize an appropriate district court to take the deposition of a witness for use in a "suit for the recovery of money or property pending in a foreign country . . ." (12 Stat. 769 (1863)), and "[i]n any civil action pending in any court in a foreign country." 62 Stat. 949 (1948).

6. The term "judicial assistance" includes the use of the subpoena to compel testimony as well as the court's inherent contempt powers. *See* H. SMIT & A. MILLER, INTERNATIONAL COOPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICES AND PROCEDURES PREVAILING IN THE UNITED STATES (1961).

7. Professor Smit felt the use of the term "judicial proceeding" in the 1949 Act did not necessarily include an investigating magistrate. Nor did the term include administrative tribunals, since these are considered quasi-judicial in nature. *Id.* at 13.

8. "The deposition of any witness within the United States to be used in any judicial proceeding in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103, *amending* 28 U.S.C. § 1782 (Supp. II, 1946).

9. The procedural problems involved in obtaining evidence in the United States for a foreign proceeding prior to the 1964 amendment were formidable. The procedure began with a request by the foreign court sent to its embassy in Washington, which transmitted it to the Department of State for forwarding to the appropriate district court. The State Department frequently refused to forward the letters rogatory. This severely hampered foreign litigants, since foreign law frequently required that letters rogatory or requests be handled only through diplomatic channels. The State Department changed its policy in 1962 to facilitate forwarding letters rogatory to the appropriate court. Foreign litigants still

procedures and to broaden the grant of judicial assistance to foreign agencies not heretofore included.[10] Accordingly, the 1964 amendment to section 1782[11] provides for the issuance of a subpoena to require testimony for use in a proceeding[12] by a foreign or international "tribunal."[13] The legislative history of the amendment suggests that the use of the word "tribunal" was a deliberate attempt to broaden the scope of United States judicial assistance to encompass proceedings beyond those of conventional courts.[14] In *In Re Letters Rogatory Issued by the Director of Inspection of the Government of India*,[15] the Court of Appeals for the Second Cir-

faced a major obstacle once they reached the district courts. The courts, if they granted the request at all, required the information-gathering process to conform to domestic procedures. Thus, United States assistance frequently proved useless to foreign litigants, particularly those whose civil law courts were incapable of assimilating information gathered under the common law adversary discovery processes. Note, *Discovery*, 10 HARV. INT'L L.J. 172, 178 (1969).

10. On September 2, 1958, Congress established the Advisory Committee on International Rules of Judicial Procedure to study the problems of administering judicial assistance to foreign agencies. Act of September 2, 1958, Pub. L. No. 85-906, § 5, 72 Stat. 1744. This Committee worked in conjunction with the Columbia Law School Project on International Procedure. The culmination of this joint effort was the 1964 amendment to section 1782.

11. Unlike its predecessor, § 1782, as amended, provides for United States judicial assistance in obtaining documentary and tangible evidence as well as the oral testimony of a witness. The amendment recognizes that it is fruitless to distinguish between types of evidence sought in view of the goal of international cooperation. Smit, *supra* note 3, at 1026.

12. It should be noted that under § 1782, as amended, the proceedings need not be in session at the time the request for assistance is made.

13. *See* note 4 *supra*.

14. The reports of the Judiciary Committees of both houses offered the following explanation for the 1964 amendment: "A rather large number of requests for assistance emanate from investigating magistrates. The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries . . . . In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings." H.R. REP. No. 1052, 88th Cong., 1st Sess. 9 (1963); S. REP. No. 1580, 88th Cong., 2d Sess. 7 (1964).

15. 385 F.2d 1017 (2d Cir. 1967).

cuit[16] held that an inquiry before an Indian Income Tax Officer was not a proceeding before a foreign tribunal within the meaning of section 1782. The court based this determination on an examination of whether the adjudicative function[17] was separate from the prosecutorial function in the purported tribunal.[18] Under the court's guideline, a tribunal is vested exclusively with adjudicative powers, and the addition of prosecutorial functions will remove the characterization of tribunal. Likewise, a body that is vested exclusively with prosecutorial functions is not a tribunal. The court found that since the Tax Officer had sole responsibility for collecting data and for evaluating the government's case against the taxpayer,[19] there was no significant separation between the adjudicative and prosecutorial functions and thus the Tax Officer was not a tribunal within the meaning of section 1782.[20] As an example of a body in which the combination of the two functions comports with section 1782, the court offered the French *juge d'instruction*,[21]

16. Judge Friendly wrote the opinion for the Second Circuit.

17. Judge Friendly offered the adjudicative-prosecutorial standard not as a test, but only as a useful guideline. 385 F.2d at 1021.

18. The court engaged in an elaborate study of Indian Income Tax procedure and concluded that the function of the Income Tax Officer is to levy an assessment and not to finally adjudicate the issue of an individual's tax liability. 385 F.2d at 1022.

19. In support of its finding that the Tax Officer's activities are limited to the levying function, the court cited the Indian case of S.S. Gadgill v. Lal & Co., 53 I.T.R. 231 (1964), which held: "The income-tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State: they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income and to assess tax on that income, but that does not impress the proceeding with the character of an action between citizen and state." 53 I.T.R. at 238, *quoted in* 385 F.2d at 1020.

20. Finding the Indian system for tax collection very similar to that of the United States, the court took judicial notice of the fact that a tax assessor does not comport with traditional notions of what constitutes a "tribunal." Thus, the court reasoned, Congress did not intend to include tax assessors in the term "tribunal." "Congressmen, who have doubtless had their income tax returns audited and sometimes questioned like the rest of us, would hardly have considered that the procedures of the Internal Revenue Service leading to a determination of deficiency or an assessment were proceedings in a 'tribunal'." 385 F.2d at 1021.

21. The *juge d'instruction* occupies a place in the French legal system somewhat parallel to that of the grand jury in the Anglo-American system. The *juge*

whose function is to determine whether there is probable cause to bind an accused over for trial in a criminal case. Unlike the Tax Officer, the court reasoned, the *juge* represents neither the interests of the accused nor those of the prosecution[22] and thus has the objectivity normally associated with a tribunal.[23] It has been suggested that the Second Circuit's use of the *juge* as a standard of comparison is too restrictive in view of the House and Senate Reports' liberal interpretation of the term "tribunal,"[24] and that the investigating magistrate is not the outer limit of the term's meaning.[25] The court was careful to point out, however, that by imposing the adjudicative-prosecutorial standard it did not hold that a foreign agency must satisfy all the requirements for an adjudicative body under the Administrative Procedure Act[26] to qualify as a tribunal[27] under section 1782.[28]

In the instant case, the court recognized that the purpose of the 1964 amendment was to expand the scope of United States judicial assistance to foreign agencies seeking to gather information and testimony in the United States.[29] The court, however, believed that

usually enters the case at the request of the *procureur*, the counterpart of the district attorney. Once the *juge* has the case before him, he assumes a more active role than the grand jury would. He is in charge of the investigation though he delegates the detective work to the police. *See* Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441 (1960).

22. *Id.* at 443.

23. 385 F.2d at 1020.

24. *See* note 14 *supra.*

25. The Committee reports make reference to the *juge*, but do not offer the *juge* as a standard. Some writers have criticized the Second Circuit for imposing the *juge* as a standard that the Indian Income Tax Officer failed to meet. It has been suggested that a more flexible standard should be imposed which would allow the benefits of § 1782 to an institution even if it performs a nonadjudicative function so long as the privileges of a witness are honored. Note, *supra* note 9, at 183.

26. Administrative Procedure Act § 5, 5 U.S.C. § 554 (1970).

27. The court also stated that it was of no consequence that under the laws of India, the proceedings before a tax officer were held to be a judicial proceeding. 385 F.2d at 1021.

28. 385 F.2d at 1020. "On the other hand, that concept is not so broad as to include all the plethora of administrators whose decisions affect private parties and who are not entitled to act arbitrarily . . . ." 385 F.2d at 1021.

29. The court cited the transmittal letter to President Kennedy from the Chairman of the Commission on International Rules of Judicial Procedure, which drafted and recommended the proposed amendment: "Until recently, the United

Congress did not intend to extend the scope of judicial assistance to foreign agencies whose purpose is to investigate and report to the legislative or executive branch of their governments.[30] The court reached this conclusion after reviewing the Judiciary Committee Reports of both houses of Congress, which contained repeated reference to "litigants" and "litigation" in their discussion of the scope of the proposed amendment.[31] As in *In Re Letters Rogatory Issued by the Director of Inspection of the Government of India*,[32] the court disregarded the characterization of the foreign agency under local law.[33] Though the court agreed that the Canadian

States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the proposed bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." 385 F.2d at 1019 n.1.

This statement of purpose was adopted by the Judiciary Committees of both Houses of Congress. H.R. REP. No. 1052, 88th Cong., 1st Sess. 4 (1963); S. REP. No. 1580, 88th Cong., 2d Sess. 2 (1964).

30. In a footnote, the court said: "The Commissioner points to language in the House and Senate Reports to the effect: 'If the court fails to prescribe the procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed, irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative or other nature.' " The court said that this language prescribes only the procedure to be followed once a valid request has been honored. "Use of the term 'investigation' and 'or other nature' recognizes that an adjudicative tribunal may be a body which conducts investigations. But it does not appear to indicate that a body whose sole function is to conduct an investigation on behalf of a legislative or executive agency is a tribunal within the meaning of the statute." 59 F.R.D. at 629 n.7.

31. *See* note 30 *supra*.

32. *See* note 16 *supra* and accompanying text.

33. In an effort to show that the Commission was a "tribunal," the Commission pointed to Order in Council 94/71, which authorized the Commission "to inquire into, ascertain and report upon the facts and circumstances relating to the development of the forestry and industrial complex near the Pas . . . and to make recommendations." Furthermore, the Commissioners argued that their inquiry was a "legal proceeding" within the meaning of subsection (f) and constituted a "court" within the meaning of subsection (d) of the Manitoba Evidence Act, R.S.M., C.E. 150. The Act in pertinent part defines "legal proceeding" as "any civil proceeding, inquiry, or arbitration, in which evidence is or may be

Commission has many of the attributes of a tribunal,[34] it held that binding adjudicative power over the rights of litigants in concrete cases is essential for an agency to qualify as a tribunal within the meaning of section 1782.[35]

This decision represents a retreat from the broad purpose[36] of the 1964 amendment since it requires a purported tribunal to have binding adjudicative power[37] to receive United States judicial assistance in gathering information. This requirement is reminiscent of the focus on conventional courts that dominated the 1949 version of the statute.[38] It can be argued that even the example of the *juge d'instruction*[39] would not satisfy the requirement set forth in this case.[40] The court seems to believe that the existence of the domestic court's power to object to the performance of procedural acts within its jurisdiction is sufficient reason for exercising that power.[41] This attitude is puzzling since one of the primary purposes

given," and "court" as a "court, judge, arbitrator, commissioner, or person before whom a legal proceeding is held or taken."

34. For example, the Commission has the power to summon witnesses to appear before the Commission by subpoena and, in appropriate cases, by warrant, and the power to punish witnesses for refusal to take an oath or refusal to testify by committing the witness to jail for a period of one month. In addition, the Commission is protected by the same judicial immunity as judges sitting on the Court of Queen's Bench. Brief for Appellant at 12.

35. 59 F.R.D. at 630.

36. The 1949 version, its predecessor, granted judicial cooperation to conventional courts. *See* note 9 *supra* and accompanying text.

37. 59 F.R.D. at 630-31.

38. *See* note 8 *supra* and accompanying text.

39. *See* note 22 *supra.*

40. It is doubtful that the *juge d'instruction* makes a "binding adjudication of the facts or law as related to the rights of litigants in concrete cases," which is the language the court used to define "tribunal" in the context of § 1782. 59 F.R.D. at 630. After making a full investigation of the facts, the *juge* merely recommends in more serious crimes that the *Chambre d'Accusation* bind the accused for trial in the *Cour d'Assises.* This recommendation is not binding on the *Chambre.* Furthermore, as in the case of some grand juries in the United States, often the *juge* is asked to investigate an incident in which there are no readily ascertainable suspects. Anton, *L'instruction Criminelle,* 9 AM. J. COMP. L. 441, 454-57 (1960). It might be said that in that instance, there is but one litigant—the state—and no real concrete case, and until such time as there is, the *juge* is not a tribunal worthy of judicial assistance in obtaining testimony under this court's holding.

41. Professor Smit criticized this approach when taken by foreign courts. He states that it would be difficult to imagine valid reasons for objecting to the

of the amendment was to set an example for other nations to follow in liberalizing their practices and procedures in the area of judicial cooperation.[42] It should be noted that Congress established no precise guidelines for defining the term "tribunal."[43] The lack of guidelines might well have been purposeful[44] in view of the intent of the act.[45] The 1964 amendment was enacted to promote the policy of effective judicial assistance in the face of increasing commercial intercourse among nations and the corresponding increase in international litigation.[46] Implementation of this policy of cooperation requires a district court to object to the performance of procedural acts within its jurisdiction only if the interest in doing so outweighs the interest in promoting the administration of justice on the international level.[47] Factors that might be considered are: (1) will there be prejudice to the witnesses; (2) does the compulsion of testimony under the circumstances violate local law; (3) will the constitutional and evidentiary privileges of the witnesses be honored; (4) is there any compelling domestic interest present, such as national security, that would be served by denying aid; and (5) could the court mould a protective order that would adequately safeguard the interests present in the foregoing considerations.[48] A consideration of these factors, which are not meant to be exclusive, would relieve a court of a detailed analysis of the nature of an unfamiliar foreign institution. Moreover, these factors would har-

performance of procedural acts in a jurisdiction when no violation of local law is involved. Smit, *supra* note 3, at 1018.

42. The Senate Judiciary Committee, in urging passage of the 1964 Amendment, said: "It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries to similarly adjust their procedures." S. REP. No. 1580, 88th Cong., 2d Sess. 7 (1964).

43. *See* H.R. REP. No. 1052, 88th Cong., 1st Sess. 9 (1963); S. REP. No. 1580, 88th Cong., 2d Sess. 7 (1964).

44. *See* Note, *supra* note 9.

45. A district court is granted a good deal of discretion in granting aid to foreign tribunals. According to the Senate Committee, § 1782(a) "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country . . . or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it." 1964 U.S. CODE CONG. & AD. NEWS 3788.

46. *See* note 30 *supra.*

47. *See* Smit, *supra* note 3.

48. *See generally* Note, *supra* note 9.

monize the administration of section 1782 with the purpose of the statute. The 1964 amendment to section 1782 gave recognition to the increasing resolution of controversies outside of conventional courts throughout the world: judicial assistance must be rendered to these forums to facilitate their task. As an increasing number of United States citizens engage in international trade and become involved in international disputes, it is in this nation's best interests to aid these nonconventional forums in quickly resolving the controversies before them. Under the 1964 amendment, no purpose is served by such scrutiny of these foreign institutions in terms of their proximity to the function of a conventional court as that presented in the instant case.

Frank R. Krok

EXTRADITION—STATUTE OF LIMITATIONS—MERE ABSENCE IS NOT EQUIVALENT TO FLEEING FROM JUSTICE UNDER 18 U.S.C. § 3290

Petitioner, a resident alien in the United States, sought a writ of habeus corpus,[1] attacking the jurisdiction of a United States Magistrate to determine the appropriateness of his extradition to India pursuant to the Treaty of December 22, 1931.[2] Petitioner, who was charged with embezzlement of India's Naval Prize Fund between 1959 and 1961,[3] argued that the Treaty bars extradition

1. A petition for habeas corpus is the only means of attacking the determination by a magistrate concerning the sufficiency of the evidence to sustain the charged offense under an applicable treaty of extradition. 28 U.S.C. § 2241 (1970). The petition for habeas corpus was filed prior to the extradition hearing before the magistrate, which is permissible under unusual circumstances. 28 U.S.C. § 2241 (1970). Although the premature use of a writ of habeas corpus is discouraged in extradition proceedings, 18 U.S.C. § 3184 (1970), the district court agreed to consider the petition before the magistrate's hearing because of the unusual circumstances. Wright v. Henkel, 190 U.S. 40 (1903). The petition had not been heard for nearly five months due to the death of the judge to whom the case had been originally assigned. The respondent also argued that petitioner did not meet the "in custody" requirement of the habeas corpus statute. 28 U.S.C. § 2241 (1970). The instant court ruled, however, that although the alleged fugitive was free on bail pending extradition, the restrictions on his freedom implicit in his being on bail were such that he could be considered "in custody" and the district court had jurisdiction to entertain the application for habeas corpus.

2. 47 Stat. 2122, 163 L.N.T.S. 59 [hereinafter cited as Treaty]. The original signatories to this Treaty were the United States and Great Britain. Article 14 stated that Great Britain could accede to the Treaty on behalf of certain listed territories, one of which was India. Both the government of India and the government of the United States have been unequivocal in relying on the validity of the Treaty and in the past there have been extraditions from both counties. Article 1 provides that "[t]he High Contracting Parties engaged to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other party." Petitioner argued that embezzlement was not an extraditable offense under the Treaty. The court ruled, however, that the offense of breach of trust is within the Republic of India statute providing that whoever being entrusted with property dishonestly misappropriates or converts to his own use that property in violation of any direction of law is guilty of criminal breach of trust, in essence, the crime of embezzlement.

3. Petitioner continued in his position as administrator of the fund until 1964. In 1966, petitioner traveled to Switzerland, where he remained for a short time. He then emigrated to Israel, where he held a high government position, before coming to the United States on a permanent resident visa. No charges were filed against him until 1968, two years after he left India. Petitioner contended that

since under United States law[4] the five-year statute of limitations[5] had expired. Respondent[6] contended that the statute of limitations was tolled under United States law[7] because petitioner was "fleeing from justice."[8] Petitioner argued that his mere absence from India did not constitute fleeing from justice and therefore the statute of limitations was not tolled. The district court found that the statute was tolled, and refused to issue the writ. On rehearing, the district court again refused. On appeal to the United States

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he was not aware of any charges against him until he was arrested in New York in 1972.

4. Article 5 of the Treaty allows the application of United States law in determining whether extradition is permissible: "The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to."

18 U.S.C. § 3184 (1970) states: "[U]pon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearings, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender is made."

5. The federal statute of limitations for noncapital offenses provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282 (1970).

6. The United States Marshall is the nominal respondent, while the Government of India is the real respondent.

7. The tolling provision of the federal statute states that "[n]o statute of limitations shall extend to any person fleeing from justice." 18 U.S.C. § 3290 (1970).

8. Petitioner left India on July 26, 1966, which, if it constituted "fleeing from justice," would have tolled the statute as to those offenses occurring less than five years before his departure. Therefore, petitioner could be extradited for alleged transactions on July 27, 1961, September 25, 1961 and September 27, 1961, although he was charged with 52 separate embezzlements.

Court of Appeals for the Second Circuit, *held*, reversed and remanded. Mere absence from the jurisdiction seeking extradition is not sufficient to constitute fleeing from justice under 18 U.S.C. § 3290; an intent to flee from prosecution must be shown before the statute of limitations is tolled and extradition is permitted. *Jhirad v. Ferrandina*, 486 F.2d 442 (2d Cir. 1973).

The federal courts have disagreed on the interpretation of "fleeing from justice" in the tolling provision of the statute of limitations. Most of the confusion is derived from three early Supreme Court cases in which the Court used interchangeably the phrases "fugitive from justice," which is found in the statute that allows for extradition between the states,[9] and "fleeing from justice," which is found in the tolling provision.[10] In *Roberts v. Reilly*,[11] an extradition case, defendant contended that he could not be a fugitive from justice because he had left the jurisdiction before an indictment was returned. The Supreme Court held that for purposes of extradition, a fugitive from justice need not have left the jurisdiction to avoid prosecution, but only to have departed and been found elsewhere.[12] Thus, for purposes of extradition,[13] the

9. 18 U.S.C. § 3182 (1970). This provision states that "[w]henever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which a person has fled shall cause him to be arrested and secured, and notify the authority making such demand . . . ."

10. *See* note 7 *supra*.

11. 116 U.S. 80 (1885).

12. "To be a fugitive from justice, in the sense of an act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment [is] found, or for the purpose of avoiding prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction and is found within the territory of another." 116 U.S. at 97.

13. Extradition agreements have one primary purpose, to return an accused to a jurisdiction to face charges against him, and the absent person's intentions or reasons for leaving the jurisdiction have no bearing on that purpose. Appleyard v. Massachusetts, 203 U.S. 222, 231 (1906).

reasons for being absent from the jurisdiction are irrelevant. The second case, *Streep v. United States*,[14] appears to be the case from which most of the confusion emanates. Interpreting the tolling of the statute of limitation provision of section 1045 of the Revised Statutes,[15] the *Streep* Court held that to constitute fleeing from justice the accused must have left the jurisdiction with the intention of avoiding prosecution for a particular offense, regardless whether prosecution had been instituted. The Court also stated that in this respect, *i.e.* whether prosecution had been commenced, the tolling provision should receive the same construction as the extradition provision. The Court then reiterated its holding in the *Roberts* case—that fugitive from justice does not necessarily mean that the defendant intended to avoid prosecution. Thus, the Court laid the groundwork for the subsequent confusion by ruling that the tolling provision and the extradition provision should receive the same construction concerning the commencement of prosecution while concluding that intent is necessary to constitute fleeing from justice but not necessary to make the accused a fugitive from justice.[16] Although not always in point, *Streep* has been cited in support of differing views in almost every subsequent opinion on the relevance of intent under section 3290. In a subsequent extradition case, *Appleyard v. Massachusetts*,[17] defendant, who had left the jurisdiction without knowing that he had committed a crime, argued that the *Streep* language meant that the extradition and tolling statutes should have identical constructions not only on the question of the commencement of prosecution but also on the question of intent.[18] Defendant then argued that since intent is relevant in tolling provision cases under *Streep*, intent should be relevant in extradition cases. The Court adopted a narrow reading of *Streep*, however, and held the reason for defendant's absence irrelevant under the extradition statute. Thus, the Court ignored *Streep*'s reference to the intent requirement in connection with the tolling provision and concluded that *Roberts* had not been modified.[19] The lower federal courts and the state courts, however, have

14. 160 U.S. 128 (1895).

15. Rev. Stat. § 1045 (1873-74), *as amended*, 18 U.S.C. § 3290 (1970).

16. 160 U.S. at 133-34.

17. 203 U.S. 222 (1906).

18. 203 U.S. at 229.

19. "Interpreting the words 'fleeing from justice' as found in [the tolling] section, the court [in *Streep*] expressly held that these words must receive the

failed to follow the Supreme Court's reasoning in these decisions. The prevailing line of authority holds that absence from the jurisdiction, regardless of intent, tolls the statute of limitations. Thus in *In re Bruce*[20] the court, interpreting a New Jersey statute of limitations essentially identical to section 3290, found the *Streep* analogy to the extradition statute controlling and declared that it was immaterial that petitioner had left the state openly and in a legitimate pursuit of his business. Subsequently, in *McGowen v. United States*,[21] the court, citing *In re Bruce*, stated that the *Streep* case expressly applied the language of *Roberts v. Reilly*[22] to section 3290; the court, therefore, found that appellant was fleeing from justice when he left the district, regardless of his motive for leaving.[23] In contrast, the minority view holds that fleeing from justice means leaving one's usual place of abode and concealing oneself either inside or outside the jurisdiction for the purpose of avoiding prosecution. The jury must then decide whether the requisite intent existed. In *Brouse v. United States*,[24] the court described fleeing from justice as absence or concealment with the intent to avoid punishment and stated that whether the accused is fleeing from justice is a question of fact to be determined from the acts and intent of the accused. Many cases have taken a similar position,[25] the most recent of which is *Donnell v. United States*.[26] The majority and dissenting opinions in *Donnell* reflect the dichotomous reasoning that has developed in the wake of the *Streep* decision. The *Donnell* majority supported its position that intent is relevant in statute of limitation cases by relying on refer-

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same construction as was given in *Roberts v. Reilly* to like words in [the extradition] section . . . , the inquiry in that case being whether the accused was a fugitive from justice." 203 U.S. at 229-30.

20. 132 F. 390 (C.C. Md. 1904), *aff'd sub nom.* Bruce v. Bryan, 136 F. 1022 (4th Cir. 1905).

21. 105 F.2d 791 (D.C. Cir.), *cert. denied*, 308 U.S. 552 (1939).

22. 116 U.S. at 97; *see* note 12 *supra*.

23. 105 F.2d at 792. There have been numerous other cases following this line of authority. *E.g.*, Green v. United States, 188 F.2d 48 (D.C. Cir.), *cert. denied*, 341 U.S. 955 (1951); King v. United States, 144 F.2d 729 (8th Cir.), *cert. denied*, 324 U.S. 854 (1944).

24. 68 F.2d 294 (1st Cir. 1933).

25. *E.g.*, Ferebee v. United States, 295 F. 850 (4th Cir. 1924); Greene v. United States, 154 F. 401 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907); Porter v. United States, 91 F. 494 (5th Cir. 1898).

26. 229 F.2d 560 (5th Cir. 1956).

ences to intent in the *Streep* and *Brouse* decisions. The court concluded that the purposes of section 3290 and those of the extradition statute are too dissimilar to justify applying the same language.[27] The dissent, however, relying on the reference in *Streep* to *Roberts v. Reilly*, urged that a definite standard making intent irrelevant would avoid unnecessarily lengthy litigation concerning the statute of limitations before the substantive issues are reached.[28] Decisions of this type reflect the seeming equivocality of the *Streep* opinion and explain the divergence among the circuits.

In the instant case, the court initially held that the 1931 extradition treaty is valid between the United States and India. The court then looked to the federal law of the United States to determine whether extradition was barred by the statute of limitations.[29] After recognizing the conflict among the courts of appeals on the interpretation of section 3290,[30] the court chose to follow the line of authority that construes fleeing from justice as requiring intent to avoid prosecution. The court stated that the phrase "fleeing from justice" carries a common sense connotation that only those persons who have intentionally absented themselves from the jurisdiction of the crime will be denied the benefit of the statute of limitations. Therefore, because of the plain language and purpose of section 3290, the government must show an intent to flee before the statute is tolled and extradition is permissible.

Although following the minority view, this court properly determined that the fleeing from justice provision in the statute of limitations requires intent and, therefore, cannot be given the same interpretation as the fugitive from justice provision in the extradition statute. The statute of limitations and the extradition statute serve very different purposes. Extradition is a procedural mechanism for returning an accused to the jurisdiction where the offense was committed to stand trial. A hearing is held to insure that there is sufficient evidence of an extraditable crime. The hearing also

27. 229 F.2d at 562-64.

28. 229 F.2d at 567.

29. The court did not discuss its reasons for applying United States law, apparently accepting the lower court's reasoning, which is as follows: "The basic intention of international treaties of extradition is uniform, regularized extradition between nations. Because of an overriding federal interest in treaties of extradition, federal law shall be controlling in limitations questions." 355 F. Supp. 1155, 1161 (S.D.N.Y. 1973).

30. 486 F.2d at 444.

prevents extradition for political harassment or other impermissible motives. It seems logical in the application of extradition statutes that the intent with which the accused departed should not be relevant. In fact, if intent were relevant, an innocent departure from a jurisdiction would be sufficient to make a criminal immune from extradition because he could not be a fugitive for lack of intent. If the rule applicable to extradition statutes is applied to the tolling of the statute of limitations, it may provide a simple and convenient test,[31] but it fails to consider the fundamental purpose of a statute of limitations. The statute of limitations is designed to prevent a trial so long after the alleged offense has been committed that the accused may be unable to locate his witnesses or produce his evidence. Also, the statute removes the threat of prosecution after a specified number of years, so that a potential defendant is given assurance he can lead a normal life after the expiration of that period. The protection provided by the statute of limitations, however, will be denied a person who flees from justice before the statute has run. It is illogical to assume that a person can flee from justice unless he intends to do so. Therefore, the intention to avoid prosecution should be present before the statute is tolled. The purposes of a statute of limitations should also be recognized in foreign extradition cases. There is little difference in applying 18 U.S.C. § 3290 to extradition between the states, and to extradition from the United States to a foreign country.[32] In the latter instance there must be a treaty between the parties before the extradition can occur.[33] Under the treaty applicable in this case the court is simply construing two provisions of federal law, just as in extradition between the states. Therefore,

31. The test simply states that if the defendant is absent from the jurisdiction he is "fleeing from justice," and any determination of intent is unnecessary. 229 F.2d at 567.

32. Because each state is an independent jurisdiction, the states must look to federal law to determine whether extradition is available. Similarly, two nations must look to a treaty to make the same determination. If the law of the United States is controlling, the application of the law is identical to that in the situation involving two states.

33. Although extradition by international comity and cooperation occurs, the United States does not extradite persons to another country unless extradition is authorized by treaty. 18 U.S.C. § 3181 (1970); *see* Factor v. Laubenheimer, 290 U.S. 276, 287 (1933); Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 714 (1969).

the policy behind the statute of limitations should be recognized in extradition under this treaty, as well as in extradition between the states. Thus, this court reached the proper decision, that intent is necessary to flee from justice, by simply looking to the purposes of the statute. Although the court did not consider it, evidence of congressional intent concerning section 3290 provides further support for the proposition that intent is a necessary element of flight from justice. Congress resolved any doubt concerning the interpretation of section 3290 in 1954 when the Internal Revenue Code of 1939[34] was revised. The 1939 Code used the word "absent" in the tolling provision for crimes under the Internal Revenue Code, as distinguished from "fleeing from justice" language applicable to other noncapital offenses. The 1954 Internal Revenue Code changed the "absence" standard; Congress incorporated by reference the "fleeing from justice" standard of section 3290.[35] This change illustrates that Congress interpreted "absence" differently from "fleeing from justice," and that absence alone is not sufficient to constitute fleeing from justice. There would have been no reason to eliminate the "absence" standard and to incorporate by reference the "intent" standard required by section 3290 unless Congress believed that section 3290 required something more than mere absence. Therefore, the *Jhirad* court correctly examined the purpose of the statutes, congressional intent and the equities of the situation before making its determination whether intent is necessary to flee from justice under section 3290. When all these factors are considered, it becomes evident that the provisions of the two statutes should not be given the same interpretation. The courts,

34. Section 6531 of the Internal Revenue Code of 1939 contained the following clause: "The time during which the person committing any of the offenses above mentioned is *absent* from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceeding." INT. REV. CODE OF 1939, ch. 36, § 3748(a), 53 Stat. 461, *as amended*, INT. REV. CODE OF 1954, § 6531(8) (emphasis added).

35. Section 6531(8) of the Internal Revenue Code of 1954 reads as follows: "The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for commencement of such proceedings. (The preceeding sentence shall also be deemed an amendment to section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed . . . ." INT. REV. CODE OF 1954, § 6531(8).

as did this case, should require an intent for the application of the tolling provision of section 3290 and thereby effectuate the purposes of the statute and congressional intent.

Paul P. Sanford

INTERNATIONAL COURT OF JUSTICE—PROCEDURE— TEMPORARY RELIEF IN THE FORM OF INTERIM MEASURES GRANTED ON PRIMA FACIE EVIDENCE OF JURISDICTION AND JURISDICTION OF THE MERITS FOUND ON BASIS OF PRIOR AGREEMENT TO COMPULSORY I.C.J. JURISDICTION

Based on a 1961 bilateral agreement,[1] the United Kingdom filed in April 1972 an Application against Iceland before the International Court of Justice (ICJ)[2] seeking a declaration that Iceland's extention of its fisheries jurisdiction to 50 nautical miles[3] was un-

1. The 1961 bilateral agreement (hereinafter referred to as the Agreement) signed by the United Kingdom of Great Britain and Northern Ireland and the Republic of Iceland moderated the dispute between the two countries over the fisheries rights off Iceland's coast. The dispute, often referred to as the Cod War, had been developing for over ten years and had involved numerous naval incidents in the fishery area. *See* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1169-78 (1965). The Agreement provides: that Britain undertake not to object to Iceland's twelve-mile limit while Iceland promised to permit British vessels to fish in certain areas during certain times of the year within the outer six miles of the zone; that this permission would expire in three years; that Iceland would continue to work for the further extension of her fisheries jurisdiction and would give Britain six-months notice of any such extension; and most importantly to this case, that any dispute which arose would, at the request of either party, be referred to the International Court of Justice. Exchange of Notes Constituting an Agreement Between Iceland and the United Kingdom Settling the Fisheries Dispute, Mar. 11, 1961, 397 U.N.T.S. 275. The Federal Republic of Germany reached a similar agreement, which also was broken and which resulted in a companion suit to the present case. Application was filed on June 5, 1972.

2. In 1946, with the creation of the United Nations, the Permanent Court of International Justice was replaced by the International Court of Justice. *See* U.N. CHARTER, Ch. XIV, arts. 92-96. For descriptions of the ICJ see O. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE (1951); S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965); 12 M. WHITEMAN, *supra* note 1, ch. 37 (1971).

3. Iceland proclaimed the extension in the *Resolution on Fisheries Jurisdiction* issued by Iceland's Althing on February 15, 1972, and brought to an end eleven years of near harmony based on the Agreement. The Resolution: unilaterally extended Iceland's fishery limits to 50 miles from baselines around the country; declared that the Agreement was no longer applicable; supported continued discussions with the United Kingdom; emphasized that the fishstocks of Iceland should be effectively supervised; and authorized the Government to take measures to prevent marine pollution. Resolution of the Althing Concerning Fisheries Jurisdiction, Feb. 15, 1972, *reprinted in* 11 INT'L LEGAL MATERIALS 643 (1972). For an informative discussion of the fisheries aspects of this dispute see Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 WIS. L. REV. 37 (1973). For discussion of fisheries jurisdiction in general see J. CRUTCHFIELD, THE FISHERIES:

founded under international law.[4] Additionally, in July 1972, the United Kingdom requested that the ICJ declare interim protective measures,[5] which were granted, and in June 1973 requested confirmation of the continuation of these measures.[6] The Court ordered pleadings on the question of jurisdiction in August 1972.[7] Throughout this dispute the United Kingdom has contended that the ICJ has jurisdiction because the compromissory clause in the 1961 bilateral agreement established the intent of the parties to confer jurisdiction on the Court over any substantive or procedural dispute;[8] that the Court should grant interim measures because any interruption of the British fishing rights would cause irremediable damage to British interests;[9] and that the Court should continue, for the same reasons, the measures until the decision on the merits

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PROBLEMS IN RESOURCE MANAGEMENT (1965); D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES (1965).

4. Article 38 of the Statute of the International Court of Justice specifies the sources of international law to be applied by the Court: "1. the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." I.C.J. STAT. art. 38.

5. The United Kingdom request for interim measures of protection of July 19, 1972, was granted by the Court on August 17, 1972. Fisheries Jurisdiction Case (Order Concerning the Request for Interim Measures of Protection), [1972] I.C.J. ____, *reprinted in* 11 INT'L LEGAL MATERIALS 1069 (1972) [hereinafter cited as Interim Measures]. For a summary of the interim measures see note 44 *infra*.

6. The United Kingdom, in a request dated June 22, 1973, asked the Court to confirm that the interim measures of protection would continue until a final judgment or a further order. This request was granted on July 12, 1973. Fisheries Jurisdiction Case (Order Concerning the Continuance of Interim Measures of Protection), [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MATERIALS 743 (1973) [hereinafter cited as Continuance].

7. Fisheries Jurisdiction Case (Order Concerning the Question of the Court's Jurisdiction), [1972] I.C.J. ____, *reprinted in* 11 INT'L LEGAL MATERIALS 1077 (1972) [hereinafter cited as Jurisdiction Question].

8. Fisheries Jurisdiction Case (Judgment on the Jurisdiction of the Court), §§ 8, 9 [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MATERIALS 290, 291-92 (1973) [hereinafter cited as Judgment].

9. Interim Measures, § 14.

is rendered.[10] Though refusing to appear before the Court, Iceland, through correspondence, contended that the 1961 bilateral agreement was not applicable and, therefore, the Court had no jurisdiction.[11] Accordingly, Iceland argued, the Court could order neither interim measures[12] nor a continuance.[13] The Court found that when parties to an agreement have therein consented to submit to the Court's jurisdiction, a later dispute over that agreement is within its jurisdiction and, therefore, it is competent to entertain the application and rule on the merits.[14] Based on the prima facie evidence of jurisdiction in the 1961 agreement, the Court, concluding that immediate implementation of Iceland's claim would prejudice the United Kingdom's rights, granted[15] and confirmed continuance of[16] the interim measures. *Fisheries Jurisdiction Case*, [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MATERIALS 743 (1973).

The jurisdiction of the ICJ and its power to impose interim measures are provided for in articles 36[17] and 41,[18] respectively, of

10. Continuance, § 1.

11. Since Iceland never pleaded against jurisdiction before the Court, the ICJ pieced together Iceland's contentions from Iceland's correspondence directed to the Court and the Security Council, and from public statements. Judgment, § 21. As the Court hypothesized, Iceland believed that the Agreement, including the compromissory clause, was no longer applicable because (1) it was agreed to under duress and therefore void *ab initio*; (2) it was intended to be applicable only if Iceland attempted to extend its fisheries jurisdiction without the required six months notice to Britain; (3) its purposes had been met; (4) it was subject to termination after reasonable notice; and (5) the doctrine *rebus sic stantibus* applied. Judgment, §§ 24-42.

12. Interim Measures, §§ 5, 6.

13. Continuance, § 3.

14. Judgment, §§ 44-46.

15. Interim Measures, §§ 12-26.

16. Continuance, § 8.

17. Article 36 provides: "1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation. 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or

the Statute of the Court.[19] Jurisdiction may be asserted only when it is conferred by voluntary consent,[20] special agreement, or treaties or conventions,[21] when it is compulsory either unconditionally or on the condition of reciprocity,[22] or when it is necessary to settle a dispute over jurisdiction.[23] Because of its limited jurisdiction,[24] the Court has refused to hear eight cases in which the Application indicated a party had not consented to the Court's jurisdiction.[25] Furthermore, in eighteen cases in which preliminary objections to jurisdiction have been filed the Court has found jurisdiction only eight times.[26] When an Applicant has claimed that a previous

certain states, or for a certain time. 4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court. 5. Declarations made under article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms. 6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." I.C.J. STAT. art. 36.

18. Article 41 provides: "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." I.C.J. STAT. art. 41.

19. While recognizing that ICJ opinions are not based on precedent (I.C.J. STAT. art. 59), this discussion proceeds from an interpretation of the statutes to an analysis of past cases on the hypothesis that such an institution as the ICJ with a stable administration is cognizant of and usually influenced by past decisions, as indicated in article 38. *See* note 4 *supra*.

20. I.C.J. STAT. art. 36, para. 1. "The Court itself, acting *propio motu*, must be satisfied that any State which is brought before it by virtue of such a Declaration has consented to the jurisdiction." Individual Opinion of President McNair, Anglo Iranian Oil Co. Case (Preliminary Objection), [1952] I.C.J. 93, 116.

21. I.C.J. STAT. art. 36, paras. 1, 2. *See* note 17 *supra*.

22. I.C.J. STAT. art. 36, para. 3.

23. I.C.J. STAT. art. 36, para. 6.

24. In 1971 only 47 of more than 127 eligible states had made declarations under the compulsory jurisdiction clause, article 36, paragraph 2. Nine of the 47 are based on declarations made to the Permanent Court of International Justice in accordance with art. 36, para. 5, and since 1951 six states have either terminated their declarations or allowed them to expire. [1970-1971] I.C.J.Y.B. 43, 44 & n.1.

25. *Id.* at 32 n.2.

26. *Id.* at 97 n.3.

agreement established jurisdiction, the Court has required evidence only that the agreement was founded in international law, and if the validity of the agreement is disputed, that the parties voluntarily signed the agreement.[27] Unlike the jurisdiction issue presented in every application, interim measures have been requested only three times—in the *Anglo-Iranian Oil Co. Case*,[28] the *Interhandel Case*[29] and the *Nuclear Test Case*.[30] In sanctioning such measures, the Court, without reaching a final determination on the question of jurisdiction, has based its order on the broad grounds that the applicant's claim did not fall "completely outside the scope of international jurisdiction."[31] The determination whether a party's rights would be irreversibly injured without interim measures has been made based on the parties' rights at the time of the request, and if granted in no way prejudges the jurisdictional question.[32] The Court has ruled only three times in the absence of a party—in the *Corfu Channel Case*,[33] the *Nottebohm Case*[34] and the *Nuclear Test Case*.[35] Although enforcement of a Court order or judgment is available through the Security Council under article 94 of the United Nations Charter,[36] no overt action

27. "These general rules . . . are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction." Anglo-Iranian Oil Case (Preliminary Objection), [1952] I.C.J. 93, 103.

28. [1951] I.C.J. 89 (Court granted measures against the Iranian take-over of a British oil company).

29. [1957] I.C.J. 104 (Court refused to grant measures on the ground that the situation in the United States did not require the provisional measures envisaged by Switzerland).

30. [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MATERIALS 749 (1973) (Court granted measures against France's detonating a nuclear explosion that would shower Australian territory with radioactive fallout).

31. Anglo-Iranian Oil Case, [1951] I.C.J. 89, 93.

32. [1951] I.C.J. at 93.

33. [1949] I.C.J. 244 (Albania refused to appoint an agent to the Court, which was assessing damages to the British ships).

34. [1953] I.C.J. 110 (Guatemala originally refused to appear before the Court to defend its wartime nationalization of property of a Liechtenstein citizen).

35. [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MATERIALS 749 (1973) (France refused to appoint an agent to the Court for the hearings on Australia's request for interim measures of protection).

36. U.N. CHARTER art. 94.

was taken in two previous cases when parties did not follow an order of the Court.[37]

In the instant case, there have been three major rulings: the Order Concerning the Request for Interim Measures of Protection,[38] the Judgment on the Jurisdiction of the Court,[39] and the Order Concerning the Continuance of Interim Measures of Protection.[40] When considering the request for interim measures, the Court stated that Iceland's nonappearance was not an obstacle to the assumption of jurisdiction since Iceland had been given the opportunity to be heard.[41] Because of the prima facie evidence of jurisdiction in the 1961 bilateral agreement, the Court first noted it could institute the interim measures without prejudging its jurisdiction on the merits.[42] The Court next found that implementation of Iceland's claim would prejudice England's fishing rights, but that to determine the extent of the British rights quantitative evaluations of the rights should be based on statistical information from the past five years rather than ten years as argued by the United Kingdom.[43] The Court then granted interim measures, reviewable within a year at the request of either party to determine if a continuation, modification or revocation was in order.[44] In the

37. The two previous cases were the Corfu Channel Case, [1949] I.C.J. 244 (Albania refused to pay damages awarded to the British), and the Anglo-Iranian Oil Co. Case, [1951] I.C.J. 89 (Iran expropriated oil company against Court's order of interim measures). A similar defiance of an interim measures order occurred in the *Nuclear Test Case*, [1973] I.C.J. ____, *reprinted in* 12 INT'L LEGAL MATERIALS 749 (1973) (France carried out the nuclear test against the order of the Court).

38. Interim Measures, *supra* note 5.

39. Judgment, *supra* note 8.

40. Continuance, *supra* note 6.

41. Interim Measures, § 17.

42. Interim Measures, § 20.

43. Interim Measures, §§ 22, 26.

44. The interim measures may be summarized as follows: (1) neither party should aggravate the dispute; (2) the parties should not prejudice the rights of either party whatever the decision on the merits; (3) Iceland should not take measures to enforce her claim against British vessels fishing in the disputed waters; (4) Iceland should not apply administrative, judicial or other measures against British ships because of such fishing activities; (5) the United Kingdom should insure a maximum catch of 170,000 metric tons from the disputed waters; and (6) the United Kingdom must give Iceland and the Court all relevant information, orders issued and arrangements made concerning the control and regulation of fish catches in the area. Interim Measures, § 26.

second major ruling, the Judgment on Jurisdiction,[45] the Court, after reviewing the history of the proceedings,[46] summarizing the British arguments[47] and piecing together Iceland's contentions,[48] justified its continuance of the case despite Iceland's nonappearance, because of its obligation under article 53 to examine *propio motu* the jurisdiction question.[49] Having narrowed the issue to whether the dispute was within the compromissory clause on the 1961 bilateral agreement, and having stated that on the face of the Application the dispute fell precisely within the terms of the clause, the Court concluded that under the circumstances a review of the negotiations leading to the bilateral agreement was necessary.[50] Through an analysis of letters and information exchanged by the two governments, the Court determined that this history reinforced the United Kingdom's right to file its Application and the validity of the Court's jurisdiction.[51] Having refuted other possible Icelandic objections,[52] the Court concluded that its jurisdiction could be based on either the bilateral agreement or articles 36 and 53, and, accordingly, assumed jurisdiction.[53] In the third major ruling, the Continuation of the Interim Measures, the Court reviewed the Applicant's request and Iceland's observations,[54] took notice of the resumption of negotiations between the states,[55] and reaffirmed its concern to preserve the rights of the parties.[56] Based on this review, the Court confirmed the continuation of the interim measures.[57]

45. After indicating the interim measures, the Court ordered that the first pleadings be addressed to the question of the jurisdiction of the Court to entertain the dispute. Jurisdiction Question, *supra* note 7.

46. Judgment, §§ 5-7.

47. Judgment, §§ 8, 9.

48. Judgment, §§ 24-29.

49. Article 53 provides: "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim. 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law." I.C.J. STAT. ar. 53.

50. Judgment, §§ 11-17.

51. Judgment, 18-23.

52. *See* note 11 *supra.*

53. Judgment, §§ 44-46.

54. Continuance, §§ 1-3.

55. Continuance, §§ 4-7.

56. Continuance, § 8.

57. Continuance, § 8 (by an 11 to 3 vote).

The instant case indicates a willingness of the Court to pursue controversial cases to a greater extent than earlier Courts.[58] Possible reasons for this increased persistence are that the Court has been affected by the contemporary situation or, conversely, that it has become more secure in its judicial role. More than with most courts, the political situation of ICJ cases must be evaluated because of the Court's consensual jurisdiction and its use of world opinion to enforce its decisions. The Court undoubtedly has been aware of its diminishing international role,[59] increasing criticism of its prolonged procedures,[60] and of the preparations for the United Nations Law of the Sea Conference.[61] In 1972, the Court reacted to criticism of its procedures by amending several of its rules.[62] By granting the interim measures on merely prima facie evidence of jurisdiction, and subsequently finding jurisdiction, the Court may be attempting to assert itself into a more prominent international role; however, thus far, its recent attempts have not been successful.[63] In fact, the Court may have inadvertently further diminished its influence because Iceland probably will gain more fisheries jurisdiction through the Law of the Sea Conference than by submit-

58. This conclusion is supported by the persistence of the same Court in the *Nuclear Test Case*. *See* note 30 *supra*.

59. *See* Brown, *The 1971 I.C.J. Advisory Opinion on South West Africa (NAMIBIA)*, 5 VAND. J. TRANS'L L. 213 (1971); Vallat, Fawcett, & Gross, *The Function of the International Court of Justice in the World Community*, 2 GA. J. INT'L & COMP. L. 55, 59, 65 (Supp. 2 1972); N.Y. Times, June 7, 1973, at 44, col. 3.

60. Gross, *Review of the Role of the International Court of Justice*, 66 AM. J. INT'L L. 479 (1972).

61. The United Nations General Assembly agreed to hold the Conference two years before the disputed Althing Resolution of 1972. G.A. Res. 2750C, 25 U.N. GAOR Supp. 28, *reprinted in* 10 INT'L LEGAL MATERIALS 226 (1971).

62. Amendments to some of the rules were accepted in 1972; however, since they are not retroactive they had no effect on this case. They are intended to decrease the time between the filing of an application and the decision of the Court. Jiménes de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1 (1973).

63. Although the United Kingdom and Iceland have sporadically attempted to negotiate a settlement, Iceland has continued to refuse to appear before the Court or to obey the interim measures. N.Y. Times, April 10, 1973, at 5, col. 1; N.Y. Times, May 20, 1973, at 13, col. 5; N.Y. Times, May 30, 1973, at 9, col. 1; N.Y. Times, June 7, 1973, at 44, col. 3; N.Y. Times, June 27, 1973, at 38, col. 1; The Sunday Times (London), Sept. 30, 1973, at 9, col. 4.

ting to the Court's jurisdiction.[64] The United Kingdom, having realized a decision of the Court would be a short-lived victory, seems to be attempting to reach an agreement with Iceland.[65] The Court itself may have concluded that any decision it makes would be superseded by the results of the forthcoming Conference.[66] Some of the proposals to be considered by the Conference may support the second hypothesis for the increased persistence—the Court's increased self-confidence. The United States and other members of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor have proposed another international court to supervise the terms of the contemplated treaty.[67] These proposals may indicate that the member states of the United Nations are increasingly willing to submit disputes to international arbitration and the Court's role would be strengthened by such a development. Significantly, because of these motivating forces, the Court appears to be attempting to correct some of its shortcomings and to become a more viable force in the United Nations community. Such a change would be a welcomed indication of a more rational world order.

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64. Iceland, through the Court, could obtain up to a 50-mile limit, while through the Conference it might obtain as much as 200 miles. The Times (London), Oct. 3, 1973, at 1, col. 7.

65. The ships of the British Navy withdrew from the disputed area in October 1973, relieving some of the international tension and concern over the situation. The Times (London), Oct. 3, 1973, at 1, col. 7.

66. There is a Committee established to draft a treaty regarding fisheries jurisdiction at the Conference. *See* G.A. Res. 2750C, 25 U.N. GAOR Supp. 28, *reprinted in* 10 INT'L LEGAL MATERIALS 226 (1971).

67. Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Report of Sub-Committee I, Annex III, U.N. Doc A/AC.138/94/Add.1 (1973); Statement by Ambassador Stevenson, Chairman of the United States Delegation to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Press Release by U.S. Information Service, Geneva, Switz. (Aug. 22, 1973).

JURISDICTION—NATO—NORTH ATLANTIC TREATY ORGANIZATION STATUS OF FORCES AGREEMENT NOT AN EXCLUSIVE REMEDY FOR MEMBER OF UNITED STATES FORCE OR CIVILIAN COMPONENT

Plaintiff, a British national and civilian employee of the United States Army, was injured while serving on an Army vessel[1] in the territorial waters of the Netherlands. Pursuant to article VIII(5) of the North Atlantic Treaty Organization Status of Forces Agreement (NATO/SOFA),[2] plaintiff filed a claim[3] with the Dutch Ministry of Defense[4] as a "third party"[5] claimant. The Dutch Ministry

1. The vessel was in transit from West Germany to England. It was stipulated that the plaintiff was injured in the performance of his duties and that the voyage was in fulfillment of United States obligations under the North Atlantic Treaty Organization.

2. Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953] 4 U.S.T. 1972, T.I.A.S. No. 2846 (effective Aug. 23, 1953) [hereinafter cited as NATO/SOFA]. NATO/SOFA addresses the peacetime situation in which troops from one NATO country would be stationed in or passing through another NATO country. The treaty covers such areas as passport and visa regulations, immigration inspections, the carrying of arms, criminal and civil jurisdiction, the settlement of claims, local procurement and local civilian labor requirements, and customs and foreign exchange regulations. The twelve original signatories were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States. Article VIII deals with claims arising out of the acts of members of a foreign force or civilian component in the host country where the foreign force or civilian component is either stationed or in transit. The article provides that all claims shall be filed, considered, and settled or adjudicated in compliance with the laws and regulations of the host country. Claims are handled in the same manner as those filed in the host country against members of the armed forces of the host country. To prevent the awarding of excessive damages, the host country must pay 25% of the settlement. Paragraph 5 of the article states that these provisions shall apply to "[c]laims . . . arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is responsible, and causing damage in the territory of the receiving host State to *third parties*, other than any of the Contracting Parties . . . ." NATO/SOFA, art. VIII(5) (emphasis added).

3. Plaintiff initially filed an administrative claim with the Department of Labor under the Federal Employees Compensation Act, 5 U.S.C. §§ 8101 *et seq.* (1970). The Department ruled that his remedy lay under NATO/SOFA.

4. The Ministerie van Defensie, Dirictie Juridische Zaken, The Hague (the Ministry of Defense) was the agency designated by Dutch authorities to hear and settle claims. NATO/SOFA, art. VIII(5)(a).

5. This term is in article VIII(5), but is not defined by NATO/SOFA.

rejected plaintiff's claim on the ground that plaintiff was a member of a "civilian component"[6] attached to the United States "force"[7] in the Netherlands and therefore was not a "third party" under article VIII(5) of NATO/SOFA. Plaintiff then sought recovery against the United States in United States district court under the Public Vessels Act[8] and the Suits in Admiralty Act.[9] Defendant United States moved for summary judgment, contending that plaintiff's exclusive remedy[10] was under article VIII(5) of NATO/SOFA and that plaintiff's proper course of action was an appeal of the Ministry's decision in the Dutch courts.[11] Defendant further contended that a Department of Defense directive[12] that

6. Article I(1)(b) of NATO/SOFA reads: " 'Civilian component' means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty . . . ." NATO/SOFA, art. I(1)(b). Because plaintiff was a national of a contracting party (the United Kingdom), he qualified as a member of a "civilian component" for purposes of this definition.

7. " '[F]orce' means the personnel belong to the . . . armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connection with their official duties . . . ." NATO/SOFA, art. I(a).

8. 46 U.S.C. §§ 741 *et seq.* (1970).

9. 46 U.S.C. §§ 781 *et seq.* (1970).

10. Brief for Defendant at 15, Newington v. United States, 354 F. Supp. 1012 (E.D. Va. 1973). For the proposition that NATO/SOFA, when applied to the *Newington* facts, provided an exclusive remedy, defendant cited Shafter v. United States, 273 F. Supp. 152 (S.D.N.Y. 1968), *aff'd per curiam*, 400 F.2d 584 (2d Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969). In *Shafter*, relatives of German citizens killed in a collision between their fishing boat and a United States naval vessel sought to bring an action under the Public Vessel Act. A United States district court granted defendant's motion for summary judgment holding that article VIII of NATO/SOFA applied to the facts presented and excluded concurrent and inconsistent jurisdiction invoked by plaintiffs under the Public Vessels Act.

11. Defendant argued that the Netherlands should consider plaintiff as one who had been injured by a member of the Dutch armed forces. Defendant noted that article 1403(3) of the Dutch Civil Code provides for suits against the Kingdom of the Netherlands in such cases. Brief for Defendant at 22.

12. The directive was from the Deputy General Counsel for the Defense Department and addressed to the claims division of the Air Force. The directive states that it is "legally permissible and in fact desirable . . . to permit and encourage the claims authorities of the foreign countries involved to process and pay the claims of . . . personnel under the provisions of Article VIII of NATO/SOFA if such personnel pursue such remedy." The directive notes that the Army

classified members of a force or civilian component as proper third party claimants was an executive interpretation[13] of NATO/SOFA that should be accepted by the district court.[14] Plaintiff, relying on the negotiative history of NATO/SOFA, argued that the framers did not intend that a member of a force or civilian component be considered a third party claimant under article VIII(5) and, therefore, article VIII(5) was not his exclusive remedy. The United States District Court for the Eastern District of Virginia, *held*, defendant's motion for summary judgment denied. When a member of a United States force or civilian component, who is injured in a NATO country, is not recognized by that NATO country as a proper third party claimant under article VIII(5) of NATO/SOFA, the injured party is not compelled to regard NATO/SOFA as his exclusive remedy. *Newington v. United States*, 354 F. Supp. 1012 (E.D. Va. 1973).

With the onset of the Cold War, the NATO countries realized

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had not allowed such claims in the past because of the objections of Canada and the United Kingdom. To meet their requests the directive provides that the policy of considering United States military personnel and employees of the military as "third parties" when damaged in the host country should be applied only when the other NATO partner wishes its troops to be accorded like treatment when in the United States. The Department of Defense directive, dated February 26, 1959, was furnished by Emmet B. Lewis, attorney for defendant.

13. As a general proposition, United States courts give "great weight" to executive interpretations of treaties. Factor v. Laubenheimer, 290 U.S. 276, 295 (1933). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 152 (1965).

14. Since NATO/SOFA is a multilateral treaty, the manner in which other signatories have dealt with article VIII(5) should be considered; unfortunately, there are few reported cases and pertinent statistics. Defendant cited Browning v. The War Office and Another, [1963] 1 Q.B. 750 (C.A.), in which a United States serviceman, who was stationed in England and injured while a passenger in a vehicle negligently driven by a British serviceman, was allowed to recover in a suit against the British War Office. Defendant alleged that the United States serviceman's status as a "third party" claimant was challenged unsuccessfully in the unreported proceeding of the trial court. The cited Court of Appeals decision dealt only with the question of damages. Brief for Defendant at 12, 13. Defendant submitted the pleadings and judgment of an unreported Canadian case, Bradley v. The Queen, No. 112199 in the Exchequer Court of Canada, decided May 15, 1957. In *Bradley*, plaintiff, a Canadian national and civilian employee of the United States Air Force in Canada, was injured through the negligent driving of a United States serviceman. Plaintiff recovered in a suit against the Canadian Government. No mention of NATO/SOFA was made in either the pleadings or the judgment.

that the multilateral nature of their defense commitments would require the stationing of troops of one NATO country in the territory of another. NATO/SOFA represents an attempt by these nations to establish the rights and duties of these troops while they are stationed in or passing through the territory of a NATO partner. Article VIII of the agreement was designed to settle by administrative action of the host government claims that arise as a result of the activities of the foreign force or its civilian component in the host country. One potential claimant under article VIII is the "third party." The agreement excludes a NATO government from the definition of "third party" but otherwise does not define the term. The negotiative history[15] of NATO/SOFA reveals that the negotiators viewed the third party as a citizen of the host country who was wronged by a member of a visting NATO force.[16] During the negotiations, the United States representative to the Working Group expressed the fear that an arbitrator settling claims under article VIII would be too partial to his compatriots,[17] thus expressing the assumption that recurred throughout the negotiating and legislative history of the agreement that the person hearing the claim and the person bringing the claim would be citizens of the same state.[18] In describing new obligations incurred by the United States under NATO/SOFA, the State Department noted that the NATO/SOFA claims procedure enables local citizens claiming injury by NATO armed forces to pursue their claim through their

15. *See* U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES 1961 (J. Snee ed. 1966).

16. The minutes of the Working Group meeting of June 5, 1951, state that the Italian Representative stated that prompt payment under article VIII(5) was essential "to maintaining good relations between the force and the *local population.*" *Id.* at 566 (emphasis added).

17. *Id.* at 152.

18. *Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. (1953) [hereinafter cited as *Senate Hearings*]; *Supplementary Hearing on Status of Forces of the North Atlantic Treaty Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. (1953). One witness, in citing an example when article VIII(5) would be applicable, envisioned a visiting division overrunning a farmer's crops. Statement of Walter Bedell Smith, Under Secretary, Department of State, *Senate Hearings*, at 6. Another witness gave an example of an American jeep colliding with a privately owned French vehicle. Statement of Robert Haydock, Counsel for Foreign and Military Affairs, Department of Defense, *Senate Hearings*, at 18.

own government's administrative agency.[19] While an injured member of the same force or civilian component was not envisioned as a proper third party, however, he was not barred from asserting third party status in a claim for damages. Thus the Department of Defense in interpreting and actually administering the terms of article VIII(5) encouraged third party claims to be filed by United States servicemen and civilian defense employees in those NATO countries that wished reciprocal treatment in the United States for their troops.[20] An important policy decision affecting selection of the proper jurisdiction in which to bring a damage claim was inherent, though unstated, in the 1959 directive.[21] United States servicemen and civilian defense employees were directed to file their claims at "the place of the wrong" regardless whether there were sufficient "significant contacts" or "governmental interest" in the foreign state in which the tortious act occurred to justify the foreign state's assuming jurisdiction.[22] The policy announced in the

19. The State Department reply noted: "We are obliged to recognize the new procedure for settlement of possible claims under which the local citizen has a right to claim through his government and receive settlement from it . . . ." *Senate Hearings, supra* note 18, at 28, 29 (emphasis added).

20. One commentator, a former Legal Adviser to the Allied Forces, Central Europe, noting that article VIII(5) is "quite comprehensive as to the [sic] persons," opined that "the absence of any restriction in NATO/SOFA even allows a member of a Force or of a civilian component having suffered damages through acts or omissions of another member of a Force or of a civilian component while they were both on duty to claim on the basis of article VIII, paragraph 5 to the extent to which his personal damages have not already been compensated for. This interpretation . . . seems to us to derive from the general trend of the Agreement." S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 305, 306 (1971).

21. *See* note 12 *supra.*

22. The traditional rule in state courts of the United States is that the law of the place of the wrong governs the substantive rights of parties involved in tort litigation. This rule—*lex loci delicti*—is based on the "vested rights doctrine," which holds that rights and liabilities of a party vest at the time of the tort and there remain until effected by the court in whatever jurisdiction the action happens to be brought. *See* 3 J. BEALE, THE CONFLICT OF LAWS § 73, at 1967-69 (1935). This was the position taken by the original *Restatement. See* RESTATEMENT OF CONFLICT OF LAWS § 384 (1934). Under the *lex loci* rule, the judicial task was simple and predictable; the court merely identified the place of the wrong and applied the law of that jurisdiction. Persistent scholarly criticism noted that the rigidity of the rule did not permit courts to assess the policy considerations of a forum whose contacts with the parties and issues might far outweigh those of the

directive, however, was not followed in dealings with the Federal Republic of Germany when the Supplementary Agreement[23] was negotiated.[24] The Supplementary Agreement incorporated by reference[25] the claims provisions of article VIII but added that the article would not apply to damage suffered by members of a force or civilian component injured by members of that same force or civilian component.[26]

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place of the wrong. *See, e.g.*, R. LEFLAR, AMERICAN CONFLICTS LAW § 90, at 206 (rev. ed. 1968); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945). Beginning in the early sixties, some state courts, seeking to avoid what they considered to be harsh results, looked to the law of the place having dominant contacts or most significant contacts with the issues in litigation. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The *Restatement (Second)*, in a significant change of emphasis, urges the application of the "law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). The *Restatement* then cites cases in over twenty jurisdictions that have adhered to this general principle. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Citations to § 145, app. at 592-603 (1971). Thus, the trend away from a mechanistic application of the *lex loci* rule is unmistakable. The same trend is observable in the federal courts, which are required to use the conflict law as well as the local law rule of the states in which they are sitting in diversity cases. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

23. Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, July 1, 1963, [1963] 11 U.S.T. 531, T.I.A.S. No. 5351 (effective July 1, 1963) [hereinafter cited as Supplementary Agreement].

24. The Federal Republic of Germany became a Party to the North Atlantic Treaty on October 23, 1954, the same day that the Occupying Forces ended the occupational regime in Germany. NATO partners felt that simple accession to NATO/SOFA by the Federal Republic would not provide adequate rights and immunities for their troops in Germany. Thus, supplemental agreements were concluded between the Federal Republic and Belgium, Canada, France, the Netherlands, the United Kingdom, and the United States and signed in Bonn on August 3, 1959. Ratification was not accomplished until July 1, 1963. For a more complete history of the Federal Republic's accession to NATO/SOFA see S. LAZAREFF, *supra* note 20, at 430-32.

25. Supplementary Agreement, art. 41(1).

26. Article 41(6) of the Supplementary Agreement states: "[T]his Article shall not apply to damage suffered by members of a force or of a civilian component and caused by acts or omissions of other members of the same force or the

The court in the instant case viewed the Department of Defense directive[27] concerning the third party status of a member of a force or civilian component for article VIII(5) purposes as requiring reciprocity of treatment between the United States and the other NATO countries. The court stated that the refusal[28] of the Dutch Ministry of Defense to recognize plaintiff's third party status, in the absence of a mutual agreement to the contrary between the United States and the Netherlands, precluded plaintiff's bringing an action under the article. The court also noted that the language of the Department of Defense directive[29] was permissive rather than mandatory, making third party status available to members of a force or civilian component when reciprocity is present but not compelling its use as an exclusive remedy, and expressed its agreement with the policy of limiting the term "third party" to local citizens of the host country, quoting supporting passages[30] from both the negotiating and legislative histories of NATO/SOFA. This policy, the court reasoned, is consistent with the choice-of-law principle of significant contacts.[31] The court stated that even following the terms of the Department of Defense directive[32] plaintiff

same civilian component . . . ." Thus, had the instant case arisen in West Germany, the Supplementary Agreement clearly would have barred plaintiff's asserting third party status.

27. *See* note 12 *supra*.

28. 354 F. Supp. at 1015. The court did not discuss defendant's contention that plaintiff should be made to appeal the decision of the Dutch Ministry of Defense in the Dutch courts. *See* note 12 *supra*.

29. *See* note 12 *supra*.

30. 354 F. Supp. at 1015. *See* note 16 *supra*.

31. 354 F. Supp. at 1015. The court cited Lauritzen v. Larsen, 345 U.S. 571, 582 (1953). In *Lauritzen*, a Danish seaman, who was temporarily in New York and knew that the rights of crew members would be governed by Danish law, signed on a ship of Danish flag and registry and owned by a Danish citizen. The seaman was injured while the ship was in Havana. The court found that Danish law was favored by an overwhelming preponderance of the connecting factors and that plaintiff should not be allowed to bring an action under the Jones Act. It can be argued that a slight shift in the *Newington* facts—the involvement of Dutch citizens or property—dictates that a Dutch civil court is the more appropriate forum from the standpoint of significant contacts. Thus, application of a significant contacts standard will not guarantee automatic selection of either the host country or the visting country as the proper forum. The way is still left open for ad hoc determinations. The instant court, presented with an injury that occurred on a ship in transit through Dutch waters, dealt with a simplified fact situation and did not find it necessary to approach this difficult problem.

32. The court viewed the Department of Defense directive as making third

could not be accorded third party status and, therefore, need not consider NATO/SOFA his exclusive remedy.

The instant case reveals the need for clarification of the phrase "third party" in the NATO/SOFA treaty. The failure to define this phrase may be the result of an assumption, present in both the negotiating and the legislative history, that the third party would be a local citizen of the host country. In narrowly interpreting the term "third party," the *Newington* court was able to reach a result that is in accord with the court's stated[33] preference for a policy that would confer third party status only on local citizens under the choice-of-law principle of significant contacts. It can be argued that although the third party claim procedure primarily envisioned local citizens, it is not limited to them. It is difficult to argue, however, that such a notable group as injured members of the same force or civilian component would have gone unmentioned if the framers had contemplated their protection under this article. The Department of Defense directive,[34] instead of specifically addressing this omission, took an ad hoc approach and affirmed different policies for different NATO countries, depending on a finding of reciprocity. Thus, it is only in pursuing a claim that a claimant may discover whether reciprocity exists and thereby determine which policy is in effect. The *Newington* court, in much the same way as the directive, proposed an ad hoc solution based on a finding of reciprocity or lack thereof but, again like the directive, did not forumlate standards on which to base that finding. *Newington* still leaves the future claimant without standards to which he can refer in advance of administrative or judicial proceedings and compels the claimant and his attorney to act on the basis of an informed guess. Because of the facts in this case, this court did not have to decide under what circumstances, if any, NATO/SOFA should be regarded as providing an exclusive remedy. If the purpose of article VIII(5) is merely to provide a more convenient method of settling claims, rather than the only acceptable method of doing so, there may not be a need or a desire to make its remedy

party status available only when reciprocity of treatment was intended. The court felt that plaintiff's treatment by Dutch authorities demonstrated a lack of reciprocity and, thus, made third party status unavailable to plaintiff. 354 F. Supp. at 1015.

33. 354 F. Supp. at 1015.

34. *See* note 12 *supra*.

exclusive.[35] The effect of the *Newington* ruling is limited further by the multilateral character of NATO, which necessarily discourages according great weight to the decisions of the courts of one nation. The solution for this state of affairs lies with the NATO governments that failed to adequately define "third party." The NATO countries must decide whether their respective courts and administrative agencies are the proper forum for settlement of claims by members of the same visting force or civilian component. This determination may depend on the standard the NATO nations believe is proper for assumption of jurisdiction over damage claims. Adherence to choice-of-law principles of significant contacts or governmental interest often would lead to a view that foreign courts or administrative agencies are not the proper forum for settlement of such claims and should not assume jurisdiction over them. On the other hand, jurisdiction based on the clear, albeit somewhat arbitrary, standard of "place of the wrong" would allow settlement of such claims and assure relative certainty of the proper forum for relief. The place of the wrong standard would still permit prompt, efficient settlement of claims filed by local citizens. Nations may not wish, however, to assume jurisdiction over claims that fortuitously occur in their territory but otherwise have no connection with their nationals. Once the NATO nations agree on a proper basis for assumption of jurisdiction over damage claims, the term "third party" can be redefined specifically to include or exclude settlement of claims filed by members of the same visting force or civilian component pursuant to article VIII(5). Only after clarifying the term "third party" should the NATO nations consider the desirability of making such a remedy exclusive.

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35. If the remedy provided is to be made exclusive it must also be made unambiguous, not only for the manner in which relief is sought but also for those persons who should properly regard it as their remedy. A court will be reluctant to infer that a remedy is exclusive when to do so would leave without remedy one who is the apparent victim of imprecise drafting.