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Doctrine of Foreign Equivalents in Trademarks

Of Growing Importance Resulting from Increase in International Trade

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Foreign word marks have long been a part of America's marketing landscape. GREY POUPON®, PERRIER®, ENTRE NOUS®, KIRIN®, TRESOR®, among countless other marks, are well recognized in our culture.[1] The explosion of cyberspace and the expanded opportunities for international shopping brought about by the Internet will only increase the number of foreign tradenames washing up on our shores. As Web Sites proliferate offering wares from around the world, retailers will likely grow increasingly aggressive in adopting chic, exotic-sounding foreign names—in the relentless effort to uniquely "brand" their products. Against this backdrop, the "Doctrine of Foreign Equivalents"[2] takes on added significance.

Recent trademark controversies arising in New York highlight the potential issues in selecting foreign generic marks.[3] Both the Second Circuit Court of Appeals and the federal district court for the Southern District of New York, analyzed below, recently reaffirmed the vitality of the Doctrine of Foreign Equivalents.

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1. GREY POUPON®, French for "little baby," is a registered trademark of Del Monte Corporation. The mark has been registered since 1986 for use in connection with prepared mustard (International Class 30) under U.S. Registration No. 1,398,731. PERRIER®, French for "quarry man," has been registered to Perrier Vittel S.A. under, among others, U.S. Registration No. 1,151,186 for use in connection with carbonated mineral table water since April 14, 1981. ENTRE NOUS®, French for "between us," is registered to, among others, Paterno Imports, Ltd. for use in connection with wines (International Class 33) under Registration no. 2,051,400, dated April 8, 1997 and to S.L. Kaye Company, Inc. for use in connection with candy (International Class 30) under Registration no. 1,865,371, dated November 29, 1994. KIRIN®, translated as "legendary animal" has been registered to Kirin Co., Ltd. of Korea since July 7, 1998 under U.S. Registration No. 2,171,389 for use in connection with foods and ingredients and ingredients of foods (International Class 30). TRESOR® French for "treasure," has been registered for use in connection with body oils, sprays and powders since January 25, 1994 to Lancome Parfumes et Beaute & Cie under U.S. Registration No. 1,817,658.

2. 2 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, § 23.36, at 23-82 (4th ed. 1996) (espousing a sound, sight and meaning trilogy of analysis under the doctrine). The doctrine operates so as to translate foreign words from common languages into English in order "to determine similarity of meaning and connotation in order to ascertain confusing similarity with English word marks." *Id.* However, "[s]imilarity in meaning may well be outweighed by differences in sight and sound and other foundational factors. *Id. See* Charles E. Bruzga & Caterina Civera-Tomaselli, 76 J. PAT. & TRADEMARK OFF. SOC'Y 571, 571 (1994) ("The meaning of [a] proposed trademark is considered under the so-called doctrine of foreign equivalents, wherein foreign words, at least from non-obscure languages, are translated into their English equivalents and evaluated according to customary trademark standards."); Frehling Enterprises, Inc. v. International Select Group, Inc., 1999 WL 828605, *9 (11th Cir. 1999) ("Under the 'doctrine of foreign equivalents,' a word from another language that is commonly used in that language as the generic name of a product cannot be imported into the United States and thereby transformed into a valid trademark.") (quoting 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 12:41, at 12-83 (4th ed.1996)).

3. *See, e.g.,* Otokoyama Co., Ltd. v. Wine of Japan Import, Co., 175 F.3d 266 (2d Cir. 1999); Orto Conserviera Cameranese D Giacchetti Marino & C.S.N.C. v. Bioconserve, S.R.L., and Penta International, Inc., 1999 WL 47258 (S.D.N.Y. 1999).

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The Doctrine of Foreign Equivalents demands that foreign language marks be evaluated based on their accepted foreign usage.[4] Domestically, trademark attorneys are familiar with the well-established principle that generic terms enjoy no trademark protection.[5] Just as bestowing trademark protection for generic terms in English is impermissible because competitors will not be able to describe their goods as what they are, trademark protection for foreign generic words is also generally prohibited.[6] As international boundaries continue to evaporate in the era of cyberspace, these principles will become increasingly familiar to attorneys and businesses merchandising foreign wares.

This article examines the core operative language in the U.S. trademark law permitting registration of federal marks, be they foreign or domestic. Also covered are the basic categories of trademarks, arranged according to their relative strength or weakness. After providing a general overview of the American prohibition against registration of generic terms, the article examines closely the Doctrine of Foreign Equivalents. Opinions reviewed include early cases involving the Doctrine, and more recent cases such as the Southern District of New York's decision in *Orto Conserviera Cameranese D Giacchetti Marino & C.S.N.C. and Penta International, Inc. v. Bioconserve S.R.L. and Bella d Cerignola, Inc.*,[7] and the Second Circuit Court of Appeals' related decision in *Otokoyama Co. v. Wine of Japan Import Inc.*[8] Finally, the article considers certain limitations on the Doctrine's applicability, generated by surrounding case law.

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4. *See* Michelle Belluzzi, *Cultural Protection as a Rationale For Legislation: The French Language Law of 1994 and the European Trend Toward Integration in the Face of Increasing U.S. Influence,* 14 DICK. J. INT'L. L. 127, 135 (1995) (explaining that a nation's language is constantly evolving to incorporate new and useful foreign terms); *see also* J. Thomas Warlick IV, *Of Blue Light Specials and Gray-Market Goods: The Perpetuation of the Parallel Importation Controversy,* 39 EMORY L.J. 347, 408 (1990) (discussing that while authorization of foreign usage of a U.S. registered trademark occurs the U.S. markholder seeks to retain his original ownership rights). *See generally* John T. Cross, *The Special Role of Trademarks, Trade Names, and Other Trade Emblems*, 76 NEB. L. REV. 95 (1997) (describing that most courts apply the doctrine to borrowed foreign terms. Under this approach, the court translates the word into English and then determines whether the English word qualifies for protection).

5. *See* Peter Sloane, *Trademark Vigilance in the Twenty-first Century: A Pragmatic Approach*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 823, 835 (1999) ("[U]nder foreign equivalents doctrine the rule is that a generic term is not entitled to trademark protection also a mark is not entitled to protection if the word designates the product in a language other than English"); Blinded Veterans Ass'n v. Blinded American Veterans Foundation, 872 F.2d 1035 (Fed. Cir. 1989) (holding the mark at issue to be generic, and therefore, not entitled to trademark protection). *See generally* Steven M. Auvil, *Gray Market Goods Produced by Foreign Affiliates of the U.S. Trademark Owner: Should the Lanham Act Provide a Remedy?*, 28 AKRON L. REV. 437, 448 (1995) (discussing the important role that trademarks perform and that they need legal protection in order to be effective at the task).

6. *See, e.g.,* Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions,* 18 LOY. L.A. INT'L & COMP. L.J. 431, 462 (1996) (discussing that Trademark Law bars the use of certain words including symbols that are similar or identical to state names, national flags or emblems, or military flags or decorations of China or other foreign countries); Cynthia Vuille Stewart, *Trademarks in Russia: Making and Protecting Your Mark*, 5 TEX. INTELL. PROP. L.J. 1, 5 (1996) (illustrating the concept through the German company Bayer who was unable to attain trademark protection in foreign nations). *See generally* John T. Cross, *The Special Role of Trademarks, Trade Names, and Other Trade Emblems*, 76 NEB. L. REV. 95, 137 (1997) (stating that "A foreign trade emblem may itself become a generic English term, especially when the product or service to which the emblem is attached is unique.").

7. (S.D.N.Y. No. 97 Civ. 6638) 1999 W.L. 47258, at *1.

8. 2d Cir. No. 97-9611, 4/29/99.

Background—Trademarks Defined

Any analysis of trademark issues must begin with the Lanham Act.[9] The Lanham Act defines a "trademark" as "any word, name, symbol, or device, or any combination thereof (1) used by a person, or (2) which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods. . . ."[10]

A key concept under the Lanham Act is the "use" of a mark "in commerce."[11] "Use in commerce," as defined under the Act, means the bona fide use of a mark in the ordinary course of trade, and "not [use] merely to reserve a right in a mark."[12] Under the Act, a mark is deemed to be used in commerce "when . . . it is placed in any manner on the goods or their containers

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9. 15 U.S.C.A. § 1127 *et seq*. *See* Judith Beth Prowda, *The Trouble with Trade Dress Protection of Product Design,* 61 ALB. L. REV. 1309, 1319 (1998) ("First, the Lanham Act promotes the distinguishability of goods and services for the protection of the public as well as of businesses. Second, the Lanham Act protects the goodwill of manufacturers and merchants and their investment of energy, time, and money from misappropriation by parties and cheats. The vehicle primarily used for trade dress protection under federal law is . . . the Lanham Act, which covers unregistered and registered marks."); Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, The Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 299 (1996) (highlighting that the Lanham Act is also known as the Trademark Act of 1946).

10. The Lanham Act contains a parallel definition for service marks, which generally receive equal treatment under the Lanham Act. Under the Act, the term service mark "means any word, name, symbol, or device, or any combination thereof - (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown. Titles, character names, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor." 15 U.S.C.A. § 1127. *See* McLean v. Fleming, 96 U.S. 245, 252 (1877) (discussing that a court proceeds on the ground that a complainant under the Lanham Act must have a valuable interest in the good-will of his trade or business); Qualitex Company v. Jacobson Products Company, Inc., 514 U.S. 159, 174 (1995) (holding that the Lanham Act permits the registration of a trademark that consists, purely and simply of a color). *See generally* Steven M. Auvil, *Gray Market Goods Produced by Foreign Affiliates of the U.S. Trademark Owner: Should the Lanham Act Provide a Remedy?*, 28 AKRON L. REV. 437, 448 (1995) (stating that "[t]he Lanham Act § 45, defines a trademark to include: any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.").

11. 15 U.S.C.A. §§ 1051-1052 (1994) (allowing registration of marks by persons with bona fide intentions to use the marks in commerce and placing certain limitations on what marks are registrable, including a ban against registration of deceptive marks); 15 U.S.C.A. § 1125(c) (1996) (providing for remedies for dilution of marks where. . . . The owner of a famous mark shall be entitled . . . to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection). *See* Miles Labs., Inc. v. Frolich, 195 F. Supp. 256, 257 (1961) (stating that Congress had the power to enact legislation to protect trademarks through the commerce clause of the Constitution).

12. 15 U.S.C.A. § 1127. *See* Gray v. Daffy Dan's Bargaintown, 823 F.2d 522, 526 (Fed. Cir. 1987) (stating that, "lawful use in commerce" is a prerequisite to valid application for registration); *see also* Faye M. Hammerley, *The Smell of Success: Trade Dress Protection For Scent Marks*, 2 MARQ. INTELL. PROP. L. REV. 105, 118 (1998) ("The applicant must provide she has a bona fide intent to use the mark. Otherwise, effective registration begins with the first use of the mark in interstate commerce. An applicant then files a Use-Based Application."). *See generally* Peter Sloane, *Trademark Vigilance in the Twenty-first Century: A Pragmatic Approach,* 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 823, 835 (1999) (defining the "use" of a mark means the bona fide use of that mark made in the ordinary course of trade, and not made merely to reserve a right in the mark).

or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and . . . the goods are sold or transported in commerce. . . ."[13]

Registration of Trademarks

The Lanham Act generally does not distinguish between foreign or domestic marks.[14] The Act universally provides for registration of all trademarks on the principal register of the U.S.

13. 15 U.S.C.A. § 1127. The Lanham Act provides a parallel provision for establishment of "use in commerce" in connection with services. Thus, under the Act a mark is deemed to be used in commerce "on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services." *See* Pub. L. 100-667, § 134(8); Drop Dead Co. v. S.C. Johnson & Sons, Inc., 326 F.2d 87, 94 (9th Cir. 1963) (holding that where the party sent across the country one item of her goods with a label appropriately attached therewith constituted transportation in commerce. So long as "the label is affixed and the goods transported in commerce, the mark is 'used in commerce' and thus, no distinction lays between a colorable use and actual use of a trademark"); Stauffer v. Exley, 184 F.2d 962, 966 (9th Cir. 1950) ("the word 'commerce' means all commerce which may lawfully be regulated by Congress"); City of Newark v. Beasley, 883 F. Supp. 3, 17 (D.N.J. 1995) ("[t]rademark and servicemark rights are established mark rights. There is no set formula as to the quantity of use required to establish mark rights. The general rule is that mark rights are not created by sporadic or de minimis use"); Avakoff v. Southern Pacific Co., 765 F.2d 1097, 1098 (Fed. Cir. 1985) (holding that the mere shipment of goods bearing the mark in which has yet to be registered constituted mere preparation for offering the goods for sale, and not use in commerce. Moreover, whether goods are used in commerce can be determined by asking "(1) [w]as the transaction upon which the registration application was founded bona fide;" and if yes, (2) "was it followed by activities proving a continuous effort or intent to use the mark.") (citing 2 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, § 19:37[c] (2d ed. 1983)).

14. 15 U.S.C.A. § 1126(f) (West 1998) (providing that domestic registration of a foreign mark "shall be independent of the registration of origin and the duration, validity, or transfer in the United States of such registration shall be governed by the provisions of this chapter"). *See* Berni v. Int'l Gourmet Rests. of America, 838 F.2d 642, 646 (2d Cir. 1988) (holding that any right given to foreign nationals under the Section 44 of the Lanham Act originates in U.S. law, and not the law of the foreign national's country) (citing Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 641 (2d Cir.) *cert denied*, 352 U.S. 871 (1956); *In re* Compagnie Generale Maritime, 993 F.2d 841, 855 (2d Cir. 1993) (reasoning that in order for a foreign trademark registrant to invoke the statutory protection of the Lanham Act, he must comply with the statute's requirement that equally applies to domestic registrants that the mark be used in commerce). *But see* Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733, 746 (2d Cir. 1994) (concluding that the Lanham Act was not intended to be "used as a sword to eviscerate completely a foreign corporation's foreign trademark" but rather to "shield against foreign uses that have significant trademark-impairing effects upon American commerce.").

Patent and Trademark Office (PTO).[15] The registration requirements are generally set forth at section 1052 of title 15.[16] The Act permits registration of any word, name, symbol, or device,

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15. 15 U.S.C.A. § 1051 (West Supp. 1999) (providing the procedures in which the owner of a trade-mark applies to register her trade-mark on the principal register); 15 U.S.C.A. § 1052 (West Supp. 1999) (describing the types of trade-marks that will be refused registration on the principal register based on the matter in which they contain). *See In re* Compagnie Generale Maritime, 993 F.2d 841, 852 (Fed. Cir. 1993) (citing 15 U.S.C.A. § 1051 and discussing trademark filing requirements).

16. Section 1051(a) lists the procedures by which an owner of a trademark used in commerce may register their trademark on the principal register. This provision states:

> (1) The owner of a trademark used in commerce may request registration of its trademark on the principal registrar hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement, in such form as may be prescribed by the Commissioner, and such number of specimens or facsimiles of the mark as used as may be required by the Commissioner. (2) The application shall include specification of the applicant's domicile and citizenship, the date of the applicant's first use of the mark, the date of the applicant's first use of the mark in commerce, the goods in connection with which the mark is used, and a drawing of the mark. (3) The statement shall be verified by the applicant and specify that—
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> (A) the person making the verification believes that he or she, or the juristic person in whose behalf he or she makes the verification, to be the owner of the mark sought to be registered;
>
> (B) to the best of the verifier's knowledge and belief, the facts recited in the application are accurate;
>
> (C) the mark is in use in commerce; and
>
> (D) to the best of the verifier's knowledge and belief, no other person has the right to use such a mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive, except that, in the case of every application claiming concurrent use, the applicant shall--
>
> (i) state exceptions to the claim of exclusive use; and
>
> (ii) shall specifiy, to the extent of the verifier's knowledge—
>
> (I) any concurrent use by others;
>
> (II) the goods on or in connection with which and the areas in which each concurrent use exists;
>
> (III) the periods of each use;
>
> (IV) the goods and area for which the applicant desires registration.

See generally, Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1047 (9th Cir. 1999) (concluding that the registrant's registration of his mark on the Principal Register in the Patent and Trademark Office constituted "prima facie evidence of the validity of the registered mark" however, ownership of such mark is governed by priority of its use in commerce). *But cf.*, Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733, 743 (2d Cir. 1994) (opining that even though one has obtained registration from the Patent and Trademark Office held by a prior user does not incontrovertibly establish his rights to use the trademark. If there is a likelihood of confusion, then the previous user of the trademark can cancel the subsequent user's registration).

or combination thereof.[17] The Act at section 1052 states that "[n]o trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature . . . ," unless it falls into one of several statutory categories.[18]

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17. *See* 15 U.S.C.A. § 1127 (West 1998) (defining "trademark" to include "any word, name, symbol, or device, or combination thereof . . . (1) used by a person, or (2) which a person has a bona fide intention to use in commerce. . .); *see also* Qualitex Co. v. Jacobson Products Co., Inc., 514 U.S. 159, 162 (1995) (providing that the Lanham Act should be construed broadly to mean that trademarks can include universe of things); Pebble Beach Co. v. Tour 18 I Ltd., 155 F.3d 526, 548 (5th Cir. 1995) (explaining that in 1988, Congress reenacted the definition of trademark to include "any word, name, symbol, or device, or combination thereof. . . ." This, along with the Lanham Act's legislative history, demonstrates that Congress intended that the Act and the protections it affords be broadly construed). *But see In re* Dixie Rests., Inc., 105 F.3d 1405, 1406 (Fed. Cir. 1997) (stating that the Patent and Trademark Office refused to register a trademark that was likely to cause confusion between another mark containing the same word, in that, (1) the services (restaurant) of both parties are legally identical; (2) the dominant part of Dixie's mark is identical to the registrant's mark; and (3) the other elements of Dixie's mark are indistinguishable from registrant's); Meridian Mutual. Ins. Co. v. Meridian Ins. Group, Inc., 128 F.3d 1111, 1115 (7th Cir. 1997) (where defendant used the same word in his business name and in the same industry as the registrant, the court granted an injunction preventing the defendants from using his mark on the ground that "'in light of what happens in the marketplace,' not merely by looking at the two marks side-by-side" the public is likely to be confused and unable to distinguish the two marks); *In re* K-T Zoe Furniture, Inc., 16 F.3d 390, 393 (Fed. Cir. 1994) (explaining that a "generic" name is always denied registration, but a "descriptive" term that describes the product may be registered if it establishes a secondary meaning); Qualitex Co. v. Jacbson Prods. Co., Inc., 514 U.S. 159, 163 (U.S. 1995) (explaining that "'[s]econdary meaning' is acquired when 'in the minds of the public, the primary significant of a product feature . . . is to identify the source of the product rather than the product itself'") (*citing* Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 n.11 (1982)).

18. 15 U.S.C.A. §§ 1052(a)-(f) (West Supp. 1999). The trademarks that are refused registration are those that contain: (a) "immoral, deceptive, scandalous," or disparaging matter, or matters in which a geographical indication is used in connection with wines or spirits on or after the WTO Agreement was enforced in respect the U.S.; (b) an "insignia of the United States, or of any State or of any municipality," or any similar branch of a foreign nation; (c) "a name, portrait, or signature identifying a living individual, unless by written consent, or of a deceased President, unless by written consent of his widow;" (d) matter that resembles a mark that is already registered, or is not distinguishable from another mark used in relation to the goods of the applicant, unless the Commission determines otherwise; (e) matter which is descriptive or misdescriptive of the goods of the applicant; and (f) except as provided in the above, "nothing in this chapter shall prevent the registration of a mark used by the applicant which as become distinctive of the applicant's goods in commerce" as determined by the Commissioner. *See generally* Lloyd's Food Prods., Inc. v. Eli's, Inc., 987 F.2d 766, 767 (Fed Cir. 1993) (asserting that a trademark was refused registration because it resembled a previously registered mark, and also would "likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive") (citing the Lanham Act); Ritchie v. Simpson, 170 F.3d 1092, 1094 (Fed. Cir. 1999) (stating that the Patent and Trademark Office resolves the issue of whether a trademark is scandalous by "first permitting the mark to pass for publication, and then allowing interested members . . . to bring opposition proceedings." This avoids the risk of pre-judging public attitudes); *In re* Mother Tucker's Food Experience (Canada) Inc., 925 F.2d 1402, 1462 (Fed. Cir. 1991) (reasoning that the factors determining whether there is a likelihood of confusion include: similarity of the marks in question; similarity of the applicant's goods and the goods attached to the registered mark; the markets in which the goods are sold; the conditions of sale and targeted customers; the advertising, fame of the prior mark; number of other similar marks; and evidence of confusion).

Thus, the Act prohibits registration of matters that are immoral, deceptive, or scandalous;[19] which may disparage or falsely suggest a connection with living or dead persons, institutions, beliefs or national symbols, or bring them into contempt or disrepute;[20] or are primarily geographically misdescriptive.[21]

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19. 15 U.S.C.A. § 1052(a) (West 1997). *See* Ritchie v. Simpson, 170 F.3d 1092, 1094 (Fed. Cir. 1999) (concluding that whether a mark is scandalous depends on the contemporary attitudes and viewpoints of not necessarily the majority of the general public, but rather, of a "substantial composite." Additionally, the Patent and Trademark Office adheres to a policy of determining whether a mark is scandalous by encouraging participation by members of the public who participate through opposition hearings) (citing *In re* Mavety Media Group Ltd., 33 F.3d 1367, 1371 (Fed. Cir. 1994); American Cyanamid Co. v. Campagna Per Le Farmacie in Italia, S.P.A., 847 F.2d 53, 54-55 (2d Cir. 1988) (concluding that proof that the trademarks in question has a "likelihood of confusion as to source of sponsorship establishes the requisite likelihood of success on the merits as well as risk of irreparable harm") (quoting Home Box Office, Inc. v. Showtime/The Movie Channel, Inc., 832 F.2d 1311, 1314 (2d Cir. 1987)).

20. 15 U.S.C.A. § 1052(a) (West 1997). *See* Trustees of Columbia University v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733, 750 (S.D.N.Y. 1997) (asserting that the Lanham Act protects "famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it, even in the absence of confusion") (quoting H.R.Rep. No. 374, 104th Cong., 1st Session 2 (1995); Hormel Foods Corp. v. Jim Henson Productions, Inc., 73 F.3d 497, 507 (2d Cir. 1996) (submitting that a disparagement of a trademark involves linking the product to shoddy quality, or unwholesomeness, resulting in the public's perception that the goods lack quality. Moreover, examples of disparagement includes attaching a mark to sexual activity, obscenity, or illegal activity); Deere & Co. v. MTD Products, Inc., 41 F.3d 39, 43 (2d Cir. 1994) (describing tarnishment of a trademark consists of diminishing the value of the trademark's reputation or commercial value as a result of linking it to shoddy quality, or is portrayed in an unsavory context). *But see* Clinique Laboratories, Inc. v. Dep Corp. (holding that defendant's "cheap knock-offs" of plaintiff's products did not constitute tarnishment or disparagement because the product was not linked with sexual or illegal activity, nor shoddy quality, nor was there evidence that plaintiff's trademark would suffer negative associations through defendant's use of an element of plaintiff's trademark); *In re* National Intelligence Academy, 190 U.S.P.Q. 570, 572 (Trademark Tr. & App. Bd. 1976) (submitting that whether a mark containing a national symbol may be registered is determined by whether the applicant's goods are such that "purchasers would be misled by the use of marks comprising or containing 'U.S.' in connection therewith into assuming that the United States Government has either approved or sponsored the product . . . [or] falsely suggest a connection with the United States Government.").

21. 15 U.S.C.A. § 1052(e) (West Supp. 1999). *See* Institute Nat. Des Appellations D'Origine v. Vintners Intern Co., Inc. 958 F.2d 1574, 1580 (Fed Cir. 1992) (concluding that whether a mark is primarily geographically misdescriptive is determined by a two-prong test to establish "(1) whether the primary significance of the mark as it is used is a generally known geographic place; and (2) whether the public would make a 'goods/place association, i.e., believe that the goods for which the mark is sought to be registered originate in that place'"); *In re* Societe Generale Des eaux Minerales De Vittel S.A., 824 F.2d 957, 960 (Fed. Cir. 1987) (holding that insufficient evidence was produced to show that applicant's mark, containing the same name as a city in France, would result in the American public inferring that that was where the goods originated. Further, the Court stated that the perception of the American public was of primary concern, and not the people of other countries); *In re* Nantucket, Inc., 677 F.2d 95, 99 (Cust. & Pat. App. 1982) (asserting that trademarks that contain a geographical meaning that is "minor, obscure, remote, or unconnected with the goods" will not be refused registration).

The Act also prohibits trademarks comprised of the flag or coat of arms of the United States or any individual state, municipality or foreign nation.[22] And the Act limits the use of presidents' names and images as trademarks.[23] The key operative terms of the Lanham Act's registration provision warrant careful scrutiny. The Act permits registration only of those marks "by which the goods of the applicant may be distinguished . . ."[24] from the goods of others. From this key language of section 1052 springs a fundamental limitation on the types of terms that may be trademarked.[25]

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22. 15 U.S.C.A. § 1052(b) (West 1997). Additionally, other insignia of the United States that are refused registration include the Great Seal of the United States, the Presidential Seal, and the seals of government departments. *Id. See* Heroes, Inc. v. Boomer Esiason Hero's Foundation, Inc., No. 96-1260, 1997 WL 335807, at *4 (D.D.C. June 16, 1997) (asserting that flags and coats of arms are official emblems of the government (citing Trademark Manual of Examining Procedures § 1204); *see also* De Nobili v. Scanda, 198 F. 341, 346 (W.D.Pa. 1912) (asserting that a trademark comprised of a flag of a foreign nation may not be registered in the U.S., and hence, afforded protection by the law of the U.S.); National Van Lines v. Dean, 237 F.2d 688, 693 (9th Cir. 1956), *overruled on other grounds,* (holding that a mark consisting of a shield with vertical stripes did not constitute an unofficial coat-of-arms of the United States, though similar, and invoke protection under the Lanham Act).

23. 15 U.S.C.A. § 1052(c). (West Supp. 1999) (stating that a mark will be refused registration of "the name, signature, or portrait of a deceased President of the Untied States during the life of his widow, if any, except by the written consent of the widow"). The Act also prohibits registration of a mark if it

> so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive: *Provided*, That if the Commissioner determines that confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks under conditions and limitations as to the mode or place of use of the marks or the goods on or in connection with which such marks are used, concurrent registrations may be issued to such persons when they have become entitled to use such marks as a result of their concurrent lawful use in commerce. . . .

15 U.S.C.A. § 1052(d). *See* Bruce D. Keller, Jeffrey P. Cunard, and David H. Bernstein, *Trademark and Unfair Competition Issues*, 568 P.L.I. 257, 261 (1999) (discussing the available defenses to any claim of trademark infringement to include the written consent of the deceased President's widow). *See generally* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 13:37 (4th ed. 1999).

24. 15 U.S.C.A. § 1052(e) (West Supp. 1999). *See* Institute Nat. Des Appellations D'Origine v. Vintners Intern Co., Inc., 958 F.2d 1574, 1580 (Fed Cir. 1992); s*ee also In re* Societe Generale Des eaux Minerales De Vittel S.A., 824 F.2d 957, 960 (Fed. Cir. 1987) (holding that insufficient evidence was produced to show that applicant's mark, containing the same name as a city in France, would result in the American public inferring that that was where the goods originated. Further, the Court stated that the perception of the American public was of primary concern, and not the people of other countries); *In re* Nantucket, Inc., 677 F.2d 95, 99 (Cust. & Pat. App. 1982) (asserting that trademarks that contain a geographical meaning that is "minor, obscure, remote, or unconnected with the goods" will not be refused registration).

25. 15 U.S.C.A. §§ 1052 (West Supp. 1999), 1127 (West 1998). Section 1127 defines trademarks that are afforded protection under the Lanham Act to include "any word, name, symbol, or device, or combination thereof" that are distinguishable from other products, and identify the source of such products. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 164 (1995) (concluding that a trademark's "the source-distinguishing ability of a mark—not its ontological status as color, shape, fragrance, word, or sign—that permits it to serve the basic purposes"). *See, e.g.,* Liberty Mutual Insur. Co. v. Liberty Insur. Co. of Texas, 185 F. Supp. 895, 902 (E.D. Ark. 1960) (discussing that factors governing trademark registrability to include evidence that the mark "be more than merely attractive or ornamental; it must be functional as well" that is, identify the origin of the products or services, guarantee their quality, or possess inherent advertising appeal so to create a market for said products) (quoting Springfield Fire & Marine Ins. Co. v. Founders' Fire & Marine Ins. Co., 115 F. Supp. 787, 792, 794 (N.D.Cal. 1953)).

As examined more closely below, courts interpret this language to prohibit registration of terms that do not distinguish the applicant's goods from the goods of others.[26] Such terms, referred to as generic terms, are not registrable as a matter of statutory definition.[27] Trademark practitioners have long been familiar with this prohibition, and it lies at the heart of the Doctrine of Foreign Equivalents.

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26. *See* Zimmerman v. Holiday Inns of America, Inc., 266 A.2d 87, 91 (1970), *cert. denied*, 400 U.S. 992, (7th Cir. 1971) (holding that the applicant was entitled to statutory protection of his trademark only in the area where he established a secondary meaning for his descriptive mark). *See In re* Northland Aluminum Prods., Inc., 777 F.2d 1556, 1558-59 (Fed. Cir. 1985) (discussing that trademark registration has been refused on two statutory grounds: (1) where the mark consists of a merely descriptive word, and (2) where the mark is incapable of identifying or distinguishing the goods from others). *But see* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992) (concluding that despite the fact that mark may be merely descriptive, it will not be denied registration if it can show a secondary meaning); *In re* Montracet S.A, 878 F.2d 375, 376 (Fed. Cir. 1989) (submitting that a trademark may lose its distinctiveness through usage, hence, becomes a common or generic name, and consequently if it is "no longer an indication of source, it would no longer be entitled to trademark status, for generic names are incapable of indicating source") (citing *In re* Northland Aluminum Prods., Inc., 777 F.2d 1556, 1559 (Fed. Cir. 1985)).

27. *See* 15 U.S.C.A. §§ 1052(e) and (f) (West Supp. 1999). A trademark may not be registered on the principal register if "[c]onsists of a mark which . . . when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them." *Id.* Section (f) however, provides that a merely descriptive mark may be registered if applicant provides proof of the mark's distinctiveness such that, "[the mark has been] used on or in connection with the applicant's goods in commerce, [and] proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made." *Id. See also* Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 193-94 (1985) (asserting that the Lanham Act does not provide protection for a mark that is merely descriptive, or "generic," which refers to the origin or species of the particular product); Two Pesos, Inc. v. Taco Cabana, 505 U.S. 763, 772-73 (1992) (discussing that marks which are merely descriptive of certain goods are not inherently distinctive, nor identify a particular source, and consequently, may not be registered and afforded protection under the Lanham Act). *But cf.,* 15 U.S.C.A. § 1064(3) (West Supp. 1999) ("[t]he primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name of goods or services on or in connection with which it has been used.").

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Enforcement and Protection of Trademarks

The Lanham Act's core enforcement mechanism, section 43(a), prohibits any person from using:

> In connection with any goods or services . . . any word, term, name, symbol, or device, or any combination thereof . . . which is likely to cause confusion, or to cause mistake, or deceive as to the . . . origin, sponsorship, or approval of his or her goods . . . by another person.[28]

The Lanham Act provides that infringing users of trademarks "shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by" the claimed infringement.[29] The Act gives a menu of remedies including monetary damages, injunctive relief, exemplary damages under certain circumstances, attorneys' fees and costs.[30]

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28. 15 U.S.C.A. § 1052 (emphasis added). The Act further prohibits use of any trademark which "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities . . . ." *See* 15 U.S.C.A. § 1125(a)(1)(b); *see also* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 783 (1992) (submitting that in enacting the Trademark Revision Act of 1988, 102 Stat. 3934, Congress intended that a secondary meaning is not required to establish a trade dress violation under the Lanham Act once inherent distinctiveness is shown); Morningside Group Ltd. v. Morningside Capital Group, L.L.C., 182 F.3d 133, 137-38 (2d Cir. 1999) (providing that in order that one prevail on a trademark infringement claim pursuant to the Lanham Act, she must produce evidence that the mark is valid, and the defendant's use of it is likely to cause confusion, such that, "numerous ordinary prudent purchasers are likely to be misled or confused as to the source of the product in question because of the entrance in the marketplace of defendant's mark") (quoting Cadbury Beverages, Inc. v. Cott Corp., 73 F.3d 474, 477-78 (2d Cir. 1996), and *citing* Polaroid Corp. v. Polarad Elecs. Corp., 287, F.2d 492, 495 (2d Cir. 1961) (identifying eight factors that contribute to confusion: "(1) strength of plaintiff's mark; (2) degree of similarity between the two marks; (3) proximity of the products (or services); (4) likelihood that the prior owner will 'bridge the gap'; (5) evidence of actual confusion; (6) defendant's good faith in adopting its mark; (7) quality of defendant's product (or services); and (8) sophistication of the buyers")).

29. 15 U.S.C.A. § 1125(a)(1)(B) (West 1998). *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 776 (1992) (holding that Section 43(a) of the Lanham Act provides for a federal cause of action for trademark and trade dress infringement claims) (quoting 1 J. Gilson, TRADEMARK PROTECTION AND PRACTICE § 2.13, p. 2-718 (1991). *See generally* Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney, Co., 145 F.3d 481, 493 (2d Cir. 1998) (stating that it is well established that in order for a claimant to recover an award under the Lanham Act, she must prove the alleged trademark violation gave rise to actual consumer confusion or deception, or that defendant's actions were intentionally deceptive, hence, providing a rebuttable presumption of consumer confusion) (quoting George Basch Co. v. Blue Coral Inc., 968 F.2d 1532, 1537 (2d Cir. 1992)).

30. The Act at section 1117 of title 15 states that a prevailing plaintiff "shall be entitled . . . to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." The formula for assessment of damages favors plaintiffs: under the statutory prescription "[i]n assessing profits, the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed." *Id.* The Act also provides for imposition of treble damages under cases involving intentional infringement or knowing use of counterfeit marks. *See* 15 U.S.C.A. § 1117(b); *see also* Hall v. Cole, 412 U.S. 1, 10 (1973) (discussing that the available remedies under the Lanham Act provide "not only for injunctive relief, but also for compensatory recovery measured by profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled"); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391 (1970) (stating that the Lanham Act meticulously and expressly delineates the available remedies to a claimant who has proved trademark infringement); Gordon and Breach Science Publishers S.A. v. American Institute of Physics, 166 F. 3d 438, 439 (2d Cir. 1999) (affirming the District Court's decision to withhold the award of attorney fees in a suit under the Lanham Act on the ground that such an award should be given only in exceptional cases).

Trademark Strength—The Spectrum of Distinctiveness

The Lanham Act protects registered as well as unregistered trademarks and tradenames.[31] Registration has never been the key; rather those marks that are sufficiently distinctive to link a product or a service to its source are protected under the Lanham Act.[32]

The Second Circuit Court of Appeals long ago set forth a "spectrum" of distinctiveness, an oft-cited listing relied upon by courts to analyze the eligibility of a particular mark for protection under the Lanham Act.[33] "Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, [the] classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful."[34] The Second Circuit's demarcation of the spectrum of distinctiveness is now widely accepted and applied across the United States.[35]

The Second Circuit re-visited and explained the basis for its ascending hierarchy of distinctiveness in *Papercutter, Inc. v. Fay's Drug Co., Inc.*[36] There the Court of Appeals stated, "[u]nderlying the distinctions among the four categories of terms is an attempt to prevent consumer confusion concerning the source of goods and to encourage businesses to invest in qual-

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31. 15 U.S.C.A. § 1051(a). *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 783 (1992); Youthform Co. v. R. H. Macy & Co., 153 F. Supp. 87, 90 (1957, DC Ga) (stating that right to trademark acquired through actual use even though the mark was not registered in Patent Office); *see also* Willajeanne F. McLean, *The Birth, Death, and Renaissance of the Doctrine of Secondary Meaning in the Making,* 42 AM. U. L. REV. 737, 739 (1993) (noting the Trademark Law Revision Act of 1988 sought to modify some aspects of the Lanham Act of 1946. The 1988 "Act also [codified] the courts' applications of the remedies sections of the Lanham Act to unregistered trademarks").

32. 15 U.S.C.A. § 1052. *See* Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 10 (2nd Cir. 1976) (quoting the Lanham Act, "nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce"); *see also* Sunburst Products, Inc. v. Cyrk International, 1996 U.S. App. LEXIS 25698, 25708 (Fed. Cir. 1996) (where trademark infringement was determined through a jury finding that "the Sunburst waist pack design was an inherently distinctive trade dress"); Sno-Wizard Manufacturing, Inc. v. Eisemann Products Company, 791 F.2d. 423, 426 (5th Cir. 1986) (where the court discussed how the Lanham Act sought to protect marks that were distinctive or "had acquired a secondary meaning").

33. *See Abercrombie & Fitch,* 537 F.2d at 9; *see also In re* E.I. DuPont DeNemours & Co., 476 F. 2d 1357, 1361 (Cust. & Pat. Ct. 1973) (setting forth a list of 13 factors to be considered when dealing with section 2(d) of the Lanham Act); Yamaha Int'l, Corporation v. Hoshino Gakki Co., Ltd., 840 F.2d 1572, 1574 (Fed. Cir. 1988) (listing particular portions of section two of the Lanham Act, under which certain trademarks will be denied protection).

34. *Abercrombie & Fitch,* 537 F.2d at 9; *see also* Otokoyama Co. Ltd. v. Wine of Japan Import, Inc., 175 F.3d 266, 270 (2d Cir. 1999) ("[g]eneric terms are not eligible for protection as trademarks"); Time, Inc. v. Petersen Publishing Company L.L.C., 173 F.3d 113, 118 (2d Cir. 1999) (discussing how under the "spectrum," generic is not protected, but the other three classifications on the list are).

35. *See*, *e.g.,* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992); *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550 (10th Cir. 1998); Champions Golf Club, Inc. v. Champions Golf Club, Inc., 78 F.3d 1111 (6th Cir. 1996); Mil-Mar Shoe Co., Inc. v. Shonac Corp., 75 F.3d 1153 (7th Cir. 1996).

36. 900 F.2d 558. (2d Cir. 1990). *See* Gruner & Jahr USA Publishing v. Meredith Corporation, 991 F.2d 1072, 1075 (2d Cir. 1993) (referring to the ascending hierarchy of the Lanham Act and the "strength of the trademark"); Milstein, Inc. v. Greger, Lawlor, Roth, Inc., 58 F.3d 27, 31-32 (2d Cir. 1995) (explaining the application of the four terms of the hierarchy).

ity goods by protecting their generated good will and customer loyalty from would-be imitators."[37] The Court of Appeals also noted that "[a]t the same time . . . [the goal is] to avoid unduly impeding the free flow of information in the marketplace that results from exclusive appropriation of terms by particular businesses."[38]

The Court of Appeals emphasized the treatment afforded trademarks at different levels of the *Abercrombie* spectrum: "[b]ecause terms unrelated to the characteristics or class of the product are less useful to competitors selling similar products and more likely to conjure up the source of the product, we grant trademark protection to arbitrary, fanciful, and suggestive terms, without further inquiry, but not to descriptive and generic terms."[39]

A brief review of the categories of trademarks as listed in Abercrombie *follows immediately below.*

Descriptive Marks

The principles relating to descriptive marks are often at the heart of trademark disputes and controversies. Descriptive terms "naturally and normally direct attention to the qualities, ingredients, appearance, effect, purpose, or other features of the goods or services."[40] "[A] person cannot, by mere adoption and use, obtain exclusive rights in words that describe the

37. Papercutter, Inc. v. Fay's Drug Co., Inc., 900 F.2d 558, 562 (2d Cir. 1990). *See generally* Tawnya Wojciechowski, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 AM. U. L. REV. 213, 223 (1994) (citing Supreme Court decisions which stated that the "general concern" of the Lanham Act "is with protecting consumers from confusion as to source . . . the focus is on the protection of consumers, not the protection of producers as an incentive to product innovation"); William T. Vuk, *Protecting Baywatch and Wagamama: Why the European Union Should Revise the 1989 Trademark Directive to Mandate Dilution Protection for Trademarks*, 21 FORDHAM INT'L L. J. 861, 880 (1998) (outlining the two underlying policies as established by Congress under trademark law as "the protection of good will and the prevention of public confusion").

38. *Papercutter*, 900 F.2d at 562. *See* Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 119 (1938) (explaining that other courts, including the U.S. Supreme Court have held that, "[t]he rationales for denying protection to marks that do not connote a source of origin include the public's inherent "right" to call a product by its name."); King Seeley Thermos Co. v. Alladin Industries, Inc., 321 F.2d 577 (2d Cir. 1963) (stating exclusive appropriation of a generic/descriptive mark is "unfair" to competitors); Canal Co. v. Clark, 80 U.S. (13 Wall.) 311, 324, (1871) (discussing that such an appropriation creates or entrenches a monopoly); *see also* Aloe Crème Laboratories, Inc. v. Milsam, Inc., 423 F.2d 845, 849 (5th Cir.), *cert. denied*, 398 U.S. 928 (1970) (asserting that the denial of secondary meaning should be preceded by an inquiry into whether the consumer believes the mark to be a certain thing from a certain source).

39. *Papercutter*, 900 F.2d at 562. *See* Jennifer F. Sigler, *Hole in One Turns Double Bogey: The Southern District of Texas' Analysis of Inherently Distinctive Marks in* Pebble Beach Co. v. Tour, 38 S. TEX. L. REV. 1175, 1180 (1997) (stating that "fanciful, arbitrary, and suggestive marks are deemed automatically distinctive; descriptive marks must acquire secondary meaning for protection, and generic marks are never protected"); C. Andrew Wattleworth, *Inherently Distinctive Product Configurations Under 43 of the Lanham Act: Where Do We Stand in the Aftermath of Two Pesos?*, 26 CUMB. L. REV. 1071, 1074 (1995/1996) (stating that the first three categories merit protection because their "intrinsic natures serve to identify a particular source of a product").

40. Fraga v. Smithhaven MRI, 866 F. Supp. 107, 111 (E.D.N.Y. 1994) (citing 3 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES, § 18.04 (1983)). *See* Mary L . Kevlin, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summary: Review of the 1985 Trademark Decisions of the Court of Appeals for the Federal Circuit,* 35 AMER. U. L.REV. 1149, 1159-1161 (1986) (discussing various cases that dealt with the difficulties with descriptive marks. Unless the terms lose their "common descriptive status" and acquire a secondary meaning, they will not be protected as a trademark.); Gruner & Jahr USA Publishing v. Meredith Corporation, 991 F.2d 1072, 1076 (2d. Cir. 1993) (defining a descriptive mark as "one that tells something about a product, its qualities, ingredients, or characteristics, . . . intended purpose, its function or intended use, its size or its merit").

attributes of the goods, services, or businesses to which the words are applied" for the simple reasons that prospective purchasers are likely to understand such terms in their descriptive sense rather than as an indication of source and that the terms are likely to be useful to competing manufacturers.[41] However, descriptive terms may, unlike generic terms, become entitled to protection if the "descriptive meaning" of a word becomes subordinate and the term instead becomes primarily a symbol of identification, a process by which, put another way, the term acquires "secondary meaning."[42]

Thus, descriptive terms are not eligible for protection unless they have "acquired secondary meaning."[43] A descriptive mark or name has acquired secondary meaning where consumers "associate it with a certain producer, and [are] likely to make that same association when an identical mark (or a confusingly similar mark), is used on another producer's product."[44]

"[P]roof of secondary meaning entails vigorous evidentiary requirements,"[45] with the mark's proponent bearing the burden of establishing that its mark has acquired secondary meaning.[46] In determining whether a mark has acquired secondary meaning, courts have exam-

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41. *See Papercutter,* 900 F.2d at 562 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 14 comment a, at 57 (Tent. Draft No. 2 1990); Havana Club Holding, S.A. v. Galleon, S.A., 1999 U.S. Dist. LEXIS 4914, 4935 (S.D.N.Y. 1999) (discussing that an attempt to claim a right to a trade name through its mere adoption and use by the party failed); La Societe Anonyme Des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265, 1271 (2d. Cir. 1974) ("right to a particular mark grows out of its use, not its mere adoption; . . .") (quoting United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (U.S. 1918)).

42. *See Papercutter,* 900 F.2d at 562; *see also* Textile Deliveries, Inc. v. Stagno, 1990 U.S. Dist. LEXIS 13309, 13319 (S.D.N.Y. 1990) (stating how descriptive terms are entitled to protection through proof of a secondary meaning, but generic terms are never entitled to protection "even with proof of a secondary meaning"); Bernard v. Commerce Drug Co., 774 F. Supp. 103, 106 (E.D.N.Y. 1991) (differentiating between descriptive and generic terms; describing how generic terms are never "entitled to protection under the Lanham Act because they merely describe the article or substance represented.").

43. *See* Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 9-10 (2nd Cir. 1976); *see also* Alexandra Mahaney, *Incontestability: The Park 'N Fly Decision,* 33 UCLA L. Rev. 1149, 1156 (1986) (describing how a possible basis for error is through "registration of merely descriptive marks without adequate proof of secondary meaning"); Timothy R. M. Bryant, *Trademark Infringement: The Irrelevance of Evidence of Copying to Secondary Meaning*, 83 NW. U. L. REV. 473, 476 (1988/1989) (describing how a mark will not be protected without the acquisition of a secondary meaning).

44. Thompson Medical Co. v. Pfizer, Inc., 753 F.2d 208, 215-16 (2d Cir. 1985). *See* Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1, n. 107-n. 110, (1999) (describing how the establishment of a secondary meaning creates the "public association" of the product with a particular producer); Hermenegildo A. Isidro, *Trade Dress: The Abercrombie Classifications and Determining the Inherent Distinctiveness of Product Configurations in Trade Dress*, 62 BROOK. L.REV. 811, 813 (1996) ("secondary meaning exists when consumers have come to associate the product's design with that specific producer").

45. Ralston Purina Co. v. Thomas J. Lipton, Inc., 341 F. Supp. 129, 134 (S.D.N.Y. 1972). *See* Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162, 169 (2d. Cir. 1991) ("the careful weighing of evidence necessary to determining secondary meaning renders it an unlikely candidate for summary judgment"); Mana Products v. Columbia Cosmetics Mfg., 858 F. Supp. 361, 367 (E.D.N.Y. 1994) (listing six factors relevant and necessary to a determination of secondary meaning).

ined: advertising expenditures,[47] survey evidence,[48] sales success,[49] unsolicited media coverage of the product,[50] attempts to plagiarize the mark,[51] and length and exclusivity of the mark's use.[52] In assessing the existence of secondary meaning, no "single factor is determinative,"[53] and

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46. *See* Saratoga Vichy Spring Co., Inc. v. Lehman, 625 F.2d 1037, 1042 (2d Cir. 1980); Dick's Sporting Goods, Inc., v. Dick's Clothing and Sporting Goods, Inc., No. 98-1653, 1999 U.S. App. LEXIS 19942 at *10 (4th Cir. 1999) (*citing* Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd., 840 F.2d 1572, 1578-79 (Fed. Cir. 1988) ("The burden of proving secondary meaning is on the party asserting it, whether he is the plaintiff in an infringement action or the applicant for federal trademark registration."); *accord* Tonawanda Street Corp. v. Fay's Drug Co., Inc., 842 F.2d 643, 647-48 (2d Cir. 1988) (noting that the burden of proving secondary meaning is on the party seeking to obtain legal protection for its mark).

47. *See* Harlequin Enterprises Ltd. v. Gulf & Western Corp., 644 F.2d 946, 949 (2d Cir. 1981) (finding that plaintiff had "adduced sufficient evidence to support the district court's preliminary finding that the Harlequin Presents cover has a "secondary meaning" for romance readers. By secondary meaning, we mean that romance readers associate the Harlequin Presents cover with a particular series and publisher . . . Harlequin's extensive national advertising, its phenomenal sales success . . . indicate that romance readers correlate the Harlequin Presents cover with Harlequin and the Harlequin Presents series."); *see also* Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc., 846 F.2d 1079, 1086 (7th Cir. 1988) ("[T]he 'amount and manner of advertising' and the 'length and manner of use' of the International Kennel Club name yields a better than negligible chance of establishing secondary meaning."). *See generally* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 15:51, at 15-74-75 (4th ed. 1999) (discussing the logical inference between advertising expenditures and consumer recognition).

48. *See* McGregory-Doniger, Inc. v. Drizzle, Inc., 599 F.2d 1126, 1133 n. 4 (1979) (stating "[w]hether secondary meaning has attached to a trademark is a factual question and we see no reason to adopt an inflexible rule that would unnecessarily restrict the ability of trial courts to determine the sufficiency of the evidence introduced to establish the existence of secondary meaning"); American Footwear Corp. v. General Footwear Co., 609 F.2d 655, 663 (2d Cir. 1979) (affirming the lower court's rejection of survey evidence that was inherently deficient, and further providing that, although there are no particular guidelines to proving secondary meaning, relevant considerations include length and exclusivity of use, sales levels, and extent of advertising and promotion); Grotrian, Helfferich, Shulz, Th. Steinway Nachf. v. Steinway & Sons, 523 F.2d 1331, 1340-41 (2d Cir. 1975) (holding that a properly conducted survey demonstrating trustworthiness and evidence of actual confusion with respect to a mark is admissible).

49. *See Harlequin Enterprises*, 644 F.2d at 949 n. 1; Black & Decker Corp. v. Dunsford, 944 F. Supp. 220, 227 (S.D.N.Y. 1996) (sales of less than $16,000 per year for five years considered "minimal commercial activity" that cuts against the existence of secondary meaning). *See generally* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 15:49, at 15-72-73 (4th ed. 1999) (discussing the correlation between substantial sales success and buyer association with the corporate symbol).

50. *See Harlequin Enterprises*, 644 F.2d at 950; Scarves By Vera, Inc. v. Todo Imports, 544 F.2d 1167, 1174 (2d Cir. 1976) (noting that, "many newspaper articles which plaintiff introduced, as well as the testimony of plaintiff's expert witnesses, clearly established that plaintiff's recognition is equivalent to that of designers who had expanded into the cosmetics and fragrances fields. Like these other designers, plaintiff appeals to the name-conscious customer."); *see also* Dick's Sporting Goods, Inc., v. Dick's Clothing and Sporting Goods, Inc., No. 98-1653, 1999 U.S. App. LEXIS 19942 at *22-24 (4th Cir. 1999) (concluding that plaintiff's organization of one public seminar and the mention of plaintiff in one newspaper article were not probative of secondary meaning).

51. *See Harlequin Enterprises*, 644 F.2d at 950; Perfect Fit Industries, Inc. v. Acme Quilting Co., 618 F.2d 950 (2d Cir. 1980) 618 F.2d at 954-55. *See generally* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 15:38, at 15-55-59 (4th ed. 1999) (discussing the majority view that "copying is probative, but not determinative, of secondary meaning" and the minority view that "copying triggers a presumption of secondary meaning").

every element need not be proved. "Each case, therefore, must be resolved by reference to the relevant factual calculus."[54]

Examples abound of marks that were held to be descriptive, requiring proof of secondary meaning before being accorded "protected" status.[55] As a general rule, courts are authorized to order the cancellation of marks deemed to be merely descriptive, in the absence of established secondary meaning.[56] Marks that have been held to be descriptive include:

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52. *See* Lanham Act § 2(f), 15 U.S.C.A. § 1052(f) (1999), which states, in pertinent part:

> The Commissioner may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which distinctiveness is made.

See also Saratoga Vichy Co. v. Lehman, 491 F. Supp. 141, 150 (N.D.N.Y. 1979), *aff'd,* 625 F.2d 1037 (2d Cir. 1980) (holding that a mark had acquired a secondary meaning through its long usage of over one hundred years); American Footwear Corp. v. General Footwear Co., 609 F.2d 655, 663 (2d Cir. 1979) (stating that although there are no guidelines to determining secondary meaning, length and exclusivity of the mark's use is one of the considerations).

53. *Lehman,* 491 F. Supp. 141 at 150; *American Footwear*, 609 F.2d at 663. *See, e.g.,* Ideal World Mktg. v. Duracell, Inc., 15 F. Supp. 2d 239, 245-46 (E.D.N.Y. 1998) (considering the various factors, the court concluded "that Ideal World has fallen short of demonstrating that the public has come to identify the term PowerCheck with the camcorder batteries marketed by Ideal World.").

54. Thompson Medical Co. v. Pfizer, Inc., 753 F.2d 208, 213 (2d Cir. 1985). *See* Dick's Sporting Goods, Inc., v. Dick's Clothing and Sporting Goods, Inc., No. 98-1653, 1999 U.S. App. LEXIS 19942 at *33 (4th Cir. 1999) ("[b]ecause Sporting has failed to satisfy any of the factors relevant to secondary meaning under Perini, we find that Sporting's trade name is ineligible for trademark protection."); *see also* Patient Transfer Systems, Inc. v. Patient Handling Solutions, Inc., No. 97-CV-1568, 1999 U.S. Dist. LEXIS 1184, at *19-20 (E.D. Pa. Jan. 29, 1999) (analyzing the factors, the court found that the plaintiff had offered insufficient evidence to show its marks had acquired secondary meaning and therefore could not be protected from an alleged infringement).

55. *See* Norsan Products, Inc. v. R. F. Schuele Corp., 286 F. Supp. 12, (E.D. Wis. 1968) (holding KUF'N KOLAR for cuff and collar cleaner, secondary meaning proven); Clinton Detergent Co. v. Procter & Gamble Co., 302 F.2d 745 (C.C.P.A. 1962) (deciding that JOY for detergent, acquired secondary meaning and was protected as a strong mark); *cf.* Gioia Macaroni C. v. Joseph Victori Wines, 205 U.S.P.Q. 986 (E.D.N.Y. 1979) (JOY not descriptive of wine or food).

56. *See* Section 1119 of title 15, which provides that

> [I]n any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Commissioner, who shall make appropriate entry upon the records of the Patent and Trademark Office, and shall be controlled thereby.

15 U.S.C.A. § 1119; *see also* Lanham Act § 2(e)(1), 15 U.S.C.A. § 1052(e)(1) (1999) (stating that "merely descriptive" marks are refused registration unless the mark "has become distinctive of applicants' goods" under Lanham Act § 2(f), 15 U.S.C.A. § 1052(f); Lanham Act § 14, 15 U.S.C.A. § 1064 (1999) ("A petition to cancel a registration of a mark . . . may . . . be filed . . . by any person who believes that he or she is or will be damaged . . . by registration of a mark. . . .").

STEAK & BREW restaurant[57]

SECURITY CENTER storage facility[58]

PUDDING TREATS pudding dessert[59]

OPEN MRI medical device[60]

MITEY FAST auto maintenance[61]

ARTHRITICARE gel used to relieve pain of arthritis[62]

BEER NUTS salted nuts[63]

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57. Longchamps, Inc. v. Eig, 315 F. Supp. 456, (S.D.N.Y. 1970) (mark held descriptive; secondary meaning proven). *See, e.g.,* Beef & Brew, Inc. v. BEEF & BREW, INC., 389 F. Supp. 179 (D. Or. 1974) (BEEF & BREW as name of restaurant found to be descriptive); Little Tavern Shops, Inc. v. Davis, 116 F. 2d 903 (4th Cir. 1941) (LITTLE TAVERN as name of restaurant-bar, secondary meaning proven).

58. Security Center, Ltd. v. First Nat'l Security Centers, 750 F.2d 1295 (5th Cir. 1985) (mark descriptive, secondary meaning not found). *See, e.g., In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523 (C.C.P.A. 1980) (QUIK-PRINT as name of printing and duplication service found to be descriptive); Telemed Corp. v. Tel-Med, Inc., 588 F.2d 213 (7th Cir. 1978) (TELEMED as name of remote medical analysis service, secondary meaning not proven).

59. *In re* General Foods Corp., 177 U.S.P.Q. 403 (T.T.A.B. 1973) (mark descriptive). *See, e.g., In re* Wileswood, Inc., 201 U.S.P.Q. 400 (T.T.A.B. 1978) (AMERICA'S BEST POPCORN! for popcorn found to be self-laudatory epithet, no secondary meaning proven); Skinner Mfg. Co. v. Kellogg Sales Co., 143 F.2d 895 (8th Cir. 1944), *cert. denied*, 323 U.S. 766 (1944) (RAISIN-BRAN for raisin and bran cereal, secondary meaning not proven).

60. Fraga v. Smithaven MRI, 866 F. Supp. 107 (E.D.N.Y. 1994) (mark descriptive). *See, e.g.,* Nature's Way Products, Inc. v. Nature's Herb, Inc., 9 U.S.P.Q. 2D 2077 (T.T.A.B. 1989) (NATURE'S MEDICINE for vitamins and food supplement found to be descriptive); Vision Center v. Opticks, Inc., 596 F.2d 111 (5th Cir. 1979), *cert. denied*, 44 U.S. 1016 (1980) (VISION CENTER for optical clinics, no secondary meaning proven).

61. *In re* Miteyfast Service Centers, Inc., 223 U.S.P.W. 1154 (T.T.A.B. 1984) (mark descriptive). *See, e.g.,* Car-Freshner Corp. v. Auto Aid Mfg. Corp., 461 F. Supp. 1055, 1060, (N.D.N.Y. 1978) (CAR-FRESHNER for auto air deodorizer, "valid absent a showing of lack of secondary meaning"); Bardahl Oil Co. v. Atomic Oil Co., 351 F.2d 148 (10th Cir. 1965), *cert. denied*, 382 U.S. 1010 (1966) (SAVMOTOR for oil additive, no secondary meaning proven).

62. Bernard v. Commerce Drus Co., 964 F.2d 1338 (2d Cir. 1992) (secondary meaning not found). *See, e.g.,* Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033 (2d Cir. 1992) (P.M. for night-time analgesic/sleep-aid, no secondary meaning was found); Wise v. Bristol-Myers Co., 107 F. Supp. 800, 803 (D.N.Y. 1952) (BUFFERIN for buffered aspirin, "plaintiff is not entitled to trade-mark protection against defendant's use of 'Buff' as part of the descriptive name 'Bufferin'").

63. Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934 (10th Cir. 1983) (mark descriptive, secondary meaning proven). Eagle Snacks, Inc. v. Nabisco Brands, Inc., 625 F. Supp. 571 (D.N.J. 1985) (HONEY ROAST for roasted nuts, no secondary meaning proven).

CHAP STICK skin preparation in a stick[64]

FUND OF FUNDS mutual fund[65]

FOOD FAIR supermarket[66]

HOLIDAY INN motel[67]

INTERNATIONAL maps and globes[68]

MUSTANG trailers[69]

NO SPOT car wash system[70]

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64. Morton Mtg. Corp. v. Delland Corp., 166 F.2d 191 (C.C.P.A. 1948) (mark descriptive). *See, e.g., In re* Carter-Wallace, Inc., 222 U.S.P.Q. 729 (T.T.A.B. 1984) (SUPER GEL for shaving gel, generic and self-laudatory); W.E. Bassett Co. v. Revlon, Inc., 354 F.2d 868 (2d Cir. 1966) (TRIM for fingernail clippers, held descriptive of function; secondary meaning proven and limited preliminary injunction granted); W. E. Bassett Co. v. Revlon, Inc., 435 F.2d 656 (2d Cir. 1970) (permanent injunction and award of profits affirmed).

65. Fund of Funds, Ltd. v. First American Fund of Funds, 274 F. Supp. 517 (S.D.N.Y. 1967) (mark descriptive, secondary meaning proven). *See, e.g.,* Two Way Radio Service, Inc. v. Two Way Radio, Inc., 322 N.C. 809 (1988) (TWO WAY RADIO for radio-telephone equipment, no secondary meaning proven); *In re* Copytele, Inc., 31 U.S.P.Q. 2d 1540 (T.T.A.B. 1994) (SCREEN FAX PHONE for fax device with screen and telephone, descriptive composite).

66. Food Fair Stores, Inc. v. Lakeland Grocery Corp., 301 F.2d 156 (4th Cir. 1962), *cert. denied*, 371 U.S. 817 (1962) (secondary meaning proven). *See, e.g.,* Leejay v. Bed, Bath & Beyond, Inc., 942 F. Supp. 699 (D. Mass. 1996) (BED & BATH for a store for items for the bedroom and bathroom, no secondary meaning proven); Pullan v. Fulbright, 695 S.W.2d 830 (1985) (SHEAR PLEASURE for a beauty salon, no secondary meaning proven).

67. Zimmerman v. Holiday Inns of America, Inc., 166 U.S.P.Q. 52, (1970), *cert. denied*, 400 U.S. 992 (7th Cir. 1971) (mark descriptive). *See, e.g.,* Hayes Microcomputer Products, Inc. v. Business Computer Corp., 219 U.S.P.Q. 634 (T.T.A.B. 1983) (INTELLIGENT MODEM for modem, descriptive because "intelligent" is computerese to describe an advanced type modem having sophisticated features, as opposed to a "dumb" modem). *Cf. In re* Intelligent Medical Systems, Inc., 5 U.S.P.Q. 2d 1674 (T.T.A.B. 1987) (INTELLIGENT MEDICAL SYSTEMS for electronic body thermometer is not merely descriptive. While "Intelligent" is descriptive of certain computer devices, it is not descriptive of medical devices such as a thermometer).

68. C.S. Hammond & Co. v. International College Globe, Inc., 210 F. Supp. 206 (S.D.N.Y. 1962) (mark descriptive). *See, e.g.,* Educational Dev. Corp. v. Economy Co., 562 F.2d 26 (10th Cir. 1977) (CONTINUOUS PROGRESS for educational materials, no secondary meaning proven); Field Enterprises Educational Corp. v. Cove Industries, Inc., 297 F. Supp. 989 (E.D.N.Y. 1969) (WORLD BOOK for encyclopedia, secondary meaning proven).

69. Westward Coach Mfg. Co. v. Ford Motor Co., 258 F. Supp. 67 (S.D.Ind. 1966), *aff'd*, 388 F.2d 627 (7th Cir. 1968), *cert. denied*, 392 U.S. 927 (1968) (mark descriptive).

70. Raco Car Wash Systems, Inc. v. Smith, 730 F. Supp. 695 (D.S.C. 1989) (discussing mark descriptive; no secondary meaning found) 929 F.2d 694 (1991). *See, e.g.,* Blodgett v. Martsch, 590 P.2d 298 , 310 (1978) (stating that "reasonable diligence on the part of a trustee, where the trustor proclaims his confusion about the meaning of the instruments he is asked to sign, may require a full disclosure and explanation, particularly where the instruments impose a heavier burden than trustor-signed documents in the trustee's hands authorize."); Blodget v. Zions First Nat'l Bank, 752 P.2d 901, 912 (1988) (discussing the only sanction for non-compliance with the state's assumed name statute is denying the defendant access to the courts).

PIZZAZZ pizza[71]

Arbitrary and Fanciful Marks

Marks that are suggestive, arbitrary or fanciful link the product or service with its source by its very nature, or by its primary meaning—and as such are always eligible for protection.[72] Secondary meaning need not have been acquired in the case of suggestive or arbitrary and fanciful marks.[73] The Doctrine of Foreign Equivalents does not arise out of these relatively "strong" categories of marks, and thus further attention is not devoted to them here.[74]

Generic Terms

The Doctrine of Foreign Equivalents springs from the identification of generic terms, the least protected of the four classes of potential trademarks.[75] As a function of section 1052 of

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71. Pizzazz Pizza & Restaurant v. Taco Bell Corp., 642 F. Supp. 88 (N.D. Ohio 1986) (discussing mark descriptive; secondary meaning not found).

72. *See* Thompson Medical Co. v. Pfizer, Inc., 753 F.2d 208, 213 (2d Cir. 1985) (discussing that arbitrary or fanciful marks enjoy all the protective rights accorded to suggestive marks); Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976) (noting four categories eligible for trademark protection including suggestive, and arbitrary or fanciful marks); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (stating that the requirement of a secondary meaning for inherently distinctive trade dress would undermine the purposes of the Lanham Act).

73. *See* Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033, 1038 (2d Cir. 1992) (describing the difference between descriptive and suggestive terms is that with suggestive terms the plaintiff is not required to provide the secondary meaning); *Thompson,* 753 F.2d 208, 213 (2d Cir. 1985) (stating that "suggestive terms are eligible for protection without proof of secondary meaning."); *Abercrombie & Fitch*, 537 F.2d 4 at 9 (2d Cir. 1976); *Two Pesos, Inc.*, 505 U.S. 763, 777 (1992) (explaining that the category of suggestive marks was designed to accord protection to marks not descriptive nor fanciful).

74. *See* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3:2 (4th ed. 1996); *see also In re* San Miguel Corp., 229 U.S.P.Q. 617 (T.T.A.B. 1986); Gary J. Sosinsky, *Laudatory Terms in Trademark Law: Square Pegs in Round Holes,* 9 FORDHAM I.P., MEDIA & ENT. L.J. 725 (1999) (discussing the Doctrine of Foreign Equivalents and its function); John T. Cross, *Language and the Law: The Special Role of Trademarks, Trade Names, and Other Trade Emblems,* 76 NEB. L. REV. 95, 139 (1997) (discussing criticisms of the Doctrine of Foreign Equivalents).

75. *See* John T. Cross, *Language and the Law: The Special Role of Trademarks, Trade Names, and Other Trade Emblems,* 76 Neb. L. Rev. 95, 138 (1997) (discussing how courts legislate to protect sellers who adopt a mark that is a foreign translation of a generic English term); Abercrombie & Fitch v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976) (classifying marks in ascending order of strength or distinctiveness as generic; descriptive; suggestive; arbitrary or fanciful); Pizzeria Uno Corp. v. Temple, 747 F.2d 1522 (4th Cir. 1984) (explaining the groupings espoused in *Abercrombie & Fitch* and noting the issue in the case as whether the mark in question was descriptive or suggestive).

title 15,[76] a generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species, and is accorded no protection.[77] A generic term is generally understood to identify a class of goods or services *without specifying a particular brand or producer.*[78] As proposed by a leading treatise, once the public begins to use a term as the *name* of the product, no matter who is the manufacturer, then the term "has become a public domain generic term of the language, free for all to use, no matter what the manufacturer who first adopted the word intended or hoped."[79]

As stated by the Second Circuit Court of Appeals, "no amount of money poured into promoting customers' association of generic terms with a particular source can justify 'depriv[ing] competing manufacturers of the product of the right to call an article by its name.'"[80]

Importantly, a generic term is forever denied registration, whereas a descriptive term may become registrable if secondary meaning is established.[81] "Generic terms are not entitled to protection under the trademark law because they are in the public domain and thus available for everyone to use."[82]

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76. 15 U.S.C.A. § 1052. *See In re* Northland Aluminum Products, Inc., 777 F.2d 1556, 1558 (Fed. Cir. 1985) (stating a common descriptive name could not be registered as a trademark, notwithstanding evidence that the word had developed secondary meaning and notwithstanding applicant's disclaimer differentiating the product); *In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1124 (Fed. Cir. 1985) (codifying the common-law doctrine of secondary meaning includes evidence of trademark owner's method of using the mark, supplemented by evidence of effectiveness of such use to cause purchasing public to identify mark with source of product).

77. *See* Park N' Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985), *on remand*, 782 F.2d 1508 (9th Cir. 1986) (stating that, "a generic term is one that refers to the genus of which the particular product is a species."); *In re* Helena Rubinstein, Inc., 56 C.C.P.A. 1110 (CCPA 1969) (pointing out that the mark must be capable of distinguishing applicant's goods from the goods of others on the basis of secondary meaning); 15 U.S.C.A. § 1127 (1982).

78. *See, e.g.*, 15 U.S.C.A. §1064(c) (1982); Henry Hide, Inc. v. George Zeigler Co., 354 F.2d 574, 576 (7th Cir. 1965) (holding "jujubes" the generic name of a tropical fruit flavor); King-Seeley Thermos Co. v. Aladdin Indus., 321 F.2d 577, 579 (2d Cir. 1963) (holding that the mark "Thermos" had become generic).

79. 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION, § 12.23, p. 12-56.2. *See* 15 U.S.C.A. § 1052(e)(1) (1982). *See, e.g.,* Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976); Henry Hide, Inc. v. George Zeigler Co., 354 F.2d 574, 576 (7th Cir. 1965) (holding "jujubes" the generic name of a tropical fruit flavor). *But see* Coca-Cola Co. v. Koke Co., 254 U.S. 143, 146-47 (1920) (it is considered palpable fraud to which the plaintiff will be granted relief when the continued use of the name imports a representation about the product that has ceased to be true).

80. Papercutter, Inc. v. Fay's Drug Co., 900 F.2d 558, 562 (2d Cir. 1990) (quoting Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976); *see also Park'N'Fly, Inc.*, 469 U.S. at 194; Two Pecos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992).

81. *See* 15 U.S.C.A. § 1052(f) (1982); *In re* K-T Zoe Furniture, Inc., 16 F.3d 390 (Fed. Cir. 1994); *Park' N' Fly,* 469 U.S. 189, 194, (1985), *on remand,* 782 F.2d 1508 (9th Cir. 1986) ("[m]arks that constitute a common descriptive name are referred to as generic.").

82. First Bank v. First Bank System, Inc., 84 F.3d 1040, 1045 (8th Cir. 1996) (quoting Hallmark Cards, Inc., v. Hallmark Dodge, Inc., 634 F. Supp. 990, 997 (W.D. Mo. 1986)); Cellular Sales, Inc. v. Mackay, 942 F.2d 483, 485 (8th Cir. 1991) (quoting *Hallmark Cards*).

In numerous reported cases, domestic terms have been deemed generic and, accordingly, held to be unentitled to protection under the Lanham Act. Domestic terms that were held to be generic include: CUSH-N-GRIP;[83] SELF REALIZATION;[84] BLINDED VETERANS;[85] SCREENWIPE;[86] CELLULAR SALES;[87] BEST BUY;[88] HIB (for flu vaccine);[89] and TEDDY.[90]

Coined Terms Can Become Generic

Terms which begin their lives as distinctive words identifying a particular product can fall into the public domain.[91] This happens most typically where a seller begins marketing a new

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83. Nupla Corp. v. IXL Mfg. Co., Inc., 114 F.3d 191 (Fed.C.A. (1997)) (ruling that the registrations for the trademark CUSH-N-GRIP were either (1) generic, or (2) merely descriptive).

84. Self-Realization Fellowship Church v. Ananda Church of Self Realization, 59 F.3d 902, 913-14 (9th Cir. 1995) (holding that the term "Self-Realization" was "invalid as a trade name and as a service mark" because it was generic). *See* Elzabeth L. Warren-Mikes, Note, *December Madness: The Seventh Circuit's Creation of Dual Use in* Illinois High School Association v. GTE Vantage, 93 NW. U.L. REV. 1009 (1999) (discussing generally that generic terms do not qualify for trademark registration). *See generally* Justin Hughes, "*Recording*" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999) (critiquing intellectual property law).

85. Blinded Veterans Ass'n v. Blinded American Veterans Foundation, 872 F.2d 1035 (Fed. Cir. 1989) (holding that "Blinded Veterans" is a generic term and logo therefore is not entitled to trademark protection).

86. *In re* Gould Paper Corp., 834 F.2d 1017 (Fed. Cr. 1987) (holding that the term "SCREENWIPE" is generic as applied to wipes for cleaning computer and television screens); *see also* Cummins Engine Co. v. Continental Motors Corp., 359 F.2d 892 (1996) (holding that the term "TURBODIESEL" is generic for engines having exhaust driven turbine superchargers); *In re* Abcor Dev. Corp., 588 F.2d 811, 815 (CCPA 1978) (holding the term "GASBADGE" is generic for a gas monitoring badge).

87. Cellular Sales, Inc. v. Mackay, 942 F.2d 483 (8th Cir. 1991) (holding that the term "CELLULAR SALES" falls within the definition of a generic trade name because the terms "CELLULAR" and "SALES" are individually generic in nature). *See also* First Fed. Sav. & Loan Ass'n of Council Bluffs v. First Fed. Sav. & Loan Ass'n of Lincoln, 929 F.2d 382, 384 (8th Cir. 1991) (concluding that "FIRST FEDERAL" is not a generic phrase, "FIRST FEDERAL" does not refer generically to banks and savings and loans as a group, but instead describes "first rate (or first in time in the area), federally determining whether a trade name is entitled to protection, it must first be classified into one of four categories: (1) generic, (2) descriptive, (3) suggestive, or (4) arbitrary or fanciful).

88. Best Buy Warehouse v. Best Buy Co., Inc., 920 F.2d 536, *rehearing denied, cert. denied*, 111 S.Ct. 2893 (8th Cir. 1990), 501 US 1252 (1991) (affirming the District Court's decision which held that the phrase "BEST BUY" is generic as a matter of law, and therefore not the subject for trademark protection).

89. American Syanamid Corp. v. Connaught Laboratories, Inc., 800 F.2d 306 (2d Cir. 1986) (holding that the term "NIB" is generic).

90. Alchemy II, Inc. v. Yes! Entertainment Corp., 844 F. Supp. 560 (C.D. Cal. 1994).

91. *See* John T. Cross, *Language and the Law: The Special Role of Trademarks, Trade Names, and Other Trade Emblems,* 76 NEB. L. REV. 95, 110, 114 (1997) (discussing coined words and their protection); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION, § 11.02, at 11-18 to 11-9 (4th ed. 1996) (discussing how manufacturers use coined words for the purpose of functioning trademarks); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection,* 58 U. PITT. L. REV. 789 (1997) (discussing junior uses of the coined words and their protection).

product under a protected name, only to have the public embrace the name as a recognized identifier for multiple products in the same field—no matter what the source.[92] This has happened over the years, with the consequent loss of trademark status, for words with surprising familiarity to Americans.[93]

THERMOS is one example. In a seminal case, *King-Seeley Thermos Co. v. Alladin Industries, Inc.,*[94] the Second Circuit Court of Appeals held that the mark THERMOS had "entered the public domain beyond recall." [95] The facts showed that "from 1907 to 1923, King-Seeley undertook advertising and educational campaigns that tended to make "thermos" a generic term descriptive of the product rather than of its origin."[96] "This consequence flowed from the corporation's attempt to popularize 'Thermos bottle' as the name of that product without including any of the generic terms then used, such as 'Thermos vacuum-insulated bottle.'"[97] "[Thus] by 1923 the word 'thermos' had acquired firm roots as a descriptive or generic word."[98]

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92. *See* Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 10 (2d Cir. 1976) (quoting J. Kohnstam, Ltd. v. Louis Mark and Company, 280 F.2d 437, 440 (C.C.P.A. 1960)). In *Abercrombie*, the Second Circuit noted that, "no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise and what success it has achieved in securing public identification, it cannot deprive competing manufacturers of the product of the right to call an article by its name." *See also* Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 260 (5th Cir. 1980) (providing that where a word is not coined, nor purely fanciful, and where its application may be arbitrary, it will not be afforded the same protection as other coined and fanciful words); Exxon Corp. v. Xoil Energy Resources, Inc., 552 F. Supp. 1008, 1014 (S.D.N.Y. 1981) (asserting that trademark registration may be invalidated if it can be proven that confusion of origin was likely to result from the use of a similar mark on non-competing goods); Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1184, n.20 (5th Cir. 1980) (providing that a descriptive mark which has acquired a secondary meaning may be subject to cancellation if it becomes generic); Theadore H. Davis, Jr., *Management and Protection of Brand Equity in Product Configurations,* 1998 U. Ill. L. Rev. 59 (1998) (discussing how coined words are inherently distinctive and protectable immediately upon their adoption).

93. *See Abercrombie & Fitch*, 537 F.2d at 9; *see also* Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 260 (5th Cir. 1980) (finding that the mark "Domino" should only receive limited protection because it is not a coined word and is not purely fanciful); Exxon Corp. v. Xoil Energy Resources, Inc., 552 F. Supp. 1008, 1014 (S.D.N.Y. 1981) (noting that a generic word may be protected as a registered trademark if it has acquired a distinctive meaning of applicant's goods in commerce); Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1184 (5th Cir. 1980) (discussing the difference between descriptive and generic terms); Davis, Jr., *supra* note 92.

94. 321 F.2d 577, 138 U.S.P.Q. 349 (2d Cir. 1963).

95. *Id*. at 579.

96. *King-Seeley Thermos,* 321 F.2d at 578. *See also* Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976) (defining the meaning of a generic term); Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 260 (5th Cir. 1980) (discussing why "Domino" only affords limited protection); Exxon Corp. v. Xoil Energy Resources, Inc., 552 F. Supp. 1008, 1014 (SDNY 1981) (stating that, "the mark "Exxon," which contains no generic, descriptive or suggestive elements, is an arbitrary or fanciful mark. It is a strong mark. It is entitled to the widest protection possible."); Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1184 (5th Cir. 1980) (illustrating a word may be generic of some things and not of others: "ivory" is generic of elephant tusks but arbitrary as applied to soap.); Theadore H. Davis, Jr., *Management and Protection of Brand Equity in Product Configurations,* 1998 U. ILL. L. REV. 59 (1998) (discussing how coined words are inherently distinctive and protectable immediately upon their adoption).

97. *King-Seeley Thermos*, 321 F.2d at 578. *See also* Bayer Co., Inc., v. United Drug Co., 272 F. at 511 (S.D.N.Y. 1921) (stating that buyers did not know acetyl salicylic acid was same as aspirin); Dupont Cellophane Co., Inc., v. Waxed Products Co., Inc., 85 F.2d at 77 (2d Cir. 1936) (noting that cellophane was in itself the name of the product).

The Court of Appeals explained that the seller's efforts to protect and preserve its ownership interest in the THERMOS mark were futile.[99]

While it is conceivable that a mark that falls into the public domain could, after decades of exclusive use, again enjoy protectible status, mark holders serve themselves best by guarding against use of their proprietary terms in any non-trademark sense.[100]

Application of the Doctrine of Foreign Equivalents

The Doctrine of Foreign Equivalents[101] has been applied to prevent registration and enforcement of claimed rights in foreign generic terms since time immemorial.[102] As applied to descriptive or generic terms used to identify particular types of products in other countries,

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98. *King-Seeley Thermos*, 321 F.2d at 578. The Court in *King-Seeley* explained that in about 1923, because of the suggestion in an opinion of a district court that 'Thermos' might be a descriptive word, King-Seeley adopted the use of the word 'vacuum' or 'vacuum bottle' with the word 'Thermos.'" *Id*. Although 'Thermos' was generally recognized in the trade as a trademark, the corporation did police the trade and notified those using 'thermos' in a descriptive sense that it was a trademark. *Id*. King-Seeley "failed, however to take affirmative action to seek out generic uses by non-trade publications and protested only those which happened to come to its attention. Between 1923 and the early 1950's the generic use of 'thermos' had grown to a marked extent in non-trade publications and by the end of this period there was wide-spread use by the unorganized public of 'thermos' as a synonym for 'vacuum insulated.'" *Id.* The trial court thus concluded that King-Seeley had failed to use due diligence to rescue "Thermos" from becoming a descriptive or generic term. *Id. See* Dupont Cellophane Co., Inc., v. Waxed Products Co., Inc., 85 F.2d at 77 (2d Cir. 1936) (discussing how inventor used the word cellophane generically); Bayer Co., Inc., v. United Drug Co., 272 F. at 512 (S.D.N.Y. 1921) (discussing how aspirin became known as the accepted name).

99. Specifically, the Court of Appeals explained:

> Substantial efforts to preserve the trademark significance of the word were made by plaintiff, especially with respect to members of the trade. However . . . whether the appropriation by the public was due to highly successful educational and advertising campaigns or to lack of diligence in policing or not is of no consequence; the fact is the word "thermos" has entered the public domain beyond recall.

King-Seeley Thermos, 321 F.2d at 578. *See also* Dupont Cellophane Co., Inc., v. Waxed Products Co., Inc., 85 F.2d at 80 (2d Cir. 1936) (stating the fact that it had registered cellophane as a trademark would give it no right to monopolize a term useful to designate a commercial article); Bayer Co., Inc., v. United Drug Co., 272 F.2d 512 (S.D.N.Y. 1921) (stating how the manufacturer's own practice recognized the meaning that the word aspirin had acquired).

100. *See King-Seeley Thermos,* 321 F.2d at 579 (stating how King-Seeley had failed to use due diligence to rescue 'Thermos' from becoming a descriptive or generic term); *see also* Bayer Co., Inc., v. United Drug Co., 272 F. at 512 (S.D.N.Y. 1921) (noting that it was the company's own practice that led to their trademark to fall into the public domain); Dupont Cellophane Co., Inc., v. Waxed Products Co., Inc., 85 F.2d at 80 (2d Cir. 1936) (stating "the public has a right to use the word for all purposes of designating the article or product, except one, it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles").

101. *See generally* French Transit, Ltd. v. Modern Coupon Sys., 818 F. Supp. 635, 636 (S.D.N.Y. 1993) (discussing when the doctrine applies).

102. *See id.*; *see also* Otokoyama Co. Ltd., v. Wine of Japan Import, Inc., 175 F.3d 266, 271 (2d Cir. 1999) (discussing the Doctrine of Foreign Equivalents); John T. Cross, *Language and the Law: The Special Role of Trademarks, Trade Names, and Other Trade Emblems*, 76 NEB. L. REV. 95, 138 (stating the Doctrine of Foreign Equivalents).

despite being relatively unknown in the United States, most authorities have not allowed trademark rights to such terms.[103]

The Doctrine of Foreign Equivalents has been described as a just rule; as explained in *Holland v. C. & A. Import Corporation*,[104] "Why should the first comer be given a monopoly of the word when he knew all along that he had no better right to it than any one else? If others who may bring the same product here cannot sell it under its real [foreign] name, fair competition would be greatly impeded."[105]

Early Case Law

In *Holland v. C. & A. Import Corporation* the plaintiffs had attempted to import into the United States a shipment of Italian wine bearing the label "It Is It Is It Is."[106] The shipment was detained by the collector of the port, at the behest of defendant.[107] Defendant challenged the plaintiffs' attempted importation of the product on the ground that the label was merely a translation of the defendant's registered trademark, Est Est Est, and thus infringed it.[108] The plaintiffs sued to enjoin the port collector from delaying the shipment, and further sought an order canceling defendant's registration.[109] The plaintiffs' primary attack on the defendant's mark was that the trademark as registered was invalid.[110]

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103. The Southern District of New York, in holding, "Est Est Est," as a proposed trademark for Italian wine, invalid due to common use in Italy to signify wine of certain locality, the Court noted that:

> By the weight of authority, a word commonly used in other countries to identify a kind of product and there in the public domain as a descriptive or generic name may not be appropriated here as a trademark on that product, even though the person claiming the word was the one who introduced the product here and the word then had no significance to our people generally.

Holland v. C. & A. Import Corporation, 8 F. Supp. 259, 261 (S.D.N.Y. 1934); *see also* Otokoyama Co. Ltd., v. Wine of Japan Import, Inc., 175 F.3d at 266, 268-69 (2d Cir. 1999) (stating that the word "otokoyama" was not eligible for trademark protection because of its long-standing use as a designation for sake by other traders in the industry); Burke v. Cassin, 5 Cal. 467, 479 (1873) (showing that the word "Schnapps" was in common use and could not be appropriated by the plaintiff as his trademark).

104. 8 F. Supp. 259 (S.D.N.Y. 1934).

105. *Holland*, 8 F. Supp. at 261-62. *But see* John T. Cross, Article, *Language and the Law: The Special Role of Trademarks, Trade Names, and Other Trade Emblems*, 76 NEB. L. REV. 95, 140 (discussing why the foreign equivalent rule is too strict); French Transit, Ltd. v. Modern Coupon Sys., 818 F. Supp. 635, 636 (S.D.N.Y. 1993) (stating when the Doctrine of Foreign Equivalents does not apply).

106. *Holland,* 8 F. Supp. at 261. *See* Le Blume Import Co. v. Coty, Inc., 293 F.2d 344 (2d Cir. 1923) (noting that the plaintiff tried to import perfume into the country); Dadirrian v. Yacubian, 98 F. 872 (1st Cir. 1900) (dealing with the importation of fermented milk food).

107. *Holland,* 8 F. Supp. at 260.

108. *Id*. at 261 (finding that the defendant claimed that the plaintiff translated Est Est Est to It is It is It is and bore this on the label of a shipment of Italian wine they attempted to import into the United States).

109. *Id.* at 260; *See* Le Blume Import Co. v. Coty, 293 F.2d 344, 347 (2d Cir. 1923) (describing that counsel moved for temporary injunctions to stop the infringer); Dadirrian v. Yacubian, 98 F. 872, 876 (1st Cir. 1900) (holding that party seeking injunction must have clean hands).

110. *Holland*, 8 F. Supp. at 260.

At a trial-level hearing it was adduced that Est Est Est was the name of a particular genus of wine made from grapes grown in a particular vicinity of Italy.[111] Plaintiff further established that the wine had been known by that name generally for at least a century, called throughout Italy Est Est Est.[112]

In addition to testimony, the Court entertained evidence in the form of the history treatise, *A History and Description of Modern Wines*, written by Cyrus Redding.[113] In that book, and in a similar work, it was generally stated that "[i]n the northern portions of the Roman States the richest and most esteemed wine is the famous Est, grown in the vicinity of Montefiascone."[114]

In the suit, the primary issue was whether defendant had a right to maintain registration of the mark Est Est Est in the United States.[115] In reaching its decision, the court canvassed the few cases existing at the time that addressed the prohibition against registration of foreign generic terms.[116] The court relied in part on *Dadirrian v. Yacubian*.[117] There, the plaintiff was denied the right to use Matzoon as a trademark for fermented milk, it being shown that the article was a well-known Armenian beverage and that Matzoon was the regular Armenian word

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111. *Id*. (discussing that plaintiff showed that Est Est Est is a name for wine made from grapes grown in the vicinity of Montefiascone, Italy and that for at least a century the wine made in this locality had been known in Italy as Est Est Est).

112. *Id*. *See* Burke v. Cassin, 45 Cal. 467, 479 (1873) (discussing how "Schnapps" had long been used to designate gin manufactured at Schiedam, prior to its adoption by the plaintiff); Otokoyama Co. Ltd., v. Wine of Japan Import, Inc., 175 F.3d 266, 268-69 (2d Cir. 1999) (discussing that the mark's use in Japan, in relation to sake, dates back at least to the Edo period, which began in the seventeenth century).

113. Holland v. C. & A. Import, 8 F. Supp. 259, 260 (*citing* CYRUS REDDING, A HISTORY AND DESCRIPTION OF MODERN WINES (1836) (a later edition was also printed in 1860)); THOMAS GEORGE SHAW, IN WINE, THE VINE AND THE CELLAR (1864). The court focused at length on the history of the Est name, recounting in its decision the lore that had arisen surrounding the origin of the name:

> The name has its origin in a legend said to date from the twelfth century. The story runs that a German bishop traveling to Rome sent his servant ahead to mark the places on the route where the wine was good. The mark to be made was Est. The servant found the wine of Montefiascone so good that he marked on the houses Est Est Est. The bishop on his arrival agreed with the servant and drank such a quantity of the wine that he died. His monument is said to be in the cathedral there, with the inscription written by the servant: 'Est-est-est.' Propter nimium 'est,' Dominus meus mortuus 'est.'

8 F. Supp. at 260.

114. IN WINE, THE VINE AND THE CELLAR, THOMAS GEORGE SHAW, at 418 (1864); *see also* CYRUS REDDING, A HISTORY AND DESCRIPTION OF MODERN WINES (1836) (discussing the same legend).

115. Holland v. C. & A. Import, 8 F. Supp. 259, 260-61 (discussing the development of the issue before the court).

116. Dadirrian v. Yacubian, 98 F. 872 (C.C.A. 1) (1900); Davis v. Stribolt, 59 L.T.N.S. 854 (1889); and Burke v. Cassin, 45 Cal. 467 (1873).

117. *Holland*, 8 F. Supp. at 261 (discussing the court's analysis of *Dadirrian*).

for it.[118] The fact that the plaintiff had brought the beverage into the U.S. at a time when neither it nor the name was known here was deemed immaterial.[119]

The *Holland* court considered also the Chancery Division's opinion in *Davis v. Stribolt.*[120] In *Davis*, the Norwegian word "Bokoe," meaning bock beer and first used in England by the plaintiffs, was held not to be a valid trademark.[121] In discussing the contention in favor of the validity of the mark, the court held that "If the argument were well founded[,] the importer into this country of any foreign article, not previously known in this country, could restrain anyone else from using the name by which it was called in the country where it was produced. . . . It is plain no such proposition could be maintained."[122]

Finally, the *Holland* court considered *Burke v. Cassin*,[123] where it was held that Schnapps, a Dutch gin, could not be taken as a trademark in this country, the word being a generic one.[124]

For the Court in *Holland,* the deciding factor was the convincing proof that the words "Est Est Est" were descriptive of a particular type of wine in Italy long before the defendant used the name as a mark to identify wines sold in the United States.[125] The Court therefore concluded that the defendant had "no right to monopolize to words 'Est Est Est' on bottles of wine and that its trademark [was] not a valid one."[126]

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118. *Id.* (*citing Dadirrian*, 98 F. at 874) (noting that the defendant replied and insisted that "Matzoon" is a word symbol and when correctly transliterated is Madzoon and that is not a beverage). *See* Kauserbrauerei, Beck & Co. v. J. & P. Baltz Brewing Co., 71 F. 695, 697 (1895) (noting that a mark affixed to a vendible article that is not lawfully appropriated for such use in a foreign country could be properly used as a valid trademark in the United States).

119. *Holland,* 8 F. Supp. at 261 (*citing Dadirran*, 98 F. at 878-80) (stating that, while it is well settled that a trademark of a descriptive character cannot be monopolized as such, there may be circumstances in which subsequent users may be bound to distinguish their merchandise and may be restrained, unless they couple with the use of the generic name, some caution suitable to guard the public from confusing sources of production). *See* Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169 (1896) (discussing more fully the secondary use of a generic term).

120. 59 L.T.N.S. 854 (1889).

121. Holland v. C. & A. Import, 8 F. Supp. at 261 (citing *Davis*, 59 L.T.N.S. at 855).

122. *Holland*, 8 F. Supp. at 261 (quoting *Davis*, 59 L.T.N.S. at 855). *See* Waller Baker & Co. v. Delapenna, 160 F. 746, 748 (C.C.D.N.J. 1908) (stating "[a] foreigner has no common law right to a trademark in the United States as against a citizen who has adopted a similar mark in good faith before the alien has sold any goods in this country").

123. 45 Cal. 467, 479, (1873) (holding that Schnapps gin could not be taken as a trademark in this country since the word was generic).

124. *Id. See Holland*, 8 F. Supp. at 261 (discussing *Burke* and *citing* Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 252 (1910); DeBevoise Co. v. H. & W. Co., 69 N.J.Eq. 114 (1905); Godillot v. Hazard, 49 How.Pr. (N.Y.) 5 (1880); Roncoroni v. Gross, 92 App. Div. 221 (N.Y. App.Div. 1st Dept. 1904); Selchow v. Chaffee & Selchow Co., 132 F. 996 (C.C.N.Y. 1904)). *See generally* HARRY D. NIMS, THE LAW OF UNFAIR COMPETITION AND TRADEMARKS § 208 (3d ed. 1929) (discussing trademark rights to importers of products not previously known in the United States).

125. *Holland,* 8 F. Supp. at 261(focusing on the "convincing [proof] that in Italy or in part of Italy the words 'Est Est Est' are in common use to signify the wine made in Montefiascone. The name is descriptive of that type of wine, and was commonly applied to it long before the defendant took the name as a mark to identify wines sold here").

126. *Id.*

Modern Application of the Doctrine

Generic foreign words are now routinely deemed invalid as trademarks for the specified good in America.[127] HA-LUSH-KA, used as a proposed trademark for egg noodles here in America, has been disallowed based on the foreign translation of the term in Hungary, where it means egg noodles precisely.[128] TIPO has been disallowed as a mark for chianti wine, based on TIPO's understood meaning in Italian;[129] CABA has been rejected for coffee, based on the Serbian translation meaning "coffee";[130] and FIOCCO has been denied for rayon, based on the Italian translation meaning rayon yarn.[131] These are but a few examples.

"What's in a name? That which we call a rose by any other name would smell as sweet."[132] With this oft-quoted concept, the Southern District in *Orto Conserviera Cameranese D Giacchetti Marino & C.S.N.C., and Penta International, Inc. v. Bioconserve, S.R.L. and Bella d Cerignola, Inc.,*[133] began its analysis of a trademark dispute over the rights to an Italian olive name.

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127. *See* Roncoroni v. Gross, 92 A.D. 221, 222 (1904) ("It is now well settled that no one can acquire a trademark by the use of the words of a foreign language which correctly describes the article manufactured."); Coty, Inc. v. LeBlume Import Co., 292 F. 264, 267 (1923) ("A foreign word used in the country of its origin, in a descriptive way, cannot be used as a trademark in this country"); *see also,* Thermogene Co. v. Thermozine Co., 234 F. 69 (1916) (providing that neither the French word "thermogene," meaning "to bring forth heat," the English spelling being "thermogen," could be monopolized by a single individual).

128. *See* Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845 (C.C.P.A. 1961) (reasoning that even though the Hungarian word is technically spelled "haluska," without the "h," the phonetic English equivalent of the word is spelled "halushka," the way it is pronounced.) The Court went on to note that the hyphenation of the "phonetic version [of the word] does not destroy its identity." *Id.* The Court concluded that words which are merely descriptive cannot be registered as trademarks, even if the word is in a foreign language.

129. *See Ex Parte* Monarch Wine Co., 117 U.S.P.Q. 454 (Commissioner Patents 1958) (affirming the Examiner of Trademark's decision to deny petitioner registration of the word "vinca" as a trademark. The Court considered evidence showing that the "Polish word 'winka' [is] a diminutive of 'wino,' [the word for wine], and that it is pronounced 'vinka.'" The Court thus concluded, 'vinka' is a foreign equivalent of a "merely descriptive word" and unregistrable).

130. *See In re* Hag Aktiengesellschaft, 155 U.S.P.Q. 598 (T.T.A.B. 1967) (rejecting the applicant's argument that the Serbian word for coffee is "kava" and not "kaba," the name of its product. The Court countered, saying that "kava" is a phonetic spelling of the Serbian "kaba," and that people familiar with the Serbian language would recognize the product name "kaba" as a "corruption, misspelling, or a play on the Serbian . . . word for coffee."). The Court conceded that the average American would not be familiar with these words, but that in a trademark situation, one must keep in mind that there is a population that will be. Therefore, "kaba" was ruled unregistrable because it is "incapable of distinguishing [the] applicant's goods in commerce" *Id.*

131. *See* Bart Schwartz International Textiles, Ltd. v. Federal Trade Commission, 289 F.2d 665 (Cust. & Pat. App., Apr 14, 1961) (No. 6599) (holding that the registration was obtained fraudulently within the meaning of the Lanham Trade-Mark Act, and was required to be canceled, because of a misrepresentation in the declaration concerning what the applicant knew to be the rights of others to use the word "fiocco," where the evidence established that the applicant, at the time he verified the application for registration, knew that others had the right to use the word in commerce for textile fabrics).

132. WILLIAM SHAKESPEARE, ROMEO AND JULIET, ACT. II, Sc. ii.

133. No. 97 Civ. 6638, 1999 WL 47258 at *1 (S.D.N.Y. Feb. 3, 1999) (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET, Act. II, Sc. ii.) (noting that both sides in the litigation believed that consumers in the United States will not consider a particular olive as sweet if it was not called "Bella di Cerignola").

In *Orto* the mark in dispute was the Italian term "Bella di Cerignola."[134] The phrase is a generic designation of a particular type of olive favored abroad and in the United States.[135] Both sides in *Orto* believed that consumers in the United States would not consider a particular olive as sweet if it were not called "Bella di Cerignola."[136] The defendant had registered the term as its trademark, and claimed to be the first producer to introduce into the United States this particular form of olive.[137] What was hotly contested between the parties was whether the term "Bella di Cerignola" had become a generic designation of this particular type of olive, and therefore, unavailable to any party for exclusive use as a trademark.[138]

The defendants in *Orto*, attempting to protect their trademark against plaintiff's challenge, argued that the term "Bella di Cerignola" had not yet become generic in the United States.[139] On this premise, defendant argued that it should be permitted to maintain its registration, and prevent others—including plaintiff—from commencing marketing efforts under the same name.[140]

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134. Orto Conserviera Caneranese D Giachetti Marino & C.S.N.C., and Penta International, Inc. v. Bioconserve, S.R.L. and Bella d Cerignola, Inc., No. 97 Civ. 6638, 1999 WL 47258 at *1 (S.D.N.Y. Feb. 3, 1999) (discussing whether "Bella di Cerignola" was a generic name). *See also* Genesee Brewing Co., Inc. v. Stroh Brewing Co., 124 F.3d 137, 140 (2d Cir. 1997) (noting that the term in dispute between the parties was "Honey Brown" was used to identify beer); CES Publishing Corp. v. St. Regis Publication, Inc., 531 F.2d 11, 12 (2d Cir. 1975) (discussing that the trademark dispute arose over the term "Consumer Electronics Monthly").

135. *Orto*, 1999 WL 47258 at *1 (stating the evidence suggested that for a substantial period before 1992 the defendant used the term "Bella di Cerignola " in the United States, not as a trademark, but only as a generic designation for the type of olive they were selling). *See generally* Ann K. Ford and Scott R. Flick, *Review of the 1989 Trademark Decisions of the Court of Appeals for the Federal Circuit*, 39 AM. U.L. REV. 1233, 1234-35 (1990) (discussing what constitutes a generic term); Mary L. Kevlin, *Review of the 1985 Trademark Decisions of the Court of Appeals for the Federal Circuit*, 35 AM. U.L. REV. 1149, 1159 (1986) (discussing that tribunals have often expressed the policy consideration that no one competitor should be granted exclusive rights in highly descriptive or generic terms).

136. *Orto*, 1999 WL 47258 at *1.

137. *Orto*, 1999 WL 47258 at *1 (stating that the defendant Bioconserve in 1995 filed a trademark application for "Bella di Cerignola & Design"). *See* Kevlin, *supra* note 135, at 1152 (discussing that an application to register a mark in the United States may be based on a registration or an application to register the mark in some foreign countries). *See generally* Louis Lorvellec, *You've Got to Fight for Your Right to Party: A Response to Professor Jim Chen*, 5 MINN. J. GLOBAL TRADE 65, 74 (1996) (discussing that foreign indigenous names of regions when it comes to wines are generic).

138. *Orto*, 1999 WL 47258 at *1 (discussing the plaintiff's contention that the term "Bella di Cerignola" is a generic designation of a particular type of olive and, therefore, defendants cannot use it as a trademark). *See also* Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 114 (1938) (discussing the term "shredded wheat" as a general designation of the product made under the product and process patents issued to Henry E. Perky). *See generally* Ralph S. Brown, *New Wine in Old Bottles: The Protection of France's Wine Classification System Beyond its Borders*, 12 B.U. INT'L L.J. 471, 483 (1994) (discussing that an American winemaker would be unable to register a product under the name "Chablis" since it is generic); Lori E. Simon, *Appellations of Origin: The Continuing Controversy*, 5 J. INTL. L. BUS. 132 (1983) (discussing that geographical denominations that indicate a product's origin and distinctive qualities associated with that product has been the source of trademark disputes).

139. *Orto*, 1999 WL 47258 at *2 (noting defendant's argument that the term "Bella di Cerignola" had not yet become generic in this country). *See* Simon, *supra* note 138, at 132 (discussing that semi-generic marks may be used regardless of the actual origin of the product.); Kevlin, *supra* note 135, at 1160 (discussing the general qualifications that deem a term generic).

140. *Orto*, 1999 WL 47258 at *2 (noting defendant's contention that the number of users of the term "Bella di Cerignola" is relatively few and that they, including the plaintiff, are infringing on their mark).

The Court in *Orto* rejected defendants' "domestic" analysis of the "generic" issue.[141] The Court refused to follow earlier cases which held only a mark's use in the United States was relevant, regardless of whether the term may be generic in another country.[142] The court explained that those cases reflected an overly parochial approach, inappropriate for today's "international" business climate.[143] In taking a less provincial approach, the Court recognized that consumers interested in gourmet foods will undoubtedly keep informed as to developments in the international food market.[144] Therefore, an unknown item may become popular within a relatively brief period of time and granting rights to the first importer of such an item would be to, in this context, grant an unfair advantage. [145] The Southern District concluded that the defendant, proponent of the Italian term mark, was not entitled to use the term as a trademark.[146]

In the second Foreign Equivalents case decided recently, the Second Circuit was called upon to analyze the potentially generic character of a Japanese term, "otokoyama."[147] The doctrine of foreign equivalents was held to provide sufficient basis for reversing a preliminary

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141. *Orto,* 1999 WL 47258 at *2 (finding that the term "Bella di Cerignola" is clearly a generic term for a type of olive and to allow defendant the exclusive use of the term would grant it a monopoly to which it is not entitled).

142. *Id. See, e.g.,* Anheuser-Busch Inc. v. The Stroh Brewery Co., 750 F.2d 631, 642 (8th Cir. 1984) (stating that, in determining whether a term used as a trademark is generic, courts should consider only its use in this country and disregard the mark's use in foreign countries); Abercrombie & Fitch v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976) (stating that, allowing an importer to use a product's generic designation in its country of origin, as a trademark, would give an unfair advantage to the importer which trademark law should not allow); Seiko Sporting Goods USA, Inc. v. Kabushiki Kaisha Hattori Tokeiten, 545 F. Supp. 221, 226 (S.D.N.Y. 1982) (noting that despite the plaintiff's attempt to show that Seiko was a generic Japanese term, the court held that the mark must still be regarded as arbitrary and fanciful in the United States).

143. In departing from prior case law, the Court explained that:

> Even if the Court were to conclude that "Bella di Cerignola" had not yet become generic in this country, it would be reluctant to permit defendants to use it as a trademark for olives because to do so would preclude producers of Italian olives from selling them using the generic designation by which they are known in the country of origin. There are cases that state that, in determining whether a term used as a trademark is generic, the courts should consider only its use in this country and the fact that the term may be generic in another country is of no consequence . . . However the facts of this case suggest that, as a general rule, such reasoning is too parochial for the modern world of international commerce.

Orto, 1999 WL 47258 at *2.

144. *Id.* ("It does not strain the bounds of judicial notice to recognize that those who are interested in gourmet foods are often people who travel internationally or, at least, keep abreast of international developments in the food market.").

145. *Id.* ("[A]n item of produce that is practically unknown in this country can become relatively popular within a brief period. To allow the first importer of such a product to use its generic designation in the country of origin as a trademark would give that importer a competitive advantage that the law of trademarks should not allow.").

146. *See Orto,* 1999 WL 47258 at *3 (holding, "the term 'Bella di Cerignola' is a generic term that may not be trademarked and may be used by the plaintiffs and others to describe olives originating in the vicinity of Cerignola, Italy.").

147. *See* Otokoyama Co. Ltd., v. Wine of Japan Import, Inc., 175 F.3d 266 (2d Cir. 1999); *see also* Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845, 846-47 (C.C.P.A. 1960) (discussing the application of a ban on trademarking generic names to foreign equivalents); *In re* Hag Aktiengesellschaft, 155 U.S.P.Q. 598, 599 (T.T.A.B. 1967) (stating that trademark law in this country holds that the foreign equivalent of a merely descriptive English word is no more registrable than the English word itself).

injunction granted earlier in favor of plaintiff.[148] In *Otokoyama Co. v. Wine of Japan Import Inc.*,[149] the Second Circuit vacated the preliminary injunction, declaring that the validity of the plaintiff's trademark was cast into doubt by evidence that the underlying term was generic in Japan.[150]

The plaintiff in *Otokoyama* held four U.S. trademarks in the word "otokoyama" and related Japanese language pictograms signifying the word.[151] Plaintiff brought its infringement suit after defendant, an importer, began selling a brand of sake known as "Mutsu Otokoyama" in the United States.[152] Defendant raised counterclaims seeking cancellation of plaintiff's mark, on the premise that the term was generic based on its foreign (Japanese) equivalent.[153] Defendant also counterclaimed that plaintiff had perpetrated a fraud on the Patent and Trademark Office in obtaining its registrations.[154]

At the trial level, the district court refused to consider evidence proffered by defendant tending to demonstrate that the term "otokoyama" in Japan was generic, signifying a particular liquid refreshment.[155] The trial court also refused to consider evidence that the Japanese trademark office had denied trademark protection for plaintiff's mark, based on the generic nature of the word "otokoyama."[156] The defendant appealed to the Second Circuit, stating that the trial court's decisions in both instances were error.[157]

The Second Circuit began its analysis by explaining the well-established principle that generic terms cannot be given trademark protection.[158] Echoing Judge Friendly's holding ear-

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148. *See Otokoyama,* 175 F.3d at 273 (stating that the evidence offered by the defendant at the preliminary injunction hearing was sufficient to undermine the plaintiff's likelihood of success on the merits, however, was not necessarily sufficient to carry the burden of proving that the term is generic which will be determined in accordance with the evidence presented below).

149. 175 F.3d 266 (2d Cir. 1999).

150. *Otokoyama*, 175 F.3d at 268 (holding that the District Court erred in granting preliminary injunction for the plaintiff and found that the defendant raised sufficient doubt as to the validity of plaintiff's trademark).

151. *Otokoyama*, 175 F.3d at 268 (specifying that the plaintiff registered the English transliteration of "otokoyama" and three trademarks of Japanese pictograms comprising "otokoyama" with the U.S. Trademark Office).

152. *Otokoyama,* 175 F.3d at 266.

153. *Id*. at 268.

154. *Id.*

155. *Id.* at 270 (discussing that on appeal the defendants contended that the District Court erred in refusing to consider evidence that "otokayama" is a generic term for sake). *See In re* Hag Aktiengesellschaft, 155 U.S.P.Q. 598, 599 (T.T.A.B. 1967) (discussing that the applicant had referred to two dictionaries which indicate that both in the Serbian and Ukrainian languages, the word for coffee is "Kava" and not "Kaba").

156. *Otokoyama*, 175 F.3d at 272 (discussing the defendant's challenge of the District Court's exclusion of a ruling of the Japanese Patent Office which denied the plaintiff trademark rights in Japan).

157. *Id.* at 270 (stating "[d]efendant contends the district court erred in refusing to consider evidence that otokoyama is a generic term for sake, or a type of sake, in the Japanese language as spoken in Japan, and that the district court erred in excluding the decision of the Japanese Patent Office.").

158. *Id*.

lier,[159] the Second Circuit stated that it is a well-settled principle that generic terms are not eligible for trademark protection.[160]

The rule prohibiting assignment of trademark rights to generic terms is founded upon principles of general fairness among both the consuming public and marketplace competitors in that it would be unduly burdensome and confusing to allow generic terms trademark protection.[161] The Circuit Court left no doubt that the prohibition extends to foreign language marks, stating, "the same rule applies when the word designates the product in a language other than English. This extension rests on the assumption that there are (or someday will be) customers in the United States who speak that foreign language."[162] The Court added that due to the diversity of the marketplace in the United States, commerce utilizes innumerable foreign languages,[163] thus, "[n]o merchant may obtain the exclusive right over a trademark designation if that exclusivity would prevent competitors from designating a product as what it is in the foreign language their customers know best."[164] This reality has been embodied in a policy, known

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159. *Id.* (quoting CES Publishing Corp. v. St. Regis Publications, Inc., 531 F.2d 11, 13 (2d Cir. 1975) (Friendly, J.) (stating "[t]o allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold [is impermissible because] a competitor could not describe his goods as what they are.").

160. In laying the legal foundation for its decision, the Court stated that:

> It is a bedrock principle of the trademark law that no trader may acquire the exclusive right to the use of a term by which the covered goods or services are designated in the language. Such a term is generic. Generic terms are not eligible for protection as trademarks; everyone may use them to refer to the goods they designate.

Otokoyama, 175 F.3d at 270. *See* Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 116-17 (1938) (holding that the term "shredded wheat" is a generic term, and therefore, "the original maker of the product acquired no exclusive right to use it."); Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 810 (2d Cir. 1999) (holding that, "the word 'hog' is generic as applied to large motorcycles before Harley-Davidson began to make trademark use of 'hog' and that Harley-Davidson's attempt to withdraw this use of the word from the public domain cannot succeed."); Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 17 (2d Cir. 1976) (holding that, inter alia, "applied to specific types of clothing 'safari' has become a generic term and 'minisafari' may be used for a smaller brim hat."); Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845, 847 (C.C.P.A. 1961) (holding that, "'HA-LUSH-KA,' as the common descriptive name for egg noodles, could not have acquired a secondary meaning as an indication of origin of appellant's product . . ."); J. Krohnstam, Ltd. v. Louis Marx & Co., 280 F.2d 437, 440 (C.C.P.A. 1960) (affirming the decision of the Commissioner of Patents who "sustained an opposition to the registration of 'MATCHBOX SERIES' on the Principle Register as a trademark for 'toy model vehicles and toy model machines.'").

161. *See Otokoyama,* 175 F.3d at 270 (stating that, "[t]his rule protects the interest of the consuming public in understanding the nature of goods offered for sale, as well as a fair marketplace among competitors by ensuring that every provider may refer to his goods as what they are."); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 15 cmt. b (1995) (stating, "A seller . . . cannot remove a generic term from the public domain and cast upon competitors the burden of using an alternative name.").

162. *Otokoyama*, 175 F.3d at 270.

163. *Id.* at 271 (stating that, "[b]ecause of the diversity of the population of the United States, coupled with temporary visitors, all of whom are part of the United States' marketplace, commerce in the United States utilizes innumerable foreign languages."). *See, e.g., In re* Cooperativa Produttori Latte E Fontina Valle D' Acosta, 230 U.S.P.Q. 131, 134 (T.T.A.B. 1986) (holding "fontina" as generic for a type of cheese); *In re* Northland Aluminum Prods., 221 U.S.P.Q. 1110, 1112 (T.T.A.B. 1984), *aff'd,* 777 F.2d 1556, 1561 (Fed. Cir. 1985) (holding "bundt" as generic for variety of ring-shaped coffee cake); Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 252, 257 (1910) (holding "tipo" as generic Italian for a type of chianti wine).

164. *Otokoyama,* 175 F.3d at 271.

in the Courts and the United States Patent Office, as the doctrine of "foreign equivalents;" making generic foreign words ineligible for private ownership as trademarks.[165]

Focusing on the Japanese term "otokoyama," the Circuit Court found the meaning to be highly relevant in determining whether the plaintiff could claim trademark protection for the word.[166] The Circuit Court ruled that it was error for the district court to reject this evidence, and on this ground held that plaintiff had not reached his standard of proof.[167] In granting the injunction, the District Court also found irrelevant the ruling of the Japanese Patent Office (responsible for trademark registrations in Japan) which denied plaintiff registration for the mark "otokoyama."[168] The Second Circuit, however, held that while rights in a mark cannot be established by showing that they have been approved by a foreign tribunal, not all foreign decisions are irrelevant and inadmissible in a U.S. trademark dispute.[169]

In distinguishing prior Second Circuit decisions,[170] the Court reasoned that the admissibility of a foreign decision depends on the purpose for which it is offered.[171] A foreign court

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165. *Id. See In re* Le Sorbet, Inc., 228 U.S.P.Q. 27, 28 (T.T.A.B. 1985) (holding that, "sorbet," the French word for fruit ice, as non-protectible); *In re* Hag Aktiengesellschaft, 155 U.S.P.Q. 598, 599-600 (T.T.A.B. 1967) (holding that, "kaba," meaning coffee in Serbian and Ukranian, as non-protectible); Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845, 846-47 (C.C.P.A. 1961) (applying ban on trademarking generic names to foreign equivalents, and holding that, "ha-lush-ka," phonetic spelling of Hungarian word for "egg noodles," is non-protectible); *see also* Thomas McCarthy, McCarthy On Trademark and Unfair Competition § 12:41 at 12-83, 12-84 (1996 ed.) (discussing the Doctrine of Foreign Equivalents).

166. *Otokoyama,* 175 F.3d at 272 (stating that, "[t]he meaning of otokoyama in Japanese, and particularly whether it designates sake, or a type or category of sake, was therefore highly relevant to whether plaintiff may assert the exclusive right to use that word as a mark applied to sake").

167. *Id.* (explaining that, "[d]efendant should have been allowed to introduce evidence of otokoyama's meaning and usage in Japan to support its claim that the mark is generic and therefore ineligible for protection as a trademark. In light of this error, the district court's finding that plaintiff is likely to succeed on the merits cannot be sustained.").

168. *Id.* (noting the district court's misplaced reliance on Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) in excluding the ruling of the Japanese Patent Office, which denied plaintiff trademark rights in Japan). In *Vanity Fair Mills*, the court broadly stated, "the decisions of foreign courts concerning the respective trade-mark rights of the parties are irrelevant and inadmissible." *Id.* at 639. However, the court also noted that the general rule that "decisions of foreign courts" are generally "inadmissible and irrelevant," is not without exceptions.

169. *Otokoyama,* 175 F.3d at 272 (disagreeing with the district court's understanding of Vanity Fair Mills, Inc. v. T. Eaton Co., the court held that despite the broad statement espoused therein, "[i]t does not follow, however, that foreign court decisions are never relevant or admissible for any purpose in a U.S. trademark dispute.").

170. *Id. See* Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956); City of Carlsbad v. Kutnow, 68 F. 794 (S.D.N.Y.), *aff'd*, 71 F. 167 (2d Cir. 1895).

171. *Otokoyama,* 175 F.3d at 273 (stating "[w]hether a foreign decision is relevant in a trademark case in our courts depends on the purpose for which it is offered.").

decision is not admissible to show entitlement, or non-entitlement, in the United States, but is admissible to prove a relevant fact.[172]

The defendant in *Otokoyama Co. Ltd.* had offered the Japanese Patent Office's decision to prove that the word "otokoyama" in Japanese refers to a type of sake.[173] The Circuit Court held that it was error for the district court to have excluded the Japanese Patent Office's decision, under these circumstances.[174]

Notably, the Second Circuit rejected the defendant's claim that plaintiff had perpetrated a fraud on the PTO, by failing to disclose the generic character of the term.[175] The District Court held that defendant's attempt to invoke the principles discussed in *Bart Schwartz,* was mis-

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172. In drawing the distinction and paving the way for its reversal, the Court stated:

> The fact that a litigant has been awarded or denied rights over a mark in a foreign country ordinarily does not determine its entitlement to the mark in the United States. The foreign court decision is not admissible if that is the purpose of the offer. But if . . . the foreign decision is competent evidence of a relevant fact, it is relevant and admissible to prove that fact.

Otokoyama, 175 F.3d at 273. *See, e.g.,* George W. Luft Co. v. Zande Cosmetic Co., 142 F.2d 536, 539 (2d Cir. 1944) (ruling foreign decisions were relevant and admissible). In *Luft,* the Second Circuit held that the district court's exclusion of various foreign registrations, offered by the defendant, was error in that "the purpose of offering the foreign registrations was not to establish the privilege of using the [mark] in the United States but to prove that the defendants might lawfully use it within the foreign country which granted registration."). *See generally* Gary M. Hnath & James M. Gould, *Litigating Trade Secrets Cases at the International Trade Commission*, 19 AIPLA Q.J. 87, 108 (1991) (discussing the general rule that if a word in a foreign language is used in its country of origin in a descriptive way, it cannot be used as a trademark in this country).

173. *Otokoyama*, 175 F.3d at 271 (noting the defendant's contention in the district court that the word "otokoyama" falls within a generic category, claiming that in Japanese, "otokoyama" had long been understood as designating a variety of "dry, manly sake" that originated more than 300 years ago").

174. *Otokoyma*, 175 F.3d at 273 (ruling that "[i]t was error to exclude the JPO decision on grounds of relevance." Evidence offered to prove what may amount to fraud should not be excluded). *But see* Orient Express Trading Co. v. Federated Department Stores, Inc., 842 F.2d 650, 653 (2nd Cir. 1988) (holding that cancellation of appellant's 19 registered trademarks was proper because "appellees had shown fraud by clear and convincing evidence" which is the proper standard); Bart Schwartz International Textiles v. F.T.C., 289 F.2d 665, 669-70 (C.C.P.A. 1961) (finding that the trademark registration "was obtained fraudulently . . . because of the misrepresentation in the declaration concerning what appellant knew to be the rights of others to use the word" 'fiocco').

175. *Otokoyama,* 175 F.3d at 273 (discussing defendant's theory that because plaintiff was denied trademark rights in Japan, and then represented to the United States Trade Mark Examiner that, "otokoyama" was an "arbitrary, fanciful term . . . [that] cannot be translated," the plaintiff committed fraud on the trade mark office in the United States). *See* The Lanham Act does permit the PTO to require applicants to disclaim ownership of non-registrable terms. Section 1056 of title 15 states that:

> The Commissioner may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. An applicant may voluntarily disclaim a component of a mark sought to be registered. . . . No disclaimer, including those made under subsection (e) of Section 1057 of this title, shall prejudice or affect the applicant's or registrant's rights then existing or thereafter arising in the disclaimed matter, or his right of registration on another application if the disclaimed matter be or shall have become distinctive of his goods or services.

placed since the case held that merely withholding information did not rise to the level of fraudulent conduct.[176]

Limitations on the Doctrine

The Doctrine of Foreign Equivalents is not without its limitations. In many cases involving seemingly "generic" foreign terms, the doctrine is disregarded based on overriding trademark principles.[177] For example, the Doctrine of Foreign Equivalents is not applied where the mark in question includes a combination of foreign and English words.[178]

This same principle was applied by the Southern District of New York in *French Transit, Ltd. v. Modern Coupon Systems, Inc.*[179] There, plaintiff brought suit to enforce its proprietary interest in the mark LE CRYSTAL NATUREL.[180] The mark thus consisted of an English word "Crystal," and the two French words "Le" and "Naturel."[181] The court therefore reasoned that "the proper form of [plaintiff's] trademark to examine in determining the trademark's classifica-

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176. Specifically, the District Court explained that:

> Defendant's reliance on Bart Schwartz International Textiles, Ltd. v. The Federal Trade Commission, 129 U.S.P.Q. 258, 289 F.2d 665 (1961) is unavailing. In that case, the court held that where a trademark applicant made a statement that no other person had the right to use the trademark and knew this was false, such conduct warranted cancellation of the trademark. The court stated, however, that "[t]he mere withholding of information as to the meaning of the Italian word 'fiocco' is not such a fraudulent withholding of information as to warrant cancellation of the mark." Thus, even if OCL fraudulently withheld the meaning of the word "otokoyama," under Schwartz, this would not warrant cancellation.

985 F. Supp. 372, 375 n. 3.

177. *See, e.g., In re* Le Sorbet, Inc., 228 U.S.P.Q. 27, 28 (T.T.A.B. 1985) (holding, "sorbet," a French word for fruit ice, as non-protectible); Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845, 846-47 (C.C.P.A. 1961) (applying ban on trademarking generic names to foreign equivalents, and holding that "ha-lush-ka," phonetic spelling of Hungarian word for "egg noodles," is non-protectible).

178. *See In re* Johanna Farms, 8 U.S.P.Q.2d 1408, 1413 (TTAB 1988) (discussing the combination of the French article "La" with the English word "Yogurt" as changing the commercial impression of the mark as a whole such that LaYogurt was perceived as a trade name rather than a product, and was therefore protectible); *In re* Universal Package Corp., 222 U.S.P.Q. 344, 347 (T.T.A.B. 1984) (stating that when a mark is of all foreign components, translation of the entire mark by the consumer is more likely to take place than when only part of the mark is in a foreign langauge).

179. 818 F. Supp. 635, 636 (S.D.N.Y. 1993).

180. *Id.* (noting that, plaintiff sued, inter alia, for trademark infringement, trade dress infringement, unfair competition and misappropriation under New York law, and for violation of New York General Business Law §§ 133, 368-d).

181. *French Transit,* 818 F. Supp. at 636 (stating that plaintiff's president testified that his company used both English and French in the mark "to highlight that the product was imported from France").

tion is 'LE CRYSTAL NATUREL,' and not 'the natural crystal.'"[182] Based on this, the court held the mark to be suggestive.[183]

Other limitations on the doctrine arise when the words involved are from obscure or even dead languages.[184] The esteemed Augustus Hand, writing for the Second Circuit, noted this limitation in *McKesson & Robbins, Inc. v. Charles H. Phillips Chemical* 10.[185] There, the Court distinguished between "common" foreign terms, and "obscure" ones.[186]

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182. *Id. See In re* Universal Package Corp., 222 U.S.P.Q. 344, 347 (stating that when the French article "LE" is used before the English word "CASE" the commercial impression created by this combination is something different then that which would be created by "THE CASE"); *In re* Johanna Farms, Inc., 8 U.S.P.Q.2d at 1413 (demonstrating that the primary significance of "LA YOGURT" to most of the public is that of a brand name and not a generic term).

183. *French Transit,* 818 F. Supp. at 637 (finding that, "[e]xamining the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff's mark is suggestive."). *See* Karmike Corp. v. The May Department Stores Co., Inc., 658 F. Supp. 1361, 1369 (S.D.N.Y. 1987) (stating, "A suggestive mark has not been clearly defined, but appears to be one that requires imagination, thought and perception to reach a conclusion as to the nature of the goods or one which only 'indirectly' describes the goods or services at issue."); Stix Products, Inc. v. United Merchants & Mfrs., Inc., 295 F. Supp. 479, 488 (S.D.N.Y. 1968) (noting that a mark is suggestive, rather than descriptive, if it merely suggests the idea of some characteristic or quality to a potential buyer who has never seen the product and does not know what it is).

184. *See* Telechron, Inc. v. Telicon Corp., 198 F.2d 903 (3rd Cir. 1952) (analyzing obscure term "TELECHRON" taken from classical Greek language); *see also* Lambert Pharmacal Co. v. Bolton Chemical Corp., 219 F. 325, 327 (S.D.N.Y. 1915) (justifying the use of the term "Listoren" because it was "a coined term with a penumbra of suggestion); General Shoe Corp. v. Rosen, 111 F.2d 95 (4th Cir. 1940). In *Rosen*, the court stated:

> Between these two extremes lies a middle ground wherein terms of mingled qualities are found. It cannot be said that they are primarily descriptive or that they are purely arbitrary or fanciful without any indication of the nature of the goods which they denominate. Such terms, indeed, shed some light upon the characteristics of the goods, but so applied they involve an element of incongruity, and in order to be understood as descriptive, they must be taken in a suggestive or figurative sense through an effort of the imagination on the part of the observer. Many such suggestive terms have been approved as valid trademarks by the court. *Id.*

185. 53 F.2d 1011 (2nd Cir. 1931). In *McKesson & Robbins,* the Court, in affirming the ruling of the District Court, held that, the plaintiff "was entitled to a decree canceling the trade-mark 'Leche de Magnesia' as well as the mark, 'Milk of Magnesia"). The Court explained:

> [m]oreover, "Leche" being the Spanish for "milk" is a word that has always been known to the many Spaniards in the United States and Puerto Rico and readily becomes understandable by others. Thus it stands on quite a different footing from words taken from the language of Hottentots or Patagonians which might be so unfamiliar as to be in effect fanciful or arbitrary terms. That "Milk of Magnesia" is sold in the United States and called for under the name "Leche de Magnesia" is apparent from the record . . . and from the inherent probabilities of the case. Consequently, "Leche de Magnesia" is the ready equivalent of "Milk of Magnesia" to many people.

Id. at 1011. *See* Federal Trade-Mark Act 15 § 5 U.S.C.A.A. § 85 (1905) (discussing that the words "exclusive use" in Section 5 of the Trade-Mark Act have been regularly interpreted to mean exclusive use not only of the specific mark, but also of any other confusingly similar mark or term). *But see In re* Sarkli, Ltd., 721 F.2d 353 (Fed. Cir. 1983) (concluding that the use of dictionaries to determine language origin not dispositive of actual meaning).

186. *McKesson & Robbins,* 53 F.2d at 1011; *see also* Horn's, Inc. v. Sanofi Beaute, Inc. & Nina Ricci, Inc., 1995 U.S. Dist. LEXIS 8232, at *6-9 (S.D.N.Y. 1995) (holding that since defendants "themselves identified to the trade the phrase 'here and there' as the translation into English of the French phrase 'deci dela' " that they were stuck with their own translation); *Ex Parte* Odol-Werke Wien Gesellschaft M.B.H., 111 U.S.P.Q. 286 (1956) (where the Commissioner of Patents stated "It is well established that foreign words or terms may not be registered if the English language equivalent has been previously used on or registered for products which might reasonably be assumed to come from the same source.").

The Doctrine of Foreign Equivalents is frequently used as a defense in a trademark infringement suit.[187] The availability of the defense, of course, depends on the meaning of the words in their native land.[188] Where the term is not generic for the goods or service in question, the defense fails.[189] In *Russian Kurier, Inc. v. Russian American Kurier, Inc.*[190] the controversy centered on the parties' competing use of the term KURIER used in connection with Russian newspapers, catering to the Russian-American community in New York City.[191] Both the plaintiff's newspaper, KURIER, and the defendants' newspaper NEW YORK KURIER, were

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187. *See* French Transit, Ltd. v. Modern Coupon Systems, Inc., 818 F. Supp. 635, 636 (S.D.N.Y. 1993) (stating that "[a]pparently relying on the doctrine of foreign equivalents, [defendant] maintains that to determine the classification of [plaintiff's] mark 'LE CRYSTAL NATUREL,' we must ascertain the classification of the English words 'the natural crystal.'"); *McKesson & Robbins*, 53 F.2d at 1011 (the court observed, "It has been the general practice of the Patent Office and of the courts to deny registration to any misleading term even where it only becomes misleading through the understanding of a foreign language); *see also* John T. Cross, *Language and the Laws: The Special Role of Trademarks, Trade Names, and Other Trade Emblems*, 76 NEB. L. REV. 95, 135 (1997) (discussing various defenses to an infringement actions); THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, 3.03[2], at 3-13 (3d. ed. 1995) (criticizing the doctrine of foreign equivalents, especially when used to deny protection to foreign words which the vast majority of shoppers do not understand).

188. *See In re* Northland Products, Inc., 777 F.2d 1556 (Fed. Cir. 1985) (explaining that a foreign word can become a generic English term regardless of whether it was a generic term in the mother tongue, like "Bundt," or whether it was a trademark). Purchasers adopt the term as generic English because the product or service was previously unknown to the market and accordingly no English term readily describes it. A foreign trademark like BUNDT is no different than NYLON and CELLOPHANE, which similarly describe products that were at one time unique. The language of the market can adopt fanciful and foreign terms as product names with equal ease. *See, e.g.,* Pizzeria Uno Corp. v. Temple, 747 F.2d 1522 (4th Cir. 1984) (Italian); Volkswagenwerk Aktiengesellschaft v. Church, 256 F. Supp. 626 (S.D. Cal. 1966) (German), *aff'd*, 411 F.2d 350 (9th Cir. 1969).

189. The Lanham Act also permits a party to oppose the granting of a registration based on deficiencies in the proponent's ownership claim. Such "opposition proceedings" take place before the PTO's Trademark Trial and Appeal Board. In such proceedings, the Doctrine can be used offensively to challenge on applicant's right to register the proposed term. The relevant section of the Lanham Act states that:

> Any person who believes that he would be damaged by the registration of a mark upon the principal register may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor, within thirty days after the publication under subsection (a) of section 1062 of this title of the mark sought to be registered. Upon written request prior to the expiration of the thirty-day period, the time for filing opposition shall be extended for an additional thirty days, and further extensions of time for filing opposition may be granted by the Commissioner for good cause when requested prior to the expiration of an extension. The Commissioner shall notify the applicant of each extension of the time for filing opposition. An opposition may be amended under such conditions as may be prescribed by the Commissioner.

15 U.S.C.A. § 1063(a). *See* Thompson Medical Co. v. Pfizer, Inc., 753 F.2d 208, 212 (2nd Cir. 1985) (showing that a mark in question is eligible for protection depending on its classification as generic, descriptive, suggestive, or arbitrary); *see also* Otokoyama Co. Ltd. v. Wine of Japan Import Co., 175 F.3d 266, 269-270 (1999) (stating that the generic meaning of a term outside of the United States is irrelevant to a determination of entitlement to the protection of the U.S. trademark laws).

190. 899 F. Supp. 1204 (S.D.N.Y. 1995).

191. *Id.* at 1207.

printed in Russian.[192] The plaintiff had published KURIER since 1992.[193] Defendants began publishing in 1995.[194]

In connection with its motion for preliminary injunctive relief, plaintiff submitted affidavits from five individuals claiming to have mistaken NEW YORK KURIER for KURIER.[195]

Defendants nonetheless argued that KURIER is a generic term, commonly used to refer to newspapers in Russia, and thus, is not entitled to protection under the Lanham Act.[196] The court canvassed the Russian and English dictionaries, and after noting the phonetic similarities between the English word "courier" and the term in question, found that the term did not appear to be generic.[197]

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192. *Id.*

193. *Id.*

194. *Russian Kurier,* 899 F. Supp. at 1207.

195. *Id. See* Gazette Newspapers, Inc. v. New Paper, Inc., 934 F. Supp. 688, 696 (D. Md. 1996) (plaintiff demonstrated, through affidavits and testimony, that a number of people were confused by defendant's use of the word 'gazette' in a newspaper's title since the plaintiff's newspaper title also contained the word 'gazette'); *see also* Lozano Enterprises v. LA Opinion Publ. Co., No. CV 96-5969 CBM, 1997 U.S. Dist. LEXIS 20372, at *13 (C.D. Cal. July 31, 1997) ("Newspapers are relatively inexpensive. Therefore, consumers do not exercise great care in their purchases and consumer confusion is likely."); Times Mirror Magazines, Inc. v. Las Vegas Sports News, NO. 98-CV-5768, 1999 U.S. Dist. LEXIS 2832, at *9-11 (E.D. Pa. Mar. 5, 1999) (plaintiff exhibited how consumer confusion occurred when he requested the 'Las Vegas Sporting News' and was handed the Times Mirror 'Sporting News' at a number of newsstands).

196. *Russian Kurier,* 899 F. Supp. at 1208. *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (where Justice White noted generic terms are not registrable as trademarks under the Lanham Act); Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9-11 (2nd Cir. 1976) ("If a term is generic, it will not be protected. If it is suggestive, arbitrary, or fanciful, it is presumably distinctive and entitled to protection."); *see also* Tonawanda St. Corp. v. Fay's Drug Co., 842 F.2d 643, 647 (2nd Cir. 1988) ("Generic terms are not entitled to any common law trademark protection, nor may they be registered under the Lanham Act.").

197. *Russian Kurier,* 899 F. Supp. at 1208. In discussing the dictionary entries proffered by each side, the Court found that:

> The entries indicate that the Russian and English words alike refer to a messenger or other means of sending information or documents. None of the definitions provided by the parties indicate that either the word "courier" or "kurier" denotes a newspaper, that either word is commonly used to refer to newspapers, or that either word describes the qualities of a newspaper. In arguing that "kurier" is a generic term commonly used to refer to newspapers, the defendants rely on a definition of the English word "courier" which states that it denotes "any means of carrying news, messages, *etc.*, regularly," and definitions of the Russian word "kurier" that allegedly define it as referring to someone who brings information, papers, or news. The mark "Kurier" suggests the good with which it is associated in this case, newspapers, but only by imaginative association — a newspaper is itself a courier, a messenger carrying information expeditiously. *Id.*

The court in *Russian Kurier, Inc.* thus concluded that the term at issue was suggestive, and entitled to protection under the Act.[198] The Court went on to conclude that plaintiff had adequately established a likelihood of confusion and the requisite irreparable injury supporting injunctive relief.[199]

Conclusion

The Doctrine of Foreign Equivalents is more vital today than ever before. The internationalization of trade will only increase the opportunity for creative use of foreign terms as marks, and for controversies to erupt. The decisions in *Orto Conserviera Cameranese D Giacchetti Marino & C. S.N.C.* and *Otokoyama Co. Ltd.* send a clear signal to trademark attorneys and generalists alike. Businesses planning to adopt foreign terms must recognize the limitations imposed by the doctrine of foreign equivalents. As foreign and domestic markets continue to intertwine, causing American consumers to develop an increased appetite for offshore products, the doctrine of foreign equivalents will remain a vital force in the trademark field.

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198. In concluding that the term was suggestive, and thus entitled to protection, the court considered testimony offered by defendant, in effect, using the defendant's testimony against him. The court's analysis is illuminating:

> Defendant Kats alleges one reason he chose to use the name "Kurier" was that the train that delivered mail in Russia at the turn of the century was referred to as the Kurier. He explains that the word "kurier" thus came to mean "speedy train" and that, "I thought that a word that meant 'speedy train' presented a good name for a newspaper." This is further evidence that the mark "kurier" is suggestive, that its relation to the good to which it is affixed, newspapers, is discernible only by an imaginative act of association.

Russian Kurier, 899 F.2d at 1208. *See* GMT Productions, L.P. v. Cablevision of New York City, Inc., 816 F. Supp. 207, 210 (S.D.N.Y. 1993) (concluding a suggestive mark is entitled to trademark protection without proof of secondary meaning if it requires imagination, thought and perception to reach conclusion as to the nature of the goods); Elizabeth Taylor Cosmetics Co. v. Annick Goutal, S.A.R.L., 673 F. Supp. 1238 (S.D.N.Y. 1987) (holding a suggestive mark is entitled to full protection under the Lanham Act); *see also* Bernard v. Commerce Drug Co., 774 F. Supp. 103, 106 (E.D.N.Y. 1991) (holding suggestive marks are entitled to protection under the Lanham Act since the ordinary consumer would be unable to readily associate suggestive marks with the product it represents).

199. *Russian Kurier,* 899 F. 2d at 1212. *See* Circuit City Stores v. Carmax, Inc., 165 F.3d 1047, 1057 (6th Cir. 1999) (stating that a plaintiff can obtain an injunction by establishing a likelihood of confusion but the same plaintiff may not be able to obtain an injunction against an infringer when the parties operate in different geographical regions); *see also* Sugar Busters LLC v. Brennan, 177 F.3d 258, 265 (5th Cir. 1999) ("A preliminary injunction . . . may be granted only if plaintiff establishes the following four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs any damage that the injunction might cause defendants, and (4) that the injunction will not disserve the public interest."); Elvis Presley Enterprises v. Capece, 141 F.3d 188, 194 (5th Cir. 1998) ("In determining whether a likelihood of confusion exists, this court considers the following nonexhaustive list of factors: (1) the type of trademark allegedly infringed, (2) the similarity between the two marks, (3) the similarity of the products or services, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant's intent, and (7) any evidence of actual confusion."). *See generally* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959) (where Justice Black indicated a party seeking an injunction must normally show that it would suffer irreparable injury absent the injunctive relief).

Treaty Implementation: Lessons Taught By U.S./U.K. Cooperation Under the NATO Status of Forces Agreement

Michael Noone*

Introduction

Military treaties of alliance are drafted by middle-aged staff officers and diplomatists, signed by elderly politicians, and commit the services of young soldiers, sailors and airmen both physically and mentally prepared for the violence of war. One can expect that, while stationed overseas as part of the Alliance, some of these young people will damage vehicles, engage in altercations, become intoxicated, molest civilians, and otherwise behave much as they would when living in their own country. "Town and uniform" relations[1] with the local community are an important part of a military commander's responsibility. The responsibility increases when the community is composed, not of fellow citizens, but of foreign nationals capable of converting any instance of misconduct into an international incident.[2] Thus, alliance agreements should delineate each nation's responsibilities for punishing offenders and compensating victims.

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1. *See* Newington v. U.S., 354 F. Supp. 1012, 1015 (1973) (providing testimony before the Senate Foreign Relations Committee, defining the purpose of SOFA clearly to be "to provide more or less uniform rights and responsibilities in the relationship of visiting forces to host countries").

2. *See* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 159 (1994) (discussing the sensitivity of state officials to the possible repercussions of mishandling foreign nationals in an enforcement context and the potential for an international incident); *see also* Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 95 (1988) (discussing the founding members' legal problems with the stationing of military forces in the territory of another state). *See generally* Francis A. Boyle, *The Relevance Of International Law to the "Paradox" of Nuclear Deterrence*, 80 NW. U. L. REV. 1407, 1416 (1986) (asserting that military commanders may be held responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control).

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On April 4, 1949, twelve nations signed the North Atlantic Treaty[3] affirming the right of individual and collective self defense under Article fifty-one of the United Nations Charter.[4] Slightly over two years later, on June 19, 1951, the same nations signed the Status of Forces Agreement (NATO SOFA).[5] Its purpose was to provide a format for the resolution of legal problems created by the continuing peacetime presence of visiting foreign troops—usually from the U.S.—within the Alliance.[6] Legal problems ranged from those concerning customs

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3. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (listing the original signatories as Belgium, Canada, Denmark, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States. Subsequently four additional nations joined the Alliance—Greece and Turkey (through the Multilateral North Atlantic Treaty, Protocol Accession of Greece and Turkey, *Opened for Signature*, October 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350); the former Federal Republic of Germany (Bonn Convention, May 5, 1955) and Spain (1982); S*ee also* Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L. L 491, 495 (1998) (stating the alliance may add as new members any other European state in a position to further the principles of this Treaty and may contribute to the security of the North Atlantic area. It was on this basis that the Alliance added Greece and Turkey in 1952, the former Federal Republic of Germany in 1955, and Spain in 1982). *See generally* Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 81 (1988) (listing all twelve signatory countries of NATO); John P. Flaherty, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 926 (1996) (discussing the twelve members of NATO in 1949); Dr. Nigel D. White, *The Legitimacy of NATO Action In Bosnia*, 144 NEW L. J. 649 (1994) (discussing the defensive right in article five to which the sixteen parties agreed).

4. U.N. Charter Article 51. *See* Dr. Nigel D. White, *The Legitimacy of NATO Action In Bosnia*, 144 NEW L. J. 649 (1994) (stating that article 51 of the UN Charter provides that "[nothing] in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security"); Mats R. Berdal, *The Security Council, Peacekeeping and Internal Conflict After the Cold War,* 7 DUKE J. COMP. & INT'L. L. 71, 73 (1996) (providing that the implication of Article 51 which affirms the "inherent right of individual or collective self-defense" of member states, is that some conflicts could not be handled within the U.N. framework). *See generally* Niedbala v. U.S., 37 Fed. Cl. 43, 49 (1996) (providing that SOFA is the exclusive remedy for the assertion of a claim of right where an American citizen is injured overseas by United States Armed Forces).

5. The North Atlantic Treaty Regarding the Status of their Forces [hereinafter NATO SOFA], June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67. *See* Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still With Us*, 117 MIL. L. REV. 153, 168 (1987) (discussing the agreement later to develop between the Parties to the North Atlantic Treaty regarding the status of their forces, NATO SOFA).

6. *See* Littrell v. U.S., 4 All E.R. 203 (1995) (discussing how SOFA regulates the stationing of the forces of member states in each other's territory and the variety of problems that may arise). *See generally* Brown v. Ministry of Defense, 683 F. Supp. 1035, 1036 (E.D.Va. 1988) (providing that "the purpose of [SOFA] is to define the legal status of the organs of the North Atlantic Treaty Organization and of the Military Forces of one NATO power stationed in the territory of another NATO power"); Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No*," 40 A.F. L. Rev. 1, 5 (1996) (explaining "NATO SOFA grants the primary right of jurisdiction to the receiving State, except in cases where the offense is solely against the property, security, or members of the sending State force, or where the offense arises out of the performance of official duty").

duties and taxes, automobile licensing, to peculiarly sensitive issues associated with civil and criminal jurisdiction over members of the visiting force.[7]

The NATO SOFA merits study for several reasons: diplomatically, as an example of superior draftsmanship, whereas it has never been amended and has served as a model for similar agreements of other countries;[8] legally, for its apparent success in reconciling Common and Civil Law views of criminal and delictual responsibility;[9] and historically, as a unique example of peacetime international civil-military collaboration outside the realm of traditional diplomatic channels.[10]

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7. *See* JOSEPH M. SNEE & A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION, (1957) 8nn. 12-13, 9n.14 (discussing the "[w]idely divergent views" over the right of a receiving State to exercise criminal jurisdiction over the sending State's forces). *See generally* Theodore Meron, *Some Reflections on the Status of Forces Agreements in the Light of Customary International Law*, [1957] ICLQ 689; Annalisa Ciampi, *Public Prosecutor v. Ashby*, 93 AM. J. INT'L. L. 219 (1999) (analyzing a case involving the Italian criminal prosecution of a U.S. aircraft commander who collided with cable car wires and caused the death of twenty people).

8. *See* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW, 3-4 (1971) (listing several agreements modeled after the NATO SOFA including: U.S. bilateral agreements with Libya (1954), Japan (1960); West Indies Federation (1961); Australia (1963); United Kingdom bilateral agreements with Libya (1953); Federation of Malaya (1957), Malta (1964); and with the United States for British Indian Ocean Territory and the Island of Mahe (1964)); *see also* Aaskov v. Aldridge 695 F.Supp. 595 (1988) (discussing the tendency of legislative history and congressional debates to confirm that the International Agreements Claims Act, 10 U.S.C. §2734a, 2734b (1982), implements SOFA, and is the sole remedy for line-of-duty torts); Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "*No", 40 A.F. L. Rev. 1, 5 (1996) (providing that "NATO SOFA was the blueprint for subsequent agreements, which generally follow its jurisdictional allocation scheme"). *See generally* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L. L. 695, 698 (1995) (discussing that "no judges would have given effect to treaties without parliamentary implementation").

9. *See* John M. Tyson, *Presumed Guilty Until Proven Innocent: Using Results of Statistical Or Econometric Studies as Evidence*, 10 ST. THOMAS L. REV. 387, 391 (1998) (discussing the major difference between common law and civil law; whereas under the civil law the defendant is presumed guilty); *See also* Andreas Gronimus, *Allied Security Services In Germany: The NATO SOFA Supplementary Agreement Seen from a German Perspective*, 136 MIL. L. REV. 43, 57 (1992) (providing that criminal jurisdiction of the sending state includes criminal court proceedings, as well as criminal investigations and any criminal proceeding leading to indictment). *See generally* Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 AM. J. INT'L L. 346, 362 (1980) (discussing remedies for indirect damage caused to countries).

10. *See generally* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Court Martial,* 108 MIL. L. REV. 52, 84 (1985) (providing that the military justice system serves well to preserve constitutional rights of service members accused of crime despite the minor differences as compared to state or civilian federal criminal justice systems); Henry H. Perrit, Jr., *Policing the International Peace and Security: International Police Forces*, 17 WIS. INT'L. L. J. 281, 282 (1999) (discussing threats to international peace and security as a result of military aggression); Kevin J. Dalton, *Gulf War Syndrome: Will the Injuries of Veterans and Families Be Redressed?,* 25 U. BALT. L. REV. 179, 204 (1996) (stating that "the Crown was immune from any suit to which it did not consent").

This article examines the bilateral SOFA relationship between the United Kingdom and the United States, in terms of Articles VII (foreign criminal jurisdiction)[11] and VIII (tort claims).[12] In describing the relationship, I focus on the formulation of legal policies implementing those provisions. Aaron Wildavsky reminds us that:

> Policy is a process as well as a product. It is used to refer to a process of decision-making and also to the product of that process. Limiting oneself to policy as a product encourages a narrow view of rationality as a presentation of results, a view that squeezes a disorderly world into the familiar procrustean formulation of objectives and alternatives. Restricting oneself to process, however, may lead to the opposite evil of denigrating reason, of being unable to account for either the creation of projects or their rationalization as public arguments.[13]

The first section describes the treaty's provisions and national legislation that implemented the treaty, which served as the basis for formulating the policy. The second part describes law as product and the bureaucratic structure in which they were conceived and applied—law as process. Section three describes the consequences of those policies for both the U.K. and the U.S. and their application.

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11. *See* John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats From Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 44 (1990) (Article VII distinguishes between exclusive jurisdiction offenses and concurrent jurisdiction offenses, thereby establishing a right and precedence of member states to exercise criminal jurisdiction over the allied forces stationed in their territory); McElroy, Secretary of Defense v. U.S. *ex rel*. Gualiardo, 361 U.S. 281 (1960) (restricting sending state jurisdiction, limited to persons subject to the military law of that State described in art. VII, para. 2 (a) to military personnel, and excluding accompanying dependents and civilians from U.S. military court jurisdiction); *see also* Andreas Gronimus, *Allied Security Services In Germany: The NATO SOFA Supplementary Agreement Seen From German Perspective*, 136 MIL. L. REV. 43, 50 (1992) (providing that "Article VII, in addition to the exercise of jurisdiction, is a leased privilege, permitted to the sending state by the receiving state . . . no state may grant another state on its territory rights in excess of the powers that the receiving state itself may exercise"). *See generally* Article 3 of the Berlin Settlement Agreement, 29 ILM 1186 (1990) (providing for exercise of German jurisdiction for violations of German law but denying German authorities jurisdiction over Allied Forces in criminal proceedings).

12. *See* Lowry v. Commonwealth, 917 F. Supp. 290, 292 (D.Vt. 1996) (providing "SOFA is the sole remedy for line-of-duty torts committed by the armed forces of one NATO nation within the territorial boundaries of another nation"); *see also* U.S. Army Claims Service, *Foreign Claims—Not Just for Overseas Offices*, ARMY LAW. 69 (1998) (providing that foreign claims are handled under either SOFA, The Foreign Claims Act, or The Military Claims Act, thereby creating a different adjudicative process than required by the Federal Torts Claims Act and it is therefore imperative that the government properly handle these claims).

13. *See* Aaron Wildavsky, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS 387 (1979); *see also* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses: How To Maximize And When To Say "No,"* 40 A.F. L. REV. 1, 3-4 (1985) (discussing that until negotiations of the SOFA, U.S. policy relied heavily on the concept of immunity from host nation criminal jurisdiction created by the host nations implied consent in expressly consenting to U.S. forces being stationed there); William K. Lietzau, *A Comity Of Errors: Ignoring Constitutional Rights Of Service Members*, ARMY LAW. 3, 4 (1996) (recommending a revision of U.S. policy in their current practice as to the handling of service members accused of crimes in Japan). *See generally* Dr. Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L.J. 45, 49 (1995) (stating that military departments have had little success with the direct participation of SOFA).

I. The NATO Treaty and its Implementing Laws

A. The Treaty's Claims Provisions

Article VIII of the Status of Forces Agreement[14] envisions three categories of delictual claims and assigns legal responsibilities accordingly: government to government,[15] official duty claims, and non-official duty claims.

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14. *See* NATO SOFA, *supra* note 5, at art. 8. *See generally* Laskero v. Moyer, No. 89-6-5966, 1990 Stet. Dist. LEXIS 7373, at *6-9 (N.D. Ill. June 15,1990) (discussing how Article VIII encompasses civil claims and addresses acts committed by members of the sending state force or civilian component some damage to a third party); Daberkow v. U.S., 581 F.2d 785, 788 (9th Cir. 1978) (specifying that claims arising out of acts or omissions of members of an armed force, in the performance of official duties, causing damage to third parties in a receiving nation, shall be adjudicated under the laws of the receiving state, as per Article VIII of the SOFA agreement); Aaskov v. Aldridge, 695 F. Supp. 595, 596 (1988) (Article VIII, paragraph 5 of NATO SOFA applies to cases "other than those involving contractual obligations, tortious acts or omissions not done in the performance of an official duty").

15. *See* NATO SOFA, *supra* note 5, at art. 8, para. 1 (government to government claims: when the military property of one government is damaged or destroyed by a military member or employee of the other acting on official duty, the claim for property damage is waived); NATO SOFA, at art. 8, ¶¶ 5(e)(iv) - 10 (the sending states may object to certain claims, including: "contractual claims"; "claims against members of a force or civilian component" for tortious acts or omissions occurring outside the scope of their official duty; and "claims arising out of unauthorized use of any vehicle of the armed services"); Francis B. Van Nuys, *Status of Forces Agreements as Exclusive Remedies*, 33 A.F. L. REV. 255, 255 (1990) (NATO SOFA addresses three types of claims: "(1) country-to-country claims; (2) official duty and legally responsible claims; and (3) claims not arising from official duty").

    NATO SOFA, at art. 8, para. 2 (When the damaged or destroyed government property is nonmilitary, an arbitrator will determine liability and assess damages unless the amount involved is less than an agreed-upon sum (damage to U.K. property less than £500; damage to U.S. property less than $1400); *see also* Judy M. Prescott, *Operational Claims In Bosnia-Herzegovina and Croatia*, ARMY LAW., 1, 5 (1998) (discussing that SOFA provides "claims for damage or injury to the government personnel or property, or to private personnel or property of the [receiving state] shall be submitted through governmental authorities of the [receiving state] to the designated NATO representatives").

    NATO SOFA, at art 8, para. 4 (When the death or injury of a member of one government's armed services while on official duties is caused by the other government, the employing government waives any claim that it might have); Jeffrey S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 232 (1997) (the Status of Forces Agreement of a given country usually contains provisions on how to process claims arising from acts performed during official duty or resulting from the execution of military operations). *See generally* Charles Hernicz, *Making Soldiers More Responsible for their Actions: Voluntary Restitution in [U.S. Army Europe],* ARMY LAW 58, 59 (1989) (ex gratia (out of grace) is the process in which the United States considers claims for reimbursement of personal injuries and property damages caused by military personnel acting outside their scope of duty. Unlike claims for damages caused by personnel during their scope of duty, ex gratia claims are paid from U.S. Treasury funds).

Official duty claims (other than those arising from a contract) arise from the acts or omissions of a member of the forces which cause damage to third parties.[16] Claims are adjudicated by the receiving State and treated as though they are claims against its armed forces.[17] Thus the liability of the sending State is determined by local law.[18] If liability exists, the receiving State will make payment.[19] If the sending State is solely responsible, it will reimburse the receiving State 75% of the award; where more than one State is responsible, contribution will be in equal shares.[20]

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16. *See* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 29 (1996) (providing that NATO SOFA is silent on the issues of what I meant by the phrase "in performance of an official duty" and who makes the determination of whether an offense fits within this definition); *see also* Newington v. U.S., 354 F. Supp. 1012, 1015 (E.D. Va. 1973) (holding that a member of a "force" could not be a third party under paragraph 5 of Article VIII, as third persons are limited to local citizens in the absence of some additional agreement between the United States and another country).

17. *See* INTRODUCTORY NOTE, VISITING FORCES ACT, 1952, 2 Halsbury's Statutory Instruments 407 (1997) (discussing that the 1933 Act has been largely replaced by the Visiting Forces Act of 1952; however, several provisions are still in force, including: the attachment of members of a visiting force to the home forces, or vice versa; commanding powers during the service of two forces together; relations to colonies; and conferring power to make subordinate legislation); Lowry v. Commonwealth, 917 F. Supp. 290, 291 (D.Vt. 1996) (stating "In the case of torts committed in the performance of duty, the local citizen who is injured proceeds against his own government exactly as he would if the injury had been caused by a member of his own governments armed forces"); *see also* Niedbala v. U.S., 37 Fed. Cl. 43, 48 (1996) (providing an example used to explain the NATO SOFA claims procedure: "If an American soldier driving a jeep on duty in France injures a Frenchman, the claim is settled by the French government as though the injury had been inflicted by a French soldier"). *See generally* Visiting Forces (British Commonwealth) Act, 1933, 23 & 24 Geo. 5 ch. 6. (Eng.) (the Act provides that: [The Defence Council] may attach temporarily to a home force any member of another force . . . who is placed at their disposal . . . whilst a member of another force is by virtue of this section attached temporarily to a home force, he shall be subject . . . to military law.).

18. *See* Allied Forces Act, 1940, 3 & 4 Geo. 6, ch. 5. (Eng.) (granting jurisdiction to the Allied Military Courts with respect to issues of discipline and administration regarding members of the visiting forces); *see also Criminal Jurisdiction Over American Armed Forces Abroad*, 70 HARV. L. REV. 1043, 1048 (1957) ("During World War II, with large number of foreign forces stationed in the British Isles, the British government claimed exclusive jurisdiction over all offenses except those involving internal discipline," pursuant to the Allied Forces Act of 1940); Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189, 196 (1989) (during the Second World War, allied forces were scattered throughout the United Kingdom, consuming local goods and services. In response to this movement, the British adopted the Allied Forces Act in 1940 which gave jurisdiction to allied military courts to oversee discipline and administration of military personnel of both the sending and receiving state).

19. *See* Shafter v. U.S., 273 F. Supp. 152, 154 (S.D.N.Y. 1967) (citing SOFA Article VIII, paragraph 5(b): "the receiving state may settle any such claims and payment of the amount agreed upon or determined by adjudication shall be made by the receiving state in its currency").

20. *See* Steven K. Forjohn, *USSSO for Italy—Working on the Set of La Dolce Vita*, ARMY LAW. 14, 15 (1997) (discussing the 75% reimbursement under NATO SOFA paragraph 5(e) and 5(i)); *see also* Shafter v. U.S., 273 F. Supp. 152, 154 (S.D.N.Y. 1967) (providing that in paragraph (d) of Article VIII: "where more than one state is responsible for the damage, the amount awarded or adjudicated shall be distributed equally among them; however, if the receiving state is not one of the states responsible, its contribution shall be half that of each of the sending states"); 10 U.S.C.S. § 2734a (a)(1) (1999) providing:

> (a) Under an international agreement to which the United States is a party that provides that claims against the United States arising out of the acts or omissions in the performance of official duty in a foreign country of a civilian employee, or a member, of an armed force may be adjudicated by that country under its laws and regulations, the Secretary of Defense may—(1) reimburse that country for the agreed pro rata share of such amounts as are spent by that country to pay those claims, including the costs of settlement or arbitration. . . .

Non-official duty claims arise from acts or omissions of a member of the force while performing non-official duties. In such cases the receiving State will evaluate the claim and make a recommendation to the sending State which will then decide whether to offer an ex gratia payment.[21] The standard legal dictionary defines "ex gratia" as "[O]ut of grace; as a matter of grace, favor, or indulgence; gratuitous."[22] It is a term applied to "anything accorded as a favor; as distinguished from that which may be demanded ex debito, as a matter of right."[23] Non-official duty claims are intended to cover situations where the sending State may, in order to maintain good public relations, elect to compensate individuals whose only legal claim would be against the individual service member.

Since the NATO SOFA affected the private rights of British subjects, that nation's constitutional law required confirmation by Parliament.[24] Although treaties are according to U.S. Constitutional law, the law of the land, those which require the payment of money, must be

21. *See* Robertson v. U.S., 294 F.2d 920, 922 (1961) (providing that the receiving state may represent that fairly, the sending state should consider an ex gratia payment); Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 29 (1996) (providing that NATO SOFA is silent on the issues of what is meant by the phrase "in performance of an official duty" and who makes the determination of whether an offense fits within this definition); *see also* Visiting Forces Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, s. 9 (stating "The [Secretary of State for Defence] may make arrangements whereby claims in respect of acts or omissions of members of visiting forces . . . will be satisfied by payments made by the [Secretary of State for Defence] of such amounts as may be adjudged by the United Kingdom or such other authority as may be provided by arrangements . . . ") (alteration in original).

22. BLACK'S LAW DICTIONARY (Pocket Edition 1996). *See* Beers v. Haughton, 34 U.S. 329, 370 (1835) ("Courts have ex gratia, extended the right to surrender, until the return of the writ of process against bail"); Luria Bros. & Co. v. Alliance Assur. Co., 780 F.2d 1082, 1084 (1986) (where the court granted Appellant restitution of a $900,000 ex gratia payment earlier made to Respondent); Thomas F. Williamson, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summaries: Government Contract Cases in the United States Court of Appeals for the Federal Circuit: 1995 In Review,* 90 AM. J. INT'L L., 278 (1996) (explaining the term ex gratia).

23. *See* BLACK'S LAW DICTIONARY (3rd ed. 1933); *see also* Green v. Sussex County, No. 91A-12-001, 1992 Del. Super. Ct. LEXIS 445, at *4 (1992) (holding where the defendant in the case contends that plaintiff must challenge an assessment by a writ of certiorari ex dibito justicia, not a declaratory judgment); Hon. Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange*, 36 AM. CRIM. L. REV. 53, 80 (1999) (explaining ex debito is understood as "grantable or common right"). *See generally* Leigh Mattox, *Eleventh Circuit: Survey Of Recent Decisions*, 24 CUMB. L. REV. 194, 203 (1994) (discussing how "most victims will now pursue their own civil recourse to protect their rights, rather than relying on intervention as a matter of right under 18 U.S.C. 357).

24. *See* The Parlement Belge, 4 P.D. 129, 154, *rev'd on other grounds*, 5.P.D. 197 (1880) (stating that English law mandates that in order for treaties to have any effect domestically, it must pass through Parliament and be confirmed first); *see also* INTRODUCTORY NOTE, VISITING FORCES ACT, 1952, 2 Halsbury's Statutory Instruments 405 (1997) (discussing that the Visiting Forces Act came into force on June 12, 1954 by Statutory Instrument 1954, No. 633, and makes provision with respect to naval, military and air forces visiting the United Kingdom, its colonies, and dependencies). *See generally* Visiting Forces Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 67; Visiting Forces Act (Commencement) Order, S.I. 1954, No. 633 (noting that in addition to the aforementioned provisions, it also grants the exercise of jurisdiction with certain restrictions within the United Kingdom over the members of a visiting force of that country).

authorized by Congressional legislation.[25] Therefore, I will examine separately the national statutes and implementing administrative regulations on which claims policy has been based.

1. United States' Implementation of the Claims Provisions

International law provides that a government is not legally responsible for the wrongs of members of its armed forces when those wrongs are committed in a private capacity.[26] If the wrong is official in nature, a foreign government must consent before it can be brought before domestic courts.[27] However, allied forces serving in France during the First World War agreed that claimants would have the right to bring suit in local courts as if the French government had caused the damage, and similar arrangements were agreed to in 1944.[28] These arrangements were to serve as the model for NATO claims provisions but provided for legal responsibility only if the service member was on duty.[29]

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25. *See* QUINCY WRIGHT, THE CONTROL of AMERICAN FOREIGN RELATIONS 207-8 (1992) (discussing examining treaties that are "self-executing" versus those that require "additional legislation" by Congress). *See generally* Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 87 MICH. L. REV. 390 (1988) (analyzing how the treaty power is not immune from the limitations of federalism); Gregory Townsend, *State Responsibility for Acts of DeFacto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635 (1997) (drafting by the International Law Commission of Article 8, which codified international law, attributing acts of an individual to the state by establishing at least one of two components: that the individual acted either "on behalf of the State" and "in the absence of authorities").

26. *See* Defence (Transfer of Functions) (No.1) Order, S.I. 1964, No. 488 (through an order in Council, Her Majesty, amended §§ 2 and 5 of the Visiting Forces Act of 952).

27. *See* R v. Bow Street Metropolitan Stipendiary Magistrate, 2 All E.R. 97 (H.L. 1999) (stating "it is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the process of the forum state"); Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189, 197 (1992) (noting the U.S. troops were the only forces enjoying a complete immunity from British jurisdiction; however, it was evident in the diplomatic notes exchanged and Parliamentary debates that the 1942 Act was temporary, exceptional, and a product of mutual camaraderie during the war). *See generally* Manuel E. F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW. 3, 8 (1994) (discussing that the U.K. adopted the U.S. Visiting Forces Act of 1942 which provided that "no criminal proceeding shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America").

28. *See* LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW, 272-75 (1971) (discussing comprehensive accounts of status of forces law which focused on the North Atlantic Organization Status of Forces Agreement); *see also* International Headquarters and Defence Organisations Act, ch. 5, s 1(2), sched. 1 (Eng.) (noting where any headquarters or organization is designated, by an Order in Council under this section, the Visiting Forces Act 1952, shall have the effect with the adaptations for extending certain provisions of that Act to the headquarters or organization and certain people connected with it).

29. *See* Jeffrey S. Palmer, USAF, *Claims Encountered During Operations Contingency*, 42 A.F. L. REV. 227, 232 (1997) (discussing claims provisions for the processing of claims arising from "official duty" or resulting from the execution of military operation). *See generally* David S. Gordon, Captain, *Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*, 100 MIL. L. REV. 49 (1983) (discussing the impact of SOFA as unique agreement in the history of international law and its impact on both individual rights and government; it has drawn from past agreements as models and it has fundamentally changed the way European and North American governments deal with one another's armed forces).

U.S. implementation of its NATO SOFA obligations fell into two categories dependent on the duty status of the tortfeasor. Therefore, the sending State's first obligation is to decide whether the service member was on duty. The SOFA fails to specify which government (the sending or receiving State) determines the status of the tortfeasor.[30] In practice, there appear to be no signs of controversy between the United States and the United Kingdom. In a 1954 exchange of correspondence with the Staff Judge Advocate, HQ 3d Air Force the Director of Public Prosecutions stated "we are not concerned to inquire about the principles upon which you decide the question whether a particular offense arose out of and in the course of duty. . . ."[31]

If the member of the force is on duty, provisions must be made for referring a claim (or notice of a lawsuit) to the receiving State, for cooperation with that State in its investigation of the incident and in any lawsuit.[32] The U.S. Department of Defense decides which of the military departments will be responsible for all claims matters in those countries where members of the armed forces may be present.[33] The United Kingdom has always been assigned to the

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30. *See* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW (1971); *see also* Armed Forces, Counsel Fees, and Court Costs, Pub. L. No. 84-777, 70 Stat. 630 (1956) (stating "an act to authorize the Secretaries of the military departments and the Secretary of the Treasury . . . to incur expenses incident to the representation of their personnel before judicial tribunals and administrative agencies of foreign action.").

31. Extract, "Offenses committed on duty" from letter MISC71/1442/54, 15th December 1954, Chapter 5, 3 AF Manual 110-1, 10 May 1957.

32. *See* Annalisa Ciampi, *International Decisions: Public Prosecutor v. Ashby, Judgment No. 161/98. Court of Trento, Italy,* 93 AM. J. INT'L L. 219, 222 (1998) (holding that under Article VII, paragraph 3(a)(ii) jurisdiction had not been waived). *See generally* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L REV. 1 (1996) (discussing the history, intent and jurisdiction formula of NATO SOFA).

33. *See* International Headquarters and Defence Organisations (Designations and Privileges) Order, S.I. 1965, No. 1535, *amended by* S.I. 1987, No. 927, S.I. 1994, No. 1962 (amended schedule Parts I and II of the act designed to make provisions as to specific international headquarters and defense organizations); s*ee also* INTRODUCTORY NOTE, VISITING FORCES ACT, 1952, 2 Halsbury's Statutory Instruments 408 (1997). The Order effectuates the International Headquarters and Defence Organisations Act of 1964 by designating the following headquarters and defence organisations:

> privileges as respects the inviolability of official archives as are accorded to an envoy of a foreign sovereign power accredited to Her Majesty: the Supreme Headquarters Allied Powers Europe; the Headquarters of the Supreme Allied Commander Atlantic; the Channel Committee; the Headquarters of the Commander of the Allied Maritime Air Force, Channel; the Headquarters of the Commander in Chief of the Eastern Atlantic Area; the Headquarters of the Commander of the Maritime Air Eastern Atlantic Area; the Headquarters of the Commander Submarine Forces Eastern Atlantic Area; the Headquarters of the Commander in Chief Allied Forces North Western Europe; the Headquarters of the Commander Allied Naval Forces North Western Europe; the Headquarters of the Commander Allied Air Forces North Western Europe; the NATO Airborne Early Warning Force Headquarters and the NATO E-3A Component.

Additionally, the Order confers upon the first two organizations in the above-mentioned the legal capacity of a corporate entity, and immunity of certain property from suit brought against them.

Department of the Air Force.[34] The Air Force, in a series of internal directives, directs the responsible sending State office—which is assumed to be part of the judge advocate function—to cooperate with its counterpart receiving State office.[35]

The sending State office reviews semi-annual reimbursement bills submitted by the receiving State, and is authorized to take exception to payments which it concludes were inappropriate.[36] The Treaty requires that the sending State object within two months of receiving the bill.[37] The International Agreement Claims Act[38] authorizes the use of appropriated funds to reimburse the receiving State.

If the member of the force was not on duty, the sending State office is still implicated in the incident. Paragraph 6 of Article VIII of the treaty requires the sending State, upon the receiving State's report of the claim has been delivered, to

> decide without delay whether they will offer an ex gratia payment and, if so, in what amount. If an offer of ex gratia payment is made, and accepted by the claimant in full satisfaction of his claim, the authorities of the sending

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34. *See* Department of Defence Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims" (noting it is D.O.D. policy that claims against the United States and claims by the United Kingdom shall be processed and settled quickly. To implement this policy, responsibility for processing and settling such claims arising in overseas is assigned to the various military departments and correspond with the appointment of the designated commanding officer for each host country).

35. *See* Air Force Instruction 51-501, Chapter 4 (Previously Air Force Regulations 112-1 and 112-9, then AFM 112-1; within the United Kingdom the sending State office has been part of the staff of the Commander Third Air Force. The sending State office ensures that subordinate commands and installations—even those of other services—comply with requisite claims procedures).

36. *See* NATO SOFA, *supra note 5*, at. art. 8, para. 5(e)(iv)-10 (explaining the sending states may object to certain claims, including: "contractual claims"; "claims against members of a force or civilian component" for tortious acts or omissions occurring outside the scope of their official duty; and "claims arising out of unauthorized use of any vehicle of the armed services"); *see also* S. Rep. No. 84-2544 (1956) (stating "This bill would authorize the military departments to employ counsel and to pay counsel fees, court costs, bail, and other related expenses of defense before foreign judicial or administrative tribunals of members of the United States Armed Forces."). *See generally* Steven K. Forjohn, *USSSO for Italy-Working on the Set of La Dolce Vita*, ARMY LAW. 14, 15 n.12 (1997) (recognizing that one of the missions of the USSSO is to administer and to supervise U.S. responsibilities under the NATO SOFA regarding claims matters).

37. *See* International Agreement Claims Act, Aug. 31, 1954, 68 Stat. 1006, 1007; S. REP. NO. 83-2324 (1954); H.R. REP. NO. 83-2523 (1954) (discussing the legislative history); Act of Aug. 31, 1954, 1954 U.S.C.C.A.N. (68 Stat. 1006) (discussing the same).

38. *See* International Agreement Claims Act (IACA), 10 U.S.C.A. §§ 2734a and b, 1954, 68 Stat. 1006, 1007 (exploring the legislative history of the Act found in S. Rep. No. 2324, 83d Cong. 2d Sess. (1954); H. Rep 2523, 83d Cong. 2d Sess. (1954); 1954 US Code Cong. & Admin. News 3570); *see also* 10 U.S.C. § 2734(h) (1994) (providing the authority to settle out of appropriated funds come directly from "The Secretary of Defense may designate any claims commission appointed under subsection (a) to settle pay . . . for damage. Payments of claims under this section shall be made from *appropriations* as provided in 2732 of this title." (emphasis added)); David P. Stephenson, Lt., *An Introduction to the Payment of Claims under the Foreign and International Agreement Claims Act*, 37 A.F. L. REV. 191, 200 (1994) (§ 2734(a) of the IACA authorizes the United States to reimburse its pro rata share to allied nations that have paid pursuant to the countries' agreement).

> State shall make payment themselves and inform the authorities of their decision and of the sum paid.[39]

The U.S. government's authority to make ex gratia payment is found in the Foreign Claims Act.[40] The Act provides that in order "to promote and maintain friendly relations through the prompt settlement of meritorious claims" the Secretary of a military department may appoint, or cause to be appointed under regulations prescribed by the Secretary, one or more claims commissions, composed of one or more officers or employees, to settle and pay claims of inhabitants of a foreign country.[41] The Claims Commissions' authority to tender payment is presently limited to $100,000.[42] Recommendations for payment in excess of that

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39. NATO SOFA, *supra* note 5, at art. 8, para. 6.

40. *See* David P. Stephenson, Lieutenant, *An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act*, 37 A.F. L. REV. 191, 196 (1994) (the Federal Claims Act authorizes the United States to make ex gratia payments to parties injured by off-duty military personnel in Japan, Korea, Australia and North Atlantic Treaty Organization countries. Further, with respect to countries in which the United States does not have a cost-sharing agreement, all meritorious claims are paid under the authority of the Federal Claims Act); Charles Hernicz, Captain, *Making Soldiers More Responsible for Their Actions: Voluntary Restitution in [U.S. Army Europe],* ARMY LAW. 58, 59 (1989) (describing ex gratia (out of grace) is the process in which the United States considers claims for reimbursement of personal injuries and property damages caused by military personnel acting outside their scope of duty. Unlike claims for damages caused by personnel during their scope of duty, ex gratia claims are paid from U.S. Treasury funds); Jeffrey S. Palmer, Captain, *Claims Encountered During an Operational Contingency,* 42 A.F. L. REV. 227 (1997) (claiming the Federal Claims Act is broadly construed by the U.S. to include acts out of grace (ex gratia) to take responsibility for almost all damages caused by armed forces personnel, and expeditiously settle meritorious claims). *See generally* Kaj Aaskov, et al. v. Edward Aldrige, Jr. et. al., 695 F. Supp. 595, 597 (1988) (providing the legislative history and recent congressional debates tend to confirm that the International Claims Act, which implements SOFA, is the sole remedy for line-of-duty torts, while Foreign Claims Act may be invoked for torts committed beyond the scope of official duty or in countries that have not signed the NATO SOFA).

41. *See* Foreign Claims Act, Jan. 2, 1942, 55 Stat. 880, 10 U.S.C.A. § 2734 (West 1998) (providing that the Secretary "may appoint . . . one or more claims commission . . . to settle and pay in an amount not more than $100,000, a claim against the U.S. for . . . personal injury to, or death of any inhabitant of a foreign country, if that injury occurs in a foreign country and is caused by the armed forces). *See generally* U.S. *ex rel.* Alaska Smokeless Coal Co. v. Lane, 250 U.S. 549 (1919) (discussing that under the Foreign Claims Act, the Secretary has no duty to settle, rather the Act simply authorizes settlements at the Secretary's discretion).

42. *See* Foreign Claims Act, Jan. 2, 1942, 55 Stat. 880, 10 U.S.C.A. § 2734 (West 1998) (stating "to settle and pay in an amount not more than $100,000, a claim against the U.S.").

amount are reported to the Secretary of Treasury of the United States.[43] Within the United Kingdom, the Air Force's single service claims responsibility extends to all ex gratia claims.

2. United Kingdom Implementation of the Claims Provisions

In drafting legislation implementing the Status of Forces Treaty, the British government utilized twenty years of experience with similar laws. The Visiting Forces (British Commonwealth) Act of 1933 had two primary purposes: it consented to Commonwealth members' exercise of criminal jurisdiction over members of their forces visiting in the United Kingdom and granted those forces and individuals the same privileges and immunities which British law granted its home forces.[44]

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43. *See* U.S.C. Section 2734(d) 31 U.S.C. § 1304 (1999)(section (a)(3) (D)). The United States Code provides discretionary authority as applicable to any settlement that may exceed the designated cap. The statute states as follows:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements and interest and costs specified in the judgments or otherwise specified in the judgments or otherwise authorized by law when . . .
>
> (3) the judgment, award or settlement is payable
>
> (D) in excess of an amount payable from appropriations if an agency for a meritorious claim under 2733 or 2734 of title 10 or section 715 of title 32.
>
> 31 U.S.C. § 1304.

See also U.S.C. § 2734(d) where it states:

> If the Secretary concerned considers that a claim in excess of $100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in the excess of $100,000 to the Secretary of the Treasury for payment under section 1304 of title 1304.

44. *See* Visiting Forces (British Commonwealth) Act, 1933, 23 & 24 Geo. 5, ch. 6 (Eng.) (providing that: [The Defence Council] may attack temporarily to a home force any member of another force . . . who is placed at their disposal . . . whilst a member of another force is by virtue of this section attached temporarily to a home force, he shall be subject . . . to military law . . .); *see also* Reeves v. Deane-Freeman, 2 All. E.R. 506 (Q.B. 1952) (The Court said, subject as therein after provided, any enactment which "(b) in virtue of a connection with the home forces or any of them, confers a privilege or immunity on any person . . . shall, with any necessary modifications, apply in relation to a visiting force as it would apply in relation to a home force of a like nation to the visiting force." If, therefore home force is to be regarded as a public authority, a visiting force is to be equally regarded). *See generally* INTRODUCTORY NOTE, VISITING FORCES ACT, 1952, 2 Halsbury's Statutory Instruments 407 (1997) (discussing the 1933 Act which has been largely replaced by the Visiting Forces Act of 1952; however, several provisions are still in force, including: the attachment of members of a visiting force to the home forces, or vice versa; commanding powers during the service of two forces together; relations to colonies; and conferring power to make subordinate legislation).

In the early days of World War II, the Allied Forces Act of 1940 extended the "privileges and immunities" provisions to all visiting allied forces, while retaining the host country's right to try allied soldiers for offenses under British law.[45] U.S. Forces were to receive more favorable treatment.[46] The United States of America (Visiting Forces) Act of 1942 granted exclusive criminal jurisdiction to U.S. military courts. Jurisdiction could be waived, therefore, permitting local courts to try the service member for a criminal offense.[47]

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45. *See* Allied Forces Act, 1940, 3 & 4 Geo. 6, ch. 5. (Eng.) (granting jurisdiction to the Allied Military Courts with respect to issues of discipline and administration regarding members of the visiting forces); *see also*, Note, *Criminal Jurisdiction Over American Armed Forces Abroad*, 70 HARV. L. REV. 1043, 1048 (1957) (stating "During World War II, with large number of foreign forces stationed in the British Isles, the British government claimed exclusive jurisdiction over all offenses except those involving internal discipline," pursuant to the Allied Forces Act of 1940); Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189, 196 (1989) (during the Second World War era, the allied forces were scattered throughout the United Kingdom, consuming local goods and services. In response to this movement, the British adopted the Allied Forces Act in 1940 which gave jurisdiction to allied military courts to oversee discipline and administration of military personnel of both the sending and receiving state). *See generally* Manuel E.F. Supervielle, Major, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW. 3, 8 (1994) (visiting forces composed of allied troops from countries overrun by Nazis sought refuge in Great Britain. Britain then adopted the Allied Forces Act in 1940, which gave them leverage as the host country, resulting in several agreements with exiled governments).

46. *See* Note, *Criminal Jurisdiction Over Visiting Armed Forces,* 52 U.S. NAVAL. WAR. C. INT'L. STUDIES 8 (1965) (stating the basis for such jurisdiction is that a member of the sending State forces is a representative of the sovereign, and as such, is accountable only under the "law of the flag" of the sending State. Although Britain had superior bargaining power with exiled governments, it acceded to the demands of the U.S. to be given complete jurisdiction over its troops in the U.S. Visiting Forces Act); Manuel E. F. Supervielle, Major, *The Legal Status of Foreign Military Personnel in the United States*, ARMY LAW. 3, 8 (1994) (stating the U.K. adopted the U.S. Visiting Forces Act of 1942 which provided that "no criminal proceeding shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America"); Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189, 197 (1992) (claiming the U.S. troops were the only forces enjoying a complete immunity from British jurisdiction, however, it was evident in the diplomatic notes exchanged and Parliamentary debates that the 1942 Act was temporary, exceptional, and a product of mutual camaraderie during the war). *See generally* Note**,** *Criminal Jurisdiction Over American Armed Forces Abroad,* 70 HARV. L. REV. 1043, 1046 n.22 (1957) (discussing the dilemma in resolving these competing sovereign interests).

47. *See* The United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. 6 ch. 31 (Eng.) (enacted after the U.S. arrived in Great Britain subsequent to the arrival of the allied forces and responding to the U.S. demand for exclusive jurisdiction over its troops).

    For a discussion of the historical development of the United Kingdom's criminal jurisdictional issues regarding visiting forces, *see generally,* Regina v. Barlte and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, 38 I.L.M. 681 (1999) (noting the original case was decided in the Queen's Bench Divisional Court in 1998); and U.S. v. Whitler, 1952 C.M.R. LEXIS 1336, 1349 (AFBR 1952) (stating "[T]he English courts have surrender jurisdiction to prosecute members of the United States Armed Forces retaining, however, the power of 'arrest, search, entry or custody' (Visiting Forces Act of 1942)").

These three precursors to the Visiting Forces Act of 1952 did not contain provisions regarding tort claims against either the sending or receiving State arising from the activities of the visiting force.[48] The Common Law provided that the Crown was immune from suit in tort[49] nor did British courts have jurisdiction over a foreign sovereign.[50] Presumably, it was assumed that if a member of a visiting force committed a legal wrong under circumstances which would bring his government into disrepute, that government would make an ex gratia payment to the victim.[51] However, by the time the Status of Forces Agreement was negotiated, both the United States and the United Kingdom had waived their immunity from suit in their

48. See NATO SOFA, *supra* note 5, at art. 8, para. 5 (analyzing torts arising under this paragraph). *See generally* Note, *Foreign Claims-Not Just For Overseas Offices*, ARMY LAW. 69 (1998) (providing an overview of procedure involving filing a tort claim within a country to which the United States is a party to a status of forces agreement); Jeffrey S. Palmer, USAF, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 233-35 (1997) (discussing tort claims arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or claims for which a visiting force may be liable under receiving state law as outlined in NATO SOFA, art. 8, para. 5).

49. *See* NATO SOFA, *supra* note 5, at art. 7, para. 3. *See generally* Attorney-General v. De Keyser's Royal Hotel Ltd., 1920 App. Cas. 508, 523 (K.B. 1920), App. Cas. 508 (H.L. 1920); Feather v. Regina, 122 All E.R. 11916 (K.B. 1865); Tobin v. Regina, 143 All E.R. 1148 (K.B. 1864); Viscount Canterbury v. Attorney General, 41 All E.R. 648, 645 (K.B. 1842).

50. *See* R v. Bow Street Metropolitan Stipendiary Magistrate, 2 All E.R. 97 (H.L. 1999) (stating "it is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the process of the forum state."); Alcorn Ltd. v. Republic of Columbia, 2 All E.R. 6 (H.L. 1984) (examining the common law prior to the State Immunity act of 1978, the court stated "The United States has clung longer than several European states to the 'absolute' theory of Sovereign Immunity, under which its courts declined to entertain any claims against foreign states even where these arose out of commercial or trading transactions."); Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 5-9 (1996) (explaining "blanket waivers" on a case by case basis). Recently, international law has made plain that certain types of conduct are not acceptable conduct of the part of anyone. This applies as much as to head of state or even more so, as it does to everyone else; the country turning the other way would make a mockery of international law. *Cf.* Siegfried Wiessner and Andrew R. Willard, *Symposium on Method in International Law: Policy Oriented Jurisprudence and Human Rights Abuses in Internal Conflict-Toward a World Public Order of Human Dignity,* 93 AM. J. INT'L L. 316, 330 (1999) (remarking on the Pinochet extradition case, at this point, both for the arrest itself and for the statement by the House of Lords, based on British domestic as well as international law, that former heads of state are no longer protected by foreign sovereign immunity).

51. *See* Visiting Forces Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, s. 9 (Eng.) (stating "The [Secretary of State for Defence] may make arrangements whereby claims in respect of acts or omissions of members of visiting forces . . . will be satisfied by payments made by the [Secretary of State for Defence] of such amounts as may be adjudged by the United Kingdom or such other authority as may be provided by arrangements. . . .") (*alteration in original*).

own courts[52] although both continued to claim sovereign immunity when sued in foreign courts.[53] By agreeing in the SOFA that official duty claims based on the activities of the sending State forces would be treated as though they were based on the activities of the receiving State, each state accepted legal responsibility for the torts of their service members if those torts fell within the doctrine of respondeat superior.[54] If the tort was outside the scope of employment, the government has the option of making an ex gratia payment.

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52. *See* Comm's of State Ins. Fund v. U.S., 72 F. Supp. 549 (1947) (noting the Court upheld waiver of sovereign immunity and submitted the U.S. to suit in a judicial tribunal); United Kingdom, Crown Proceedings Act, 1947, 10, 11 Geo. 6, ch. 44 at 10. It states:

    > Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to provisions of this Act, the Crown shall, in respect of a failure to comply with the duty, be subject to all those liable in tort (if any) to which it would be so subject if it were a private person of full age and capacity . . .

    See also Watkins v. United States, U.S. App. LEXIS 21010, at *5 (6th Cir. 1999) (stating "The government grants a limited waiver of this immunity through the FTCA. The FTCA, subject to specifically enumerated exceptions, waives the federal government's sovereign immunity and subjects it to suits for the tortious conduct of federal employees, acting within the scope of their employment, if for the same conduct attributed to the federal employee, a private person would be liable to the plaintiff under the law of the state where the federal employee's conduct occurred."). *See* generally 35 A.J. 2D Federal Tort Claims Act § 2 (1946) (claiming that by enacting the Federal Tort Claims Act, Congress merely waived immunity with reference to certain ascertainable tort claims).

53. *See* Littrell v. U.S., 4 All E.R. 203 (C.A. 1993) (noting that the United States asserted its sovereign immunity in a tort claim against it in England, due to the misuse of military forces); *see e.g.,* Michael F. Noone, *Legal Problems of Non-Appropriated Funds*, Bicentennial Issue, MIL. L. REV. 357, 447-56 (1975) (remarking the doctrine of sovereign immunity was easily applied when it was used to eliminate attempts to sue a breach of a promise or debt. The twentieth century introduced more government-owned businesses, and the doctrine of sovereign immunity was no longer feasible. Until 1952, the United States Department of State insisted that foreign governments were immune from suit in our courts, and in turn requested that foreign states reciprocate this treatment); *see also* Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812) (stating the principles of sovereign immunity as enunciated by Chief Justice Marshall are advanced as implications of an "express license" to enter foreign territory. Thus in granting sovereign immunity, the sovereign state is, in Justice Marshall's words, "to be understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be attributed to every nation."); A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980,"* 75 AM. J. INT'L L. 257, 265-66 (April 1981) (British law affords its citizens the defense of sovereign compulsion in American courts. Moreover, "[n]o action may be brought in an English court against an individual in respect of any act done by him which was authorized by the sovereign or government of a foreign state within the territory of that state.") (alteration in original). *See generally* BROWNLIE, IAN, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 334-338 (4th ed.1990) (Looking to the introduction comment on the subject of privileges and immunities of foreign states in his leading textbook on international law); Dolfus Mieg et Compagnie S.A. v. Bank of England, 1 All E.R. 747 (C.A. 1950) (stating "[t]his the independent states in international law of a foreign sovereign] gives the sovereign, so far as concerns courts of law, an immunity even in respect of conduct in breach of the municipal law.") (alteration in original).

54. *See* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW, 160-3 (1971) (discussing status of forces agreements in connection with the stationing of U.S. military personnel abroad and the rights, privileges, powers, duties, and obligations of a foreign military force); *see also* Hervey A. Hotchkiss, Lieutenant, *An Overview of the Federal Tort Claims Act*, 33 A.F. L. REV. 51, 51-52 (1990) (discussing Congress enacted the Act in 1946 as a waiver of sovereign immunity permitting a limited remedy for persons injured by federal employees acting within the scope of their duties. The FTCA waiver, however, is not absolute because Congress expressly limited the available remedies to exclude claims arising out of discretionary functions, and incidents occurring in foreign countries, as set forth in § 2680); *but see* Feres v. U.S., 340 U.S. 135, 146 (1950) (holding the U.S. is immune from tort liability for injuries to servicemen arising out of the scope of their military duties).

The Visiting Forces Act of 1952 repealed all the provisions of the Allied Forces Act of 1940, the U.S. Forces Act of 1942, and most of the provisions of the Commonwealth Act of 1933 (retaining only those which related to the assignment of Commonwealth personnel to the home forces).[55] Section 9 of the 1952 Act provides that the Secretary of State for Defense has the authority to make arrangements for settling of claims against the visiting forces, and authorizing the expenditure of funds provided by Parliament for payment of such claims.[56] These payments will be based either on the judgment of a United Kingdom court or agreed to by the claimant and the Secretary of State's designees.[57] The latter provisions apply only to official duty claims whereas the receiving State's obligation of payment is limited to that category.[58] The statute commencing on June 12, 1954, contained claims provisions which were implemented by arrangements publicly disclosed shortly before the Act became effective[59] and were later amended in 1964.[60]

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55. *See* United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. 6 ch. 31 (Eng.) (enacted after the U.S. arrived in Great Britain subsequent to the arrival of the allied forces, and responding to the U.S. demand for exclusive jurisdiction over its troops by repealing the prior acts). *See generally* Reid v. Covert, 354 U.S. 1, 15-40 (1955) (summarizing the history of British and American experiences with military authority).

56. *See* Visiting Forces Act, 1952 (Commencement) Order, 1954 S.I. 1954 No. 653. Section 9: Entitled "Settlement of claims against visiting forces" provides:

> (1)The [Secretary of State for Defence] may make arrangements whereby claims in respect of acts or omissions of members of visiting forces, or of other persons connected therewith to whom the arrangements relate, being acts or omissions of any description to which the arrangements relate, will be satisfied by payments made by the [Secretary of State for Defence] of such amounts as may be adjudged by any United Kingdom court or as may be agreed between the claimant and the [Secretary of State for Defence] or such other authority as may be provided by the arrangements; and any expenses of the [Secretary of State for Defence] incurred in satisfying claims in pursuance of any such arrangements or otherwise in connection with the arrangements shall be defrayed out of moneys provided by Parliament.
>
> (2) The [Secretary of State for Defence] shall take such steps as may be requisite for securing that persons concerned with any arrangements made by him under this section shall be informed of the nature and operation of the arrangements.

57. *See* Brooks v. United States, 337 U.S. 49 (1949) (recognizing the U.S. Supreme Court took this approach by holding that a soldier was not barred from seeking compensation which "[did] not mean that the amount claimed under servicemen's benefit laws should not be deducted, or taken into consideration when the serviceman obtains judgment under the Tort Claims Act."); *cf.* Feres v. U.S., 340 U.S. 135 (1950) (noting that a year later the Supreme Court rejected the distinction between benefits and damages and focused instead on status or service relatedness. French law's distinction between "administrations," has no Anglo-American counterpart.).

58. *See* Letter from Staff Judge Advocate Third Air Force to HQ USAF Claims Division, (Feb. 9, 1981) (Request for Advisory Opinion—U.S. Personnel as Claimants under NATO SOFA). *See generally* Feres v. U.S., 340 U.S. 135 (1950).

59. *See* INTRODUCTORY NOTE, VISITING FORCES ACT, 1952, 2 Halsbury's Statutory Instruments 405 (1997) (establishing that the Visiting Forces Act came into force on June 12, 1954 by Statutory Instrument 1954, No. 633, and makes provision with respect to naval, military and air forces visiting the United Kingdom, its colonies, and dependencies. Further, the Act grants the exercise of jurisdiction with certain restrictions within the United Kingdom over the members of a visiting force of that country).

60. *See* Defence (Transfer of Functions) (No.1) Order, S.I. 1964, No. 488, art. 2, Sch. 1.

The term "visiting force" is defined by the Act as "any body, contingent, or detachment of the naval, military or air forces of [a designated] sending country."[61] Therefore, individual members of subordinate NATO international headquarters were not members of a visiting force. In order to include them under the Visiting Forces Act, Parliament passed the International Headquarters and Defence Organizations Act of 1964.[62] The 1964 Act authorized appli-

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61. Visiting Forces Act, 1952, 15 & 16 Geo. 6 and 1 Eliz. 2 c. 67, § 12 (Eng.) Amended in 1964 by the International Headquarters and Defence Organisations Act to read:

> 'visiting force' means, for the purpose of any provision in this Part of this Act, any body, contingent or detachment of the forces of a country to which that provision applies, being a body, contingent or detachment for the time being present in the United Kingdom on the invitation of Her Majesty's Government in the United Kingdom.

See generally Cherwell Dist. Council v. Oxfordshire Valuation and Community Charge Tribunal, 1 W.L.R. 1261 (1992) (holding that Section 12 of the Visiting Forces Act interprets Part 1 of the Act which deals persons who have relevant association as or with a visiting force member who has committed an offense); The Queen v. Thames Justices, 3 All E.R. 941 (1975) (holding that the definition of "visiting forces" in Section 12 of the Act only pertains to Part 1 of the Act, and is not relevant to "desertees and absentees" described in Part 2, or "forces" in Part 3).

62. *See* International Headquarters and Defence Organisations Act, 1964, s 1(2), Sch. 1; *see also* Visiting Forces and International Headquarters (Application of Law) Order, S.I. 1965, No. 1536 (expanding the definition of Section 2 regarding the term "visiting force" to mean a visiting force to which the Order applied and "headquarters" to mean a headquarters or defense organization to which the Order applied. Articles 7 and 12 of this Order to members of a headquarter include "any person so connected with the headquarters as to be a member thereof within the ordinary meaning of that expression, though not within the meaning assigned to it by paragraph 1 of the Schedule to the International Headquarters and Defense Organizations Act of 1964."); Cherwell District Council v. Oxfordshire, 1 W.L.R. 1261 (C.A. 1992) (noting that the third judgment recognized that there is a precedent in English law for the construction of a statute by the reference to a prior statute); International Headquarters and Defence Organisations Act 1964, s 1(2) (providing that the headquarters designated by Order in Council under s 1 as qualifying for the Act should be subject to the Visiting Forces Act 1952 as adapted particularly for the circumstances involved by the provisions contained in a schedule to that Act).

cation of the 1952 Act's provisions to members of those designated international headquarters by Order in Council.[63] The fact that the International Headquarters Act of 1964 has been the only legislation necessary to correct a perceived deficiency in the 1952 Act is indicative of the strength and simplicity of the Treaty provisions. However, there were (and are) problems of interpretation which will be discussed in Parts II and III below.

B. The Treaty's Foreign Criminal Jurisdiction Provisions

Jurisdiction[64] was a particular problem for the United States' negotiators for two reasons. As a receiving State, the federal government found it constitutionally and politically difficult to

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63. *See* International Headquarters and Defence Organisations Act, S.I. 1964, No. 1536 provides:

> Where any headquarters or organization is designated by an order in Counsel under this section the Visiting Forces Act 1952 shall have effect with the adaptations set out in the Schedule to this Act, being adaptations for extending certain provisions of that Act to the headquarters or organization and certain persons connected with it.

See also International Headquarters and Defence (Designation and Privileges) Order, S.I. 1965, No. 1535 *amended by* S.I. 1987, No. 927, S.I. 1994, No. 1642 (listing the headquarters and defense organizations that apply are: Supreme Headquarters Allied Powers Europe (SHAPE); Headquarters of the Supreme Allied Commander Atlantic (SACLANT); Channel Committee (CHANCOMTEE); Headquarters of the Commander of the Allied Maritime Force, Channel (COMMAIRCHAN), Headquarters of the Commander in Chief Eastern Atlantic Area (CINCEASTLANT), and Headquarters of the Commander of the Maritime Air Eastern Atlantic Area (COMMAIREASTLANT), Headquarters of the Commander Submarine Forces Eastern Atlantic Area (COMSUBEASTLANT), Headquarters of the Commander in Chief Allied Forces North Western Europe (HQCINCAFNORTHWEST), Headquarters of the Commander Allied Naval Forces North Western Europe (HQCOMNAVNORTHWEST), Headquarters of the Commander Allied Air Forces North Western Europe (HQCOMAIRNORTHWEST) and NATO Airborne Early Warning Force Headquarters and the NATO E-3A Component). *See generally* INTRODUCTORY NOTE, VISITING FORCES ACT, 1952, 2 Halsbury's Statutory Instruments 408 (1997) (this Order effectuates the International Headquarters and Defence Organisations Act of 1964 by designating the following headquarters and defence organisations

> privileges as respects the inviolability of official archives as are accorded to an envoy of a foreign sovereign power accredited to Her Majesty: the Supreme Headquarters Allied Powers Europe; the Headquarters of the Supreme Allied Commander Atlantic; the Channel Committee; the Headquarters of the Commander of the Allied Maritime Air Force, Channel; the Headquarters of the Commander in Chief of the Eastern Atlantic Area; the Headquarters of the Commander of the Maritime Air Eastern Atlantic Area; the Headquarters of the Commander Submarine Forces Eastern Atlantic Area; the Headquarters of the Commander in Chief Allied Forces North Western Europe; the Headquarters of the Commander Allied Naval Forces North Western Europe; the Headquarters of the Commander Allied Air Forces North Western Europe; the NATO Airborne Early Warning Force Headquarters and the NATO E-3A Component.

Additionally, the Order confers upon the first two organizations in the above-mentioned the legal capacity of a corporate entity, and immunity of certain property from suit brought against them.

64. *See* BLACK'S LAW DICTIONARY (6th ed. 1991) (defining in general the right of the receiving State to initiate a criminal prosecution against a member of the sending State).

undertake control of criminal prosecutions at the state level. As a sending State, senatorial suspicion of foreign criminal justice systems was heightened.[65]

The final version of Article VII envisioned three categories of crimes.[66] The first category dealt with the sending State's right to exclusive jurisdiction over persons subject to its military law when (a) a security offense—treason, espionage, sabotage—is involved; or (b) when the offense is punishable in the sending State but is not a crime in the receiving State.[67] The second category involved the receiving State's right to exclusive jurisdiction because the offense—including security offenses—is punishable in that State, but not by the receiving State.[68] The third involved crimes in which the two States have concurrent jurisdiction. Within that cate-

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65. *See* Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 95-96 (1998) (discussing that the criminal jurisdiction over members of the sending states' forces was the primary concern of the drafters of the NATO SOFA. The agreement states that it is the duty of the military personnel to "respect" the law of the receiving state. The United States interpreted the word "respect" to be vague and that it connotes "a favorable climate for the adherence to and enforcement of the laws of a host State."); Benjamin Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219, 219 (1984) (stating "[a]s a consequence of the criminal jurisdiction provision and safeguards . . . explicit fair trail standards are guaranteed to American service members stationed in Europe in they are tried under the foreign law of courts in NATO member states."); John E. Parkerson, Jr. and Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Right Developments,* 129 MIL. L. REV. 41, 44 (1990) (noting that another point of debate has been the difference in thought between those countries that assert the death penalty as punishment and those that do not. When one looks to NATO SOFA for a jurisdictional framework regarding this issue, it allows host nation assertions of jurisdiction based upon to the death penalty).

66. *See* NATO SOFA, *supra* note 5, at art. 7.

67. *See* NATO SOFA, *supra* note 5, at art. 7, Sect. 2(a) (reading: "The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State."). *See generally* John E. Parkerson and Steven J. Lepper, *Short v. Kingdom of Netherlands*, 85 AM. J. INT'L L. 698 (1991) (providing a detailed summary of the *Short* case which held that the Netherlands' obligation under the European Convention on Human Rights must prevail over the conflicting allocation of SOFA jurisdiction; Short v. Kingdom of the Netherlands, 29 I.L.M. 1388 (1990) (discussing Art. 7, Sect. 2 of NATO SOFA and an exercise of primary jurisdiction over a visiting force member).

68. *See* NATO SOFA, *supra* note 5, at art. 7, Sect. 2(b) (reading in pertinent part " . . . authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State."); *see also* Short v. Kingdom of the Netherlands, 29 I.L.M. 1388, 1380 (1990) (holding that in view of the fact that the act of which Short is suspected is punishable under the laws of both the sending State, the United States, and the receiving State, the Netherlands, in this case the provisions of paragraph 2 involving cases of exclusive jurisdiction of the sending State or receiving State are not applicable, while the provisions of the third paragraph are: both states have jurisdiction). *See generally* S. LAZEREFF, STATUS OF MILTARY FORCES UNDER CURRENT INTERNATIONAL LAW 8-18 (1971) (providing a deeper and more comprehensive analysis of the provisions of NATO SOFA).

gory, the sending State has the primary right to exercise jurisdiction.[69] Otherwise, the receiving State shall have primary jurisdiction.[70] The concluding provisions of the paragraph merit direct quotation:

> If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.[71]

Two aspects of these treaty provisions were formally implemented into U.S. law. Upon Senate ratification, language was inserted requiring that the designated receiving State's commander examine that State's law in order to ensure that service members receive Constitutional protections. If there is a danger that an accused will not be protected, the commander will seek

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69. *See* NATO SOFA, *supra* note 5, at art. 7, Sect. 3(a). Section 3(a) states:

In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offenses solely against the property of security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State

or of a department;

(ii) offenses arising out of any act or omission done in the performance of official duty.

See also Ying Hui Tan, *US Cannot be Sued by Airman; Littrell v. United States of America—Court of Appeal*, THE INDEP. (LONDON), Dec. 2, 1993, at 30 (examining the primary right to exercise jurisdiction is the right to prosecute, when the offense is solely against its personnel or property or when the offense is committed in the performance of official duty); Holland v. Lampen-Wolfe, [1999] 1 W.L.R. 189 (discussing the decision of *Littrell*); Benjamin P. Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219 (1984) (discussing Art. VII provisions that structure a system of concurrent jurisdiction which allocates priorities of jurisdictional competence between the sending and receiving states over criminal offenses committed in the territory of the host nation).

70. *See* NATO SOFA, *supra* note 5, at art. 7, Sect. 3(b).

71. NATO SOFA, *supra* note 5, at art. 7, Sect. 3(c); *see* Benjamin P. Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219, 221 (1984) (delineating the areas of concurrent jurisdiction, the receiving state has the option either to exercise the primary right to prosecute or to waive the right by allowing the sending state to assume jurisdiction over the case); Major Mark R. Ruppert, *USAF Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 6 (1996) (suggesting that when an issue of "concurrent jurisdiction" exists between a sending and receiving nation the doctrine may be disregarded and instead conceptions of good faith, reasonableness, and efficacy may be relied upon.). *See generally* G.P. Barton, 1954 BRIT. Y.B. INT'L. L. 363, 363-70 (discussing the provisions of the first three paragraphs of art. 7 of the NATO Status of Forces Agreement).

a waiver of the receiving State's primary jurisdiction.[72] The provision has not had any effect on U.S.-U.K. relations, nor did Public Law 777 which implements Art. VII, paragraph 9(e)'s guarantee of a right to counsel by authorizing expenditure of appropriated funds to pay for an accused's counsel fees and bail.[73]

British implementation of the foreign criminal jurisdiction provision is found in the Visiting Forces Act, which exempts five categories of offenses if the accused is subject to trial by a sending State military court:

- when the offense arose out of and in the course of the accused's duty;
- when the offense is against a person and that person had a "relevant association" with the visiting force;

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72. S*ee* JOSEPH M. SNEE & KENNETH A. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 117-19 (1957) (discussing the Senate resolution which contained advice and consent to the ratification of the NATO SOFA agreement, stating that, when one is to be tried by the authorities of a receiving state, "[t]he United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States[.]" Moreover, if commanding officer believes that the accused will not be granted his rights pursuant to the United States Constitution, he "shall request the authorities of the receiving state to waive jurisdiction. The basis of the request is more than a failure to observe the procedural rights guaranteed by the Fourteenth Amendment, and therefore, the request for waiver of jurisdiction should be made in every case under similar circumstances. It should be noted, however, that a request for waiver of jurisdiction may be detrimental to relations between states, and therefore, may ultimately endanger the treatment of the accused); s*ee also* Holmes v. Laird, 459 F.2d 1211, 1223 (D.C. Cir. 1972). Stating:

> Prior to trial, the laws of the prosecuting nations are to be examined by the commanding officer of the armed forces 'with particular reference to the procedural safeguards contained in the Constitution of the United States.' If the commanding officer is of the view that 'there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States,' he must request a waiver of foreign jurisdiction and, if refused, must 'request the Department of State to press such request through diplomatic channels.' (citations omitted).

See generally Plaster v. United States, 720 F.2d 340, 347 (4th Cir. 1983) (reinforcing the requirement that a treaty be enforced subject to the protections afforded by the constitution, in a criminal prosecution on foreign soil of a U.S. serviceman); Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, July 1, 1963, 14 U.S.T. 531 (noting a receiving state may grant a standing waiver in deference to an actual exercise of jurisdiction by the sending state with the condition that the waiver may be withdrawn in specific cases).

73. *See* Benjamin Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219, 221 (1984) (stating that integral to the recognition of the host nation's primary right to exercise criminal jurisdiction under art. VII, a list of the specific fair trial guarantees is set forth in paragraph 9; this provision is applicable to all criminal trials in the courts of the NATO nations). *See generally* NATO SOFA, *supra* note 5, at art. 7, Para. 9(a)-(g) (discussing fair trial guarantees for visiting forces personnel who are tried by the host nation include the rights to a prompt and speedy trial, advance notice of the charges, confrontation of the witnesses, compulsory process for obtaining witnesses, legal representation of choice or free or assisted appointed representation, interpreter, to communicate with representatives of his own government); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972) (noting it is the first case to include a claim based directly on the violation of the individual rights conferred by a status of forces agreement, rather than upon a violation of rights secured by the United States Constitution. The appellants alleged deprivations of rights were rights which they claimed directly or indirectly by the NATO SOFA and Constitution, supported principles of international law).

- when the offense is against property and the property had a "relevant association" with the visiting force;
- when the offense is the hijacking of a military aircraft; or
- when the offense involves damaging, destroying or endangering military aircraft.[74]

In Part III of the paper we will see that Article VII's language is controversial in three respects. The drafters could not predict controversies over the concurrent jurisdiction provisions. Accusations of violent crimes against a civilian—rape, for example—will excite public demands in both the sending and receiving States demanding that the service member be tried under their system. Paragraph 3.c.'s vague undertaking to "give sympathetic consideration" to requests for waiver of jurisdiction gave the sending and receiving States the opportunity to work out responses to such demands on a case-by-case basis.[75] Apparently, the drafters did not foresee that by leaving the term "persons subject to military law" undefined, they were creating potential problems.[76] Nor did they foresee the problem posed when the sending State exercised

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74. 3 & 4 Eliz. 2, c. 18 § 3, as amended by the Aviation Security Act 1982, section 40, Schedule 2, paragraph 3. *See generally* Percy v. Moore, CO/3422/96 (Q.B. 1996) (finding that the offender, charged with common assault, was not liable to be tried by the United Kingdom, as the offense arose out of his course of duty).

75. *See* NATO SOFA, *supra* note 5, at art. 7, para. 3(ii)(c) (Setting forth the requirement of "sympathetic consideration," states, in pertinent part, a

> [S]tate having the primary right decides not to exercise jurisdiction . . . shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give *sympathetic consideration* [emphasis added] to a request from the authorities of the other state for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

See also Major John E. Parkerson, Jr., and Major Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments,* 129 MIL. L. REV. 41, 47-48 (1990) (discussing sympathetic consideration.); Davis, *Waiver and Recall of Primary Concurrent Jurisdiction in Germany*, ARMY LAW. 30, 33 (May 1998) (discussing the Federal Republic of Germany claiming that the major interest in German administration of justice are determined by "careful examination of each case." Certain kinds of cases, such as homicides, robbery and rape, may make the exercise of German jurisdiction imperative. Therefore, the focus is on the kind of offense in each individual case).

76. *See* Major John E. Parkerson, Jr., and Major Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments,* 129 MIL. L. REV. 41, 47-48 (1990) (claiming exclusive jurisdiction offenses are those crimes that are punishable solely under either the laws of the sending state or the laws of the receiving state. Relatively few offenses fall within the category. In the context of the U.S.-host nation relations, U.S. sending State exclusive jurisdiction is limited as a practical matter to those offenses that are purely military in nature and that are committed by U.S. military personnel).

The United States Supreme Court rendered decisions that restricted the category of "persons subject to military law of that State," as provided in paragraph 2(a) of NATO SOFA. *See generally* Kinsella v. U.S. ex rel Singleton, 361 U.S. 234 (1960) (discussing the constitutional validity of peacetime court-martial trials of civilian persons accompanying the armed forces out of the U.S. and charged with capital offenses under the Uniform Code of Military Justice); Grisham v. Hagan, 361 U.S. 278 (1960) (holding that the court-martial prosecution and conviction of civilian employee of the United States Army was not constitutionally permissible).

its primary right of jurisdiction over a member of the force who has committed an offense against a dependent who is also a national of the receiving State.[77]

II. The Legal Regime in Which the Law is Applied

A. The Post War Presence of United States Forces in the United Kingdom[78]

In January 1946, as Allied forces demobilized and two months before Churchill's "Iron Curtain" speech in Fulton, Missouri, General Spaatz of the U.S. Army Air Force (USAAF) and Air Marshall Tedder of the RAF made a farewell trip around the U.S. bases in Britain to decide which ones should be retained for future contingencies.[79] They selected four RAF airfields suitable for conversion to accommodate B-29s.[80] In 1947, B-29s of the Strategic Air Command

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77. *See* Benjamin Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219, 220 (1984) (discussing the sending state's exclusive jurisdiction over those few offenses which are not offense under the host nation law. As a practical matter, the exclusive jurisdiction of the U.S. within the territory of the receiving state is limited to those offenses which are purely military in nature under the Uniform Code of Military Justice and those people to whom the code can be applied); Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 95, n.51 (1998) (noting the issues of criminal jurisdiction over members of the sending states' forces was the predominant focus of attention by the treaty drafters. Their solution under Article VII of SOFA, to the problem of the conflict of sovereign interests involved in the situation, was to distinguish between offenses involving the exclusive jurisdiction of either state and those involving concurrent jurisdiction. With those involved in concurrent jurisdiction, the primary right of jurisdiction is granted to the sending state for offenses solely against the property, security or member of the sending state force (including civilian members and dependents), or offenses arising out of performance of official duty. In all other cases, the primary right of jurisdiction belongs to the receiving state. However, it is unclear whether this compromise includes those offenses committed by sending state forces against dependents of receiving state). *See generally Hearings on Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters Before the Senate Committee on Foreign Relations*, 83rd Cong., 1st Sess. (1953) (discussing the operation of Article VII of the NATO SOFA before a subcommittee of the Senate and Armed Services Committee).

78. *See* Donald A. Walbrecht, A Diplomatic History of United States Air Power in the United Kingdom. 1917-1990 (1990) (unpublished Ph.D. dissertation, Cambridge University, Darwin College) (on file with author); *see also* Cotswold District Council, ex parte Barrington Parish Council, 75 P & C.R. 515 (1997) (holding that where parties sought judicial review of a decision to grant planning permission with respect to part of the former RAF Rissington air base site, last used by the U.S. Air Force during the Gulf War); Ellison v. Ministry of Defence, 81 B.L.R. 101 (Q.B. 1996) (addressing the dismantling of Greenham Common airfield, which was built during the Second World War and in recent years has been occupied by the United States Air Force under NATO agreements).

79. *See* CHARLES H. HILDRETH, SHORT HISTORY AND CHRONOLOGY OF THE USAF IN THE UNITED KINGDOM, 3 (1967); J.E. SCHROEDER, A HISTORY OF THIRD AIR FORCE 1940-1988, iii and 5 (1989).

80. *See* John W. Keeler, *Locations of United States Military Units in the United Kingdom, 16 July 1948-31 December 1967*, p. ii. File K438.041-3 (USAF Research Library); *see also* R v. Huntingdon Magistrates' Court ex parte Bugg, co/1142/86 (Q.B. 1988) (holding where the court reviewed concerns regarding peace movement activities being conducted at the Air Force bases of the Royal Air Force and United States Army Air Force).

(SAC) deployed periodically to the United Kingdom for training.[81] In June 1948, as the Berlin crisis developed, the British government invited Strategic Air Command units to return for training.[82] Third Air Division (Provisional), with a colonel commanding, was established on July 16. The following day two groups of SAC B-29s arrived on a thirty-day deployment at the "long runway" bases selected by Tedder and Spaatz two and a half years earlier.[83] On August 7, a major general took command of the Division. He immediately sought and was granted permission to extend the B-29s' stay to sixty days.[84] On August 23, the headquarters' provisional designation was dropped and command responsibility was transferred from SAC to Headquarters U.S. Air Forces Europe (USAFE), the Air Force component of European Command (EUCOM).[85] Two weeks later, in September 1948, the Division moved from RAF Marham to

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81. *See* UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY, IN FOREIGN RELATIONS OF THE UNITED STATES, 1950, 262-63 (Vol. I 1977)); *see also* Fred Charles Ikle, *Nuclear Strategy: Can There Be a Happy Ending?,* 1985 FOREIGN AFF. 810 (describing the instability of strategic concepts because of disagreements within the Atlantic alliance). *See generally* Carl Kaysen, *Nuclear Weapons after the Cold War*, 1991 FOREIGN AFF. 95 (discussing the desire of the United Kingdom to participate in U.S. military decision-making).

82. *See* Major Carl J. Woods, *An Overview of the Military Aspects of Security Assistance*, 128 MIL. L. REV. 71, 102 (1990) (stating that "training and support of foreign law enforcement personnel as part of security assistance has generally been forbidden, as has any support for programs of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad"). *See generally* Ernest R. May, *Heart of the Cold War*, 1998 FOREIGN AFF. 148 (stating that the transfer of B-29s to bases in Britain was a bluff by President Truman to indicate to the Soviet Union that these planes were equipped with atomic bombs); Major Mark D. Welton*, The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 108 (1998) (discussing the impact of the Berlin crisis as creating a permanent east-west border in Europe).

83. *See* Carl Kaysen, *Nuclear Weapons After the Cold War*, 1991 FOREIGN AFF. 95 (discussing the buildup of overseas U.S. air bases on the "periphery of the Soviet Union"); *see also* Timothy J. Pendolino, *Contract Law Developments—The Year in Review*, ARMY LAW. 3, 12 (1996) (describing the Department of Defense Appropriations Act as necessary for deployment of United States Armed Forces); Dr. Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L. J. 45 (1995) (discussing the authority of the United States to build, maintain, and use air bases to "station forces and conduct military activities within the host country").

84. *See* Justus R. Weiner*, The Temporary International Presence in the City of Hebron: A Unique Approach to Peacekeeping*, 16 WIS. INT'L L. J. 281, 290 (1997) (stating that the host country can revoke permission for the deployment of peacekeeping troops at any time). *See generally* Charles Bennett, *Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts: The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 28 (1998) (describing the War Powers Resolution as allowing the president to deploy forces for up to sixty days and allowing Congress to extend that time in certain situations*)*; Louis Fisher*, War Powers and Foreign Affairs: Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1276 (1997) (stating that just recently President Clinton used his power to extend the deployment of troops in Bosnia).

85. *See* Dr. Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L. J. 45, 60 (1995) (citing the U.S. Air Force in Europe (USAFE) Regulation 11-5, Negotiating, Concluding, Reporting, and Maintaining International Agreements (May 24, 1998)); *see also* Captain William H. Walsh and Captain Thomas A. Pulces, Jr.*, The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. REV. 195, 200 (1999) (describing the United States European Command (USEUCOM) as one of 9 specified joint commands under which the United States Armed Forces had been organized); Mark S. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939 (1998) (according to the doctrine of command responsibility, "a superior officer is criminally liable for subordinates atrocious acts if he knew or had reason to know that they were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent . . .").

Bushey Park which had been General Spaatz's wartime headquarters.[86] Simultaneously, Third Air Division was instructed to assume the long-term presence of U.S. forces and to begin war planning accordingly.[87] As senior commander of U.S. Forces in the United Kingdom the Third Air Division commander was responsible for all claims and foreign criminal jurisdiction matters involving the visiting force.[88]

By November 1948, SAC bombers were deployed at seven RAF bases and Burtonwood Air Depot had been established to support the B-29 groups and to perform maintenance on Berlin Airlift aircraft.[89] Burtonwood, initially the responsibility of Air Material Command in Dayton, Ohio, was transferred to Third Air Division in January 1949.[90] At that time the Division was removed from USAFE and transferred to Headquarters USAF, although SAC was

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86. *See* Sebra v. Neville, 801 F.2d 1135, 1141 (1986) (applying the Mindes test as a way to determine if internal military decisions are reviewable). *See generally* Michael J. Berrigan, *The UCMJ and the New Jointness: A Proposal to Strengthen the Military Justice Authority of Joint Task Force Commanders*, 44 NAVAL L. REV. 59, 61 (1997) (discussing the authority for the movement of troops); Guru Sant Singh Khalsa v. Weinberger, 779 F.2d 1393, 1395 (1985) (stating that review of internal military regulations by courts could raise potential problems).

87. *See generally* Major Dawn R. Eflein, *A Case Study of Rules of Engagement in Joint Operations: The Air Force Shootdown of Army Helicopters in Operation Provide Comfort*, 44 A.F. L. REV. 33, 39 (1998) (stating that planners of war must consider the threats of violence to United States forces and whether it is permissible to use force to accomplish their mission); Allan A. Ryan, Jr., *The Owen M. Kuper Schmid Holocaust and Human Rights Project Seventh International Conference: Judgments on Nuremburg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L.J. 193, 205-06 (1996) (participating by individuals in the planning, waging, and carrying out a war of aggression will be held accountable); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 541 (1997) (discussing the changes in war planning because of more precise weapons used today).

88. *See* John Woodliffe, *The Peacetime Use of Foreign Military Installations Under Modern International Law*, 141 MIL. L. REV. 232, 235 (1993) (discussing that NATO SOFA provides for foreign criminal jurisdiction and claims provisions as do more sophisticated agreements where a long-term presence of foreign forces is contemplated); *see also* Walter Gary Sharp, Sr., *Protecting the Aviators of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 116 (1996) (discussing further criminal jurisdiction over foreign forces as key issue to be addressed in any SOFA). *See generally* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 3 (1996) (stating "it appears clear in the absence of a special agreement, nations as sovereigns may exercise criminal jurisdiction over all persons within their territory, including foreign military forces).

89. *See* Paul Stephen Dempsey, *The Disintegration of the U.S. Airline Industry*, 20 TRANSP. L.J. 9, 41 (1991) (comparing operation Desert Shield as the most massive airlift since the Berlin airlift in 1948); Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 1, 40 (1986) (discussing the major contributions from the United States to Berlin by aircraft); Heather L. Miller, *Civil Aircraft Emissions and International Treaty Law*, 63 J. AIR L. & COM. 697, 724 (1998) (describing International Civil Aviation Organization [ICAO] as the agency that establishes standards and practices for the maintenance of aircrafts).

90. *See* M. Victoria Bayoneto, *The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. L. J. 111, 124 (1994) (stating that "U.S. laws and regulations on the parts of the base where U.S. operations, such as the maintenance of U.S. aircraft, are necessary to protect U.S. personnel."); *see also* Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 55 (1996) (discussing the determination of responsibility for the maintenance and operation of a facility). *See generally* Kathyrn R. Sommerkamp, *Developments of 1996—The Year in Review*, ARMY LAW. 3, 113 (1997) (discussing the duties of the Secretary of the Air Force such as allocating maintenance operations).

given control over bombers in the U.K.[91] This was the command relationship in place when the NATO treaty was signed in April 1949, and when North Korean forces invaded South Korea on June 25, 1950.[92]

In January 1951, Third Air Division was transferred from HQ USAF to HQ USAFE but a subsequent March USAFE-SAC transfer agreement provided for the establishment of SAC's Seventh Air Division. It became responsible for twelve bomber bases, while Third Air Division (to become Third Air Force in May 1951) retained ten bases, various smaller installations and provided support to SAC's operations.[93] HQ USAFE directed that Third Air Force was to "maintain liaison with the British Air Ministry and other foreign military or civilian agencies . . . represent the U.S. in negotiations . . . provide administrative and logistical support to all USAF and Army activities, units, personnel and installations in the U.K."[94] It was this charter that was to govern the U.S. forces' relationship with the United Kingdom after passage of the Visiting Forces Act in 1952.[95]

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91. *See* Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1575 (1988) (discussing the four major command posts that control American strategic nuclear forces). *See generally* Selma M. Lussenburg, *The Collision of Canadian and U.S. Sovereignty in the Area of Export Controls*, 20 CAN.-U.S. L.J. 145, 159 (1994) (discussing agreements that restrict nuclear proliferation and weapons and use by national controls "as a result of the redefined strategic relationships in the wake of the demise of the former Eastern Bloc."); Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 515, 523 (1994) (comparing actions of withdrawal of heavy weapons in the region of Sarajevo).

92. *See generally* James W. Houck, *The Command and Control of United Nations Forces in the Era of "Peace Enforcement,"* 4 DUKE J. COMP & INT'L L. 1, 16 (1993) (stating that "North Korea's refusal to comply with Security Council resulted in a resolution recommending that member states take action necessary to repel the armed attack and to restore international peace and security in the area."); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 146 (1995) (comparing actions of the Security Council in response to Iraq's invasion of Kuwait in 1990); Draft Concept Plan, Defense Logistics Agency Contingency Term (12 Oct. 1993) (describing command and control relationships).

93. *See* Department of Defense, *Ceremony Marks 17th Airforce Inactivation*, FEDERAL DEPARTMENT AND AGENCY DOCUMENTS, Aug. 2, 1996, at Group 09—General Classification (discussing the Third Air Force); *see also* U.S. v. Lindsey, 7 C.M.R. 587, 588-589 (1952) (discussing the cessation of the 3rd Air Division and its subsequent replacement, the 7th Air Division).

94. Third Air Division Historical Data, 1 May-31 December 1951, Vol. I, p.4-0750. *See generally* U.S. v. Lindsey, 7 C.M.R. 587, 589-90 (1952) (where the court questioned whether the defendant, a member of the 7th Air Division, was subject to the Third Air Force Regulation, when at the time of the offense, the Third Air division had just been discontinued and the Third Air Force was designated in its place and assigned to the United States Air Forces in Europe); John E. Parkerson, Jr., *The U.S. Military Death Penalty in Europe: Threats From Recent European Human Rights Developments*, 129 MIL. L. REV. 41 (1990) (discussing the disturbance of the arrangements concerning exercise of jurisdiction over the offenses of American military members overseas).

95. *See* Rob Evans, *Is America Squatting at Menwith?*, SUN. TELEGRAPH, Aug. 10, 1997, at 13 (discusses the Visiting Forces Act of 1952 [Visiting Forces Act 1952 allows American troops on to British soil. "This law has itself proved controversial. Under it, the Government gives American servicemen immunity from prosecution for crimes committed in Britain while engaged on 'official duty'. . ."]); *see also* Littrell v. U.S., 4 All E.R. 203 (Q.B. 1994) (discussing the variety of provisions enacted by the Visiting Forces Act in relation to criminal jurisdiction); Nick Cohen, *Hold on a Minute . . . ,* THE OBSERVER, Nov. 17, 1996 at 24 (discussing the Visiting Forces Act of 1952).

Subsequent changes in force structure and base realignments had no effect on the preeminent role assigned to the Commander Third Air Force as U.S. Country Representative in the United Kingdom.[96] Neither his SAC counterpart, the major general commanding Seventh Air Division until it disbanded in 1966, nor the admiral commanding U.S. Naval Activities, United Kingdom had SOFA responsibilities for claims and foreign criminal jurisdiction matters.[97]

B. The United States: Structure and Process

1. The Claims Function

Since their arrival in World War II, U.S. forces in the United Kingdom have designated at each of their installations a claims officer responsible for reporting and collecting information about potential claims against or on behalf of the United States.[98] At larger installations, a judge advocate will perform that function; otherwise it is additional duty of an officer or civilian employee.[99] The claims officer ensures that the duty status of the service member involved in a potential claim is determined by the appropriate commander and reports claims and potential

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96. *See* U.S. v. Richard E. Lindsey, Jr., 7 C.M.R. 587, 589 (1952) (discussing the authority of the Commanding General, of the Third Air Force, as USAF area commander); U.S. v. Brousseau, 32 C.M.R. 861 (1962) (providing that the commander in chief of the USAFE has defined the mission of the commander in chief of the Third Air Force and has delegated to him certain powers, responsibilities and functions, including assisting the commander in chief of the USAFE, and acting as a point of contact between the U.S. forces and the U.K. government). *See generally* Culver v. Secretary of the Air Force, 559 F.2d 622, 623 (1977) (where the commander of the Third Air Force approved the court martial judgment of the sentencing and finding of appellant for participating in a demonstration).

97. *See* Mark R. Ruppert, *USAF Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 6 (1996) (discussing foreign criminal jurisdiction and Status of Forces Agreement, in respect to the exercise of jurisdiction over an offender by the receiving and/or sending nation.). *See generally* George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L. REV. 509, 598 (1985) (discusses the claims process within the Army: "Army claims officer should keep claimant and attorney informed of status of claim and familiarize them with all aspects of the procedure"); Andreas Gronimus, *Allied Security Services in Germany: The NATO SOFA Supplementary Agreement Seen From a German Perspective*, 136 MIL. L. REV. 43, 50 (1992) (providing that "Article VII, in addition to the exercise of jurisdiction, is a leased privilege, permitted to the sending state by the receiving state . . . no state may grant another state on its territory rights in excess of the powers that the receiving state itself may exercise.").

98. *See* Ted B. Borek, *Legal Services During War*, 120 MIL. L. REV. 19, 42 (1988) (discussing the establishment of U.S. claims offices, and the installation of U.S. claims officers in the United Kingdom under the Foreign Claims Act of 1942); Jonathan M. Epstein, *Global Positioning System (GPS): Defining the Legal Issues of its Expanding Civil Use*, 61 J. AIR L. & COM. 243, 267 (1995) (discussing the purpose of the Foreign Claims Act *i.e.*, "[t]o provide an administrative means for individuals to file claims for damages . . ."); United States Army Claims Service*, Tort Claims Note: Finality of Military Claims Act Decisions*, ARMY LAW. 49, 50 (1999) (providing a general discussion of the function of the Foreign Claims Act).

99. *See* Ted B. Borek, *Legal Services During War*, 120 MIL. L. REV. 19, 22-23 (1988) (discussing the various legal functions performed by a judge advocate residing in the United Kingdom and other areas of Europe); *see also* Commander John Astley III, USCG, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119 (1997) (providing that judge advocates tended to be service centric in the past, as opposed to what they do today, such as advising the Army CENTCOM commander on military operations; Major Stephen E. Castlen, *Let the Good Times Roll: Morale, Welfare, and Recreation Operations*, ARMY LAW. 3, 14 (1996).

lawsuits to the sending State office at Third Air Force headquarters.[100] NATO SOFA duty and non-duty claims are relatively rare. Claims officers, typically assigned to the United Kingdom for three years, spend most of their time handling the claims of military and civilian personnel whose property was damaged or destroyed under circumstances where the U.S. government will compensate them for their loss.[101] The sending State office at Third Air Force Headquarters is primarily responsible for NATO SOFA claims, both "duty" and "non-duty," although local claims officers investigate the incidents which give rise to such claims.[102]

When Third Air Division (Provisional) was established at RAF Marham in 1948, World War II claims arrangements were still in place. The United States deposited its instruments of ratification of the Status of Forces Agreement on July 24, 1953, and since the United Kingdom previously ratified the treaty by passage of the Visiting Forces Act of 1952, the sending and receiving State offices' bilateral relationship can be said to have commenced on that date.

The Staff Judge Advocate, Third Air Force, by then located at the Victoria Park Estates in South Ruislip outside London, had little guidance from higher headquarters. "Information Concerning the NATO Status Agreements," a volume prepared by an interdepartmental working group composed of representatives of the Departments of State, Defense, Treasury and Justice was not published until March 17, 1953.[103] Apparently the Staff Judge Advocate of Third Air Force heard of the publication and requested it on April 29, 1954, over a year after its publication and shortly before the Visiting Forces Act was to go into effect in July.[104] On May 18,

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100. *See generally* Army Publications and Printing Command, 27 Claims Procedures, 162, Section 2.2.C(4) and 1.8A (1998) (Section 2.2C(4), Area claims office responsibility, Delegation of investigative responsibility, states that heads of the Army must appoint a unit claims officer to conduct preliminary factual investigation of the claim. Moreover, where a large organization is concerned, the unit claims officer shall coordinate investigations with the proper area claims office or claims processing office when the claim's potential value exceeds $25,000. Further, Section 1.8A, Duties, Operations, Policies, and Guidance, Command claims services, states that the judge advocate or the chief of the command claims service assign claims personnel the duty of ensuring claims are promptly investigated and processed, and if with the authorization of the commander, the area claims office carries out claim duties within that service's jurisdiction).

101. *See* Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, 1998 ARMY LAW. 1 (1998) (discussing the mechanisms for investigating and settling/denying claims against U.S. forces and the function of the Foreign Claims Act [in respect to military and civilian personnel] "to promote and [to] maintain friendly relations with the receiving state"); *see also* United States Army Claims Service, *Tort Claims Note: Foreign Claims -- Not Just for Overseas Offices*, ARMY LAW. 69, 70 (1998) (discusses the legal procedure for establishing claims for actions arising outside of the U.S.). *See generally* Captain Jeffery S. Palmer, USAF, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 232 (1997) (providing that claims arising from "property owned by a party to the SOFA and used by its armed forces is damaged by a member of the armed forces of another party in the performance of official duty" are usually waived).

102. *See* George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. L. REV. 509, 598 (1985) (discusses the claims process within the Army: "Army claims officer should keep claimant and attorney informed of status of claim and familiarize them with all aspects of the procedure"); Captain Jeffrey S. Palmer, USAF, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227 (1997) (stating that "claims arising out of acts or omissions of members of a force or civilian component done in the performance of an official duty shall be dealt with by the receiving state's law").

103. *See* 18 May 1954 letter from Acting Director of Civil Law to Staff Judge Advocate Third Air Force.

104. *See id.*

1954, the Office of the Judge Advocate General in Washington sent him a copy, and a copy of the U.S. Senate Supplementary Hearing, held in June 1953, on the SOFA.[105] Although the Departments of State, Defense and Army had, during 1954 testimony on the International Agreement Claims Act,[106] agreed on an interpretation of the SOFA which excluded U.S. nationals as claimants, Third Air Force did not learn of their testimony until 1970.[107]

2. The Foreign Criminal Jurisdiction Function

The Visiting Forces Act, effective on June 12, 1954, contained restrictions on the right of British courts to exercise jurisdiction over certain criminal offenses.[108] The Staff Judge Advocate

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105. *See id.*; *see also* Keith Raynor, *Army Legal Services, War and Order-the Jurisdiction of Army Courts Martial*, LAW SOCIETY'S GUARDIAN GAZETTE, Vol. 90 No. 34 (1993) at 30 (the judge advocate general's department contains a body of judicial officers, called judge advocates who are appointed by the Lord Chancellor); Littrell v. U.S., 4 All E. R. 203 (1995) (SOFA, status of forces agreement, regulates the stationing of the forces of member states in each other's territory. It was made between the parties to the North Atlantic Treaty in 1951, and was ratified by the United States and the United Kingdom).

106. *See* Hearings before the House subcommittee of the Committee on Foreign Affairs on H.R. 7819, *A Bill to Implement the Claims Provisions of NATO SOFA and Other Similar International Agreements* (1954); 10 USC § 2374b (1999) (addressing activities of armed forces of foreign countries in the United States); *see also* Littrell v. U.S., 4 All E. R. 203 (1995) (discussing how SOFA set the basis on which NATO states consented to the forces of other states being stationed on their territory).

107. *See* 16 November 1970 letter from Chief, Claims Division, Subject: Claim of [name deleted] to CINCUSAFE/JAD; *see also* Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still With Us*, 117 MIL. L. REV. 153, 173 (1987) (discussing how most SOFA agreements give the United States jurisdiction over all persons subject to its military law where the United States has primary jurisdiction or where the host waives jurisdiction); Keith Raynor, Army Legal Services, *War and Order—The jurisdiction of Army Courts Martial*, LAW SOCIETY'S GUARDIAN GAZETTE, Vol. 90 No. 34 (1993) at 30 providing that:

> a soldier is [also] subject to the laws of the country in which he or she happens to be serving and may be charged in the domestic courts of that country. The matter of jurisdiction in such cases is often regulated by a status of forces agreement (a treaty between friendly states). There is a NATO status of forces agreement.

108. *See* The Visiting Forces Act 1952 (Commencement) Order 1954, SI 1954/633, s3, c67 (1952) (providing the offender be a member "of a visiting force or a member of a civilian component of such a force" as a prerequisite of the restriction of the jurisdiction of the British courts. "The Commission found that the 1952 Act is a special provision implementing bilateral relations between the UK and certain other states concerning the treatment of, and authority over, foreign military staff and personnel, which was in the nature of an extradition arrangement applicable to such persons"); R. v. Thames Justice, Ex parte Brindle, 3 All E.R. 941 (App. Cas. 1975) (discussing criminal jurisdictional issues arising under the Visiting Forces Act when an American serviceman is convicted of certain criminal offenses); *see also* J.P. Gardner & S. Dolle, *European Commission of Human Rights: Report European Commission of Human Rights—Report on the 179th Session*, LAW SOCIETY'S GUARDIAN GAZETTE Vol. 83 No. 28 (1986) at 2318.

of Third Air Force confirmed that formal requests for waiver of the receiving State's primary jurisdiction would be made only by the Staff Judge Advocate, Third Air Force.[109] As a matter of general policy, U.S. Forces would seek to exercise jurisdiction in all cases where members of the force, the civilian component or their dependents, were alleged to have committed an offense.[110] Shortly afterwards, the two agreed that the British would, in the absence of some compelling reason, waive their primary jurisdiction over minor drug offenses and permit U.S. authorities to deal with them.[111]

The American authorities offered two rationales for blanket waivers of primary jurisdiction: that conviction of what, in a civilian context, might be seen as a minor offense barred subsequent prosecution in military courts and that administrative separation of such offenders

109. *See* Third Air Force, SJA-1 letter of 24 September 1954 (in an exchange of letters with the [British] Director of Public Prosecutions in the fall of that year); Director of Public Prosecutions letter of 15 October 1954, MISC/71/1442/54; *see also* John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats From Recent European Rights Developments,* 129 MIL. L. REV. 41, 41-55 (1990) (discussing criminal jurisdictional schemes under the NATO SOFA Agreement); Captain David S. Gordon, *Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*, 100 MIL. L. REV. 49, 97 (1983) (discussing the refusal of foreign nations to relinquish jurisdiction to the U.S. in potential capital cases); s*ee generally* U.S. v. Covert, 16 C.M.R. 465, 481 (1954) (discussing the Third Air Force Regulation, which in part prescribes the procedures for dependents of service personnel to enter the United Kingdom).

110. In 1956 the U.S. Supreme Court was to rule that Article 2 of the Uniform Code of Military Justice, which granted court-martial jurisdiction over civilians accompanying the forces, was an unconstitutional violation of the Sixth Amendment, *see* Reid v. Covert, 351 U.S. 487, 487 (1956) (wife's murder of her husband on base in the U.K.); Kinsella v. Kreuger, 351 U.S. 470, 470 (1956) (wife's murder of husband in Japan); Grisham v. Taylor, 361 U.S. 278 (1959) (civilian employee charged with murder); Gugliardo v. McElroy, 361 U.S. 281 (1960) (civilian employee charged in non-capital case); Kaj Aaskov, et al., v. Edward C. Aldridge, Jr., et al., 695 F. Supp. 595 (D.D.C. 1988) (discussing differences between NATO SOFA Agreement, Foreign Claims Act, and the International Claims Act); *but see* Armed Forces, 10 U.S.C.S. § 2734(a) (1999).

111. *See* Third Air Force, SJA-2 letter of 4 October 1954; Director of Public Prosecutions letter of 13 October 1954, MISC/109/3847/54 ("The authorities of the state having the primary right shall give sympathetic consideration to request from the authorities from the other state for a waiver of its right in cases where that other state considers such waiver to be of particular importance"); SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW, 197-98 (1971) (discussing the efforts made to establish relationships and methods of operations with host countries authorities); *see also* Autry v. Hyde, 19 U.S.C.M.A. 433, 435 (1970) (discussing how NATO SOFA provides that authorities of the sending and receiving states are to assist each other in the arrest of members of a force in the receiving state and handing them over to the jurisdiction which is to exercise authority). *See generally* Benjamin P. Dean, *An International Human Rights Approach to Violations of the NATO SOFA Minimum Trial Standards*, 106 MIL. L. REV. 219, 230-37 (1984) (discussing fair trial standards and minimal procedural standards under the International Bill of Human Rights and the NATO SOFA Agreement).

because of their civil conviction involved delays that enabled them to commit subsequent offenses.[112] However, in early 1955, Third Air Force sought a similar blanket waiver of cases involving homosexual offenses. The British refused on two grounds: that the other offender would in many cases be a civilian who should be tried jointly with the service member and that victims of homosexual assaults might object to testifying before a U.S. court-martial.[113]

Three years before Third Air Force issued its first regulation to units within the United Kingdom regarding foreign criminal jurisdiction, a mechanism for resolving disputes and making policy was firmly in place.[114] Since that time, the process has remained fundamentally unchanged although regulations governing the process are periodically revised and reissued by superior headquarters.[115] Unit commanders are expected to maintain close contact with local police authorities so that they are promptly notified when a member of the force, civilian com-

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112. *See* NATO SOFA, *supra* note 5, at art. 7, para. 8. Stating:

> Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of the other Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force from any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another Contracting Party.

See also John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats From Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 41 (1990) (discussing how under NATO SOFA provides each state the option to waive the right of assuming jurisdiction); U.S. v. Covert, 16 C.M.R. 465, 481 (1954) (if a civilian can be shown to be serving with, employed by, or accompanying the armed forces outside the United States and beyond certain geographical limits, jurisdiction may be accomplished under the Uniform Code of Military Justice).

113. *See* Third Air Force letter 3CJA-1, 4 January 1955; Director of Public Prosecutions letter, MISC/17/73/55, 8 January 1955 ("The power granted to Congress to make rules to regulate the land and naval forces would seem to restrict court-martial jurisdiction to persons who are actually members of the armed forces."). *See generally* U.S. ex rel. Toth v. Quarles, Secretary of the Air Force, 350 U.S. 11 (1955) (contending that civilian ex-servicemen could constitutionally be subjected to trial by court martial); U.S. CONST. art. I, § 8 (stating "Congress shall have the power . . . to make rules for the government and regulation of the land and naval Forces").

114. *See* Third Air Force Reg 110-2, (16 May 1957) (rescinding letter HQ 3AF, 3CJA-2, 25 Nov. 55, Subj: Administrative Procedures for Implementing AFR 110-12 in the United Kingdom. Air Force Regulation (AFR) 110-12, Foreign Criminal Jurisdiction Over U.S. Personnel, had been issued on August 25, 1955); U.S. v. Covert, 16 C.M.R. 465, 481 (1954) (discussing the Third Air Force Regulation, which in part prescribes the procedures for dependents of service personnel to enter the United Kingdom). *See generally* Autry v. Wiley, 440 F.2d 799 (1st Cir. 1971) (discussing how the criminal jurisdiction of the United States may be defeated if custody is obtained in violation of a treaty).

115. *See* Department of Defense Directive 5525.1 (setting forth the basic policy for the services in the Department); *see also* Army Regulation (AR) 27-50 (implementing the policy in a joint regulation): Secretary of Navy Instruction (SECNAVINST) 5820.4G, AFR 110-12 (being implemented in Europe by US European Command); USEUCOM Directive (ED) 45-3 (assigning responsibility for foreign criminal jurisdiction in each country to a designated commander); US Army Europe (USAREUR) Regulation 550-50 (stating that designated commanders, and their subordinates are also governed by theatre joint service regulations); Commander in Chief US Navy Europe (CINCUSNAVEUR) Instruction 5820.8H; US Air Force in Europe (USAFE) Regulation 110-1 (explaining that designated commanders of one service may, by virtue of the authority delegated to them by the joint service regulations, issue orders and establish procedures binding members of other services serving in country. The regulations describe reporting procedures, explain how counsel can be retained to represent accused service members, and require regular prison visits if a service member is convicted and confined. Criminal jurisdiction in each country to a designated commander).

ponent or dependent is suspected of, or charged with, a criminal offense.[116] At larger U.S. installations, retired British police officers were hired to serve as liaisons with the local constabulary. Once notified of an offense, they are required to notify Third Air Force Headquarters and are directed to issue a duty certificate if the offense is one over which the U.S. has the primary right of jurisdiction.[117] If the receiving State has primary jurisdiction they are instructed to request that the offender be "handed over" to U.S. authorities.[118] The 1957 instruction forbade subordinate commanders from making written requests for waiver but encouraged them to make oral requests and to enter into oral blanket understandings with local authorities that minor offenses, breach of the peace, drunk driving, and other traffic violations would be turned over to the military for disposition.[119]

Third Air Force's foreign criminal jurisdiction function has been remarkably stable during the past forty-five years. The first civilian attorney-advisor, who was responsible for the criminal jurisdiction function and negotiations over customs duties and labor-management relations, served from 1954 to 1973. His replacement has served for twenty-six years. Similar longevity of tenure existed at higher headquarters' offices concerned with foreign criminal jurisdiction: the attorney-advisor at HQ U.S. Air Forces Europe has served for nearly thirty years, as did the attorney-advisor at HQ USAF and as a member of the Secretary of Defense's General

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116. *See* AR 27-50 (prescribing the joint regulation policies, procedures, and responsibilities for the protection of U.S. personnel who become subject to foreign jurisdiction, proceedings or imprisonment; also providing uniform reporting procedures on the exercise of foreign criminal jurisdiction); AR 27-50, section 1.7A, (claiming the Designated Commanding Officer should maintain direct liaison with the judicial authorities who have cognizance over cases involving U.S. forces in host countries); AR 27-50, section 1.7B (outlining procedures to apply when it appears that foreign authorities may assume criminal jurisdiction over dependents of U.S. military personnel civilian personnel or dependents of personnel).

117. *See* Annalisa Ciampi, *International Decisions: Public Prosecutor v. Ashby. Judgment No. 161/98.*, 93 AM. J. INT'L L. 219, 221-23 (1999) (discussing jurisdiction and waiver of jurisdiction by sending states in matters of criminal jurisdiction in foreign countries with respect to offenses that are punishable by the law of one State but not by the law of the other); *see also* D.S. Wijewardane, *Criminal Jurisdiction Over Visiting Forces with Special Reference to International Forces*, 41 BRIT. Y.B. INT'L L. 122, 141-146, (1965-66) (espousing the rationale that the NATO SOFA Agreement is an exception to the general rules which govern crimes committed on the receiving state's territory); *but see* JOSEPH M. SNEE, & A. KENNETH PYE, STATUS OF FORCES AGREEMENT AND CRIMINAL JURISDICTION, 46-54 (1957) (contradicting the views of the court in *Public Prosecutor v. Ashby*).

118. *See* Appendix R, Country Representative Instruction—United Kingdom, USAFE Regulation 110-1 (23 September 1987); *see also* Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying The Forces Overseas—Still With Us*, 117 MIL. L. REV. 153, 173 (1987) (discussing the release of a murder case by British authorities upon certification from the United States that the defendant was subject to American military law under the Visiting Forces Act). *See generally* P. Gardner & S. Dolle, *European Commission of Human Rights-Report on the 179th Session*, LAW SOCIETY'S GUARDIAN GAZETTE, Vol. 83 No. 28 (1986) at 2318 (discussing the surrender to Indian authorities of a deserter of the Indian army from the magistrates, upon receipt of a certificate signed by an Indian officer).

119. *See* Section III, para. 5, p. II-9, 3AF Manual 110-1, 10 May 1957; *see also* Percy v. Moore, CO/3422 (Q.B. 1996) (finding that the offender, charged with common assault, was not liable to be tried by the United Kingdom, as the offense arose out of his course of duty); Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still With Us*, 117 MIL. L. REV. 153, 175 (1987) (discussing the 54 "less serious" cases of crimes where jurisdiction was released to the United States in 1977, as stated in the GAO report).

Counsel's Office. The consequences of that longevity will be discussed in the final section of this paper.

C. The United Kingdom: Structure and Process

1. The Claims Function

Initially, the War Office's Claims Commission served as the receiving State's claims office. Headed by a senior lieutenant colonel and staffed by career civil servants, the Claims Commission, with its stable work force and extensive experience during World War II, was far better prepared than the Americans to respond to the peacetime workload. The scattered documents remaining from those early years suggest that the British did not take advantage of their superior bargaining position in order to minimize their 25% contribution to duty claims. The fact that only two duty claims have appeared in the law reports[120] indicates that claimants' lawyers did not believe they had grounds to challenge the receiving State's decisions on liability or the proposed damage awards. During a Parliamentary debate in 1983, the government spokesman reported that, during the prior five years, "[t]he claims commission has handled about 430 claims a year against United States service men, all of which have involved road traffic accidents. In each year about 15 cases have involved personal injury, but not more than two fatal injuries. The majority of cases are settled amicably."[121]

Unlike the judge advocates at Third Air Force, the members of the U.K. Claims Commission were not lawyers. When legal advice was thought to be needed on a particular claim—duty or non-duty—the Claims Commission relied on the Treasury Solicitors. These Solicitors

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120. *See* Browning v. War Office, 1 Q.B. 750 (1963) (reversing the lower court's decision to award pecuniary damages to a technical sergeant of the United States Air Force on duty in the United Kingdom who was injured by the negligent driving of a British soldier. The Court of Appeals held that the lower court erred by failing to take into account the sergeant's disability pension in assessing damages, and hence, reduce his final award); *see also* Littrell v. U.S., 4 All E.R. 203, 203-13 (Q.B. 1994) (dismissing an interlocutory appeal by plaintiff, member of the U.S. Air Force who sustained injuries from medical treatment administered by U.S. Air Force personnel at the U.S. air force base in England. The Court of Appeal held that the lower court properly dismissed plaintiff's claim against the U.S. on the ground that the alleged negligent medical treatment was an act of U.S. sovereign authority, pursuant to the Agreement between the parties to the North Atlantic Treaty Regarding the Status of Their Forces (NATO SOFA), and thus, granting it immunity from suit.).

121. *See, e.g.*, Littrell v. U.S., 3 All. E.R. 218, (appeal denied by Littrell v. U.S., 4 All E.R. 203, (C.A. 1994)) (in an attempt to construe the articles of the NATO SOFA agreement, the Court enlisted the help of plaintiff's counsel who recommended two academic works so to assist in the Court's determination of whether plaintiff was entitled to damages); *see also* Visiting Forces Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 67, § 9 stating:

> [T]he [Secretary of State for Defence] may make arrangements whereby claims in respects of acts or omissions of members of visiting forces . . . being acts or omissions of any descriptions to which the arrangements relate, will be satisfied by payments made by the [Secretary of State for Defence] of such amounts as may be adjudged by any United Kingdom court or as may be agreed between the claimant and the [Secretary of State for Defence] or such other authority as may be provided by the arrangements . . .

would also act on behalf of the Crown (substituted under the Visiting Forces Act for the United States) if a "duty" claimant elected to sue, rather than pursue an administrative claim. The Crown Proceeding Act, unlike the U.S. Federal Tort Claims Act, does not require an administrative claim as a prerequisite to suit.[122] It appears that suits on duty claims were rare: the claimant gained no apparent benefit by involving the Treasury Solicitor, since his office would consult with the Claims Commission before making a settlement offer.

Non-duty cases usually involved auto accidents. Those rare non-duty claims not based on careless driving generally involved an intentional tort: rape, murder, simple assault or trespass to property.[123] American law provides that a service member charged with an offense before a foreign court will be represented by a lawyer paid for by the U.S. government.[124]

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122. *See* Crown Proceedings (Armed Forces) Act, 1987, 10 & 11 Geo. ch. 44, §§ 1 and 2 (Eng.) (repealing Section 10 of the Crown Proceedings Act, 1947 and providing that exclusion of the Crown from liability in tort in cases involving the armed forces shall cease); Crown Proceedings Act, 1947, 10 & 11 Geo. ch. 44, §§ 17 and 18 (Section 17 states that "Civil proceedings against the Crown shall be instituted against the appropriate authoris[z]ed Government department. . . ." Moreover, Section 18 provides that, the solicitor shall be served all documents required to be served upon the Crown in the event of a civil proceeding against an authori[z]ed government department; however, if there is no such solicitor, then documents shall be served upon the Solicitor for the affairs of His Majesty's Treasury); *but cf.* Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b) (West Supp. 1999) and 2675 (West 1994) (contrasting proceedings against the sovereign in the United Kingdom, Section 2675 of the United States Federal Tort Claims Act provides that:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim have been finally denied by the agency in writing and sent by certified or registered mail.

Moreover, Section 1346 defines "employee of the Government" to include "persons acting on behalf of a federal agency in an official capacity . . . in the service of the United States . . ." and further, "acting within the scope of his office or employment" is defined as acting in the line of duty in regard to a member of the military or naval forces); *see also* Hervey A. Hotchkiss, *An Overview of the Federal Tort Claims Act*, 33 A.F. L. REV. 51, 51-54 (1990) (asserting that in 1966, Congress amended the Federal Tort Claims Act so to require claimants to submit an administrative claim prior to suit. Generally, a claimant must first present to the appropriate federal agency a written administrative claim stating the amount he demands in compensation, then the claimant must provide the agency with adequate notice so that it may conduct a proper investigation of the claim. The claim must be signed and indicate that it has been presented to proper party. The agency's final decision on the claim may be reviewed, subject to a request submitted by claimant).

123. *See, e.g.*, Holmes v. Laird, 459 F.2d 1211, 1214 (D.C. Cir. 1972) (considering charges of attempted rape and related offenses of American citizens serving in the United States Army while stationed with the Eighth Infantry Division in West Germany); *see also* In re Burt, 737 F.2d 1477, 1478 (7th Cir. 1984) (considering the petition of a writ of Habeas Corpus for two U.S. servicemen in West Germany); Plaster v. United States, 720 F.2d 340, 342 (4th Cir. 1983) (extradition proceeding of U.S. servicemen for murder).

124. *See* NATO SOFA, *supra* note 5, at art. 7, para. 9 (a)-(g); *see also* Benjamin P. Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Trial Standards*, 106 MIL. L. REV. 219, 221-23 (1984) (recognizing that integral to the host nations primary right to criminal jurisdiction, is a list of procedural safeguards including the right to military counsel of your choice or free counsel).

2. The Foreign Criminal Jurisdiction Function

Cooperation with legal authorities over criminal matters involves liaisons with the police and prosecutors. The U.S. sought a single point of contact—achieved in the British Claims Commission—but a criminal justice counterpart was more elusive. The Home Secretary directly controls the (London) Metropolitan Police, indirectly supervises local police forces, and appoints the Director of Public Prosecutions (DPP) whose office is responsible for some, but not all, criminal prosecutions.[125] Thus, it is useful to separate the discussion into two overlapping categories: cooperation with the police (authorized to prosecute minor cases without relying on a lawyer) and cooperation with prosecutors (giving legal advice to the police before a decision is made to prosecute).[126]

Liaison with the police was achieved by appointment of a Police Liaison Officer, who came from the Metropolitan Police, with the consent of the Home Office. His role is described as follows:

> It is the mission of the Police Liaison Officer to achieve a uniformity of interpretation under the Status of Forces Agreement of incidents involving violations of United Kingdom law by personnel of the Visiting Forces and to assist in the establishment of a harmonious relationship between the Visiting Forces and the law enforcement authorities of the United Kingdom. To accomplish this the Liaison Officer is in continual close contact with Legal Offices and Provost Marshals of the Visiting Forces, while maintaining his already intimate knowledge of and relationship with the United Kingdom law enforcement agencies. In addition it is important for him to know the policies of the various government departments which have some responsibility in regard to the Visiting Forces so that he may interpret these policies in contentious cases. He also consults frequently with the Director of Public Prosecutions who under the authority of the Attorney General advises police

125. *See generally* Metropolitan Police Act, 1829, sched. 1 (Eng.) (stating "It shall be lawful for his Majesty to cause a new police office to be established . . . directed by one of his Majesty's principal secretaries of state, . . ."). *See generally* Prosecution of Offences Act 1985, sched. 2, (Eng.) (it states as much); Prosecutions of Offenses Act, 1985, sched. 1 (Eng.) (creating a prosecution service for England and Wales for which the Director of Public Prosecutions will be the head).

126. *See* Prosecutions of Offences Act, 1985, sched. 3 (Eng.) (stating "It shall be the duty of the Director . . . to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of the police force . . ." where specified proceedings are defined as "proceedings which fall within any category for the time being specified by order made by the Attorney General for the purposes of this section.").

> forces as to whether or not a case is one in which it would be suitable for the United Kingdom to waive its primary right to exercise jurisdiction.[127]

Obviously the position called for a police officer with superior diplomatic and intellectual qualities, particularly since the incumbent would be negotiating with the U.S. attorney advisor for Third Air Force. The position only permitted an exercise of indirect control over local police authorities whose actual head was the Chief Constable for their county. Day-to-day cooperation between Third Air Force and the Police Liaison Officer proved to be excellent, as did cooperation between local police authorities and the military base representatives who, as noted previously, were retired British policemen.[128] A description of the scope and application of the Visiting Forces Act, the criminal jurisdiction provisions, and police liaison was issued to all Police Forces in late May 1954.[129] The latest version was issued in 1986[130] containing the following provisions relating to the theme of cooperation:

- Authorities of the visiting force should be warned before prosecution is initiated and authorities should be kept informed of the progress and result of all proceedings.[131]

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127. Appendix A, para. 4, 3AFM 110-1. *See generally* Steven G. Hemmert, *Peace Keeping Mission SOFAs: U.S. Interests In Criminal Jurisdiction*, 17 B.U. INT'L L.J. 215, 221 (1999) (As the receiving states under most SOFAs partially waive and partially retain jurisdiction over foreign troops within their borders, any waiver must be explicit and precise); Major John E. Parkerson Jr. and Major Steven J. Lepper, *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged With Criminal Offenses Overseas*, 85 AM. J. INT'L. L. 698, 699 (1991) (NATO includes a formula that allocates criminal jurisdiction over offenses committed by members of the visiting force, and it so happens that a vast majority of crimes committed in Europe by U.S. military personnel violate the laws of both the United States and the host state); John M. Raymond and Barbara J. Frischholz, *Lawyers Who Established International Law in the United States, 1776-1914*, 76 AM. J. INT'L. L. 802, 808 (1982) (modern practice permits, by agreement, a friendly visiting force stationed abroad to try a member of that force for an act committed in line of duty, and subordinates the criminal jurisdiction of the host state over the offense).

128. Lest too favorable a picture be painted, it must be observed that liaison with British Customs and Excise authorities was less smooth. Customs officials were less willing to waive their right to primary jurisdiction while the U.S. authorities were more sensitive to their sovereign right to be free from on-base customs inspections. The provisions of Articles X (which exempts members of the Force and civilian component from taxes and duties) and XI (which exempts them from customs duties but not from searches) fall outside the scope of this paper. *See generally* Michael N. Schmitt, *The Use of Force Overseas: An Analytical Framework*, 39 NAVAL L. REV. 93, 100 (1990) (discussing how local understandings have proven helpful and emphasizing the key is planning and the development of set procedures for coordination of efforts. For example, the coordination at Florennes Air Base, Belgium, outside the perimeter, the Belgian national police controlled demonstrators and inside the perimeter, Belgian Air Police provided general security with U.S. Security policeman guarding critical exclusive-use facilities. A similar procedure is employed at U.S. bases in Great Britain).

129. Home Office Circular, No. 114/1954, Visiting Forces Act, 1952), 29th May 1954 (on file with author).

130. Section 13, Home Office Circular No. 35/1986, Consolidated Circular to the Police on Crime and Kindred Matters (on file with author).

131. Section 13, Home Office Circular No. 35/1986, Consolidated Circular to the Police on Crime and Kindred Matters Para.13.36 (on file with author); *see* Holmes v. Laird, 459 F.2d 1211, 1212-15 (D.C. Cir. 1972) (considering the North Atlantic Treaty Organization's Status of Forces Agreement (NATO SOFA) as it applied to a trial of a U.S. Serviceman in the Federal Republic of Germany, and listing the procedural safeguards contained therein); Collins v. Weinberger, 707 F.2d 1518, 1521 (D.C. Cir. 1983) (stating "The German authorities and the authorities of a sending State shall take all administrative measures necessary for the implementation of the NATO Status of Forces Agreement and of the present Agreement, and, where necessary, shall conclude administrative or other agreements to that end.").

- Authorities of the visiting force should be given a reasonable period of time, before commencement of the action, to decide whether to claim that the offense was duty related (and that the force has primary jurisdiction) or to arrange for the presence of a trial observer.[132]

- "All cases in which a member of a visiting force or a member of a civilian component is charged with an indictable expense [i.e., a felony, which by definition entails the possibility of imprisonment for over a year] which is going for trial should be reported to the Director of Public Prosecutions so that he may have the opportunity of conducting the prosecutions"[133] and no U.K. police authorities should seek the advice of the DPP before seeking U.S. waiver of primary jurisdiction.[134] U.S. requests for waiver should be given sympathetic consideration and consultation with the DPP is urged.[135]

- The Circular repeats the rationales which U.S. authorities had proffered since 1954 for routine "blanket waivers" of U.K. primary jurisdiction but then says:

> It has been explained to the U.S. authorities that assurances were given when the Visiting Forces Bill was before Parliament that offenses against the criminal law of the United Kingdom would be dealt with in United Kingdom courts unless they fell into the [five] categories described in section 3(1) of the Act[136] and that there can be no question of handing over an offender whose case did not fall within section 3(1) unless there were special circum-

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132. Section 13, Home Office Circular No. 35/1986, Consolidated Circular to the Police on Crime and Kindred Matters Para.13.16 (on file with the author) (Paragraph 9(g) of Article VII of the Status of Forces Agreement guarantees an accused under the jurisdiction of a receiving State the right "to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial"); *see* NATO SOFA, *supra* note 5, at art. 7; *see also* Benjamin Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219, 227-28 (1984) (discussing the application of the NATO fair trial standards by military trial observers).

133. Section 13, Home Office Circular No. 35/1986, Consolidated Circular to the Police on Crime and Kindred Matters Para.13.15 (on file with the author). *See generally* NATO SOFA, *supra* note 5, at art. 7, para. 1.

134. *See* Section 13, Home Office Circular No. 35/1986, Consolidated Circular to the Police on Crime and Kindred Matters Para. 13.21 (on file with the author); NATO SOFA, *supra* note 5, at art. 7, para. 3 (resolving the conflict between two overlapping jurisdictions by dividing up jurisdictional rights based on the nature of the offense).

135. *See* Section 13, Europe Art. VII, Circular No. 35/1986, Consolidated Circular to the Police on Crime and Kindred Matters Para. 13.22 (on file with the author); *see also* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 5-9 (1996) (stating "If a host nation with the primary right to exercise concurrent jurisdiction receives a request to waive that right, its only obligation is to give the request "sympathetic consideration."); *see, e.g.,* Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes, Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248, Article 7; Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea with Agreed Minutes, Agreed Understandings, Exchange of Letters and Other Implementing Agreements, Jul. 9, 1966, 17 U.S.T. 1677, 674 U.N.T.S. 163, Article 12.

136. *See* Visiting Forces Act, October 30, 1952, Section 3; *see also* Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994) (describing the Visiting Forces Act).

> stances or the alleged offense were trivial from the point of view of the criminal law, but a serious breach of military discipline.[137]

During a Parliamentary debate in 1983 a government spokesman reported that

> [i]n 1982, more than 2,100 United States service men . . . were convicted in United Kingdom courts, about 2,000 of which were for traffic offenses . . . in the past two years there have been 27 instances of serious offenses of violence committed by United states military personnel against United Kingdom citizens . . . most occurred in pub and disco fights. All of these incidents were dealt with by the United Kingdom courts. Five American service men are presently in our prisons.[138]

The government also supplied statistics regarding drug convictions in England and Wales of U.S. nationals employed in military establishments (i.e., members of the force or civilian component):

1978	128
1979	133
1980	109
1981	114
198	237[139]

Liaison mechanisms within the prosecutorial function are not documented. Until the 1980's criminal prosecutions were either undertaken by the local police subject to guidelines set down by the Director of Public Prosecutions, or were prosecuted by the DPP's office.[140] The

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137. Section 13, Home Office Circular No. 35/1986, Consolidated Circular to the Police on Crime and Kindred Matters Par. 13.25 (on file with the author). *See generally* Georges R. Delaume, *Jurisdiction Over Crimes Committed Abroad: French and American Law*, 21 GEO. WASH. L. REV. 179 (1952).

138. Hansard (HC), 19 December 1983, pp. 106-107; *see* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW, 160-3 (1971); *see also* Keith Highet et al., *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged With Criminal Offenses Overseas—European Commission on Human Rights: Short v. Kingdom of the Netherlands*, 85 AM. J. INT'L L. 698 (1991) (describing the effect of Short v. Kingdom on the NATO SOFA).

139. Hansard (HC), 19 December 1983, pp. 106-107; *see* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW, 160-3 (1971); *see also* Keith Highet et al., *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charged With Criminal Offenses Overseas—European Commission on Human Rights: Short v. Kingdom of the Netherlands*, 85 AM. J. INT'L L. 698 (Oct. 1991) (describing the effect of Short v. Kingdom on the NATO SOFA).

140. For an overview of some of the functions of this office prior to the passage of the Prosecution of Offenses Act 1985, *see generally* Turner v. Director of Public Prosecutions, 68 Crim. App. 34 (Q.B. 1982) (discussion of whether the DPP could lawfully exercise his discretion in such a way as to interfere in a private prosecution in order to bring it to a stop); Attorney-General of Fiji v. Director of Public Prosecution, [1983] App. Cas. 672 (P.C. 1982) (whether DPP is entitled to bring proceedings against the Crown in the name of his office or whether he should have brought them in his personal name).

Crown Prosecution Service was established in 1988 to assume responsibility for most police prosecutions.[141] This affects liaison channels since protocol and the location of the Service in London means that, in many cases, a Third Air Force lawyer has to negotiate with the lawyer prosecutor rather than relying on a base level lawyer or police liaison officer.[142] The transition has been uneventful.

III. Accommodating Conflicting Interests

The documents relating to claims and foreign criminal jurisdiction matters published by the U.S. and U.K. authorities evidence a sincere effort to accommodate the other's national interests within the mechanism established by the Treaty and its implementing laws. However, two issues remain unresolved after 40 years.

A. Controversy Caused by Cooperation: "Third Party" Claimants

Could a member of the sending State forces, injured in the line of duty by another member of the forces, make a claim under Article VIII of the SOFA? This question was to occupy British and American authorities for over thirty years, and has still not been resolved.

At the time the SOFA was negotiated and ratified, neither the U.S. nor the U.K. permitted members of their armed forces to sue their own governments in tort.[143] The United States'

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141. *See* Prosecution of Offenses Act 1985, S.I. 1985, No. 243 (provides for the establishment of the Crown Prosecution Service for England and Wales, for the Director of Public Prosecutions to be head of the Service, with under him in each area a Chief Crown Prosecutor to supervise the operation of the service in that area and for the other staff to be appointed by him). For a demonstration of the scope of power within the act, *see also* Regina v. Director of Public Prosecution ex parte Association of First Division Civil Servants, THE INDEPENDENT, May 24, 1988 at 88. Since implementation of section 3(2) of the Prosecution of Offenses Act 1985, it has been the duty of the Director of Public Prosecutions as head of the Crown Prosecution Service to take over the conduct of almost all criminal proceedings in England and Wales instigated by police. On June 2, 1987, a Committee of Chief Crown prosecutors issued a report that recommended that most summary offenses should be reviewed by executive officers, who are not qualified as lawyers. It should be their function, upon examination of case files, to assist lawyers to decide whether "prosecution instigated by the police should be accepted or not by the Service at the initial acceptance review stage. *See generally* Regina v. Bow Street Stipendiary Magistrate and another ex parte South Coast Shipping Co. Ltd., 96 Crim. App. 405 (Q.B. 1993) (interpretation of duties conferred upon Director of Public Prosecution under 3(2) of the Prosecution of Offenses Act 1985).

142. *See generally* Practice Note, 4 All E.R. 863 (1993) (framework of basic responsibilities of police liaison officer); James Morton, *The Crown Prosecution Service-Wood Green Branch*, 137 NEW L.J. 990 (1987) (a broad overview discussion of the different components and effects of the Crown Prosecution Service on different aspects of the system).

143. *See* Feres v. U.S., 340 U.S. 135 (1950) (following the Federal Tort Claims Act, 28 U.S.C. § 2671, a remedy does not extend to members of the United States armed forces who sustained injuries incident to their service); U.S. v. Johnson, 481 U.S. 681 (1987) (holding under the Feres doctrine, the Federal Government is not liable under the Federal Tort Claims Act for injuries to a service member where injuries arise out of or in the course of activity incident to the member's military service); U.S. v. Shearer, 413 U.S. 52, 60 (1985) (holding the Federal Torts Claim Act does not allow a serviceman or his representative to recover from the government for negligently failing to prevent another serviceman's assault and battery).

immunity was (and is) defined in the "Feres doctrine," derived from a 1950 Supreme Court decision, holding that the Federal Tort Claims Act did not permit suits against the United States by service members injured "incident to service."[144] "Injury" includes property damage and "incident to service," soon came to mean any event, including events that occurred while the serviceman was on leave and which had no relationship to his military duties.[145] British immunity is guaranteed by the Crown Proceedings Act of 1947.[146] Both countries rationalized the bar on suits by pointing out that, in lieu of a law suit, which required proof of carelessness, pension and survivors' benefits statutes provided compensation for personal injury and death while other laws provided reimbursement for military members' personal property that was damaged or destroyed incident to service.[147]

The language of the NATO SOFA "duty claims" provision neither includes nor excludes members of the visiting force. It provides that claims arising out of acts or omissions of members of a force or civilian component occurring while on official duty, and causing damage to third parties in the receiving State shall be handled by the receiving State.[148]

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144. *See* Feres v. United States, 340 U.S. 135 (1950); *see also* United States v. Johnson, 481 U.S. 681, 684 (1987) (explaining the Feres doctrine bars a Federal Tort Claims Act action on behalf of a service member killed during an activity incident to service, even if the alleged negligence is by civilian employees of the federal government); *but cf.* United States v. Muniz, 374 U.S. 150 (1963) (holding a federal prisoner can sue under the Federal Tort Claims Act to recover damages from the United States for personal injuries sustained during confinement in a federal prison and resulting from the negligence of a government employee).

145. *See* 28 U.S.C. § 1346(b) (1982), which provides that:

> [D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act oromission occurred.

146. *See* Crown Proceedings Act, 1947, 11 & 12 Geo. 6, ch. 44, § 10(1)(Eng.).

147. *See, e.g.,* 10 U.S.C. §§ 3721, 6201, and 8721 (provides members of uniformed services serving on active duty free medical care when injured or ill; 10 U.S.C. §§ 1475-1478 (survivors of service members are entitled to benefits); 10 U.S.C. §§ 1201 & 1401 (provides a comprehensive disability retirement system for service members permanently injured in the line of duty).

148. *See* NATO SOFA, *supra* note 5, at art. 8, para. 5; *see also* 10 U.S.C. § 2734a (1994) (granting the authority for the United States Department of Defense to pay a share of official duty claims made pursuant to international agreements).

It is doubtful that the term "third party," intended to identify those persons harmed by members of the visiting force, was meant to encompass other members of the visiting force.[149] Moreover, the sending State's legal responsibility is to be determined by the receiving State's laws "with respect to claims arising from the activities of its own armed forces."[150] Even if a member of the visiting force was considered a third party eligible to make a claim, the visiting force's legal responsibility would be determined by local law.[151] However, both the U.S. and the U.K. have held that the armed forces were not "legally responsible" or subject to suit to members of their own armed forces.[152] It should be noted, British and American law barred only ser-

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149. For a discussion of proper and improper claimants and claims, *see* Captain Jeffery S. Palmer, USAF, *Claims Encountered During An Operational Contingency*, 42 A.F. L. REV. 227, 241-42 (1997). *See generally* Lieutenant Colonel Arthur C. Bredemeyer, *International Agreements: A Primer for the Deploying Judge Advocate*, 42 A.F. L. REV. 101, 105 (1997) (discussing "[administrative and technical] status provides the deployed military forces with certain immunities, the most important of which is complete immunity from the receiving state's criminal jurisdiction and immunity from their civil jurisdiction to the extent that the act giving rise to the action was done in the performance of an official duty").

150. Major Mark R. Ruppert, *USA*F, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 4 (1996) (discussing how "in the wake of strong disagreement among nations and commentators on the immunity of a sending State's forces from a host nation's criminal jurisdiction, the predominant focus of the NATO SOFA was the issue of allocation of criminal jurisdiction and the sharing of this sovereign prerogative); *see also* Captain Jeffrey S. Palmer, USAF, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 227 (1992). Providing that

> claims arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or claims for which a visiting force may be liable under receiving state law, which cause damage to third parties (other than any of the Contracting Parties) shall be dealt with by the receiving state.

Steven G. Hemmert, *Note: Peace-keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. INT'L. L. J. 215, 217 (1999) (providing that "Part VII [of the NATO SOFA] concludes by recommending that sending states maintain exclusive criminal jurisdiction for as long as is practical, but relinquish it in the form of sympathetic waiver when necessary").

151. *See* SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 305-06 (1971) (stating "[t]he general trend of the agreement," the granting of rights to foreign nationals in the receiving State marks "a real evolution in the field of international law." There are, however, obvious reasons for not including members of the visiting force among those foreign nationals intended to be protected by the treaty's provisions).

152. *See* SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 305-06 (1971) ("In France, the Courts admit that a State employee on duty who is the victim of a tort caused by a public servant of another administration (for example, a policeman wounded while on duty by a soldier also on duty) can request compensation for the prejudice not compensated by his own administration." Interestingly, Lazareff does not comment on whether French law provides that soldiers may seek judicial compensation for damages caused by fellow soldiers, nor does he describe the kinds of prejudice not compensated by the public servant's administration, which the national policeman could claim); *but cf.* Brooks v. United States, 337 U.S. 49, 53 (1949) (holding by the U.S. Supreme Court that a soldier was not barred from seeking compensation, which "[did] not mean that the amount claimed under servicemen's benefit laws should not be deducted, or taken into consideration when the serviceman obtains judgment under the Tort Claims Act"); Feres v. United States, 340 U.S. 135, 142 (1950) (rejecting the distinction between benefits and damages and focused instead on status or service relatedness. French law's distinction between "administrations" has no Anglo-American counterpart. Anglo-American law has traditionally drawn a firm distinction between statutory benefits and damages).

vicemen's claims. Civilian employees and the families of service personnel could sue in tort.[153] Thus, even a strict application of the local law relating to servicemen's claims still left the "third party" question unanswered as to claims brought by civilian employees and family members of the visiting force.[154]

It is not known whether the British government engaged in this kind of legal hairsplitting. What is known, from a Third Air Force letter written a quarter of a century later, is that beginning in 1954 the British Claims Commission (BCC) under the NATO SOFA, began processing claims by U.S. service personnel, members of the civilian component, and dependents of service personnel or civilian component, for property damage to privately owned motor vehicles arising from collisions with U.S. vehicles. Although it was anticipated that there would be relatively few such claims, the primary reason for the BCC's decision to handle these claims was

153. *See* Reid v. Covert, 354 U.S. 1, 23 (1955) (Justice Black concluded that civilians do not lose their civilian status when abroad, nor do they lose their right to a civilian trial, even though the Government helps them live as members of a soldier's family); *see also* Captain Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still With Us*, 117 MIL. L. REV. 153, 159 (1987) (noting "[d]ecisions negating military jurisdiction over dependents in noncapital cases, and jurisdiction over civilian employees of the forces for capital and noncapital offenses followed fast on the heels of Covert. The issue of the military jurisdiction over civilians in wartime remains unresolved"); Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995) (summarizing the history of jurisdiction over civilians was unconstitutional during peacetime; and thirteen years later when the United States Court of Military Appeals held jurisdiction applied only during a congressionally declared war).

154. *See* AFR 112-1 ¶ 9-2g (defining third party as "Those other than members of the force and civilian component of the sending or receiving States. Dependents, tourists, and other noninhabitants of a foreign country are third parties unless the agreement specifically excludes them."); *see also* ARMY LAW. 69, 70 (1998) (The term "third party" is defined by each individual signatory to a SOFA, but generally includes anyone who is not a member of the force, a civilian component of the force, or a dependent of a member of the force or civilian component of the force. Thus, "third parties" are typically tourists, business travelers, or inhabitants of foreign nations who are present within the receiving state.); AR 27-20 para. 7-10(b) (Thus, each member nation of NATO could define third parties differently from the other member nations). *But see* Captain Jeffery S. Palmer, USAF, *Claims Encountered During an Operational Contingency,* 42 A.F. L. REV. 227, 233 (1997) (noting that a proper third party claimant may include: a natural person, a corporate entity, or a local and city government); Lieutenant Colonel Richard A. Phelps, USAF, *Environmental Law For Overseas Installations,* 40 A.F. L. REV. 49, 83 (1996) (noting the NATO SOFA does not define the term. By agreement with Canada, Germany, and Japan, third parties do not include members of the U.S. force or civilian component and thus, they cannot file claims. Even dependents are excluded in Canada and Japan.).

the existence of mutual forbearance and sharing agreements between them and U.K. insurance companies.[155]

During 1957-58 there was a significant increase in the number of motor vehicle claims of U.S. personnel.[156] As a result, discussions commenced between the U.S. and the BCC to determine how to appropriately handle these cases. The BCC indicated that it would agree to handle these motor vehicle cases under the SOFA, provided assurance was received that the U.S. as a receiving State would handle claims of British personnel similarly.[157] As of June 9, 1958, the BCC began deferring payment of claims of U.S. personnel; the Army, as receiving state claims agent in the U.S. would not voluntarily extend reciprocity as the British desired.[158]

The U.S. Army's position was apparently based on its reading of the "third party" provisions of the SOFA and was consistent with the position taken by executive branch witnesses before Congress.[159] In February 1959, the Deputy General Counsel of the Department of Defense advised that he would have no objection to an interpretation of the treaty which drew

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155. *See* Letter from Staff Judge Advocate Third Air Force to HQ USAF Claims Division (Feb. 9, 1981) (on file with author) (Request for Advisory Opinion—U.S. Personnel as Claimants under NATO SOFA).

    Mutual forbearance or "knock for knock" agreements provided that if an insurer paid for damages to its insured's car under the insured's comprehensive coverage (which did not require proof of fault as a prerequisite to payment), the insurer would not then assert its subrogated claim (which would require proof of fault), no matter how valid, against the other driver's insurance company. Obviously, the premise for the agreement was that, in the long-run, each company's expense of asserting and defending subrogated claims based on fault would exceed receipts. The British Claims Commission, by conceiving itself as a comprehensive insurer of U.S. government vehicles, would not assert a subrogated claim, for example, against the insurer of the member of the visiting force who collided with the government vehicle. Nor would the visiting force member's insurer assert a claim against the BCC. If a member of the visiting force asserted a motor accident claim against the BCC, it meant either that he had no comprehensive insurance coverage, or that he did but elected not to seek compensation from his own insurer so that his insurance premium would not increase. While the mutual forbearance agreements would not apply in either case, the BCC may have decided that most visiting force members would possess and utilize comprehensive coverage, and that paying the claims (of which 75% would be recoverable from the sending State) of the remainder could be rationalized on the grounds that, when confronted with claims of British service members, other receiving States would take the same approach.

156. *See* Letter from Staff Judge Advocate Third Air Force to HQ USAF Claims Division (Feb. 9, 1981) (on file with author) (Request for Advisory Opinion—U.S. Personnel as Claimants under NATO SOFA).

157. *See id.*

158. *See id.*

159. *See A Bill to Implement the Bill Provisions of NATO SOFA and Other Similar International Agreements,* 1954: *Hearings on H.R. 7819 Before the House Subcomm. of the Comm. on Foreign Affairs*, 83rd Cong. 1st Sess. (1954); *see also* 10 U.S.C. § 2374b (1999) (addressing activities of armed forces of foreign countries in the United States); Littrell v. U.S., 4 All ER 203 (1995) (discussing how SOFA set the basis on which NATO states consented to the forces of other states being stationed on their territory).

no distinction between dependents (who would under local law be permitted to sue the State for personal injury or property damage), members of the civilian component (who would be able to sue the state for property damage or for personal injuries which were not job related), and members of the armed forces (who were barred from suing the State).[160] In July, the Army advised the Staff Judge Advocate of USAFE[161] and the British Joint Services Mission in Washington D.C.[162] that it was changing its policy. The advantages to the sending State were clear. Claims that would have been paid under some other statute permitting reimbursement for loss would be paid under the SOFA. This meant that the receiving State would absorb 25% of the costs and some claims which could not otherwise be paid, e.g., personal injury claims of servicemen, could be under the SOFA.[163] In August 1959, the Third Air Force Staff Judge Advocate advised the Claims Commission accordingly.

However, both the British and the Americans revised their views on the personal injury claims of members of the sending State.[164] In March and June 1960, the British Mission to the U.S., acting as a sending State office, accepted the U.S. interpretation as applied to members of the British forces assigned in the U.S. In November 1960 the U.S. as receiving State agreed to that interpretation.[165] Meanwhile, the U.S. sending State office in the U.K. had been advised by the British Claims Commission in September 1958 that a USAF Sgt. Browning had filed a claim under the SOFA for serious personal injuries. He claimed negligence by two drivers, one of whom was employed by the British War Office, and the other by the U.S. Air Force.[166] Browning was severely injured, and was given a disability discharge in June 1959. In time his condition sufficiently stabilized allowing him to seek adjudication of his claim. The British Claims Commission was willing to settle the claim, although the Third Air Force advised him that they had no statutory authority to reimburse the payment and that, in the future, members of the armed forces seeking compensation for personal injuries would not be treated as "third parties."[167] When the Claims Commission made an award, it deducted the amount he

160. *See* Memorandum for the Chief of Claims Division Office of the Judge Advocate General, Department of the Air Force (Feb. 26, 1959) (interpreting the term "third parties" as used in NATO SOFA and the Japanese Administrative Agreement).

161. *See* Letter from the United States Army to the Staff Judge Advocate of USAFE (July 28, 1959) (on file with author) (discussing the applicability of Article VIII, NATO SOFA, a Civilian Component, or Dependents of a Member of the Force or Civilian Component).

162. *See* Letter from the United States Army to the British Joint Services Mission (Dec. 19, 1960) (on file with author) (defining U.S. Sending State Personnel as Third Parties Within the Meaning of Article VIII, para. 5, NATO SOFA).

163. *See* Letter from Staff Judge Advocate Third Air Force to HQ USAF Claims Division (Feb. 9, 1981) (on file with author) (Request for Advisory Opinion—U.S. Personnel as Claimants under NATO SOFA).

164. *Id.*

165. *Id.*

166. *Id.*

167. *See* Letter from Staff Judge Advocate Third Air Force to HQ USAF Claims Division (Feb. 9, 1981) (on file with author) (Request for Advisory Opinion—U.S. Personnel as Claimants under NATO SOFA).

received as disability pay. He subsequently brought suit over this ruling, which was affirmed by the Court of Appeals in November 1962.[168]

Meanwhile, in January 1961, the General Counsel of the Department of Defense raised the problem with the Department of State. In May 1962, the Legal Adviser to the Department of State concluded that members of the force could be third party claimants and informed the British Embassy that the Department of State considered Browning and any other United States personnel in the United Kingdom proper third party claimants.[169] A week later, in response to a letter requesting clarification, the Deputy Legal Adviser told the Department of Defense:

> While further agreed interpretations [of the meaning of the term "third parties"] . . . would not be appropriate under the Department of State's interpretation . . . there would be no legal objection to reciprocal arrangements being made between two NATO countries concerning the substantive law on disposition of claims. Such possibility could be explored with the British in the course of discussions with them on the Browning case.[170]

Subsequently, the U.S. sending State office and U.K. claims authorities agreed that the sending State office would not refer any U.S. national's claim to the British unless the claimant expressly requested referral thus minimizing the number of controversial claimants.[171] By 1973, the Department of State had modified its earlier position that members of the visiting force were legitimate third party claimants.[172] In *Newington v. United States*,[173] a British employee of

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168. *See* Browning v. War Office, 1 Q.B. 750, 758-59 (Eng. C.A. 1963) (stating in dictum, Lord Denning stated that credit must be given when a plaintiff continues to receive wages, or a proportion of them, notwithstanding injury); *see also* Hussain v. New Taplow Paper Mills Ltd., 1 W.L.R. 336, 347 (Eng. C.A. 1986) (accepting Lord Denning's dictum, the court held that credit must be applied where the plaintiff continued to receive wages); Parry v. Cleaver, A.C. 1, 22 (Eng. H.L. 1969) (holding no deduction for pensions); Christopher Sprague, *Damages for Personal Injury and Loss of Life-The English Approach*, 72 TUL. L. REV. 975, 1002 (1997).

169. *See* Letter from The Legal Advisor, Department of State to General Counsel, Department of Defense (May 9, 1962) (on file with author).

170. Letter from the Deputy Legal Advisor to the Assistant General Counsel in the Department of Defense (May 17, 1962) (on file with author).

171. *See* Annotation, Air Force Manual 111-2, 9-6b(3) (1969); *see also* Letter from HQUSAF/JACC to CINUSAFE/JAD (July 26, 1971) (on file with author) (discussing U.S. personnel as third party claimants).

172. *See* Newington v. United States, 354 F. Supp. 1012, 1015 (E.D. Va. 1973). The Court concluded:

> This view of limiting third persons to local citizens in the absence of some additional agreement between the United States and another country is most consistent not only with the legislative history but also with the general conflict-of-law/choice-of-law principle of most significant contacts which has been given full recognition by the Supreme Court.

173. 354 F. Supp. 1012 (E.D. Va. 1973); *see also* Brown v. Ministry of Defense, 683 F. Supp. 1035, 1038 (E.D. Va. 1988) (holding that the treaty provision did not apply because only a "force" member could not be a "third party" under paragraph five); Laskero v. Moyer, No. 89-C-5966 1990 U.S. Dist. LEXIS 7373 (N.D. Ill. 1990) at *8 (holding NATO SOFA is inapplicable. A receiving nation has at best minimal interest in suits between two members of a force or a civilian component of a sending nation).

the U.S. Army was injured while on duty in the Netherlands. When the Dutch rejected his NATO claim, on the grounds that members of the visiting forces were not "third parties" within the meaning of the SOFA claims provisions, he sued the United States under the Public Vessels Act.[174] The government's lawyers introduced evidence regarding their 1959 conclusion that members of the force could be third parties but argued that it was a matter to be resolved reciprocally between the respective sending and receiving States. In doing so, they implicitly rejected any blanket interpretation of their 1962 ruling that Newington was a legitimate third party claimant.[175]

Subsequently in *Daberkow v. United States*,[176] a federal appeals court affirmed the U.S. Army's refusal to pay the claim of the widow of a German airman killed in a training accident in the United States allegedly due to the carelessness of a U.S. pilot. Applying the Feres doctrine[177] to members of the Visiting Force the court barred the claims of service members or their survivors. In doing so, the court applied U.S. domestic law (since the treaty provides that liability will be determined by local law) and did not interpret the treaty's term "third parties."[178] In 1991, a British court ruled in a suit brought under the Visiting Forces Act that a U.S. service member had no right of action as a third party against the sending state.[179]

The controversy over members of the forces as third party claimants is instructive. First, it should be noted that the problem was first raised in 1954, more than forty years ago. One of the characteristics of disputes over international agreements is that the disagreements may per-

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174. *See* Newington v. United States, 354 F. Supp. 1012, 1013 (E.D. Va. 1973) (discussing a British national who was a civilian employee of the U.S. Army, brought this action against the United States under the authority of the Public Vessels Act, 46 U.S.C.A. Section 781 et. seq., and the Suits in Admiralty Act, 46 U.S.C.A. Section 741 et. seq.).

175. *See* Newington v. United States, 354 F. Supp. 1012, 1014 (E.D. Va. 1973) (rejecting the government's argument, the Court concluded that the defendant overlooked two important aspects of the Department of Defense Directive of February 26, 1959, "[f]irst, such an interpretation is not compelled by law but is merely a matter of reciprocity. Also, the Department would not advocate their position if it would preclude United States citizens from pursuing other statutory claims remedies provided by United States legislation.").

176. 581 F.2d 785 (9th Cir. 1978); *see also* Woodside v. United States, 606 F.2d 134, 139 (6th Cir. 1979) (discussing the Daberkow decision); Brown v. Ministry of Defense of the United Kingdom of Great Britain, 683 F. Supp. 1035, 1038-39 (E.D. Va. 1988) (discussing the Daberkow decision); Taber v. Robert S. Maine & United States of America, 67 F.3d 1029, 1046-47 (2d Cir. 1995) (citing Daberkow).

177. *See* Feres v. United States, 340 U.S. 135, 146 (1950) (holding that the Federal Tort Claims Act does not extend its remedy to members of the United States armed forces who sustain injuries incident to their service); *see also* Raymond J. Toney & Shazia N. Anwar, *International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls*, 14 AM. U. INT'L L. REV. 519, 540 n.59 (1998) (discussing the Feres doctrine); Littrell v. United States, 4 All E. R. 203 (1994).

178. *See* Daberkow v. United States, 581 F.2d 785, 789 (9th Cir. 1978) (applying NATO SOFA, the Court noted "[w]hile the provision does not precisely cover the situation presented in this case, this provision does suggest, as the District Court pointed out, that the foreign serviceman is 'assimilated' into the United States military for limited consideration.").

179. *See* Littrell v. United States, 4 All E. R. 203 (1994); *see also* Ying Hui Tan, *US Cannot be Sued by Airman: Littrell v. United States of America—Court of Appeal*s, THE INDEPENDENT (London), Dec. 2, 1993, at 30; Holland v. Lampen-Wolfe, 1 W.L.R. 189 (1999) (discussing the Littrell decision); *State Immunity Against Libel Action*, TIMES (London), Aug. 29, 1998, at Features.

sist for years with no apparent loss in government efficiency. Second, the dispute arose because the British government applied a "generous" definition to the term "third party," a definition which the United States would not have sought but which it accepted because it thought it would save 25% on minor property damage claims submitted by U.S. claimants. Sending State authorities never took seriously the possibility that the same definition could force them to pay 75% of personal injury and wrongful death claims. Third, the reciprocal provisions of the treaty created their own dynamic. Although receiving State authorities are supposed to rely on domestic law to evaluate liability, the generous British ruling—which was not based on law but insurance industry practice—pressured the United States to be similarly generous. The reciprocity problem was further compounded by the fact that the Air Force's sending State reimbursements would benefit from a generous interpretation (by saving 25% on claims that they would otherwise pay under some other US statute) while the Army's receiving State office would suffer a detriment (by paying 75% on claims that they would not otherwise pay at all).[180] Fourth, problems of intra-governmental cooperation, illustrated by the differing positions of the British Mission in Washington and the British Claims Commission may only be resolved by appealing to a higher authority, so removed from the problem that they didn't understand it—illustrated by the State Department's ruling which had to be "clarified" within a week of its issuance.

B. Controversy Caused by Legislative Drafting: Dependents as Victims

SOFA provides that the military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of the force or civilian component in relation to offenses solely against the person or property of a dependent.[181] Moreover, SOFA defines "dependent" as the spouse of a member of the force or of a civilian component or a child of such member depending on him or her for support.[182]

Pursuant to SOFA, if an American serviceman stationed in the United Kingdom murdered his British wife, the sending State shall have primary jurisdiction over the case, because

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180. *See* Littrell v. U.S., 3 All E.R. 218 (1992) (the Court referred to SOFA para. 5 of art. VIII, section e, and stated as follows:

> [t]he cost incurred in satisfying claims pursuant to the preceding subparagraphs and paragraph 2 of this Article shall be distributed between the Contracting Parties, as follows:- (I) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent chargeable to the receiving State and 75 per cent chargeable to the sending State . . .

The court concluded if the plaintiff could bring himself within the paragraph, the claim would be decided according to the laws which would apply to the United Kingdom's armed forces, with resulting damages to be borne 25% by the United Kingdom and 75% by the United States).

181. *See* NATO SOFA, *supra* note 5, at art. 7, para. 3.

182. *See* NATO SOFA, *supra* note 5, at art. 1, para. 1(b).

there is a "relevant association" between the serviceman and the victim.[183] In contrast however, the Visiting Forces Act granted the United Kingdom—not the United States—primary jurisdiction over an American serviceman stationed in the United Kingdom who killed his British wife, who retained her British citizenship.[184]

Surprisingly, neither of the standard treatises on the Status of Forces Agreement discusses the conflict between the treaty and the statute.[185] Silence implies that there had been no disputed cases at the time the treaties were written, or that there had been disputed cases, which were not brought to the drafters' attention. Research suggests that there have been such cases but they have not been reported in standard legal publications. Typically, legal publications rely on judicial opinions—and the murderous husband would have no legal grounds for seeking a ruling that his preference to be tried before some other court should have been honored—or rely on legislative material—and there have been no Parliamentary efforts to resolve the conflict.

The mechanisms in place usually provide an adequate solution. When a service member's victim is a dependent who is also a British citizen, the United States could waive its primary right under the treaty and allow local authorities to exercise their primary right under the Visiting Forces Act.[186] In the alternative, British authorities could, after consultation with the Direc-

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183. *See* Visiting Forces Act, 1952, 15 & 16 Geo. 6 and 1 Eliz. 2, c. 67, § 12 (Eng.). Section 12 of the Act defines "relevant association" as:

> (a) references in this Part of this Act to a person's having at any time a relevant association with a visiting force are references to his being
>
> (b) a person not being a citizen of the United Kingdom and Colonies or ordinarily resident in the United Kingdom, but being a dependent of a member of that visiting force or of a civilian component of that force.

184. *See* Visiting Forces Act, 1952, 15 & 16 Geo. 6 and 1 Eliz. 2, c. 67, § 3 (Eng.). Section 3 of the Visiting Forces Act provides in pertinent part that:

> (a) a person charged with an offence against United Kingdom law shall not be liable to be tried by a United Kingdom court if at the time of [the incident] he was a member of the visiting force or a member of a civilian component and
>
> (b) the alleged offence is against the person, and the person [against] whom it is alleged to have been committed had at the time thereof a relevant association with that force or with another visiting force of the same country.

185. *See* JOSEPH M. SNEE & A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION (1957) (observing that the Treaty's definition is restrictive and noting that § 12(4) of the Visiting Forces Act defines "dependent" as anyone wholly maintained by the serviceman or in his care); SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 166-67 (1971) (reporting that earlier drafts of the Agreement required that the dependent who was a victim of an offense must be a citizen of the sending State before that State had primary jurisdiction and the elimination of the requirement meant "[t]hat the sending State has the primary right to exercise jurisdiction, even if the victim possesses the nationality of the receiving State").

tor of Public Prosecution[187] give "sympathetic consideration" in accordance with the treaty to a U.S. request for waiver of the claimed British right under the statute.

In 1992, Air Force Master, Sergeant Michael Tilghman was suspected of defrauding the U.S. government. U.S. investigators spoke with a British woman with whom he had been living. She had complained that he often hit and raped her.[188] Tilghman was convicted by court-martial of fraud, rape, and assault despite the fact that his lawyers claimed that under British law he would not have been convicted of rape.[189] Since the victim was not a dependent, the British authorities had primary jurisdiction over the rape and assault charges but relinquished their jurisdiction.

In 1986, Airman Rowne Johnson was convicted by court-martial for stabbing his British citizen wife twelve times.[190] Although his wife pleaded that he not be imprisoned, he was jailed for 19 years. The leader of the Oxford City Council, who lectured in international law at an Oxford College, challenged the decision, arguing that the U.K. criminal court should have considered the wife's interests before sentencing.[191] A U.S. spokesman said that the decision over jurisdiction was made at a higher level because of the confusion caused by the victim being both a dependent and a British subject.[192] The Director of Public Prosecutions was quoted as saying that "each case was decided on its own merits and that they always gave sympathetic

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186. The joint service regulation, AFR 110-12, required approval from The Judge Advocate General of the accused's service. Designated Commanding Officers may deny such requests without forwarding them. The controversy surrounding the U.S. government's 1957 decision to waive its primary jurisdiction under the Japanese SOFA makes it probable that such waivers are rare. *See generally* Rob Evans, *Is America Squatting at Menwith?*, SUN. TELEGRAPH, Aug. 10, 1997, at 13 (discussing the Visiting Forces Act of 1952.); Littrell v. United States of America, 4 All E. R. 203(1994); Major John E. Parkerson, Jr. & Major Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 48 n.30 (1990).

187. This office was established by the Prosecutor of Offences Act, 1985, 12 Hals. Stat. 895 (4th ed.). Several sources state that the Office of the Director of Public Prosecution was established in 1879. *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 516 n. 14 (1994); Sue Anna Moss Cellini, *The Proposed Victim's Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. LAW 839, 842 (1997). *But cf.* Andrew L.-T. Choo, *Developments in Criminal Law and Criminal Justice: Ex parte Bennett--The Demise of the Male Captus, Bene Detentus Doctrine in England?*, 5 CRIM. L.F. 165, 172 n. 31 (1994) (indicating that the Prosecution of Offenses Act was either amended or re-enacted to expand the function and authority of public prosecutors in England in 1985); Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 494-95 n. 38 (1988).

188. *See* Robert Shrimsley, *US Air Force Rebuked Over Rape Trial*, DAILY TELEGRAPH (London), Apr. 17, 1992, at 20; *Court Martial Jails US Airman*, TIMES (London), Apr. 1, 1992, at Home News.

189. *See* Robert Shrimsley, *US Air Force Rebuked Over Rape Trial*, DAILY TELEGRAPH (London), Apr. 17, 1992, at 20; *Court Martial Jails US Airman*, TIMES (London), Apr. 1, 1992, at Home News.

190. *See* OXFORD MAIL (London), October 18, 1986, at 1 & 3.

191. *Id.*

192. *Id.*

consideration under the Agreement for requests for waiver."[193] There was no discussion of the conflict between the treaty and the statute.

The Tilghman and Rowne Johnson cases are instructive. Tilgham suggests that the British authorities were willing to waive jurisdiction over offenses against their own citizens and that the accused has no grounds to challenge the decision. Rowne Johnson teaches several lessons. First, potential disputes between friendly nations can persist for years[194] and they need not be permanently resolved. Second, the U.S. has been careful not to embarrass the U.K. by demanding that the Visiting Forces Act be amended to conform to treaty obligations or by publicizing the discrepancy. The U.K. has responded by "giving sympathetic consideration" to what it prefers to call U.S. requests for waiver of primary jurisdiction.[195] Finally, Rowne Johnson illustrates that many scholars, including an Oxford international law lecturer, are not well informed about this arcane subject. Public ignorance, illustrated in the 1983 Parliamentary debates over the Status of Forces Agreements[196] facilitates inter-governmental accommodations.

C. Other Lessons Learned from the U.S./U.K. Experience

Two lessons are noteworthy. The first lesson is that legal scholarship has had little apparent effect on the two nations' approaches to interpretation of the treaty. The sending State's law library at Third Air Force Headquarters had neither of the two standard treatises on the Status of Forces Agreement, nor did it receive U.S. or U.K. journals on international law. Correspondence between headquarters rarely cited international law authorities and correspondence between the two nations never referred to scholarly discussions of the problem. One can only assume that the practitioners of international law did not believe that academic discussions would be useful.

The second lesson is the beneficial effect of having long-tenured civil servants, rather than military officers, handling the day-to-day cooperative effort. American civil servants emphasized that U.S. military officers prided themselves on resolving problems—even if the resolution was unsatisfactory, the problem was solved. Civil servants saw no need to press for a solution when mutual accommodations could be achieved. The "third party claims problem" was due in part to the fact that there was no long-term attorney advisor in Third Air Force's claims function. Officers would arrive, seek short-term solutions, be reined in by the civilian

193. *Id.*

194. The retired legal advisor to the Judge Advocate General of the Air Force in an interview with the author recalled that the Staff Judge Advocate of Third Air Force and the Director of Public Prosecutions first discussed the conflict between the statute and treaty in 1954.

195. *See generally* Benjamin P. Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219, 221 (1984) (the receiving state has the option either to exercise the primary right to prosecute or to waive the right by allowing the sending state to assume jurisdiction over the case).

196. These debates addressed the possibility that U.S. troops guarding Cruise missiles at Greenham Common Air Base would fire on peace demonstrators and that the victims would have no civil or criminal recourse. Those challenging the government's policies knew nothing about the treaty or its implementing legislation. *See* Hansard (HC) Dec. 19, 1983, at 90-108.

attorneys at higher headquarters, and leave without arriving at an accommodation with the Claims Commission. The long-tenured civil servants were also familiar with precedent—called state practice in diplomatic circles—but were cautious in displaying their knowledge.

There is no evidence, for example, that the U.S. ever sought waiver of primary jurisdiction in a given case on the grounds that it was the same kind of case as one in which the British had previously waived jurisdiction. Instead, the Third Air Force office carefully argued each case on its individual merits so that the British would be able to justify their waiver decision without opening themselves to charges that they were making policy. Each side has established a careful ritual with predictable arguments and predictable responses; the Home Office Circular description of U.S. waiver requests is a particularly good example.[197] Each side permits its opponent maximum maneuver space. Civil servants assume that there will be conflict and attempt to ensure that there will be no after effects which will affect the next conflict. Officers assume that by the time the next disagreement occurs they will have been posted elsewhere. I close on this sardonic note because Third Air Force Headquarters has, as a consequence of the mandated overseas manpower personnel cuts, been pressed to eliminate the attorney advisor position responsible for foreign criminal jurisdiction and customs matters. Those duties will be turned over to a military lawyer who may, I fear, be unable to achieve the perspective so necessary to retaining our alliance.

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197. *See generally* Major Mark R. Ruppert, *USAF Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 9 (1996) (providing an illustration of the waiver process).

A Peace Process Perspective

Northern Ireland and the Agreement Reached in the Multi-Party Negotiations Belfast, April 10, 1998

Colleen J. O'Loughlin*

Introduction

Approved after marathon negotiations involving the leading political factions of Northern Ireland,[1] the Agreement Reached in Multi-Party Negotiations (the "Good Friday Agreement")[2] endeavors to effect structural changes and protect equality in Northern Ireland.[3] The Good Friday Agreement governs the relationship among Northern Ireland, the Republic of Ireland and Great Britain and focuses on resolving the political conflict that has plagued Northern Ireland for decades.[4] The history of the struggle and the many failed attempts to create peace illustrate the complexity of the problem and accordingly, the difficulty in developing a viable solution.[5] The Good Friday Agreement, signed on April 10, 1998, and ratified by Referendum on May

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1. Three distinct parties compose Northern Ireland's political arena. David Trimble leads the Unionist Party of Protestants which represents 54% of the population. Within the Nationalist Party of Catholics which represents 42% of the population, John Hume leads the Social Democratic Labor Party and Gerry Adams leads Sinn Fein, the political wing of the Irish Republican Army. *See The People of Ireland Don't Want To Go Back*, AMERICA, May 2, 1998, at 3; John Lloyd, *Ireland's Uncertain Peace,* FOREIGN AFFAIRS, October 1998, at 109.

2. *See* Agreement Reached in Multi-Party Negotiations, April 10, 1998, UK-N. Ir.-Ir., 37 I.L.M. 751 (1998) (setting forth each provision and its purpose in detail).

3. *See* Peter Ford, *N. Ireland's Peace Map: The Long Road Ahead,* CHRISTIAN SCI. MONITOR, Apr. 13, 1998, at 6 (discussing the pivotal elements of agreement); *see also* Matthew McAllester, *A Deal of Pain, Hope / Accord is Historic First Step,* NEWSDAY, April 11, 1998, at A04 (describing three tiers of government established by agreement); T. R. Reid, *Historic Promise of Peace for N. Ireland; Accord Reached on Good Friday Offers a Return to Self-Rule After 26 Years,* WASH. POST, April 11, 1998, at A01 (explaining agreement process and basic terms including "three strand" structure).

4. *See 30 Years of Murder / Parties Race for Pact to End Ulster's History of Strife*, NEWSDAY, April 9, 1998, at A07 (discussing Belfast agreement and hopes for Northern Ireland's future); *see also North Ireland Foes Meet Face-to-Face*, NEWSDAY, September 11, 1998, at A19 (discussing face-to-face meeting of David Trimble and Gerry Adams and surprisingly amenable nature of their encounter despite years of disagreement).

5. For a detailed summary of the history and attempts at reaching a resolution, see Duncan Shipley-Dalton, *Political Viewpoint: The Belfast Agreement,* 22 FORDHAM INT'L L.J. 1320, 1325-30 (1999). *See, e.g.*, Dick Grogan, *Adams Says Sinn Fein Remains Focused on Peace,* THE IRISH TIMES, June 18, 1996, at 6 (noting Sinn Fein's focus over the preceding two years on equality in attempts to bring about a peace settlement and denying any involvement with the IRA bombing in Manchester); Finian McGrath, *The Declaration*, THE IRISH TIMES, February 15, 1994 at 13 (discussing the killing of 3,000 people in Ireland over the last 25 years as well as the problems of unemployment and social deprivation).

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22 of 1998, implicates the international law concepts of statehood, sovereignty and self-determination, and provides a basis for the political reconstruction of Northern Ireland.[6]

I. The Development of the Hostile Environment in Northern Ireland

Throughout history, communal division dominated Northern Ireland.[7] The sixth century B.C. Celtic invasions, the arrival of Saint Patrick in 432 A.D., and the later ninth century Norse invasions delimit early stages of conflict among the inhabitants of the territory.[8] In an effort to settle discord among native Irish, Henry II of England received control of Ireland from Pope Adrian IV in 1172 and thus, the relationship between Ireland and Great Britain began.[9] For the next eight centuries the English ruled Ireland.[10] In 1558, the English established the Protestant Church of Ireland. The native Irish rejected this religious infringement and remained Catholic.[11]

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6. *See* David Lynch, *Mitchell: Agreement 'is up to the people'*, USA TODAY, Apr. 13, 1998, at 14A (dealing with reconstruction of government of Northern Ireland and reapportioning of powers as result of Good Friday Agreement); *see also* Reid, *supra* note 3, at A01 (discussing return to self-rule after 26 years and satisfaction of demands of both Catholics and Protestants in Northern Ireland); *Northern Ireland Accord Called 'Victory for Peace'; All-night Talks Produce a Deal to Share Power*, STAR TRIBUNE, Apr. 11, 1998, at 1A (describing peace in Northern Ireland after three decades of political turmoil).

7. *See* Carmel Robinson & Maol Muire Tynan, *North "must reflect dual nationality,"* THE IRISH TIMES May 13, 1997, at 7 (discussing existence of communal conflict for decades in Northern Ireland). *See generally* John Murray Brown, *Assembly May Transform Our Politics, Says Trimble,* FINANCIAL TIMES (London), June 23, 1998, at 26 (introducing a speech by David Trimble in which he addresses existence of communal division in Northern Ireland's history).

8. *See* James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty,* 61 FORDHAM L. REV. 317, 320 (1992) (discussing St. Patrick's presence in Northern Ireland and settlement of Celtics); *see also* Norman Hammond, *Researchers Rethink Clues to Dublin's Viking Past,* TIMES NEWSPAPERS UNLIMITED, Jan. 29, 1996, Features (discussing an archaeological study supporting existence of Vikings in Ireland as early as AD 795); Charles Fitzgerald, *Fitzgeralds' World: Yes, We Do Have a Common Lineage*, BELFAST NEWS LETTER, July 19,1997, at 20 (discussing a time in history when Norse and Celtics controlled Ireland).

9. St. Patrick introduced Christianity to Ireland through his teachings and the establishment of churches. In the ninth century, the Norse invasions undermined Christianity and weakened Christian Ireland. Upon the request of Henry II, which may have been driven by geopolitical rather than religious intentions, Pope Adrian IV granted Ireland to England "[i]n an attempt to ameliorate the situation and to restrain vice, improve morals, implant virtue and propagate Christianity. . . ." *See* ROGER H. HULL, THE IRISH TRIANGLE, CONFLICT IN NORTHERN IRELAND 15 (1976); *see also* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS, REVISED EDITION 226-27 (1996).

10. *See* Peter Berry v. Irish Times Limited, 108 ILTR 33 (1974) (discussing eight centuries of British rule in Ireland as a disruption of internal peace); *see also* John Christofferson, *Thatcher's Legacy*, THE SAN DIEGO UNION- TRIBUNE, Dec. 9, 1990, at Ed. 1, 2; C-3 (discussing deprivation of Ireland's right to govern itself for 800 years).

11. Under Queen Elizabeth, the English conversion to the Protestant Church of England was mandated for Ireland. This English demand provided a converse effect, the native Irish resented such a ruling and grew closer to Roman Catholicism. *See* HULL, *supra* note 9, at 16-17; *see also Quarrel Led to Split with Rome*, THE STRAITS TIMES (Singapore), March 3, 1996, at Focus; 6 (discussing problems that remaining Catholics endured after introduction of Church of England in Ireland).

In 1652, King James created the Irish Parliament, which enacted a "Penal Code" designed to suppress Irish Catholics.[12] The Penal Code sanctioned a divisive form of repression by prohibiting Roman Catholics from owning land, attending school or participating in administrative, judicial or political office.[13] The English justified these actions as measures designed to eliminate of the political or economic threat posed by Roman Catholics.[14] Although the laws were repealed by Yelverton's Act in 1782, the subtle effects of this repression remain today through the employment discrimination against Catholics still practiced by some.[15]

After enduring centuries of unequal treatment at the hands of the British, the native Irish declared a republic in 1916.[16] In response, the British Parliament enacted the Government of Ireland Act of 1920,[17] which granted home rule of the southern twenty-six counties to the

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12. *See* Lisette M. Currier, *Religion and Employment in Northern Ireland: U.S. Influence on Anti-Discrimination Legislation,* 12 COMP. LAB L. 73, 78 n.41 (1990) (describing enactment of the Penal laws in late 17th century and their effect on preventing Catholics in Ireland from holding positions of power). *See generally* Ray Moseley, *Centuries of Hatred Stalk Ulster*, CHICAGO TRIBUNE, Dec. 19, 1993, at Perspective; 1; Zone: C (discussing influence of King James and his support of English policies in Ireland).

13. *See Troubles in Ulster Grew from Centuries of Conflict*, CHICAGO SUN-TIMES, Dec. 16, 1993, at News 8 (discussing suppression of rights of Catholics as result of enactment of Penal Code); *see also* Currier, supra note 11, at 78 n.41 (describing deprivation of rights to Catholics in areas of politics, education, and military).

14. *See A Brief History of Ethnic Cleansing,* FOREIGN AFFAIRS, June 1993, at Essays 110 (describing England's ethnic cleansing as reflection of its desire to prevent spread of Catholic influence); *see also God, Labor, and the Law: The Pursuit of Religious Equality in Northern Ireland's Workforce*, 31 VAND. J. TRANSNAT'L. 719, 721 (1998) (dealing with the Protestants' traditional control over Catholics and unequal employment opportunities throughout Ireland).

15. *See* KEVIN BOYLE ET AL., LAW AND STATE, THE CASE OF NORTHERN IRELAND, 163 (1975); HULL, *supra* note 9, at 18. *See also* HANNUM *supra* note 9, at 232 (discussing present employment discrimination and resulting lack of job opportunities for Catholics which stimulated rise in Catholic emigration); John Hume, *Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L.J. 967, 968 (1994) (stating "[i]n order to maintain their position and protect their heritage the Unionist people discriminated against the Catholic minority in housing, jobs and voting rights").

16. *See* Pol O. Croidheain, *Pearse and Monarchy,* THE IRISH TIMES, June 4, 1993, at Editorial Page; letters to the editor, 3 (discussing the declaration of Irish Republic in 1916); *see also* Walter J. Walsh, *Redefining Radicalism: A Historical Perspective*, 59 GEO. WASH. L. REV. 636, 670 (1991) (describing Easter Rising of 1916 and Proclamation of Irish Republic through which Ireland "str[ikes] for her freedom" after "long usurpation of that right by a foreign people and government").

17. The Easter uprising in 1916 served as a catalyst for the first formal declaration by the Irish for independence from Great Britain. This event spurred a redrawing of the Irish map and separated the territory into its current state. The South gained independence and the North remained British. The meticulously contrived division ensured a Protestant majority in the North and fostered Unionist control. *See* HANNUM supra note 9, at 228; HULL, *supra* note 9, at 19-20; Hume, *supra* note 15, at 968. *See generally European Court of Human Rights: Judgment in Ireland v. United Kingdom*, 17 I.L.M. 680, 682 (1978) (discussing delegation of authority, after 1920, over particular counties in Ireland); *God, Labor and the Law: The Pursuit of Religious Equality in Northern Ireland's Workforce*, *supra* note 14, at 726.

Republic of Ireland, but held the northern six counties as part of Great Britain and thereby effected a partition of the Irish territory.[18]

Fighting erupted as the southern counties refused to recognize Great Britain's retention of the country's six northern counties.[19] After a bitter civil war, the Anglo-Irish Treaty of 1921 ratified the secession.[20] In 1949, the southern counties achieved complete autonomy following passage of Irish Free Act.[21]

The six counties comprising Northern Ireland continued to be united with Great Britain.[22] Direct governing authority on local matters rested with the Northern Ireland Parliament, devised at Stormont in Belfast under the Government of Ireland Act (the "Act").[23] Although the Act guaranteed democratic rights for all of Northern Ireland citizens and declared any law based on religious preference automatically void, religious discrimination pervaded Northern Ireland and characterizes the environment today.[24]

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18. Partition represents one of the seven avenues toward state succession. State succession occurs when one state replaces another and accordingly, sovereignty of the territory transfers in accordance with international law. As partition seldom transpires in modern international law, the splitting of Ireland more accurately exemplifies secession. A state secedes when it breaks apart from an existing state and forms a separate state. *Compare* HANNUM *supra* note 9, at 228 (classifying division of Ireland as partition) *and* Christopher A. Callanan, *Does Peace Have a Chance? Protection of Individual Rights as the Foundation for Lasting Peace in Northern Ireland,* 15 B.C. THIRD WORLD L. J. 87, 97-98 (1995) (noting split as partition) *with* IAN BROWNLIE, QC, DCL, FBA, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 654-55 (1990) (defining state succession including secession description) *and* OPPENHEIM'S INTERNATIONAL LAW, VOLUME I, PART 1, 222-24 (Sir Robert Jennings QC & Sir Arthur Watts KCMG QC eds., 9th ed. 1992) (setting forth elements of secession). *See generally,* Dennis Kennedy, *Dash for Agreement: Temporary Accommodation or Lasting Settlement?,* 22 FORDHAM INT'L L.J. 1440,1443 (1999) (discussing the events leading up to partition).

19. *See North – South Divide in Counties of Ireland*, THE IRISH TIMES, July 16, 1999, at Editorial Page; letter to the editor; 17 (discussing the southern counties' animosity towards British rule of northern counties in Ireland). *See generally Accord Reached in Northern Ireland; Irish, British Cabinets Agree to Give Dublin*, THE SAN DIEGO UNION-TRIBUNE, Nov. 15, 1985, at Ed. 1,2,3,4,5,6; A-1 (discussing first peaceful meeting between British and Ireland since division of control over Ireland's counties in 1920s).

20. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS, REVISED EDITION 228 (1996); Roger H. Hull, THE IRISH TRIANGLE, CONFLICT IN NORTHERN IRELAND 19-20 (1976); *Brief History of Northern Ireland* (updated October 1999) <http://www.nio.gov.uk/p_history.htm>; *Britain and Ireland: Two Centuries of Unrest, Revolution, and Broken Accords,* THE CHRISTIAN SCI. MONITOR, Jan. 22, 1986, at 28 (discussing establishment of the Irish Free State as result of passage of Anglo-Irish Treaty of 1921).

21. *See* HANNUM *supra* note 20, at 228-29; HULL, *supra* note 20, at 19-21.

22. Armagh, Antrim, Down, Fermanagh, Londonderry and Tyrone are the six counties of Northern Ireland. *See* HULL, *supra* note 20, at 19-20 n.7. *See generally* BRIGID HADFIELD, THE CONSTITUTION OF NORTHERN IRELAND 45-93 (1989) (stating "through Parliament at Westminster, Great Britain exercised sovereignty on a smaller scale").

23. *See* Elizabeth Kondonijakos, *The Reasonable Suspicion Test of Northern Ireland's Emergency Legislation: A Violation of the European Convention of Human Rights*, 3 BUFF. J. INT'L L. 99, 103 (1996) (discussing Protestant control of Stormont Parliament); *see also* Brendan O'Leary, *Academic Viewpoint: The Nature of the Agreement,* 22 FORDHAM INT'L L.J. 1628, 1647 (1999) (noting the federal character of the government during the period of the Stormont Parliament between 1921 and 1972); ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 60 (1998) (using example of Government of Ireland Act of 1920 to illustrate that "the point is that for nearly fifty years Stormont has been left free to regulate the internal affairs of the Province").

24. *See* BOYLE, *supra* note 15, at 6; HANNUM *supra* note 20, at 229.

The establishment of a representative parliament created the illusion of democracy in Northern Ireland and further sharpened cultural dissonance.[25] The Protestant Unionist majority, loyal supporters of union with Britain, controlled the Irish Parliament and through manipulation suppressed Catholics.[26] Despite the stated mission of the Irish Parliament, Unionists sought to preserve their control.[27] Creative gerrymandering forced election of Unionist representatives in predominantly Nationalist areas where, had voting district lines been drawn proportionally, Nationalists could have easily gained seats. [28]

The separation of the Unionist and Nationalist communities permeated every aspect of Northern Ireland life.[29] Schools, leisure activities, and churches were mostly segregated, and the majority of marriages did not cross religious lines.[30] The separate communities sustained themselves with basic employment opportunities and services unencumbered by the other side.[31] Unfortunately, the arrangement promoted severe inequity insofar as Catholics endured a substandard existence defined by under-representation in government, inadequate voting rights, unequal access to housing, and higher rates of unemployment.[32]

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25. *See* Daniel T. Kiely, Jr., Note, *The Compromise Between Outrage and Compassion: Article 3(a) and In re Requested Extradition of Smyth*, 30 CORNELL INT'L L.J. 587, 592-93 (1997) (noting the Westminster style of democracy was not put into practice which resulted in continuation of violence and polarization along religious lines).

26. *See* Colin Harvey, *Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context*, 22 FORDHAM INT'L L.J. 1389, 1399 (1999) (discussing the domination by the Unionist Party and the systematic discrimination against the Catholic minority); *see also* Jennifer Schense, *Creating Space for Change: Can the Voluntary Sector Help End Northern Ireland's Troubles?*, 11 HARV. HUM. RTS. J. 149, 150-51 (1998) (discussing the discriminatory legislation passed by the Protestant-dominated Stormont regime).

27. *See* Harvey, *supra* note 26, at 1399; Schense, *supra* note 26, at 150.

28. *See* KEVIN BOYLE ET AL., LAW AND STATE, THE CASE OF NORTHERN IRELAND 6 (1975) (stating reality of Parliament as "the proud promise of a Protestant parliament for a Protestant people"); HANNUM *supra* note 20, at 231 (discussing Unionist contrived voting lines).

29. *See* Stephen Farry & Sean Neeson, *Beyond the "Band-Aid" Approach: An Alliance Party Perspective Upon the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1221, 1222-24 (1999) (discussing deeply divided society of Northern Ireland). *See generally* Schense, *supra* note 26, at 153 (discussing the Catholic response to Stormont regime).

30. Farry & Neeson, *supra* note 29; Schense, *supra* note 26.

31. Farry & Neeson, *supra* note 29; Schense, *supra* note 26.

32. John Hume, leader of Northern Ireland's Social Democratic Labor Party, effectively analyzed the situation:

> [H]istory led to the drawing of a line on a map to separate both parts of Ireland. The North stayed British and the South got independence. Unfortunately, when you draw a line on a map you always leave some people on the wrong side of it. . . That is the destabilized situation that was set up in Ireland in 1920. In order to maintain their position and to protect their heritage the Unionist people discriminates against the Catholic minority in housing, jobs and voting rights.

John Hume, *Prospects for Peace in Northern Ireland*, 38 St. Louis L. J. 967, 968 (1994). *See* BOYLE, *supra* note 28, at 7 (discussing injustices borne by Catholics); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS, REVISED EDITION 229-31 (1996) (noting distinct social separation).

This oppressive environment eventually led to a civil rights movement in 1969.[33] The Catholic civil rights movement in Northern Ireland expressed fundamental democratic ideals such as the right to participate in elections, to engage in political and social activity without government interference, to equitably share in resources, and to freedom from arbitrary detention or arrest.[34] Demonstrations resulted in a heightened British military presence.[35] This presence ultimately ignited a resurgence of the Irish Republican Army (IRA), and violence pervaded Northern Ireland.[36] In 1972, the reckless massacre of thirteen Catholic demonstrators known as "Sunday Bloody Sunday" resulted in a watershed decision by Great Britain to impose direct control over judicial and policing activity.[37]

Such direct control lasted until execution of the Good Friday Agreement on April 10, 1998.[38] During the period of direct rule, Great Britain, Northern Ireland and the Republic of Ireland endeavored to develop and implement an effective peace arrangement on several occasions.[39] After more than two decades of failed attempts, the Good Friday Agreement offers hope for a peaceful reconciliation.

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33. *See* Schense, *supra* note 26, at 154-57 (discussing grassroots activism through The Campaign for Social Justice); *see also* Stephen Livingstone, *The Northern Ireland Human Rights Commission*, 22 FORDHAM INT'L L.J. 1465, 1470-77 (1999) (discussing role of Standing Advisory Commission on Human Rights).

34. *See* HANNUM *supra* note 32, at 234-35 (listing events of civil rights movement); Boyle, *supra* note 28, at 8-9 (explaining that studies performed by the Cameron Commission on Disturbances in Northern Ireland, instituted in 1969, validate the Catholic plight.).

35. *See* Elizabeth Kondonijakos, *The Reasonable Suspicion Test of Northern Ireland's Emergency Legislation: A Violation of the European Convention of Human Rights*, 3 BUFF. J. INT'L L. 99, 103-4 (1996) (discussing enactment of Northern Ireland (Emergency Provisions) Act of 1972).

36. The violence grew from the frustration of the Catholic community as the reform movement proved futile and the barbaric reaction of the Protestant sector flourished. The IRA resurfaced primarily as a Nationalist defense tactic. *See* Boyle, *supra* note 28, at 27-33 (detailing rise of IRA); *see also* Ireland v. U.K., 2 Eur. H.R. Rep. 25, 30-36 (1978) (Court Report) (summarizing the development of the civil rights crisis and the rise of the IRA); *id.* (discussing evolution of the IRA in response to discriminatory treatment of Catholics by Protestant majority in Parliament of Northern Ireland). *See generally The Irish Republican Army* (visited Nov. 12, 1999) <http://www.utexas.edu/students/iig/archive/ira/history/irahist.html> (summarizing the history of the IRA, and how its presence as a military organization had declined after 1920 until the Civil Rights Movement).

37. The "Sunday Bloody Sunday" incident occurred on January 29, 1972 and captivated both national and international attention. When the public inquiry resulted in exoneration for those responsible for the tragedy, the British acted immediately, instituted direct control and suspended the Stormont Parliament. *See* Boyle, *supra* note 28, at 32; HANNUM *supra* note 32, at 235; *N. Ireland Peace Accord Clears First Hurdle With Ulster Unionists*, DEUTSCHE PRESSE-AGENTUR, Apr. 11, 1998.

38. *See* David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1218-19 (1999). *See generally* Paul Mageean & Martin O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1499 (1999); April E. Schwendler, *In the Matter of Pearson: Partisan Politics and Political Pressure Contravene Congressional Intent,* 10 PACE INT'L L. REV. 607, at 634 n.133 (describing the lengthy negotiations involved in the passage of the agreement, and the receipt of the Nobel Peace Prize by the leaders of the Protestant and Catholic parties for their efforts in bringing about the accord).

39. *See* Dr. Ian R.K. Paisley, *Peace Agreement—Or Last Piece in a Sellout Agreement?*, 22 FORDHAM INT'L L.J. 1273, 1273-74 (1999) (discussing appeasement of Irish Republican agenda by British government through signing of Anglo-Irish Agreement, Downing Street Declaration, Framework Document and Downing Street Communique); *see also* Byrne, *supra* note 38, at 1209-10 (highlighting development of joint understanding due to earlier agreements).

II. International Law Analysis

Northern Ireland holds a unique status under international law. The secession of the Republic of Ireland in 1920 raised questions concerning statehood, sovereignty and the interrelated issues of self-determination and minority rights.[40]

A. Statehood

Customary international law has long required four elements as constituting the prerequisites for statehood.[41] The Montevideo Convention on Rights and Duties of States in 1933, formalized these prerequisites and governs fifteen Latin American states and the United States.[42] Valid statehood requires (i) a group of individuals creating a community, (ii) a territory where the people reside, (iii) a government acting for the people pursuant to the laws of the land, and (iv) sovereignty.[43] Northern Ireland fails the statehood scrutiny test.[44] Northern Ireland only satisfies the population requirement. Failure to meet the remaining three requirements stems from the divided citizens of Northern Ireland, Great Britain and the Republic of Ireland.[45]

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40. *See supra* text accompanying notes 15-20; *see also God, Labor, and the Law: The Pursuit of Religious Equality in Northern Ireland's Workforce*, 31 VAND. J. TRANSNAT'L. 719, 726 (1998) (discussing Northern Ireland's autonomy from the British government); *see also* Jennifer Schense, *Creating Space for Change: Can the Voluntary Sector Help End Northern Ireland's Troubles?*, 11 HARV. HUM. RTS. J. 149, 151 (1998) (discussing the civil rights movement and the evolution of the voluntary sector in Northern Ireland); s*ee also* JOHN DARBY, CONFLICT IN NORTHERN IRELAND: A BACKGROUND ESSAY, IN FACETS OF THE CONFLICT IN NORTHERN IRELAND 17-18 (Seamus Dunn ed., 1995) (discussing the power of the Protestant majority in the Stormont government, from its inception in 1920 through its prorogation in 1972).

41. *See* D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW, at 204 n.2 (5th ed. 1998) (explaining elements of statehood).

42. *See* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents, 37* COLUM. J. TRANSNAT'L L. 403, 414 (1999) (discussing the origins of the Montevideo criteria*); see also 28* AM. J. INT'L L. (Supp.) 75 (1934) (reprinting text of Montevideo Convention).

43. *See* OPPENHEIM'S INTERNATIONAL LAW, VOLUME I, PART 1, 120-22 (describing four tenets of a state); Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1 (setting forth the elements of statehood). *See generally* Grant, *supra* note 42, at 414-15 (discussing the origins of the Montevideo criteria); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 36 (1979) (discussing Article 1 of Montevideo Convention).

44. For an overview of statehood in international law rules, *see* Thomas D. Grant, *Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood,* 12 Am. U.J. INT'L L. & POL'Y 629 (1997). *See, e.g.,* John Dugard, Recognition and the United Nations at 8 n.1(1987) (discussing Montevideo Convention as textual basis for statehood); s*ee also* James Crawford, *The Criteria for Statehood in International Law,* 48 BRIT. Y.B. INT'L L. 93, 111 (1976-77).

45. *See* Dennis Kennedy, *Academic Viewpoint: Dash for Agreement: Temporary Accommodation or Lasting Settlement?,* 22 FORDHAM INT'L L.J. 1440 (1999) (discussing sharp division between nationalism and republicanism in Northern Ireland). *See generally* Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico,* 18 B.C. THIRD WORLD L.J. 159, 168 (1998) (discussing the fact that Irish citizenship is granted not only to those residing in the six counties of Northern Ireland, but also to those "who can prove familial ties to the Irish people no matter where they reside"); Jennifer Schense, *Creating Space for Change: Can the Voluntary Sector Help End Northern Ireland's Troubles?*, 11 HARV. HUM. RTS. J. 149, 149 (1998) (discussing civil rights movement and evolution of voluntary sector in Northern Ireland).

The controversy concerning territory ownership resonates through the polar views of Great Britain and the Republic of Ireland.[46] The territory formally exists as a province of Great Britain as a result of the Ireland Act of 1949, which recognized the exercise of self-determination by the South, but retained Northern Ireland until the Irish Parliament decided otherwise.[47]

The Ireland Act of 1949 embodies Great Britain's response to Southern unrest.[48] Following the Republic's declaration of independence, Great Britain passed the Ireland Act which provided, in Section 1(2), "that Northern Ireland remains part of his Majesty's dominions and of the United Kingdom and . . . in no event will Northern Ireland or any part thereof cease to be part of his Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland." [49]

Although the international community recognized Northern Ireland as a province of Great Britain, the Republic of Ireland preserved the integrity of the entire territory with the Constitution of 1937,[50] claiming the territory as "the whole island of Ireland, its islands and territorial seas."[51] This claim blatantly ignored Great Britain's role in Northern Ireland.[52] The Republic of Ireland drafters recognized the impact of such a bold statement and later offset its effect by acknowledging the role of Great Britain in Northern Ireland.[53] Article 3 of the Constitution stated that jurisdiction over the entire territory only activated "pending the reintegration

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46. *See* JOHN WHYTE, INTERPRETING NORTHERN IRELAND (discussing a comprehensive survey of different schools of thought on nature of conflict in Ireland) (1990); Stephen Farry & Sean Neeson, *Beyond the "Band-Aid" Approach: An Alliance Party Perspective Upon the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1221, 1222 (1999) (discussing Northern Ireland's conflicts focused around clash of political identities). *See generally* COLLIN IRWIN, IN SEARCH OF A SETTLEMENT: SUMMARY TABLES OF PRINCIPAL STATISTICAL RESULTS 11-12 (1998) (noting unpublished opinion poll, on file with the *Fordham International Law Journal*).

47. *See* James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty,* 61 FORDHAM L. REV. 317, 322 (1992) (discussing sovereignty of Irish State according to Irish Constitution of 1937); IRISH CONSTITUTION, 1937, art. III (Article 3 of the Irish Constitution of 1937 confines exercise of power to 26 southern countries of Ireland "[p]ending the reintegration of the national territory.").

48. *See* Kelly, *supra* note 47, at 322-23 (discussing Ireland Act of 1949). *See generally* Scott Tiedemann, Note and Comment: *The Abortion Controversy in the Republic of Ireland and Northern Ireland and its Potential Effect on Unification,* 17 LOY. INT'L & COMP. L.J. 737, 743 (1995) (discussing unification of Northern Ireland by majority consent).

49. *See* SEAN CRONIN, WASHINGTON'S IRISH POLICY: 1916-1986*,* 218 (1987); ROBERT LEE, IRELAND, A HISTORY 300-01 (1980) (quoting from Republic of Ireland Act of 1949); *see also* ROGER H. HULL, THE IRISH TRIANGLE, CONFLICT IN NORTHERN IRELAND 15, 96 (1976) (discussing reaction of Great Britain to Republic independence); Kelly, *supra* note 47, at 323 (discussing Ireland Act of 1949).

50. *See* Kelly, *supra* note 47, at 322 (discussing sovereignty of Irish State according to Irish Constitution of 1937); IRISH CONSTITUTION, 1937, art. III (Article 3 of Irish Constitution of 1937 confines exercise of power to the 26 southern countries of Ireland "[p]ending the reintegration of the national territory.").

51. *See* HULL, *supra* note 49, at 100-101. This claim established the national territory of Ireland and remained undisturbed until the Good Friday Agreement of April 10, 1998.

52. *See* Agreement Reached in Multi-Party Negotiations, April 10, 1998, UK-N. Ir.-Ir., 37 I.L.M. 751, 755 (1998) (setting forth substitute Articles for Constitution).

53. *See* GERARD HOGAN & GERRY WHYTE, THE IRISH CONSTITUTION: J.M. KELLY 12-16 (1994); *see also* Sarah Frazier, *Liberty of Expression in Ireland and the Need for a Constitutional Law of Defamation,* 32 VAND. J. TRANSNAT'L L. 391, 402 (1999) (discussing Irish Constitution and its recognized dependence on Great Britain).

of the national territory and without prejudice to the right of the Parliament and Government established by this Constitution."[54] Although the Constitution recognized the authoritative presence of Great Britain in Northern Ireland, the British viewed the claim of jurisdiction over the entire territory of Ireland as "a revolution in law" repugnant to the structure crafted by the Ireland Act.[55]

The dispute over the ownership of the territory continued to thwart any resolution of the Northern Ireland conflict.[56] The Constitutional territorial claim periodically underwent judicial review until 1990, when the Irish Supreme Court decided *McGimpsey & McGimpsey v. Ireland*.[57] In *McGimpsey*, the Court rejected a prior interpretation of the Constitution that the territorial claim reflected a political aspiration rather than the assertion of a legal right.[58] The Court held that the Constitution articulated a valid legal claim.[59] Chief Justice Finlay determined that the Constitutional restriction imposed to recognize British presence "in no way derogates from the claim as a legal right to the entire territory."[60]

The Good Friday Agreement resolves the dispute created by the extreme divergence over the status of Northern Ireland by requiring the Irish government, with the support of its citizens, to revise the national territory language of the Constitution.[61] Accordingly, the Constitution was amended to provide that every person born in Northern Ireland is entitled "to be a *part* of the Irish nation,"[62] and a united Ireland may arise peacefully "with the consent of a majority of the people, democratically expressed in both jurisdictions on the island."[63] As a result, the Good Friday Agreement provides that Northern Ireland remains part of the United

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54. IR. CONST., 1937, art. III. *See* Scott Tiedemann, Note and Comment: *The Abortion Controversy in the Republic of Ireland and Northern Ireland and its Potential Effect on Unification,* 17 LOY. INT'L & COMP. L.J. 737, 743 (1995) (discussing Article 3 of the Irish Constitution and the reserved "right of the Republic of Ireland to govern the whole island.").

55. *See* ROGER H. HULL, THE IRISH TRIANGLE, CONFLICT IN NORTHERN IRELAND 15, 100 (1976) (discussing British response to Constitution of 1937).

56. *See* HOGAN & WHYTE, *supra* note 53, at 12-14.

57. 1 I.R. 110, 119 (1990).

58. *Id*.

59. *Id*.

60. *Id*.

61. IR. CONST., 1937, art. II. *See generally* Scott Tiedemann, Note and Comment*: The Abortion Controversy in the Republic of Ireland and Northern Ireland and its Potential Effect on Unification,* 17 Loy. INT'L & COMP. L.J. 737, 743 (1995) (discussing Article 2 of the Irish Constitution).

62. IR. CONST., 1937, art. II; *see also* David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1217 (1999) (explaining provisions of Article 2 of the new Constitution).

63. Agreement Reached in Multi-Party Negotiations, April 10, 1998, UK-N. Ir.-Ir., 37 I.L.M. 751, 755 (1998) (setting forth each provision and its purpose in detail). *See* David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1217 (1999) (noting it is up to all people to decide on unification); *Ireland-United Kingdom*, *Agreement on Northern Ireland,* 24 I.L.M. 1579, 1580 (1985) (observing resolving differences between two governments and promoting reconciliation); John Hume, *Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L. J. 967, 970 (1994) (opining North and South should come together and share Ireland).

Kingdom until the citizens of Northern Ireland exercise self-determination through democratic means.[64]

B. Sovereignty

Sovereignty represents complete independence.[65] A sovereign nation controls both its internal and external affairs without interference from any outside authority.[66]

The sovereignty of Northern Ireland is a complicated international law issue. Although Great Britain formally exercises sovereignty over Northern Ireland, in many ways Northern Ireland operates as a sovereign nation.[67] For example, throughout Northern Ireland's colorful history, although the British influence waxed and waned, Great Britain remained committed to a basic policy of authoritative restraint allowing Northern Ireland to conduct its own national activity.

Prior to the era of direct control, Great Britain merely oversaw the activity of Northern Ireland.[68] Later, under direct rule, the Parliament at Westminster controlled the day to day affairs, security, and judicial affairs of the state.[69] Although not the preferred option by either Unionists or Nationalists, the system functioned properly and enjoyed acceptance by both par-

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64. *See* Agreement Reached in Multi-Party Negotiations, *supra* note 63, at 753 (discussing constitutional issues and proposing draft provisions to amend British legislation and Irish Constitution); *see also* Byrne, *supra* note 63, at 1217 (noting that united Ireland will only happen by consent of majority); Kate Fearon & Monica McWilliams, *The Good Friday Agreement: A Triumph of Substance Over Style,* 22 FORDHAM INT'L L.J. 1250, 1271 n.33 (1999) (observing that UK has not tried to impede Irish unity).

65. *See* Glen St. Louis, *The Tangled Web of Sovereignty and Self-Governance: Canada's Obligation to the Cree Nation in Consideration of Quebec's Threats to Secede,* 14 BERK. J. INT'L LAW 380, 388 (1996) (explaining that under international law, respect for territorial sovereignty remains the hallmark of a nation's independence and authority). *See generally* Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 313 n. 66 (1995) (defining sovereignty).

66. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS, REVISED EDITION 15 (1996) (discussing elements of sovereignty); *see also* Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 312 (1995) (discussing privileges of sovereign states under the U.N. charter); Donat Pharand, *Perspectives on Sovereignty in The Current Context*: *A Canadian Viewpoint*, 20 CAN.-U.S. L.J. 19, 21 (1994) (defining internal sovereignty as the power of a state to decide for itself its system of government without any outside interference, and external sovereignty as that part of a state's power that is subject to the limits imposed by international law).

67. *See* Byrne, *supra* note 63, at 1219 (observing the uniqueness of Northern Ireland in terms of the United Kingdom). *See generally Ireland-Great Britain*: *A New Framework for Agreement,* 34 I.L.M. 946, 950-951 (1995) (discussing Britain's role in respecting the wishes of the people in Northern Ireland).

68. *See* Jennifer Schense, *Creating Space for Change: Can the Voluntary Sector Help End Northern Ireland's Troubles?*, 11 Harv. Hum. Rts. J. 149, 150-51 (1998) (discussing policies of Northern Ireland under Protestant control). *See generally God, Labor, and the Law: The Pursuit of Religious Equality in Northern Ireland's Workforce*, 31 VAND. J. TRANSNAT'L. 719, 726-27 (1998) (noting Ulster Protestants' development of Northern Ireland).

69. *See God, Labor, and the Law: The Pursuit of Religious Equality in Northern Ireland's Workforce*, 31 VAND. J. TRANSNAT'L. 727-28 (1998) (noting the date Britain sent in troops to Belfast to obtain direct control); *see also* Daniel T. Kiely, Jr., Note, *The Compromise Between Outrage and Compassion: Article 3(a) and In re Requested Extradition of Smyth*, 30 CORNELL INT'L L.J. 587, 594 (1997), at 594 (observing that Britain suspended Northern Ireland's Parliament).

ties.[70] This disparate exercise of Great Britain's authority fostered the mistrust of government, further aggravated the social climate, and sharpened the division of the Unionists and Nationalists.[71] Nationalists express a fervent desire for unification with the Republic of Ireland, while Unionists, equally determined, advocate remaining part of the United Kingdom.[72]

The Good Friday Agreement provides order in response to Great Britain's intermittent exercise of sovereignty over Northern Ireland.[73] The Agreement clarifies the sovereign power of Great Britain over Northern Ireland[74] by confirming British sovereignty temporarily, and requiring a complete overhaul of existing government.[75] The new arrangement subjects Northern Ireland to British sovereignty merely as a default, effective until the Agreement's devised three-strand structure is in place and the citizens choose whether "they prefer to continue to support the Union with Great Britain or a sovereign united Ireland."[76] Thus, Northern Ireland's future will be decided through self-determination.[77]

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70. *See* HANNUM, *supra* note 66, at 240 (describing community response to direct rule); *see also* Schense, *supra* note 68, at 149 (discussing the point that direct rule ended some of the discriminatory practices in Northern Ireland); *see generally* Edward A. Harris, *Living With the Enemy: Terrorism and the Limits of Constitutionalism*, 92 COLUM. L. REV. 984, 989 (1992) (noting Britain's attempt to end the violence).

71. *See* John Hume, *Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L. J. 967, 967 (1994) (discussing foundation of "quarrel for sovereignty" stems from Unionist affiliation with British and Nationalist affiliation with Irish); *see also God, Labor, and The Law: The Pursuit of Religious Equality in Northern Ireland's Workforce, supra* note 69, at 721 n.1 (observing the sectarian strife that has persisted since the British resumed direct control over Northern Ireland is commonly referred to as "the troubles"); Kiely, Jr., *supra* note 69, at 594 (noting violence has continued despite Britain's intervention).

72. *See Ireland-Great Britain*: *A New Framework for Agreement,* 34 I.L.M. 946, 948-49 (1995) (discussing the differences between the two factions); *see also Ireland-United Kingdom: Agreement on Northern Ireland,* 24 I.L.M. 1579, 1580 (1985) (noting the need for the Nationalists and Unionists to respect each other's views).

73. *See* Fearon & McWilliams, *supra* note 64 (discussing the Agreement); David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1220 (1999) (stating "the Good Friday Agreement will hopefully bring peace to the region").

74. *See* Fearon & McWilliams, *supra* note 64, at 1271 (observing that the agreement does not change Northern Ireland's status in the United Kingdom); *see also* Byrne, *supra* note 73, at 1208 (discussing the status of Northern Ireland in the British Constitution).

75. *See* Hume, *supra* note 71, at 972 (discussing Britain's relaxed role in dealing with Ireland); Byrne, *supra* note 73, at 1209 (stating "a new beginning is possible for the nation").

76. *See* Agreement Reached in Multi-Party Negotiations, April 10, 1998, UK-N. Ir.-Ir., 37 I.L.M. 751, 752 (1998) (stating commitment of British and Irish Governments to Agreement objective); *see also* Hume, *supra* note 71, at 972 (stating "the matter of self determination is for the Irish people"); *Ireland-United Kingdom*: *Agreement on Northern Ireland,* 24 I.L.M. 1579, 1583 (1985) (stating "under Article 1, Great Britain will respect the wishes of the people").

77. *See Ireland-United Kingdom*: *Agreement on Northern Ireland,* 24 I.L.M. 1579, 1583 (1985) (observing that under Article 1, will respect the wishes of the majority of the people); Hume, *supra* note 71, at 972 (noting that the matter of self-determination is for the Irish people).

C. Self-Determination

The cherished principle of self-determination concerns the fundamental idea that every community freely determines its own political, economic and social regime.[78] Customary international law provided the original source for the principle of self-determination.[79] Later, the United Nations Charter adopted an elementary interpretation of this principle that was further expanded by General Assembly Resolutions.[80] Repairing the condition of Northern Ireland requires devoting attention to the issues of self-determination and consent.[81]

Consent plays an integral role to the self-determination of a polarized community.[82] However, achieving valid consent has proved difficult in light of the social degradation endured by Catholics since the secession of the southern counties in 1920, and the discriminating social

78. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS, REVISED EDITION 27 (1996) (defining self-determination); OPPENHEIM'S INTERNATIONAL LAW, VOLUME I, PARTS 2 TO 4, 714 (Sir Robert Jennings QC & Sir Arthur Watts KCMG QC eds., 9th ed. 1992) (defining self-determination as "need to pay regard to the freely expressed will of peoples"); *see also* Byrne, *supra* note 73, at 1219 (noting the desire of Britain to respect the wishes of its people); Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement,* 22 FORDHAM INT'L L.J. 1345, 1346-47 (1999) (summarizing all peoples' right to self-determination).

79. For a discussion of the historical development of the international right to self-determination, *see* Trent N. Tappe, *Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L L. 255 (1995); *see also* Edward T. Canuel, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence,* 20 B.C. INT'L & COMP. L. REV. 85 (1997). *But see id.* (noting that "[i]rrespective of the UN-supported documents regarding the 'right' of self-determination, legal scholars disagree as to whether self-determination should be afforded the binding characterization of customary international law"); Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry,* 22 BROOKLYN J. INT'L L. 495, 504 (1997) (noting that since the Cold War period, "the notion of internal self-determination as customary international law has suffered in obscurity").

80. UN Charter Articles 1, 55 and 56 provide the basic foundation of the self-determination guarantee. *See* U.N. CHARTER art. 2, para. 2 (stating the purpose of United Nations as "[t]o develop friendly relations among nations based on respect for the principles of equal rights and self-determination"); art. 55 (concerning promotion of international and social cooperation based on self-determination); art 56 (regarding pledge of all members to enforce art. 55). U.N. CHARTER art. 1, 55, 56.

81. *See Paths to a Political Settlement: Realities, Principles and Requirements* (visited Nov. 17, 1999) <http://www.irlgov.ie/iveagh/angloirish/forum/> (noting self-determination and consent as basic to solution in Northern Ireland); Embassy of Ireland, Washington, D.C., *Ireland–Great Britain: A New Framework for Agreement*, 34 I.L.M. 946, 948 (1995) (noting the "primary guiding principles for the cooperation between the governments of Great Britain and Northern Ireland entails self-determination; the consent of the governed is an essential ingredient for stability in any political arrangement"); *see also* Bell & Cavanaugh, *supra* note 78, at 1351 (discussing self-determination and consent of the people).

82. *See* Embassy of Ireland, Washington, D.C., *Ireland-Great Britain: A New Framework for Agreement*, 34 I.L.M. 946, 948 (1995) (emphasizing consent as a vital ingredient in maintaining stability in any political arrangement). *See generally* David Byrne, Political Viewpoint, *An Irish View of the Northern Ireland Peace Agreement,* The Interaction of Law and Politics, 22 FORDHAM INT'L L.J. 1206, 1218 (1999) (discussing the need for consent of the majority of the people).

and economic policies advanced by a Protestant Unionist-dominated Parliament.[83] International law provides that the exercise of self-determination arises from a fundamental right vested in the people.[84] In Northern Ireland the divided people are not merely component parts of a greater cohesive entity, but rather comprise two distinct factions, coexisting with completely different substantive identities.[85] This proves problematic as valid exercise of self-determination must occur through the consent of the *entire* population.[86]

Self-determination also requires identifying the relevant *self* through both subjective and objective elements.[87] Subjectively, the members of the community must view themselves as distinctive, and objectively, the group must possess certain common characteristics such as ethnicity or religion.[88] International law scholars note that upon isolating the *self*, "it is abundantly clear that full independence is considered to be the 'normal' result of the exercise of self-deter-

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83. *See* Council of Europe, *European Court of Human Rights: Judgment in Ireland v. United Kingdom (Inhumane and Degrading Treatment and Torture)*, 17 I.L.M. 680, 682 (1978) (observing Northern Ireland is not a homogenous society, but consists of two antagonistic communities—Protestant Unionists and Catholic Nationalists.); *see also* Bell & Cavanaugh, *supra* note 78, at 1364 (1999) (declaring that Protestant Unionist majoritarianism exacerbates rather than addresses communal divisions).

84. *See* James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 841 (1990) (noting that the exercise of self determination arises within international law's expanding notion of human rights concerns and is posited as a fundamental right that attaches collectively to groups of living human beings); *see also* Bell & Cavanaugh, *supra* note 78, at 1346-47 (describing the principle of self-determination under International Law). *See generally* S. P. Zochowski, *Will Labour Keep its Promise?,* 5 D.C.L. INT'L L. & PRAC. 403, 405 (1996) (stating that the United Kingdom owes a duty of protection of the rights of both its citizens and aliens within its borders under the customary international law doctrines of state protection of nationals and of state responsibility to aliens).

85. Embassy of Ireland, Washington, D.C., *Ireland-Great Britain: A New Framework for Agreement*, 34 I.L.M. 946, 948-49 (1995) (stating that in Northern Ireland there is a deep division between the members of two main traditions over their respective senses of identity and allegiance); Dennis Kennedy, *Academic Viewpoint: Dash for Agreement: Temporary Accommodation or Lasting Settlement?,* 22 FORDHAM INT'L L.J. 1440, 1442-43 (1999) (discussing tension between Irish people); Council of Europe, *European Court of Human Rights: Judgment in Ireland v. United Kingdom (Inhumane and Degrading Treatment and Torture),* 17 I.L.M. 680, 682 (1978) (observing Northern Ireland is not a homogenous society, but consists of two antagonistic communities – Protestant Unionists and Catholic Nationalists.).

86. *See* John Hume, *Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L. J. 967, 970 (1994) (stating that Irish people can only come together through agreement, and force will only force them more apart); *see also* David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1210 (1999) (discussing Unionist opposition to the Anglo-Irish Agreement of 1985.); Bell & Cavanaugh, *supra* note 78, at 1351 (discussing self-determination and consent of the people).

87. *See* Edward T. Canuel, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence*, 20 B.C. INT'L & COMP. L. REV. 85, 88 (1997) (stating that self-determination requires examination of either an objective or subjective standard in determining whether a nationalist movement exists).

88. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS, REVISED EDITION 31 (1996) (setting forth a two-prong analysis of self-determination as what constitutes *self* and how it should be determined); *see also* Canuel, *supra* note 87, at 88 n.8 (declaring that under a "subjective" standard of self-determination, a group must popularly desire to form a political entity which may be satisfied by a plebiscite); Bell & Cavanaugh, *supra* note 78, at 1357 (stating that all are born in the island of Ireland).

mination."[89] Determining the appropriate *self* in Northern Ireland raises embedded questions of human rights and minority interest suppression.[90]

In the past, repression by the Protestant Unionists of the Catholic Nationalists in Northern Ireland effectively silenced the minority voice.[91] Many international law scholars recognize that a government may become partially illegitimate if it blocks minority participation by either a contrived political setting rendering minority activity impossible, or direct discrimination.[92] The majority in Northern Ireland constructed a democratic edifice, but deprived the minority of any meaningful political access.[93] The exercise of self-determination requires a dis-

89. *See* HANNUM, *supra* note 88, at 31 (discussing self-determination progression and questioning whether self-determination applies beyond cases of decolonization); *see also Advisory Opinion on the Western Sahara*, 14 I.L.M. 1355, 1374 (1975) (declaring that self-determination entails the freedom of expression of all peoples and the bringing of all colonial situations to a speedy end.). *See generally* Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement,* 22 FORDHAM INT'L L. J. 1345, 1348 (1999) (stating self-determination is often associated with independent statehood as an outcome).

90. *See* Angela Hegarty, *Human Rights on the Eve of the Next Century: Human Rights & Non-Governmental Organizations: Observing the Rule of Law: Experiences from Northern Ireland*, 66 FORDHAM L. REV. 647, 660 (1997) (stating that human rights are a significant element in the conflict in Northern Ireland, specifically the failure of the law to guarantee the people of Northern Ireland equal and adequate protection of rights and liberties.); *see also* Bell & Cavanaugh, *supra* note 89, at 1362 n.86 (noting that human rights and equality commissions can be seen as part and parcel of democratic government and an aspect of internal self-determination.). *See generally* John Hume, *Prospects for Peace in Northern Ireland*, 38 ST. LOUIS L. J. 967, 968-69 (1994) (noting the discrimination against the Catholic minority in Northern Ireland).

91. *See* James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty,* 61 FORDHAM L. REV. 317, 323 (1992) (stating that Northern Ireland's sizable minority became second-class citizens in Protestant enclave run for Protestants). *See generally* Council of Europe, *supra* note 83, at 682 n.84 (noting that two thirds of population of Northern Ireland is comprised of Protestant Unionists who, by commanding majority of population, readily seek to enforce their will on Catholic Republican minority); Hume, *supra* note 90, at 968 (stating how boundary of Northern Ireland was drawn to ensure that there would be two Protestants for every Catholic in the North, which enabled the Protestants to maintain their position).

92. *See* Bell & Cavanaugh, *supra* note 90, at 1351 ("Catholic Nationalists attest to the discrimination against the Catholic minority by the Protestant majority as regards civil, political, social, and economic rights"); *see also* Kelly, *supra* note 91, at 323 n.92 (noting Protestant majority's discrimination towards Catholic minority in allocation of housing and job opportunities); Hume, *supra* note 90, at 968 (observing Unionist discrimination against Catholic minority in order to maintain their position and protect their heritage in housing, job and voting rights).

93. *See* HANNUM, *supra* note 88, at 471 (discussing plight of minority in connection with self-determination); *see also* Kelly, *supra* note 91, at 323 (stating that government of Northern Ireland refused demand for civil rights by Catholic Nationalists and refused to protect Catholic demonstrators from violent attacks by elements of Protestant majority); Hume, *supra* note 90, at 968 (discussing Northern Catholics' lack of civil rights for over fifty years).

tinct *self* to achieve results.[94] The strong presence of both Unionists and Nationalists complicates the identification of a definite, united self to determine the fate of Northern Ireland.[95]

Many modern attempts to reconcile the differences in Northern Ireland failed to address self-determination.[96] The 1981 Anglo-Irish Intergovernmental Council, the 1985 Anglo-Irish Agreement, and the 1991/92 Round Table Talks all focused on the relationships among Northern Ireland, the Republic of Ireland and Great Britain.[97] In 1993 the Joint Declaration introduced self-determination as a required element for the peaceful settlement of conflict.[98]

The Joint Declaration reiterated the provisions of the 1985 Anglo-Irish Agreement and focused on self-determination and consent.[99] The riveting aspects of the Declaration included the statement which assured that Great Britain retained no selfish, strategic, nor economic interest in Northern Ireland and "that it is for the people of Ireland alone, by agreement between the two parts respectively, to exercise their right of self-determination on the basis of

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94. *See supra* text accompanying notes 86-89.

95. *See* James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 841 n.85 (1990) (observing application of self-determination principle to ethnic autonomy claims involves the concept of cultural integrity.); *see also* Henry J. Richardson, *Constitutive Questions in the Negotiations for Namibian Independence*, 78 A.J.I.L. 76, 89 (1984) (stating that there is no bar under international law to invoking and then, by expressed will of people concerned and/or by successful revolution, to establishing right of national self-determination). *See generally* Bell & Cavanaugh, *supra* note 89, at 1347 (stating that all people have right to self-determination).

96. *See* Dr. Ian R.K. Paisley, *Peace Agreement--Or Last Piece in a Sellout Agreement?*, 22 FORDHAM INT'L L.J. 1273 (1999) (declaring situation in Northern Ireland was brought about by three decades of appeasement of Irish Republican agenda, specifically brought about by ill-disguised treachery of British government through signing of the Anglo-Irish Agreement.). *See generally* Dennis Kennedy, *Dash for Agreement: Temporary Accommodation or Lasting Settlement?,* 22 FORDHAM INT'L L.J. 1440,1446-47 (1999) (discussing failure and general unacceptance of Anglo-Irish Agreement.); BRIGID HADFIELD, THE CONSTITUTION OF NORTHERN IRELAND 45-93 (1989).

97. *See* Paisley, *supra* note 96, at 1278 (declaring utter ineffectiveness of Anglo-Irish Agreement's ability to quell violence in Northern Ireland). *See generally* Paul Mageean & Martin O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1499, 1505 (1999) (discussing intergovernmental commitment to free and equal society reaffirmed by the Anglo-Irish Agreement).

98. *See* David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 Fordham Int'l L.J. 1206, 1210 (1999) (stating that Joint Declaration of 1993 embodies principles of consent and self-determination.); Mageean & O'Brien, *supra* note 97, at 1505-6 (discussing acceptance of Joint Declaration with view toward self-determination tempered by respect for "the democratic dignity and the civil rights and religious liberties of both communities"). *See generally* Clive Walker & Russell L. Walker, *A Peace Deal for Northern Ireland? The Downing Street Declaration of 1993*, 8 EMORY INT'L L. REV. 817, 818 (1994) (stating that the aim of the Joint Declaration of 1993 was to attempt to provide "realistic call for a lasting peace").

99. *See* Walker & Walker, *supra* note 98; s*ee also* Byrne, *supra* note 98, at 1215 (stating that Irish constitutional changes embodied the issues of Joint Declaration of 1993, specifically adopting ideals of self-determination and trying to achieve Irish unity through consent and peaceful means); Mageean & O'Brien, *supra* note 97, at 1505 ("The Anglo-Irish Agreement of 1985 is believed by some commentators to have been the genesis of the peace process.").

consent, freely and concurrently given, North and South to bring about a united Ireland, if that is their wish."[100]

Although the Declaration promised the opportunity for Northern Ireland to choose unification by consent, the existing Parliament dominated by British loyalists never effected the necessary structural changes to implement the decree.[101] As the guarantee of self-determination by majority consent requires proportionate representation of all the political parties in Northern Ireland, any effort to effect change would lay dormant while Unionists controlled Parliament.[102]

The Good Friday Agreement expands the self-determination aspect of the Joint Declaration and provides the missing implementation strategy.[103] The self-determination language basically tracks the provision set forth in the Joint Declaration affirming the "right of the people of Ireland alone . . . without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given . . . to bring about a united Ireland."[104] In addition, the Agreement effects a comprehensive restructuring of the Northern Ireland political system, thus eliminating the power-sharing struggle that resulted from the Unionist dominated Parliament.[105]

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100. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION, THE ACCOMMODATION OF CONFLICTING RIGHTS, REVISED EDITION 487 (1996) (explaining status of Northern Ireland can only change by consent of majority and noting offer of Irish government to consider constitutional amendment reflecting such consent); Byrne, *supra* note 98.

101. John Hume, *Prospects for Peace in Northern Ireland*, 38 St. Louis L.J. 967, 970 (1994); Austin Carrie, *Walking Away from Trouble: 25 Years After Northern Ireland's First Civil Rights March, There Are Hints of a Possible End to the Conflict—If the Political Will Exists*, THE GUARDIAN (London), Aug. 24, 1993, at 16; s*ee also* Colin Harvey, *Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context*, 22 FORDHAM INT'L L.J. 1389, 1389-1401 (1999) (discussing history of failure in achieving devolution).

102. *See* HANNUM, *supra* note 100, at 488 (discussing resultant low impact of Joint Declaration); Matthew McAllester, *A Deal of Pain, Hope / Accord is Historic First Step,* NEWSDAY, April 11, 1998, at A04, at 752 (tracing "long road to peace," noting development and failure of Joint Declaration). *See generally* Stephen Farry & Sean Neesan, *Beyond the "Band-Aid" Approach: An Alliance Party Perspective Upon the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1221, 1231 (1999), (noting Northern Ireland suffers from historical counter-claims to self-determination.)

103. *See* Brendan O'Leary, *Academic Viewpoint: The Nature of the Agreement,* 22 FORDHAM INT'L L.J. 1628, 1646-47 (1999) (discussing the difficulty that the United Kingdom will have in exercising power in Northern Ireland in any way without violating the Agreement, thereby shielding Northern Ireland from interference with its self-determination); David Trimble, *Essay: The Belfast Agreement,* 22 FORDHAM INT'L L.J. 1145, 1152 (1999); s*ee also* Mageean & O'Brien, *supra* note 97, at 1505 ("The Agreement . . . recognized the right of the government in Dublin to have an input into the governance of Northern Ireland for the first time."); Duncan Shipley-Dalton, *Political Viewpoint: The Belfast Agreement,* 22 FORDHAM INT'L L.J. 1320, 1232-33 (1999) (describing the process of the devolution of Ireland, which should lead to self-determination).

104. *See* Agreement Reached in Multi-Party Negotiations, April 10, 1998, UK-N. Ir.-Ir., 37 I.L.M. 751, 752 (1998) (confirming independent right of citizens of Northern Ireland to exercise self-determination); *A New Framework for Agreement*, February 22, 1995, Ireland–U.K., 34 I.L.M. 946 at 949.

105. *See* Harvey, *supra* note 101, at 1396-97 (explaining that the changes to the Irish Constitution pursuant to this restructuring will become permanent once the Government declares that the terms of the Agreement have been complied with substantially); *see also* Tim Pat Coogan, *Blair Needs More Than Words to Fill Ulster's Vacuum*, EVENING NEWS (Edinburgh), Nov. 26, 1998, at 10 (referring to the system perpetuated by the Unionists as a "log jam").

The Good Friday Agreement promotes democratic development on three levels.[106] First, the Agreement establishes a locally elected Northern Ireland Assembly responsible for the day to day affairs of the territory.[107] Second, it creates a North/South Ministerial Council to coordinate diplomatic activity between Belfast and Dublin.[108] Third, the Agreement establishes a Council of the Isles to govern the relationship between Northern Ireland and Britain.[109] Thus, although self-determination remains a disputed international law precept, the Good Friday Agreement heralds the doctrine as a fundamental right of the citizens of Northern Ireland.[110]

III. Salient Features of the Good Friday Agreement

The Good Friday Agreement offers the promise of a peaceful democratic future for Northern Ireland.[111] The agreement resulted from the joint efforts of the three key political players in

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106. *See Commitment to Democracy Cannot Be an Each-Way Bet*, THE IRISH TIMES, June 3, 1999, at 16 (pressing that the development of democracy through the Agreement requires whole-hearted support from people in both the North and South). *But see* Paisley, *supra* note 96, at 1287 (describing the framework of the Agreement and naming the three levels, or Strands). *See generally* Byrne, *supra* note 98, at 1208 (discussing in general the complex substance of the Agreement and the even more complex negotiations that preceded it, as well as the democratic goals that are sought).

107. *See Sleeping Dog on a Heap of Explosives: Peace in Ireland is Not a Done Deal*, THE GUARDIAN (London), October 15, 1998, at 7 (explaining the internal government structure put forth by Strand One of the Agreement.); *see also* Mageean & O'Brien, *supra* note 97, at 1520-21 (explaining the structure instituted by Strand One); *see* Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement,* 22 FORDHAM INT'L L.J. 1345, 1354 (1999) (examining movement towards "internal self-determination" created by language, rights protection and power-sharing systems delineated in Belfast Agreement).

108. *See Time to End the Wishing and the Waiting—We Must Now Make the Agreement Work: The First Phase of the Belfast Agreement Was To Be Completed Today,* THE IRISH TIMES, Oct. 31, 1998, at 7 (describing the Council created by Strand Two as an important part of balancing the country's structure as a whole); *see also* Steven Livingstone, *Academic Viewpoint: The Northern Ireland Human Rights Commission*, 22 FORDHAM INT'L L.J. 1465, 1495 (1999) (mentioning that the Council could act in an additional role, addressing human rights issues in the "field[s] of health, education, the environment and language"); *but see* Bell & Cavanaugh, *supra* note 107, at 1355-56 (discussing ambiguity in language of Agreement concerning exercise of the right of self-determination which is subject to agreement and consent of Protestant majority of Northern Ireland).

109. *See* Agreement Reached in Multi-Party Negotiations, *supra* note 104, at 756-66 (explaining provisions governing three strand structure); McAllester, *supra* note 102, at 44 (describing three strand system established by Agreement); T. R. Reid, *Historic Promise of Peace for N. Ireland; Accord Reached on Good Friday Offers a Return to Self-Rule After 26 Years,* WASH. POST, April 11, 1998, at A01 (describing new policy set forth by Agreement); *see also* Bell & Cavanaugh, *supra* note 107, at 1363 (discussing "the provisions for power-sharing, parallel consent and vetoes, and weighted majorities, in particular, which seek to provide for 'effective participation' in government for both communities").

110. *See* HANNUM, *supra* note 100, at 44 (noting continuing debate among international law scholars questioning whether right to self-determination exists in customary international law and whether such right established applies beyond colonial situations). *See generally* Dr. Ian R.K. Paisley, *Peace Agreement—Or Last Piece in a Sellout Agreement?*, 22 FORDHAM INT'L L.J. 1273, 1286-93 (1999) (discussing framework of Agreement).

111. *See Commitment to Democracy Cannot Be an Each-Way Bet*, *supra* note 106, at 16 (being cautiously optimistic that although a good deal of progress has been made in making the Agreement, a great deal of work still remains to make its ideals a reality); Prime Minister Tony Blair, *The Path to War or Peace? New Life; Now All the People Must Put the Past Behind Them*, Sunday Mirror, July 4, 1999, at 6-7 (espousing all of the breakthroughs the Agreement makes in its outline for democracy and criticizing those who oppose it); *see also* Harvey, *supra* note 101, at 1402 (despite past failures, "elections for the 108-member assembly took place on June 25, 1998," implementing part of the Agreement).

Northern Ireland.[112] leaders of the unionist, nationalist (including Sinn Fein, the political wing of the Irish Republican Army), and the Social Democratic Labor parties convened at the Castle Buildings at Stormont to negotiate a broad political agreement.[113] the endeavor received widespread support from the United States, through Senator George Mitchell, and from Great Britain, through Prime Minister Tony Blair, whose joint influence proved integral to the process.[114]

Following the approval of the Good Friday Agreement by the leaders of the three principal parties, the citizens of Northern Ireland ratified the Agreement by referendum on May 22, 1998[115] by a 71.12% majority vote, where approximately 81% of eligible voters appeared.[116]

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112. *See The People of Ireland Don't Want to Go Back*, AMERICA, May 2, 1998, at 3.

113. *See* Stryker McGuire, *A Clean Shot at Peace*, NEWSWEEK, Apr. 20, 1998, at 10 (describing negotiation session which resulted in historic peace accord to completely renovate political environment in Northern Ireland); *see generally,* Carol Daugherty Rasnic*, Northern Ireland's Criminal Trials without Jury: The Diplock Experiment*, 5 ANN. SURV. INT'L & COMP. L. 239, 242 (1999):

> The April 10, 1998 Stormont Settlement—generally referred to as the 'Good Friday'—was executed by all of Northern Ireland's major political parties. It was submitted to voters via a referendum in both the Republic of Ireland and Northern Ireland on May 22, 1998. It needed majority acceptance in both sectors to pass. The "yes" vote in Ireland was in excess of 95%, and, in Northern Ireland, over 71%. Most of the population in the north concur, however, that peace still remains an ideal, and that much compromise and work remain before the strife will be ended.

114. *See* David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1207 (1999) (stating George Mitchell was one of independent chairmen facilitating peace talks); *see also* Dani Garavelli, *Ulster Plays Waiting Game*, Scotland on Sunday, July 18, 1999 at 12 (implying that without Prime Minister Blaire and Senator Mitchell, the impetus for the Agreement loses steam). *See generally* Bell & Cavanaugh, *supra* note 107.

115. *See Hope Postponed in Northern Ireland*, CHICAGO TRIBUNE, July 16, 1999, at 20 (noting that despite the fact that the Agreement was ratified, "all the air . . . [in the] peace process" has since been "sucked out" by various groups unwilling to support it.); *see also Adams, in U.S., Still Demurs Over IRA's Disarming; Issue Could Diminish Peace Process*, THE WASHINGTON TIMES, May 31, 1998, at A7 (confirming the date of the ratification of the Agreement by the Northern Ireland citizenry). *But see* Paisley, *supra* note 110, at 1294 (also confirming the date of the vote and asserting that the Agreement ratified by the people is powerful: "No other conditions, whether verbal or written, given by any of the parties, can override what is set out in this Agreement.").

116. *See* The Newshour with Jim Lehrer: Unfinished Business; Steeling [sic] Jobs; Prospects for Peace (Public Television Broadcast, March 16, 1999) (confirming figures); John Lloyd, *Ireland's Uncertain Peace,* Foreign Affairs, October 1998, at 109 (revealing result of referendum); John Mullin, *Adams Told: It's Time to Deliver; Arms Row Flares After Yes Vote Triumph*, The Guardian (London), May 25, 1998, at 1. *See also* Agreement Reached in Multi-Party Negotiations, April 10, 1998, UK-N. Ir.-Ir., 37 I.L.M. 751 (1998) (setting forth data concerning referendum). *See generally* Colin Harvey, *Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context*, 22 FORDHAM INT'L L.J. 1389, 1389-90 (1999) (discussing generally the support that the people of Ireland have given to the Agreement).

Supported by both the political factions of Northern Ireland and its citizenry, the Good Friday Agreement erects a solid foundation for democratic development.[117] A blueprint for peace and prosperity, the Agreement immediately corrects the conflict concerning the territory of Northern Ireland with amendments to the Constitution of the Republic of Ireland.[118] On May 22, 1998, the people of the Republic of Ireland ratified the changes to the Constitution of 1937 by 94.4% vote.[119]

Many other provisions of the Agreement require a longer period for implementation. The institution of the three strand political structure commenced in mid-September with Strand One, the democratic institutions in Northern Ireland.[120] The 108-member Northern Ireland General Assembly reconvened, comprised of 54% Unionists and 42% Nationalists, and reflected the population as a whole for the first time in history.[121] The Agreement provides an intricate system of safeguards to protect the participation of all sections of the community and to prevent any usurpation of power by one political party.[122]

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117. *See* Fawn Vrazo Knight, *N. Ireland Voters Overwhelmingly Back Peace Plan*, THE DAILY NEWS OF LOS ANGELES, May 24, 1998, at N1 (outlining the process for democratic development through the Assembly election and legislation by British Parliament); *see also* Gerry Adams, *Adams Stresses His Organisation's Main Themes are Liberation, Emancipation and Empowerment*, THE IRISH TIMES, May 10, 1999, at 6 (admitting that his Sinn Fein party made substantial concessions in making the Agreement, but expressing hope that these concessions will be rewarded by the strong foundation). *See*, Brendan O'Leary, *The Nature of the Agreement*, 22 FORDHAM INT'L L.J. 1628 (1999) (explaining the Agreement and how its structure encourages democratic development). *See generally* Byrne, *supra* note 114, at 1207 ("The talks lasted the better part of two years, following earlier years of preparatory work. They involved two sovereign governments, the British and the Irish, and eight extremely disparate Northern Ireland political parties").

118. *See generally* Sean Farren, *Disarmament Is the Only Logic; with the Endorsement of the Agreement There Was Created a Strong Moral as Well as a Political Obligation for Paramilitaries to Acknowledge the Changing Constitutional and Political Circumstances*, BELFAST NEWS LETTER, June 22, 1999, at 16 (mentioning the amendments).

119. *See* Agreement Reached in Multi-Party Negotiations, April 10, 1998, UK-N. Ir.-Ir., 37 I.L.M. 751 (1998) (setting forth data concerning Republic of Ireland Constitutional amendment acceptance); *see also* Knight, *supra* note 117, at 1389.

120. *See* Harvey, *supra* note 116, at 1402 ("Strand One of the negotiations centered on the creation of democratic institutions in Northern Ireland"). *Cf.* Duncan Shipley-Dalton, *Political Viewpoint: The Belfast Agreement,* 22 FORDHAM INT'L L.J. 1320, 1332 (1999) ("The talks were organized in one to three strands, which were written into the Agreement but not the act"); David Lynch, *Mitchell: Agreement 'is up to the people',* USA TODAY, April 13, 1998, at 14A (dealing with the political reconstruction of the government of Ireland).

121. *See The People of Ireland Don't Want To Go Back*, *supra* note 112, at 3; *see also* Susan Taylor Martin, *Northern Ireland Peace Plan Earns Approval at Polls,* ST. PETERSBURG TIMES, May 24, 1998, Northern Ireland; 1A ("The Irish parliament also must approve the amendment of its constitution so it no longer makes a territorial claim to Northern Ireland"); *see also Day of Obligation: Pact Comes at a Time Sacred to Both Faiths,* THE ATLANTA JOURNAL, Apr. 11, 1998, at 07B ("The Irish government will ask voters to approve changes to constitutional amendments that define the Irish nation and lay territorial claim over Northern Ireland").

122. The British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependents; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables. Agreement Reached in Multi-Party Negotiations, supra note 119, at 767.

Strands Two and Three will occur over time.[123] Strand Two creates the North/South Ministerial Council, a body intended to coordinate the executive responsibilities of Northern Ireland with those of the Republic of Ireland. Activities subject to such cooperation include agriculture, education, transportation, environmental protection, tourism, health and urban and rural development.[124] The Council remains in the initial stages of formation and will become fully operational early next year.[125]

Strand Three governs the British-Irish Council designed to promote the development of beneficial relationships among Great Britain, the Republic of Ireland, Northern Ireland, Scotland and Wales.[126] This element appears the least developed as the actual date of operation remains uncertain.[127]

The Agreement also addresses a host of other issues that have plagued the territory since the secession of the Republic of Ireland in 1920.[128] Human rights, decommissioning of the terrorist groups, reforming policing measures and the gradual withdrawal of British troops and the

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123. *See* Agreement Reached in Multi-Party Negotiations, *supra* note 119, at 764 (unveiling format for North/South Council); *see also* Ann Shaw, *View from the Chair: Taking a Closer Look at the British Market,* BELFAST NEWS LETTER, Mar. 9, 1999, at 21 ("This Council will include the Assemblies of Northern Ireland, Scotland and Wales and potentially the Channel Islands and the Isle of Man and will address specifically regional issues ranging from EU issues to agriculture and infrastructure."); *see also* David Trimble, *Essay: The Belfast Agreement,* 22 FORDHAM INT'L L.J. 1145, 1157 (1999) ("[T]he British-Irish Council will operate by consensus and be a forum where the parties can discuss, consult, and agree on co-operation on matters of mutual interest. Such co-operation may result in common policies or common action."); Dr. Ian R.K. Paisley, *Peace Agreement—Or Last Piece in a Sellout Agreement?*, 22 FORDHAM INT'L L.J. 1273, 1292 (1999) ("This is simply a consultive body for representatives of the British and Irish Governments and devolved institutions in the United Kingdom.").

124. *See* Harvey, *supra* note 116, at 1409 ("The six areas of cooperation include aspects of transport, agriculture, education, health, environment, and tourism"). *See generally* Byrne, *supra* note 114, at 1213 n.15 (predicting that "existing economic agencies, both North and South, however, would continue to be funded by and operate under the direction of the respective administrations").

125. *See* Matthew McAllester, *A Deal of Pain, Hope / Accord is Historic First Step,* NEWSDAY, April 11, 1998, at A04 (discussing implementation of Strand Two). *See generally* David Byrne, *An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics*, 22 FORDHAM INT'L L.J. 1206, 1213 n.15 (1999) ("The implementation bodies referred to under paragraph 9(ii) of Strand Two of the Multi-Party Agreement were agreed upon in December 1998."); Paisley, *supra* note 123, at 1291-92 n.32 (noting that the all-Ireland Ministerial Council missed the October 31, 1998 deadline for identifying six areas for implementation through the all-Ireland implementation bodies on an all-Ireland basis).

126. *See* McAllester, *supra* note 125.

127. *See* Paisley, *supra* note 123, at 1290-92 (discussing of the main components of Strands Two and Three and possible problems with their implementation).

128. *See* Paisley, *supra* note 123, at (discussing coverage of Strand Two to include—among other areas—waterways, social security, EU programs, inland fisheries, and marine matters). *See* Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement,* 22 FORDHAM INT'L L.J. 1345, 1362 (1999) (concluding that "[t]he Belfast Agreement does encompass minority rights that can be enforced individually, such as non-discrimination rights and equality in a range of civil, political, social, and economic rights").

establishment of a commission to review past violations of civil rights all fall under the purview of the Good Friday Agreement.[129]

The Good Friday Agreement promises a brighter future for Northern Ireland.[130] Its broad vision overcomes failure of prior attempts by addressing the civil unrest and discrimination with proportional representation in the General Assembly, and responding to the territorial dispute with a Constitutional amendment, already approved by the Irish population.[131] The Agreement seeks to formulate beneficial relations among nations with a common interest in Northern Ireland.[132] In addition, each provision endeavors to remedy the plight of Northern

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129. *See* Agreement Reached in Multi-Party Negotiations, *supra* note 119, at 766-74 (setting forth provisions addressing social reform); *see also* McAllester, *supra* note 125 (discussing social elements of Agreement); David Byrne, *Political Viewpoint: An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics,* 22 FORDHAM INT'L L.J. 1208 (1999) (discussing "new and strengthened safeguards and institutions in the field of human rights; measures to promote social, economic and cultural equality; and practical measures to encourage reconciliation and to recognize the needs of victims of violence"); Trimble, *supra* note 123, at 1160 ("There were, in addition to the constitutional and institutional matters mentioned above, a range of other matters that were also crucial to the Agreement. These covered the so-called equality agenda, policing, security, decommissioning, and prisoners"); Brendan O'Leary, *Academic Viewpoint: The Nature of the Agreement,* 22 FORDHAM INT'L L.J. 1628, 1651 (1999) ("The Agreement encompasses decommissioning, de-militarization, police reform, and prisoner release. [T]hey are not explicitly tied to the construction or timing of the new political institutions").

130. *See generally Politics: 'Yes' to Agreement,* BELFAST NEWS LETTER, Apr. 28, 1998, at 8 (observing "[i]t is also clear that this historic agreement is just the beginning of a long process of conciliation and we will monitor the implementation of the agreement very closely, in line with our long established principles of democracy and consent"); Byrne, *supra* note 125, at 1206 ("[T]he Agreement has truly marked a new beginning and will prove to be the foundation of both a lasting peace and a durable political accommodation").

131. *See* T. R. Reid, *Historic Promise of Peace for N. Ireland; Accord Reached on Good Friday Offers a Return to Self-Rule After 26 Years,* WASH. POST, April 11, 1998, at A01 (noting Strand Three is designated to "coordinate activities across the Irish Sea"); *see also* Brendan O'Leary, *Academic Viewpoint: The Nature of the Agreement,* 22 FORDHAM INT'L L.J. 1628, 1637 (1999) (noting "[t]he Agreement is consistent with past and future measures to promote fair employment and affirmative action in the public sector that will, one hopes, eventually ensure a proportional and non-discriminatory civil service and judiciary"); Trimble, *supra* note 123, at 1157 (concluding that "[t]he concept of an assembly elected by proportional representation with powers similar to the old Stormont Parliament, but with an initial reservation of police powers was common ground"); Paul Mageean & Martin O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1499, 1523 (1999) (noting that "[a]ll of the parties to the Agreement affirm 'their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community'").

132. *See* Reid, *supra* note 131; *see also* Byrne, *supra* note 129.

Ireland's sharply divided citizens.[133] The commitment to democracy permeates the document through its focus on self-determination.[134]

The success of the new structure hinges on a cooperative effort by every member of Northern Ireland society.[135] Studies reveal that peace triggers enormous economic benefits in the areas of tourism, inward investment, cross-border trade, the inflow of external funds and employment creation.[136] According to the Report prepared by the Forum for Peace and Reconciliation, a peaceful resolution could stimulate up to 30,900 jobs assuming the funds saved from security are fully spent in Northern Ireland.[137] Confidence and a positive image of North-

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133. *See* Brendan O'Leary, *supra* note 131, at 1631 (1999) ("The Agreement . . . is one made with national and not just ethnic or religious communities, and it is one endorsed by both leaders and the led"). *See generally* Brendan O'Cathaoir, *Let's Put Compromise Ahead of Principles for Peace,* THE IRISH TIMES, Feb. 10, 1995, at News Features; 14 (noting that the Act of 1920 did not actually effectuate complete unity in Ireland, in fact, problems were still being resolved for decades following its adoption); Bell & Cavanaugh, *supra* note 128 (noting "the Northern Ireland peace process and the formula devised in the 1998 Belfast Agreement may serve as a model for other divided societies"); *Govt. of Ireland-Dept. of Foreign Affairs . . . Friday Agreement-Declaration of Support* (visited Sept. 19, 1999) <http://www.irlgov.ie/iveagh/angloirish/goodfriday/declarat.htm> ("We reaffirm our total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues, and our opposition to any use or threat of force by others for any political purpose"); *Minister Welcomes Report,* BELFAST NEWS LETTER, May 7, 1999 at 6 (discussing the Government's rapid progress in creating measures based on equality shows a determination to bring about real and lasting change).

134. *See* Bell & Cavanaugh, *supra* note 128, at 1362 (observing "the many references to protection of individual rights . . . can be seen as part and parcel of democratic government and an aspect of internal self-determination"); *see also* Garvin Crawford, Comber *Letter: Threat to Democracy,* BELFAST NEWS LETTER, May 6, 1999 at 16 (noting "the letter and the spirit of that agreement specifically requires that our government be a democratic one"); Byrne, *supra* note 125, at 1208 (discussing the Agreement includes the treatment of the issues of self determination and consent).

135. *See* Dr. Ian R.K. Paisley, *Peace Agreement--Or Last Piece in a Sellout Agreement?*, 22 FORDHAM INT'L L.J. 1273, 1285 (1999) (the participants in the negotiations strongly commended the Agreement to the people, north and south "for their approval"); *Cf. Minister Welcomes Report,* BELFAST NEWS LETTER, May 7, 1999 at 6 (concluding "equality is . . . central to the lives of everyone in Northern Ireland.").

136. *See* Chris Gibson, *View from the Chair: The Right Contacts,* BELFAST NEWS LETTER, Oct. 13, 1998 at 21 (stating the capacity for tourism, inward investment, employment and cross-border trade to grow is greatly enhanced by economic cooperation). *See generally* Ann Shaw, *View from the Chair: Taking a Closer Look at the British Market,* BELFAST NEWS LETTER, Mar. 9, 1999, at 21 (observing "[i]f we remember that 34 per cent of all local manufacturing sales are consumed in GB, the importance of that market cannot be underestimated").

137. *See* Shaw, *supra* note 136, at 21 ("[T]he Strand Three proposal . . . could represent over 30,000 jobs."); *see also* Siobhan Creaton, *Full Peace Dividend Hinges on Security Budget Reallocation,* THE IRISH TIMES, July 14, 1995, at 3 ("The report indicates that employment throughout the island of Ireland could grow between 21,200 and 67,500 over the next five years depending on the political outcome in Northern Ireland . . . the size of the peace dividend will, according to the report, be dependent on the reallocation of any potential savings in security expenditures to other areas of public spending").

ern Ireland also encourage foreign investment.[138] The report further estimates an increase in revenue from tourism creating a 1.2% rise in GDP growth by the year 2000.[139]

Conclusion

Decades of controversy defined the political environment of Northern Ireland. The effects of the intense discord between Protestant Unionists and Catholic Nationalists permeated every aspect of political, social and economic life. Many attempts for reconciliation failed due to an inability to recognize the breadth of the conflict. The Good Friday Agreement offers a realistic approach providing a comprehensive solution. The Agreement finally attempts to resolve the disputed questions of statehood, sovereignty and self-determination.

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138. *See Framework Fails to Address Issue of Unemployment Policy,* THE IRISH TIMES, Feb. 24, 1995, at Business This Week; On the margin; Supplement Pg. 16 ("Northern Ireland likely to win a significant share of future foreign investment"); *see also* Creaton, *supra* note 137, at 3 (concluding "progress towards the political agreement and stability will underpin investor, tourist and business confidence."); *Forum for Peace and Reconciliation,* (visited Sept. 19, 1999) <http://www.fusio.ie/web1/forum/socio_economic.html> (concluding that a political agreement will increase foreign investment in Northern Ireland as compared to when it suffered severe economic losses as a consequence of violence in the early 1970s).

139. *See Framework Fails to Address Issue of Unemployment Policy, supra* note 138.

Haarhuis v. Kunnan Enterprises, Ltd., et al.

177 F.3d 1007 (D.C. Cir. 1999).

District of Columbia Circuit Affirms in Case of First Impression that Jurisdiction of Bankruptcy Court Under 11 U.S.C § 304 Does Not Require Presence of Assets Within the United States.

In *Haarhuis v. Kunnan Enterprises, Ltd,*[1] the United States Court of Appeals for the District of Columbia affirmed the decisions of the district court and bankruptcy court below, holding that the presence of assets in the United States is not a condition to a bankruptcy court's exercise of jurisdiction under 11 U.S.C. § 304.[2] The court also reviewed an array of objections to the judgment of the bankruptcy court, all of which it found meritless.[3]

Appellants in this case are nine professional tennis players (jointly "Haarhuis") who filed a complaint against respondent Kunnan, a Taiwanese corporation that manufactures sporting equipment.[4] In April 1995, a creditor of Kunnan filed for an involuntary reorganization of the company in a Taiwanese court.[5] In October 1995, Haarhuis filed an action in the United States Court for the District of Columbia, claiming breach of contract, in that Kunnan had signed endorsement contracts with the players and failed to pay its contractual obligations.[6] The reorganizers, appointed by the Taiwanese court, then sought an injunction under 11 U.S.C. § 304 in the United States Bankruptcy Court for the District of Columbia in order to enjoin the continuance of the breach of contract case and to ensure that all claims against Kunnan would be decided in one forum, specifically, under the reorganization proceeding already underway in Taiwan.[7] At trial, the bankruptcy court rejected Haarhuis's argument that Kunnan's not having

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1. 177 F.3d 1007 (D.C. Cir. 1999) (hereinafter "Haarhuis").
2. *See id.* at 1012.
3. *See id.* at 1013-1016.
4. *See Haarhuis*, 177 F.3d at 1009.
5. *Id.*
6. *Id.*
7. § 304 Cases ancillary to foreign proceedings

   a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

   b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

   1) enjoin the commencement or continuation of—

   A) any action against—

   i) a debtor with respect to property involved in such proceeding; or

   ii) such property; or

   B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

   2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

   3) order other appropriate relief.

assets in the United States precluded the jurisdiction of the Bankruptcy Court to entertain the Reorganizers' petition.[8]

The District Court affirmed the decision of the Bankruptcy Court to enjoin further proceedings against Kunnan Enterprises.[9] The court held that the usefulness of § 304 would be diminished if it were to hold that the presence of a debtor's assets in the United States is a jurisdictional prerequisite.[10] The court found nothing in the legislative history of § 304 to suggest such a requirement,[11] and Haarhuis failed to cite any case law explicitly stating that the presence of debtor assets in the United States is necessary for jurisdiction under § 304.[12]

On appeal, appellant's foremost argument was that a bankruptcy court lacks jurisdiction under § 304 where a foreign debtor has no assets in the United States.[13] The court, however, did not agree. First, it found that a United States court must actually have jurisdiction over property in order to entertain an in rem type suit before a bankruptcy court may enjoin the continuation of an action against the property involved in a foreign proceeding, as provided in § 304(b)(1)(A)(ii).[14] Second, § 304(b)(1)(B), which provides for the enjoinment of the commencement or continuation of a lien against property in a foreign proceeding, contemplates assets in the United States, because a United States court can create or enforce a lien only against property over which it has jurisdiction.[15] Third, because a United States court cannot order the turnover to the representative of the foreign proceeding of property over which it has no jurisdiction, § 304(b)(2) appears to contemplate assets in the United States as well.[16]

However, the reorganizers did not bring their petition under the foregoing subsections.[17] The petition was brought under §§ 304(b)(1)(A)(i) and (b)(3). Section 304(b)(1)(A)(i) provides for the enjoinment of an action against a debtor rather than property, with respect to property involved in a foreign bankruptcy or reorganization proceeding, not property necessarily located in the United States.[18] This describes the present case in which the property involved in the reorganization proceeding was not in the United States, and Haarhuis sued Kunnan, the debtor, in a United States court with respect to property located abroad.[19] Further, § 304(b)(3), providing that the Bankruptcy Court can order other applicable relief, is simply a further indi-

8. *Haarhuis v. Kunnan*, No. 97-630 (Aug. 12,1997).

9. *See Haarhuis v. Kunnan*, 223 B.R. 252 (1998).

10. *Id.* at 255.

11. *Id.*

12. *See Haarhuis*, 223 B.R. 252 at 254.

13. *See Haarhuis*, 177 F.3d a1010.

14. *See id.* at 1012.

15. *Haarhuis,* 177 F.3d at 1012.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

cation of the broad discretion accorded a bankruptcy court in granting the applicable relief under § 304.[20]

Haarhuis however argued that the legislative history[21] of § 304 indicates the intent that claims under § 304 be limited to those involving assets in the United States.[22] Though the court recognized the inference that local assets will usually be involved in § 304 cases, it nevertheless rejected this argument.[23] Although Haarhuis pointed to a number of decisions which purportedly assumed that § 304 only applies when a debtor has assets in the United States,[24] this argument was rejected as well, as none of the cases addressed the precise issue before the court. In sum, the court held that the statutory language did not limit 304's application to cases in which assets were present in the U.S. Therefore, the bankruptcy court did have jurisdiction over the Reorganizers' petition.[25]

Haarhuis also asserted that comity,[26] one of the factors governing a bankruptcy court's decision to grant relief under § 304, was not met in the instant matter.[27] The argument was

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20. *Id; see also supra* note 5.

21. *See* S. Rep. No. 95-989 at 35 (1978), stating:

> This section governs cases filed in the bankruptcy courts that are ancillary to foreign proceedings. That is, where a foreign bankruptcy case is pending concerning a particular debtor and that debtor has assets in this country, the foreign representative may file a petition under this section, which does not commence a full bankruptcy case, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief.

22. *See Haarhuis* at 1012.

23. *Id.* at 1013.

24. *See Haarhuis*, 177 F.3d at 1013 (noting that the cases appellant cites speak only to the general legislative purpose of §304 and do not address the issue before the court); *see also Victrix Steamship Co. v. Salen Dry Cargo, A.B.,* 825 F.2d 709, 714 (2d Cir. 1987) (remarking that the purpose behind the legislation of 11 U.S.C. § 304 was to allow foreign bankrupts to avoid piecemeal distribution of assets by filing ancillary proceedings in domestic bankruptcy courts).

25. *See Haarhuis* 177 F.3d at 1013.

26. *See Hilton v. Guyot,* 159 U.S. 113, 164 (1895) (defining comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."); *see also* Theresa P. Fisher, *1988 Developments and the Conflicts Arising Under Section 304,* 6 Bank. Dev. J. 345 (1989) (providing a detailed discussion of the importance of the comity provision of § 304).

27. 11 U.S.C. § 304

> c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—
>
> 1) just treatment of all holders of claims against or interests in such estate;
>
> 2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> 3) prevention of preferential or fraudulent dispositions of property of such estate;
>
> 4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
>
> 5) comity; and
>
> 6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

based on the provision of Taiwan's bankruptcy law that a bankruptcy adjudicated outside the Republic of China would not take effect with respect to the properties owned by the debtor within the Republic of China.[28] However, Dr. Chiu, the reorganizers' expert witness, testified that the provision did not apply to the present case, because Kunnan was involved in a reorganization and the provision applies only to bankruptcies.[29] Haarhuis failed to produce an expert witness to rebut this testimony, so the court held that the Bankruptcy Court was justified in relying on the opinions of Dr. Chiu.[30]

As there was no relevant precedent available regarding the issue in controversy, the court fulfilled its difficult task quite suitably.[31] In all, the Circuit Court's decision reflects well the logical practice of looking to the plain meaning of a legislative act.

Theresa Spinillo

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28. *See Haarhuis*, 177 F.3d at 1013.

29. *Id.* at 1014.

30. *Id* at 1014-1015 (Haarhuis did however object to the qualifications of Dr. Chiu and the essence of his testimony. The first objection was that Dr. Chiu was not an expert in bankruptcy law. Nonetheless, the court found him to be exceptionally qualified. Haarhuis also unsuccessfully argued that the other factors of § 304(c) were not met because the Bankruptcy Court's sole reliance on Dr. Chiu's testimony was neither sufficient nor competent to support the satisfaction of the factors. The Court found, however, that the evidence presented was sufficient and competent to meet the factors of § 304(c).

31. *See id.* at 1011 (citing the unpublished case *United Kingdom Mutual S.S. Assurance Ass'n, Ltd v. Continental Maritime of San Francisco, Inc*., 1992 U.S. Dist. LEXIS 13485, No. C-91-2798, 1992 WL 486937, at 7 (stating that § 304 is irrelevant where a foreign debtor owns no assets in the United States); *see also In re Brierley* 145 B.R. 151, 169 (Bankr. S.D.N.Y. 1992) (providing that the ownership of assets in the United States is a requisite of jurisdiction, but where a party seeks discovery under § 304).

In re Application of Technostroyexport

853 F. Supp. 695 (S.D.N.Y. 1994)

United States District Court Vacates Discovery Order and Subpoenas Issued Thereunder on Grounds that Judicial Interference in Foreign Arbitration Proceedings Is Not Permitted Absent the Express Authorization of Arbitrators.

In *In re Application of Technostroyexport*,[1] the United States District Court for the Southern District of New York considered whether it had the authority to mandate discovery in aid of arbitration pursuant to 28 U.S.C. § 1782(a) in the absence of discovery orders by the arbitrators.[2] The court held that without an express ruling from the foreign arbitrators which authorized discovery, it did not have the requisite power to force compliance in the United States.[3]

Technostroyexport ("Technostroy"), the petitioner, is a foreign economic association organized under Russian law.[4] The respondent, International Development and Trade Services, Inc. (IDTS), is located in and organized under the laws of New York.[5] The parties had entered into two distinguishable agreements. The first consisted of separate contracts through which Technostroy would sell minerals to IDTS.[6] The second was an agreement through which IDTS became Technostroy's agent for the sale of the minerals.[7] Due to disagreements with regard to the payment of the contracts,[8] the parties instituted separate arbitrations in Moscow[9] and Stockholm.[10]

This matter was brought to the District Court through a direct petition from Technostroy under its belief that judicial intervention, and a decree that would force IDTS to comply with discovery demands, were essential to further the arbitration itself.[11] As a result of the petition, Part I of the District Court issued subpoenas in favor of Technostroy.[12] The respondents then

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1. 853 F. Supp. 695 (S.D.N.Y. 1994) [hereinafter "In re Technostroy"].
2. *Id.* at 696.
3. *Id.* at 698 (describing section 15 of the Swedish Arbitration Act which provides that "[I]f the arbitrators have considered the procedure necessary, and if the requisite information is made available, the court shall arrange for the examination or issue an order . . .").
4. *Id.* at 696.
5. *Id.*
6. The first agreement involved seven written sales contracts. *See In re Technostroy,* 853 F. Supp. at 696.
7. *Id.*
8. Technostroy contends the IDTS has refused to pay the $172 million that is owed on the contracts. IDTS raises two issues to explain its default. The first is that the parties had agreed to lower the original price stipulated. The second involves IDTS's claim that it already paid $58 million towards the contracts. *See In re Technostroy,* 853 F. Supp. at 696.
9. *Id.* (The parties had agreed to resolve disputes regarding the seven sales contracts through arbitration in Russia).
10. *Id.* (The agency agreement provided for arbitration in Stockholm).
11. *Id.* (Technostroy wished to obtain certain documents along with the deposition testimonies of both the president and the primary shareholder of respondent IDTS's corporation).

filed a motion to quash the subpoenas, dismiss the petition, and refer the parties to the arbitration proceedings.[13]

Technostroy based its action on 28 U.S.C. § 1782(a), which provides that:

> [T]he district court of the district in which a person resides or is found may order him to . . . produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory[14] issued, or request made by a foreign or international tribunal or upon the application of any interested person. . . ."[15]

Technostroy maintained that the plain meaning of this section allowed it to go directly to the District Court for assistance without first seeking a ruling from the arbitration tribunal regarding discovery.[16] Technostroy also relied on *In re Malev Hungarian Airlines*[17] and *In re Aldunate*[18] to support its view that application of § 1782(a) did not necessitate prior resort to an arbitrator.[19] *Malev* and *Aldunate*, however, are distinguishable because both involved judicial hearings between United States and foreign corporations, and dealt with the application of § 1782 only in the context of purely judicial procedures,[20] not arbitration.[21] The court in *In re Technostroy* did not find that either of these cases supported the petitioner's argument.[22]

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12. *Id.* (On January 6, 1994, Judge Mukasey authorized a subpoena duces tecum and deposition subpoenas to be served to IDTS).

13. *Id.*

14. John Murray Brown, *SFO Seeks Access to Nadir Banks,* FINANCIAL TIMES (LONDON), June 19, 1993, at 4 (through a letter rogatory, a court in one country can seek the co-operation of a court in another jurisdiction in an investigation . . .").

15. 28 U.S.C.S. §1782(a) (1999).

16. *See In re Technostroy*, 853 F. Supp. at 697.

17. 964 F.2d. 97 (2d Cir. 1992).

18. 3 F. 3d 54 (2d Cir. 1993).

19. *See In re Technostroy*, 853 F. Supp. at 697.

20. *See Malev*, 964 F.2d. at 99 (2d Cir. 1992) (where the parties decided to undertake judicial resolution of the conflict and where the court stressed the "necessity for statutory improvements and other devices to facilitate the conduct of such litigation"). *See also* In re Aldunate, 3 F.3d 54, 56 (2d Cir. 1993) (where the guardians of Ciro Aldunate "applied ex parte to the United States District Court for the District of Connecticut" for assistance in obtaining discovery for his foreign assets).

21. *Malev,* 964 F.2d at 99; *Aldunate* 3 F.3d at 57 (discussing the 1964 Amendments to § 1782 and their contemplated effect on assisting in the foreign and international litigation process).

22. 853 F. Supp. 695, 697 (S.D.N.Y 1994) (The District Court did not give petitioner's argument in favor of the application of § 1782(a) much credence, and in fact ruled that Technostroy should not have sought judicial assistance without the approval of the foreign arbitrator).

The District Court found these precedents inapposite.[23] The court emphasized that arbitrations and court proceedings are completely distinct and follow different guidelines, and that neither is subject to the control of the other.[24] The District Court also held that "[w]hether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrators decide."[25]

The court referred to two cases to support its position that the "Federal District Court has no power to order discovery under court rules where the matter is being litigated in an arbitration."[26] The first case, *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*,[27] held that when parties to a contract decide to resolve all issues through arbitration, they give up access to judicial methods of dispute resolution and rely solely on "procedures peculiar to the arbitral process."[28] The second case, *Penn Tanker Co. of Delaware v. C.H.Z. Rolimpex Warszawa*,[29] followed the same line of reasoning as *Commercial Solvents* by holding that the initial choice of arbitration as the appropriate method of dispute resolution, and the adherence to its distinct procedures, must remain constant during the proceedings.[30] *Penn Tanker* further held that depositions and interrogatories could not be ordered under judicial authority in a matter that was the subject of arbitration.[31]

The court in *In re Technostroy* also cited *Western Employers Ins. Co. v. Merit Ins. Co.*[32] to demonstrate that there is some authority allowing court intervention to enforce an arbitrator's ruling.[33] Upon analysis, however, the facts of that case were found to be dissimilar to those in *In re Technostroy.*[34] In *Western*, a ruling by the court was permitted because there was initially an *underlying civil action* pending, which was later stayed by the trial judge who then granted an order for arbitration.[35] The federal court's jurisdiction over the arbitration stemmed from this

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23. *Id.* at 697.
24. *Id.* (where the court stated that there was great difference between the rules that govern the courts and those that govern independent arbitration).
25. *Id.* at 697, 698.
26. *Id.* at 698.
27. 20 F.R.D. 359 (S.D.N.Y. 1957).
28. *Id.* at 361; *see id.* ('A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial' (quoting 1 Wigmore, Evidence § 4(e)(3d. ed. 1940))). *See also* Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956) (where the court stated that "[a]rbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results").
29. 199 F. Supp. 716 (S.D.N.Y. 1961).
30. *Id.* at 718 (as soon as the parties decide to arbitrate, they may no longer ["invoke the discovery procedures of the court]").
31. 199 F. Supp. 716, 717 (S.D.N.Y. 1961).
32. 492 F. Supp. 53 (N.D. Ill. 1979).
33. 853 F. Supp. 695, 698 (S.D.N.Y. 1994).
34. *Id.*
35. *Id.* at 54 (emphasis added).

grant by the judge.[36] Also of note, the fact that the parties had not initially agreed to settle all disputes through arbitration as they had in *In re Technostroy*.

Finally, the District Court in *In re Technostroy* referred to certain provisions of Russian and Swedish arbitration acts that supported its findings that judicial interference should not be permitted absent an express grant by the arbitrator.[37] For example, Article 27 of the Law of the Russian Federation on International Commercial Arbitration provides in pertinent part that "the arbitral tribunal . . . may request from a competent court of the Russian Federation assistance in taking evidence."[38] In addition, Section 15 of the Swedish Arbitration Act states that "arbitrators may take steps in order to promote the investigation of the matter, such as summoning a party or an expert or any other person to attend for examination."[39] It is clear from these provisions that courts cannot take affirmative action in arbitration proceedings unless their assistance is first solicited by the arbitrators.

The decision of the District Court in this case would appear consistent with the precedent that exists regarding judicial interference in arbitration proceedings. As arbitrators are not compelled to follow the rules of evidence and the guidelines established by the judicial system, it would be counterproductive to allow courts to interfere with the arbitration process, employ their own set of rules, and issue orders to parties involved in a pending arbitration.

Lauren M. Mazzara

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36. *Id.*

37. *Id.* at 698.

38. *Id.*

39. *Id.*

In re Impounded

178 F.3d 150 (3d Cir. 1999)

Third Circuit Affirms District Court, Holding that the Existence of Facts Justifying Invocation of Fifth Amendment Privilege Based on Fear of Foreign Prosecution Is Not to Be Presumed but Is Within Discretion of Trial Court.

In *In re Impounded*,[1] the United States Court of Appeals for the Third Circuit addressed the Supreme Court's decision in *United States v. Balsys*,[2] which held that the Fifth Amendment's[3] guarantee against compelled self-incrimination did not apply to foreign prosecutions. The court held that even if there was an exception to this rule, where "the prosecution was as much on behalf of the United States as of the prosecuting nation,"[4] it was nevertheless inapplicable in the case at bar, where the appellants did not face a "real and substantial fear" of prosecution efforts transcending national boundaries.[5]

The appellants were employees of a corporation in the artificial sausage casings industry that was targeted in an antitrust investigation.[6] The District Court for the District of New Jersey impaneled a special grand jury in order to investigate alleged price-fixing practices or other anti-competitive agreements among manufacturers and distributors that violated Section 1 of the Sherman Act.[7]

Pursuant to a subpoena and an immunity order compelling their testimony, the appellants appeared before the grand jury and indicated their willingness to answer questions relating to certain business dealings within the United States.[8] However, claiming that the court's compulsion order and grant of immunity provided insufficient protection against foreign prosecution, they refused to answer questions about activities occurring in the United States that related to foreign markets or about activities occurring outside the United States.[9] When the government moved for a contempt order, the appellants requested the court to order a hearing for the purpose of questioning the government regarding contacts with foreign governments relating to this investigation.[10]

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1. 178 F.3d 150 (3d Circuit 1999) (hereinafter "*Impounded*").
2. 524 U.S. 666 (1998).
3. U.S. CONST. amend. V. provides in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself. . . ."
4. *Impounded*, 178 F.3d at 154-55.
5. *Id.* at 155-56.
6. *Id.* at 152.
7. *Id.* 15 U.S.C. § 1.
8. *Id.*
9. *Id.* Essentially the whole case centers on the fear of foreign prosecution based upon the testimony provided in the New Jersey District Court.
10. *Id.*

At the hearing, the appellants introduced inconclusive evidence[11] indicating cooperative prosecution between the United States and various foreign countries, including Canada, Spain, the United Kingdom, Germany, Mexico, and France. The appellants argued that they were facing a "whipsaw," in which they could be compelled to produce incriminating evidence in the United States and face prosecution based upon that testimony.[12] In order to develop the somewhat tenuous connections between the United States and the foreign governments, the appellants also sought to question government witnesses.[13] The government countered with a set of *Schofield* affidavits,[14] which stated that the appellants were being questioned to advance the grand jury's inquiry and not for the purpose of delivering that testimony to a foreign nation.[15] The appellants, however, were unsatisfied by the government's proffer of the affidavits, and argued they had produced enough evidence to mandate an evidentiary hearing.[16]

In its ruling on the hearings, the court accepted the government's pronouncements made in the *Schofield affidavits* and found that appellants had not raised an issue of material fact requiring an evidentiary hearing, and denied appellants' motion to compel.[17] The appellants again applied for an evidentiary hearing, claiming that the disputed issues had presented themselves in the course of the government's presentation.[18] The court denied the hearing motion once again.[19]

On appeal, the appellants again argued that *United States v. Balsys*[20] established a new test to determine whether the Fifth Amendment privilege can be invoked to protect oneself from

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11. *Id.* at 152-53. (Whether a witness faces a real and substantial fear of foreign prosecution and the Fifth Amendment privilege is not determined in *United States v. Balsys*, 542 U.S. 666 (1998), but rather in the Second Circuit decision of *In re Flanagan*, 691 F.2d 116 (2d Cir. 1982). *Id*. at 157.). The *Flanagan* Test involves the following factors: (1) whether there is an existing or potential foreign prosecution of a witness; (2) what foreign charges could be filed against that witness; (3) whether prosecution would be initiated or furthered by testimony; (4) whether any such charges would entitle the foreign jurisdiction to have an individual extradited from the United States; and (5) whether there is a likelihood that any testimony given would be disclosed to the foreign government. *In re Flanagan*, 691 F.2d at 121. The Flanagan court also noted that the apprehension "must be real and reasonable one, based on objective facts as distinguished from . . . subjective speculation." *Id*. Courts have construed these factors narrowly (*Impounded*, 178 F.3d at 157) because the Fifth Amendment does not protect remote and speculative possibilities, but "real dangers." *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 476-78, 478 n.2 (1972); *Impounded*, 178 F.3d at 157).

12. *Id.* at 152. The appellants argued that language in the Supreme Court's opinion in *United States v. Balsys* created a test for when a foreign prosecution implicates a defendant's Fifth Amendment rights, and that this prosecution falls within the "test" of *Balsys*, because it is an instance of cooperative international antitrust enforcement.

13. *Id.*

14. *See generally, In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973) (affidavits set forth the nature of the grand jury proceedings and the government's interest in and need for the witnesses' testimony).

15. *Id.* at 152-53.

16. *Id*. at 153.

17. *Id.*

18. *Id.*

19. *Id*. (The evidence and argument presented by the appellants were "immaterial and inadequate" and did not undermine the government's representations).

20. 524 U.S. 666 (1998).

prosecution abroad.[21] They claimed that specific language[22] in *Balsys* amounted to a test for determining whether an individual may claim a Fifth Amendment privilege against self-incrimination based on fear of foreign prosecution. The test, according to the appellants, involved determining whether: (1) the witness's fear of foreign prosecution is reasonable; (2) the fear is based on a foreign criminal statute substantively similar to United States law; and (3) the testimony is being taken with a purpose that it will be shared with a foreign government.[23]

The Court of Appeals held that the Supreme Court in *Balsys* did not establish a test for recognizing an exception for prosecutorial actions that essentially transform foreign efforts into domestic prosecution.[24] The court, relying on the conditional nature of Justice Souter's language, believed he had merely set forth a hypothetical situation reserved "for another day," rather than rules that a court could readily apply.[25]

The court held that even assuming *arguendo* such a test was articulated in *Balsys*, there was no evidence indicating a cooperative or joint effort in the current prosecution.[26] The court also stated that the grand jury questions concerning activities relating to foreign markets were not sufficient to demonstrate a joint or cooperative prosecution between the United States and other nations.[27] In particular, questions about instances of contacts with overseas nationals, requests for documents in foreign countries, questioning of witnesses about foreign contacts, and even the existence of criminal antitrust penalties in other countries would not entitle immunized witnesses in a Sherman Act investigation to claim Fifth Amendment privilege against self-incrimination.[28]

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21. *Impounded*, 178 F.3d 154, 155.

22. Justice Souter's opinion for the Court included this:

> This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood. If it could be said that the United States and its allies had enacted substantially similar codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence-gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.

United States v. Balsys, 524 U.S. at 678.

23. *Impounded*, at 155 (quoting Appellant's Brief at 34).

24. *Id.* at 156-57.

25. *Id.* at 155 (quoting Justice Souter).

26. *Id.* at 155, 156 (". . . we view appellants' argument as urging a 'what if' scenario rather than a true case of an ongoing or imminent international 'cooperative prosecution'. . .") (emphasis in original). (The court essentially saves itself from reversal by the United States Supreme Court by applying the test expressed by *Balsys*, and declaring the appellants had not met the threshold articulated on their own).

27. *Id*. at 156, 157-58. (*See also* note 10, *supra*, discussing the *Flanagan* test).

28. *Id*. at 155.

From all indications, the Court of Appeals followed closely the prevailing case law,[29] and was correct in concluding that the language cited by appellants in Justice Souter's opinion in *Balsys* was conditional.[30] As well, the court properly concluded that the facts of the case did not conform to the situation hypothetically contemplated in *Balsys*, because the evidence did not indicate a collaborative effort.[31] The court seemed to suggest, however, that if the facts of the case had more closely resembled Justice Souter's hypothetical, the outcome likely would have been different. Furthermore, by agreeing with the District Court that *Balsys* did not establish a test requiring the application of the Fifth Amendment privilege, the Third Circuit leaves open the question of whether, in fact, a determination of a "real and substantial fear" of potential foreign prosecution is to be left to the discretion of the trial court judge. Noticeably missing from the prevailing case law is whether the trial court's inquiry should indeed focus on the government's intent in gathering evidence or the net result afterward. Simply put, should the inquiry focus on self-serving statements by prosecutors made in, for example, *Schofield* affidavits, or on the practical repercussions of the situation? These concerns need to be addressed in order to ascertain the true scope of the rights granted under the Fifth Amendment to witnesses fearing prosecution in a foreign jurisdiction.

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29. *Id.* at 156-58. *See United States v. Balsys*, 524 U.S. 666 (1998). *See also*, *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1064-66 (3d Cir. 1988*); Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 n.2 (1972); *United States v. Gecas*, 120 F.3d 1419, 1425-26 (11th Cir. 1997), *cert. denied,* 118 S. Ct. 2365 (1998); *In re Grand Jury (Nigro)*, 705 F.2d 1224, 1227-28 (10th Cir. 1982); *In re Baird*, 668 F.2d 432, 434 (8th Cir. 1982); *Impounded*, 178 F.3d at 157-58 (citing *United States v. Sealed*, 794 F.2d 920, 924-25 (4th Cir. 1986) (existing prosecution and possibility of extradition created a real and substantial fear of prosecution); *Moses v. Allard*, 131 B.R. 328, 779 F. Supp. 857, 863-69 (E.D. Mich. 1991) (criminal investigation pending in Switzerland, nexus existed between information requested in proceeding and pending prosecution, and witness faced possibility of extradition, so real and substantial fear of prosecution*); Mishima v. United States*, 507 F. Supp. 131, 132-33 (D. Alaska 1981) (where conduct was criminalized under Japanese law, and cases had been referred to a Japanese prosecutor, witnesses had demonstrated real and substantial fear of prosecution, whereas witnesses whose cases had not been referred to a prosecutor had not demonstrated such a fear); *In re Cardassi*, 351 F. Supp. 1080, 1083-84 (D. Conn. 1972) (questions witness refused to answer concerned events in Mexico, potential acts were incriminating under Mexican law, and Mexican authorities had expressed an interest in the case); *In re Grand Jury (Chevrier)*, 748 F.2d 100, 103-106 (2d Cir. 1984) (no evidence of current, pending investigation, only routine inquiry by Canadian government, and lack of potential named violations, so no real and substantial fear of prosecution); *In re Grand Jury (Gilboe)*, 699 F.2d 71, 76-77 (2d Cir. 1983) (no present or prospective foreign prosecution, despite asserted claims of "shadowy investigations" and newspaper accounts, and no likely potential for extradition, so no real and substantial fear of prosecution).

30. *Id. See also* note 26, *supra*.

31. *Id.*

Former Republic of Yugoslavia—Legality of Use of Force

Yugoslavia v. United States of America

International Court of Justice, June 2, 1999

International Court of Justice Rejects Yugoslavia's Request For the Indication of Provisional Measures Against the United States of America, Citing Jurisdictional Barriers.

On June 2, 1999, the International Court of Justice rejected the request for provisional measures submitted by the Federal Republic of Yugoslavia (FRY) in the cases concerning Legality of Use of Force.[1] By a vote of twelve to three, the Court found that it manifestly lacked jurisdiction to entertain the cases against Spain and the United States, and ordered those cases removed from the Court's docket.[2] As for the remaining cases against countries including France, Italy, and the United Kingdom, the Court declared that it lacked *prima facie* jurisdiction over these parties as well, and therefore could not impose the requested provisional measures.[3]

In response to NATO bombing, Yugoslavia filed an application with the Court on April 29, 1999, instituting proceedings against ten States, including the United States of America, maintaining *inter alia* that those States had committed "acts by which [they] have violated [their] international obligation[s] not to use force against another State, not to intervene in [that State's] internal affairs *** not to violate [its] sovereignty *** [and] the obligation to protect the civilian population and civilian objects in wartime."[4] Yugoslavia requested that the Court adjudge and declare the respondent States were "responsible for the violation of the above[-mentioned] international obligations," and were obliged to immediately cease such actions and "provide compensation for the damage done."[5]

As basis for the Court's jurisdiction, Yugoslavia invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide,[6] which provides that disputes

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1. *Yugoslavia v. Belgium; Yugoslavia v. Canada; Yugoslavia v. France; Yugoslavia v. Germany; Yugoslavia v. Italy; Yugoslavia v. Netherlands; Yugoslavia v. Portugal; Yugoslavia v. Spain; Yugoslavia v. United Kingdom;* and *Yugoslavia v. United States of America.*

2. http://www.icj-cij.org/icjwww/idocket/iyus/iyusorders/Iyus_iorder_19990602.htm.

3. *Id.*

4. *See* ICJ Press Communique 99/17, http://www.icj-cij.org/icjwww/iPress1999/ ipresscom9917_19990429.htm.

5. *Id.* (Damage cited included deaths to 1,000 civilians, serious injury inflicted upon 4,500, "enormous damage to schools, hospitals, radio and television stations, cultural monuments and places of worship, the destruction of a large number of bridges, roads and railway lines, as well as oil refineries and chemical plants, resulting in serious health and environmental damage"). *Id.*

6. Dec. 9, 1948, art. IX, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (hereinafter "Genocide Convention").

between contracting parties (such as the U.S.)[7] relating to the interpretation, application or fulfillment of the Convention shall be submitted to the International Court of Justice.[8] Also invoked as a basis for jurisdiction was Article 38, paragraph 5, of the Rules of Court, which provides that when an application is filed against a State that has not accepted jurisdiction of the Court, the application is transmitted to that State, but no action is to be taken unless and until that State accepts jurisdiction of its own accord.[9]

Since the Court included on its Bench no judge of Yugoslavian nationality, FRY appointed Judge *ad hoc* Kreca, pursuant to Article 31 of the Statute of the Court, which provides that "[if] the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge."[10]

The Court began by stressing its concern "with the human tragedy, the loss of life, [the] enormous suffering in Kosovo [and the] continuing loss of life and human suffering in all parts of Yugoslavia."[11] The Court noted that it was "profoundly concerned with the use of force in Yugoslavia, [which] raises very serious issues of international law."[12] However, the Court went on to state that it did not "automatically have jurisdiction over legal disputes between States," and that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction."[13] Notwithstanding the merits of any given case, the Court stated that it could not indicate provisional measures unless such measures "appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established."[14]

Dealing first with Yugoslavia's claims under Article IX of the Genocide Convention, the Court noted that it is not disputed that both Yugoslavia and the United States are parties to the Convention.[15] However, the Court found that when the U.S. ratified the Convention on

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7. The Convention was adopted unanimously by the United Nations General Assembly in 1948. However, the United States did not actually ratify the Convention until 1988, and then only subject to certain reservations. *See, generally*, Matthew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later," 15 ARIZ. J. INT'L & COMP. LAW 415. The reservation of particular importance in the instant matter stated in essence that jurisdiction over the United States by the I.C.J. under article IX of the Convention was contingent upon the specific consent of United States in each case. *See* U.S. Reservations and Understandings to the Genocide Convention, November 25, 1988, 28 I.L.M. 782; *see also* note 17, *infra*.

8. *See* ICJ Press Communique 99/33, http://www.icj-cij.org/icjwww/ iPress1999/ipresscom9933_iyus_19990602.htm.

9. *Id. See also* Article 38 of Rules of Court, http://www.icj-cij.org/icjwww/ibasicdocuments/basetext/irulesofcourt.html#Article38.

10. *Id. See also* Dissenting Opinion of Judge Kreca, http://www.icj-cij.org/icjwww/idocket/iyus/iyusorders/iyus_.../iyus_iorder_19990602_Kreca.htm; Article 31 of the Statute of the Court, http://www.icj-cij.org/icjwww/ibasicdocuments/basetext/ istatute.html#CHAPTER_1.

11. *See* Case Concerning Legality of Use of Force (Yugoslavia v. United States of America) Order of 2 June 1999, http://www.icj-cij.org/icjwww/idocket/iyus/iyusorders/ Iyus_iorder_19990602.htm, at 6.

12. *Id.*

13. *Id.* at 7 (citing *East Timor, Judgment, I.C.J. Reports 1995*, p. 101, para. 26).

14. *Id.*

15. *Id.*

November 25, 1988, it made a reservation of particular importance in the instant matter.[16] In essence, the reservation made the Court's jurisdiction over the U.S. in Article IX disputes conditional upon consent.[17] Not surprisingly, such consent was far from forthcoming in the case at bar. As the Court noted, "[t]he United States has not given the specific consent [required] and will not do so."[18] Since such reservations to the Convention are generally permitted, and since Yugoslavia did not object to the U.S. reservation, the Court found that Yugoslavia was bound by it, and that Article IX therefore did not afford a basis for jurisdiction in the present case, even prima facie.[19]

Addressing next Yugoslavia's claims of jurisdiction under Article 38 of Rules of Court, the Court found that here, too, in absence of U.S. consent, it could not exercise jurisdiction in the present case, even prima facie.[20] As Article 38 itself provides, "[no] action [may] be taken *** unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."[21]

As a consequence, the Court found that it manifestly lacked jurisdiction to entertain Yugoslavia's application against the United States.[22] The Court noted that "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice."[23] There was, as the Court explained, a "fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law."[24] The former required consent, while the latter question "can only be reached when the Court deals with the merits after having established its jurisdiction. . . ."[25]

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16. *Id. See* U.S. Reservations and Understandings to the Genocide Convention, November 25, 1988, *28 I.L.M. 782* ("before any dispute to which the United States is a party may be submitted to the jurisdiction of the [I.C.J. under article IX of the Convention], the specific consent of the United States is required in each case").

17. *Id.* Reservations such as these have understandably generated much in the way of debate as to their effect upon the integrity and efficaciousness of treaties. The Genocide Convention in particular resulted in an advisory opinion by the I.C.J. in 1951 which recommended a flexible approach to reservations, so as to encourage widespread international ratification of the Convention. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 21. However, the Court warned against acceptance of reservations which would "frustrate the purposes which the [U.N.] General Assembly and the contracting parties had in mind. . . ." *Id.* at 24. Four dissenting judges did not endorse this flexible approach, contending that it was preferable to lose a contracting party which insisted upon modifications than to permit it to join against the wishes of States which had unconditionally accepted all of the Convention's obligations. For a fuller account of the Convention's history, *see* Lippman, *supra* note 7.

18. *Id.*

19. *Id.* at 7-8.

20. *Id.* at 8.

21. *Id. See also* Article 38 of Rules of Court, http://www.icj-cij.org/icjwww/ibasicdocuments/basetext/irulesofcourt.html#Article38.

22. *Id. See also Yugoslavia v. Spain*, http://www.icj-cij.org/icjwww/idocket/ iysp/iyspframe.html.

23. *Id.*

24. *Id.* at 8-9.

25. *Id.* at 9.

The Court concluded by stressing that irrespective of consent, States "remain in any event responsible for acts attributable to them that violate international law, including humanitarian law," and warned that the parties in the instant matter should "take care not to aggravate or extend the dispute."[26]

Yugoslavian Judge *ad hoc* Kreca dissented from the majority's holding on both procedural and substantive grounds, citing, *inter alia*, what he referred to as the Court's failure to equalize the composition of the Bench.[27] In his opinion, the fact that all the respondent States were members of NATO acting "as integral parts of an organized whole"[28] led to "the inevitable conclusion *** that all the respondent States are *in concreto* parties in the same interest."[29] In support of this position Judge Kreca relied upon *Customs Regime between Germany and Austria*, Order of July 20, 1931, which stated that "all governments which, in the proceedings before the Court, come to the same conclusion, must be held to be in the same interest. . . ."[30]

In light of this, Judge Kreca asserted that the inherent right to equalization on the Bench required that Yugoslavia should have the right to choose five judges *ad hoc*, because five of the ten respondent States[31] had permanent judges on the Bench.[32] Further, he concluded that those respondent States not originally having judges on the Bench[33] should not have been allowed to appoint their own judges *ad hoc*, citing again the fact that all respondents were acting in concert as one, and therefore were already represented by the five permanent judges.[34]

Moreover, humanitarian concerns required the imposition of provisional measures, according to Judge Kreca. "In the case at hand, it seems that 'humanitarian concern' has lost [its] acquired autonomous legal position *** [Indeed,] 'humanitarian concern' [in the case at bar] has as its object the fact of an entire nation, in the literal sense."[35] Accordingly, since such concerns had assumed primary importance in the "more recent practice of the Court," Judge Kreca found it "entirely inexplicable" that the present matter did not warrant provisional measures under similar reasoning.[36]

As for the issue of the United States' reservation to Article IX of the Genocide Convention, Judge Kreca found that portions were entirely "incompatible with the object and purpose

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26. *Id.*

27. *See* Dissenting Opinion of Judge Kreca, http://www.-icj-cij.org/icjwww/idocket/iyus/iyusorders/iyus_.../iyus_iorder_19990602_Kreca.htm, at 1-4.

28. *Id.* at 1.

29. *Id*. at 2.

30. *Id. See also* Customs regime between Germany and Austria (P.C.I.J., Series A/B, No. 41, p. 88 [1931]).

31. The United States of America, the United Kingdom, France, Germany and the Netherlands.

32. *See* Dissenting Opinion of Judge Kreca, http://www.-icj-cij.org/icjwww/idocket/iyus/iyusorders/iyus_.../iyus_iorder_19990602_Kreca.htm, at 2.

33. Belgium, Canada, Italy and Spain.

34. *Id.* at 3-4. (Relying upon *Territorial Jurisdiction of the International Commission of the River Order*, P.C.I.J., Series C, No. 17-11, [1929], p. 8; *Customs Regime between Germany and Austria*, P.C.I.J., Series A/B, No. 41, [1931], p. 88).

35. *Id.* at 6.

36. *Id.* at 8.

of [the Convention.]"[37] Accordingly, since the relevant articles of the Convention were agreed to have codified international law, and thus represented *ius cogens*,[38] which could not be derogated from, the U.S. reservation was rendered null and void.[39]

Beyond the plain irony of the fact that Yugoslavia determined to proceed under the unlikely aegis of the Genocide Convention, there is also the profoundly indigestible position of the majority on court composition that leaves one wondering.[40] That the sole dissenting voice upon the Bench was Yugoslavian Judge *ad hoc* Kreca will not surprise many. What may, however, catch the observant eye is the apparent soundness of that judge's argument. Despite the official insistence that the Court's Members "do not represent their governments but are independent magistrates,"[41] there is little doubt that nationality does matter, as evidenced by the Court's provisions allowing for the appointment of judges *ad hoc* for equalization purposes. Moreover, Judge Kreca's characterization of the various respondents as "parties of the same interest" would seem to be the more genuine assessment of the circumstances, procedural rules notwithstanding.

But beyond this there looms the larger question of what purpose a treaty may serve that allows its signers to "opt out" of certain of the consequences of possible noncompliance. The I.C.J. itself, in an advisory opinion on reservations to the Convention in 1951, warned against any which would "frustrate the [Convention's] purpose"[42]—although it did so while allowing reservations generally, so as to encourage widespread ratification.[43] But a vigorous dissent shunned this flexible approach, preferring the loss of a contracting party to allowing the dilution of the Convention.[44]

Quite possibly, the dissent's position was the wiser. The United States, through the ingenious employment of reservations and "understandings," has proven itself only too adept at legal creativity. Such craft as seen through the instant case would of course bring a smile to those who find persuasive the concept that success at enforcing international law depends upon the distribution of power in any particular case.[45] However, this is the very appearance of impropriety that bodies such as the International Court of Justice must strive to rise above.

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37. *Id.* at 10 (citing favorably Jordan Paust, *Congress and Genocide: They're not going to get away with it*, MICH. J. INT'L L., Vol. 11, 1989-1990, pp. 92-98).

38. "A peremptory norm of international law . . . a norm accepted and recognized by the international community [and] a norm from which no derogation is permitted. . . ." BLACK'S LAW DICTIONARY 833, (6th ed, 1990).

39. *Id.* at 10-11.

40. This is to say, Article 31 of the Statute of the Court would seem to allow much room for interpretation on this issue. That the various cases were docketed separately does little to mask the fact that the respondents were parties of the same interest. However, this should be viewed in light of the fact that the legal basis underlying Yugoslavia's complaint was untenable in the first instance.

41. *See* International Court of Justice, General Information, http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html.

42. *See* 1951 I.C.J. 15, 24, *supra* note 17.

43. *Id.* at 24-26.

44. *See* note 17, *supra*.

45. *See, e.g.*, MORGENTHAU & THOMPSON, POLITICS AMONG NATIONS 312 (6th ed. 1985).

Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service & United Parcel International, Inc.

177 F.3d 1142 (9th Cir. 1999)

Ninth Circuit Holds the Warsaw Convention Does Not Apply to Lost Cargo Shipped Between Taiwan and California Because Taiwan Is Not a Signatory Thereto Although China Is.

In *Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service*,[1] the United States Court of Appeals for the Ninth Circuit held that Taiwan is not bound by China's adherence to the Warsaw Convention (the "Convention").[2] Recognizing that it was confronted with a political question,[3] the court deferred to the political branches in determining whether China's status as a signatory was sufficient to bind Taiwan to the terms of the Convention.[4] Under constitutional constraints, the court merely considered whether the statements and actions of United States political departments,[5] which recognized China and derecognized Taiwan, meant China's adherence to the Warsaw Convention bound Taiwan.[6]

Mingtai Fire & Marine Insurance Co., Ltd. ("Mingtai") insured a package, shipped by Gemtronics Corp. from Taipei, Taiwan to San Jose, California.[7] The package was lost en route by the air carrier, United Parcel Service.[8] Mingtai brought suit in the Northern District of California against United Parcel Service and United Parcel Service International (collectively "UPS"),[9] claiming loss of cargo under the Convention for the Unification of Certain Rules Relating to International Transportation By Air, the relevant provision of the Warsaw Convention.[10] Mingtai alleged the lost package contained computer chips worth $83,454.80.[11] In its answer, UPS argued that the Convention did not apply and that its air carrier liability was limited to the $100 release value provided by the airway bill.[12]

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1. 177 F.3d 1142 (9th Cir. 1999).
2. 49 U.S.C.A. Sec. 40105 (the Warsaw Convention is reprinted in the note pertaining to this section).
3. *See Mingtai*, 177 F.3d at 1145. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1 cmt. c, reporters' notes 4 (1986 Main Vol.) (discussing generally the political question doctrine which embodies a form of judicial restraint).
4. *See id.*
5. *See id.*
6. *See* Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service, 177 F.3d 1142, 1145 (9th Cir. 1999).
7. *See id.* at 1144.
8. *See id.*
9. *See id.*
10. Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934). This provision is reprinted in the note following 49 U.S.C.A. Sec. 40105, known as the "Warsaw Convention" or the "Convention."
11. *See Mingtai*, 177 F.3d at 1144.
12. *See id.*

The District Court held that Taiwan, which was not a signatory to the Convention, was not bound by China's adherence thereto and entered summary judgment in favor of Mingtai in the amount of $100, thereby upholding the limitation on liability provided by the airway bill.[13] Further, Mingtai's state law claims for negligence were held to be preempted by federal law.[14] Mingtai appealed the ruling of the District Court, except with regard to the dismissal of its state law claims.[15]

On appeal, the Ninth Circuit recognized that the Convention applies only to those shipments transported between the territories of signatory states (or "High Contracting Parties").[16] It was undisputed that Taiwan was not a signatory,[17] but China had signed the Convention with the declaration that the Convention "shall of course apply to the entire Chinese territory including Taiwan."[18] Thus, the sole question on appeal was whether China's status as a High Contracting Party was sufficient to bind Taiwan to the terms of the Convention.[19]

The court was confronted with a controversy precariously nestled within two overlapping spheres: the effects of foreign sovereign recognition and the status of treaties.[20] In setting forth a foundation for its ultimate ruling, the court recognized that the realm of foreign relations is committed, by the Constitution, to the political departments of the Federal Government and that the propriety of the exercise of that power is beyond the scope of judicial review.[21] As the Supreme Court has routinely held, the Constitution commits to the Executive Branch alone the authority to recognize, and to withdraw recognition from, foreign regimes.[22]

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13. *See id.*

14. *See id.* at 1144, n.1.

15. *See Mingtai*, 177 F.3d at 1142.

16. *See id.* at 1144. *See also* Warsaw Convention, art. 1(2).

17. *See Mingtai*, 177 F.3d at 1144.

18. *Mingtai*, 177 F.3d at 1144; *see also* 2 CHRISTOPHER N. SHAWCROSS & KENNETH M. BEAUMONT, AIR LAW A17 (Peter Martin et al. eds., 4th ed. 1977) (1997 supplement).

19. *See Mingtai*, 177 F.3d at 1144.

20. *See id.*

21. *See* United States v. Pink, 315 U.S. 203, 222-23 (1942); *see also* Taiwan v. United States Dist. Ct. for the N. Dist. of Cal., 128 F.3d 712, 718 (9th Cir. 1997) (recognizing "the primacy of the Executive in the conduct of foreign relations' and the Executive Branch's lead role in foreign policy") (quoting First Nat'l City Bank v. Banco Nacionale de Cuba, 406 U.S. 759, 767 (1972)).

22. *See e.g.*, *Banco Nacionale de Cuba*, 376 U.S. 398, 410 (1964) (stating that, "Political recognition is exclusively a function of the Executive."); *Pink*, 315 U.S. at 223 (stating, "Recognition of a foreign sovereign conclusively binds the courts."); and Jones v. United States, 137 U.S. 202, 212 (1890) (determining, "who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question").

Similarly, the court recognized that governmental action must be regarded as of controlling importance in determining the status of treaties following a change in the status of a foreign sovereign.[23] Realizing that the controversy before it was of a political nature,[24] the court simply looked to the statements and actions of political departments in order to determine whether China's adherence to the Warsaw Convention bound Taiwan.[25]

The court found that upon establishing relations with China in 1979, the United States severed diplomatic relations with Taiwan.[26] However, despite terminating its official diplomatic relations, the United States maintained informal, commercial and cultural dealings with Taiwan.[27] The United States continued to deal with the people of Taiwan, but on a basis that did not involve official government representation or diplomatic relations.[28] Other Acts of Congress formalized this continuing relationship.[29] The court concluded that, based on certain provisions in the Taiwan Relations Act,[30] "despite the absence of official relations, the United States continues to deal separately with Taiwan."[31]

The court then looked to the status of treaties as between Taiwan and the United States.[32] In so doing, the Court examined a publication of the State Department, *Treaties in Force*,[33] which contains sections listing bilateral treaties between (1) the United States and "China" and (2) the United States and "China (Taiwan)."[34] The distinction indicated to the court that the United States deals separately with Taiwan absent an express provision to the contrary.[35] More

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23. *See* Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service, 177 F.3d 1142, 1145 (9th Cir. 1999) (quoting Baker v. Carr, 369 U.S. 186, 212 (1962); *see also* Then v. Melendez, 92 F.3d 851, 854 (9th Cir. 1996) (recognizing that whether a treaty remains in force after a change in the foreign status of one of the signatories is a political question).

24. *See Mingtai*, 177 F.3d at 1145; s*ee also Then*, 92 F.2d at 854 (stating, "Thus, courts answer questions regarding the status of treaties following a change in the sovereign status of one of the relevant entities by deferring to the political branches' understanding of the resulting obligations.").

25. *See Mingtai*, 177 F.3d at 1145.

26. *See id*. (quoting Taiwan v. United States Dist. Ct., 128 F.3d 712, 714, n.2 (9th Cir. 1997)).

27. *See Mingtai*, 177 F.3d at 1145.

28. *See* President's Memorandum for All Departments and Agencies: Relations With the People on Taiwan, reprinted in 1979 U.S.C.C.A.N. 36, 75.

29. *See generally* Taiwan Relations Act, 22 U.S.C Sec. 3301-3316.

30. *See, e.g.,* Taiwan Relations Act, 22 U.S.C. Sec. 3301(a)(2) (which states one of its purposes as to provide a structure for "the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan."); and Taiwan Relations Act, 22 U.S.C. sec. 3303(a) which states that:

> the absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to [derecognition].

31. *Mingtai*, 177 F.3d at 1146.

32. *See id.*

33. *See* U.S. Dep't of State, Treaties in Force iii-iv (1997).

34. *Id.*

35. *See Mingtai*, 177 F.3d at 1146.

specifically, with respect to the Warsaw Convention, the listing of "China" does not appear to encompass Taiwan, because where both China and Taiwan are signatories to a treaty, Treaties in Force so indicates.[36]

In reviewing the existing relationship between the United States and Taiwan as evidenced by official political statements, Acts and provisions, the court determined that despite the absence of official relations, the United States continues to deal with Taiwan separately from China.[37] Furthermore, the court found no indication that existing or future agreements with newly recognized China would be considered by the Executive Branch as binding upon Taiwan.[38]

In addition, the court gave considerable weight to the express position of the United States on the issue, as presented in an amicus brief and at oral argument.[39] In these forums, the United States made plain its position that China's adherence to the Convention did not bind Taiwan.[40]

In deferring to the political departments' position regarding the status of Taiwan,[41] the court held that China's adherence to the Warsaw Convention was not binding upon Taiwan and that the Convention therefore did not apply to the lost cargo. Thus, the court affirmed the District Court's decision upholding the limitation of liability in the airway bill.[42]

Despite not having the authority to answer a political question, the court was called upon to interpret the position of those entities with express authority to determine and implement foreign policy. In this case the evidence was unequivocal and the foreign policy position clear. However, presented with a scenario in which a foreign policy position is less clear, the courts may be forced to rely on presumptions where the political branches have left uncertainty. If evidence of the United States' political posture were conflicting with respect to a foreign government, the courts might have to withhold decision until the appropriate branch of government makes an official statement. Here, the Ninth Circuit, showing appropriate discipline, recognized its own caution, stating, ". . . we do not independently determine the status of Taiwan; instead, we merely recognize and defer to the political departments' position that Taiwan is not bound by China's adherence to the Warsaw Convention."[43]

Eric Schwarz

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36. *See* U.S. Dep't of State, Treaties in Force iii-iv (1997) (where under "Atomic Energy," the "China" section lists only the "Protocol on cooperation in nuclear safety matters"; under "Atomic Energy," the "China (Taiwan)" section lists only the "Agreement for cooperation concerning civil uses of atomic energy."); and *id*. at 52, 315.

37. *See Mingtai*, 177 F.3d at 1146.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See Mingtai*, 177 F.3d at 1147 (noting, "We caution, however, that we do not independently determine the status of Taiwan; instead, we merely recognize and defer to the political departments' position that Taiwan is not bound by China's adherence to the Warsaw Convention").

42. *See id.*

43. *See id.*

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.

119 S. Ct. 1961 (1999).

Supreme Court Holds 5-4 that Today, As in 1789, Federal Courts May Not Interfere with a Debtor's Property Prior to Judgment.

The Supreme Court held in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund Inc.*[1] that, in an action for money damages, a U.S. district court does not have the power to issue a preliminary injunction preventing a defendant from transferring assets in which no lien or equitable interest is claimed by the plaintiff.[2] The Court reasoned that such an equitable remedy was historically unavailable[3] and that federal courts have the same equity powers exercised by the English Court of Chancery at the time the Constitution was adopted and the Judiciary Act of 1789 was enacted.[4] Permitting federal courts to grant creditors such injunctions "could radically alter the balance between debtors' and creditors' rights,"[5] and "might induce creditors to engage in a race to the courthouse in cases involving insolvent or near-insolvent debtors, which might prove financially fatal to the struggling debtor."[6]

Respondent, Alliance Bond Fund, Inc. ("Alliance Bond"), eleven U.S. investment funds, purchased unsecured notes from the petitioner, Grupo Mexicano de Dessarollo (GMD).[7] GMD was a Mexican holding company that, through its subsidiaries, constructed and operated roadways.[8] From 1990 to 1994, GMD participated in the Mexican Government's toll road concession program, the purpose of which was to build intercity highways.[9] The program allowed participating concessionaires to arrange private financing for the construction of roads in return for the right to collect tolls.[10] When road toll revenue fell below anticipated levels,[11] GMD undertook to raise money by selling $250 million in notes due in 2001, $75 million of which were sold to the respondent.[12] The Notes required GMD to pay interest twice a year at an annual rate of 8.25%.[13] Five GMD subsidiaries guaranteed the notes, which were ranked pari passu with all present or future unsubordinated debt of GMD.[14]

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1. 119 S. Ct. 1961 (1999).
2. *See Grupo Mexicano*, 119 S. Ct. at 1967.
3. *Id*. at 1974.
4. *Id*. at 1967.
5. *Id*. at 1973.
6. *Id*. at 1973.
7. *See* Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A., 143 F.3d 688, 688 (2d Cir. 1998) ("Alliance Bond").
8. *Id*. at 688.
9. *Id*.
10. *High Court Limits Federal Judges' Control Over Defendants' Assets*, THE LEGAL INTELLIGENCER, June 18, 1999, at 4.
11. *Id*.
12. *See Alliance Bond*, 143 F.3d at 688.
13. *Id*.
14. *See id*.

However, in June 1997, in its annual report filed with the Securities and Exchange Commission, GMD confirmed that it was experiencing financial difficulty.[15] In August 1997, the company failed to make its interest payment on the Notes. The guarantors also failed to satisfy their obligations under the terms of the Notes.[16]

The Mexican government responded by establishing the "toll road rescue program." Under the terms of the program, the Mexican government promised GMD and concessionaires Toll Road Notes to "reimburse them for unpaid construction receivables and expenses." In exchange for the Toll Road Notes, the Mexican government would, in due time, assume ownership of the toll roads. GMD stated, in its Third Quarter 1997 financial statement, that it expected to receive $309 million in Toll Road Notes.[17]

In addition to the Notes, GMD owed other creditors approximately $450 million, the largest being the Mexican government (for back taxes), various Mexican banks, other Mexican financial institutions, trade creditors, and terminated employees.[18] In August 1997, GMD began to renegotiate its debt with the Mexican bank.[19] In October 1997, GMD publicly announced that of its expected $309 million of the Toll Road Notes, it had assigned $100 million to the Mexican government and $17 million to terminated employees.[20] Negotiations to restructure between GMD and the holders of the Notes (including the respondent) failed.[21]

On December 11, respondents accelerated the principal amount due on the Notes.[22] On December 12 respondents filed suit in U.S. District Court for the Southern District of New York.[23] The complaint alleged that GMD was at risk of insolvency, or currently insolvent, and that it was preferring its Mexican creditors "by its planned allocation of Toll Road Notes to the payment of their claims, and its transfer to them of Toll Road Receivables; and that these actions would frustrate any judgment respondents could obtain."[24] The respondents alleged breach of contract and requested the amount due on the Notes[25] and a preliminary injunction to restrain GMD from assigning its Toll Road Notes.[26] The District Court immediately issued a temporary restraining order prohibiting GMD and the Guarantors from assigning their rights to the Toll Road Notes.[27] On December 23, under Federal Rule of Civil Procedure 65 ("Rule

15. *Id.* In its report GMD "expressed 'substantial doubt' that it could continue as a going concern."
16. *Id*.
17. *Id*.
18. *Id*. at 692.
19. *Id*.
20. *See Grupo Mexicano*, 119 S. Ct. at 1964.
21. *Id*.
22. *Id*.
23. *See Alliance Bond*, 143 F.3d at 691.
24. *See Grupo Mexicano*, 119 S. Ct. at 1964-1965.
25. *Id*. at 1965. Respondents sought $80.9 million for breach of contract damages.
26. *Id*. at 1965.
27. *See Alliance Bond*, 143 F.3d at 691; *Grupo Mexicano*, 119 S. Ct. at 1965.

65"),[28] the District Court entered an order prohibiting GMD "from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting [petitioner's] right to, interest in, title to or right to receive or retain, any of the [Toll Road Notes]."[29] The Court also ordered respondents to post a $50,000 bond.[30] The Second Circuit affirmed, holding that the district court possessed the authority to issue a preliminary injunction prohibiting GMD from distributing assets not related to the pending litigation.[31]

The primary issue before the Supreme Court was whether or not, in a suit for monetary damages, the district court had the authority to grant a preliminary injunction, enjoining the defendant from transferring assets as to which no lien or equitable interest had attached.[32] The Court reversed and remanded, holding that a district court does not have the authority to issue such an injunction.

Writing for a scant 5-4 majority, Justice Scalia conducted a detailed historical analysis and found that the federal courts have substantially the same equity jurisdiction the English Court of Chancery had at the time the Constitution was adopted and the Judiciary Act of 1789 was enacted thus, "the substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction."[33]

The United States, as amicus curiae, contended there were exceptions to "the well-established general rule that a judgment fixing the debt was necessary before a court in equity would

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28. Federal Rule of Civil Procedure 65 permits a temporary restraining order on a verified complaint when it is shown that the petitioner will suffer "immediate and irreparable injury, loss or damage" if the restraining order is not granted. *See* STEPHEN C. YEAZELL, 1998 FEDERAL RULES OF CIVIL PROCEDURE, Aspen Law and Business, (1998) at 135.

29. *See* Alliance Bond, 143 F.3d at 691.

30. *See Grupo Mexicano*, 119 S. Ct. at 1965.

31. GMD had argued that Rule 65 was not applicable because the Investors sought monetary damages, as opposed to equitable relief. *Id*. at 692. Thus, the company contended that Federal Rule of Civil Procedure 64 ("Rule 64") was "[t]he only procedural mechanism to prevent a litigant from concealing or transferring assets in order to frustrate a potential judgment." *Id*. Rule 64 provides, in pertinent part, "all remedies providing for the seizure of the person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held." *See* STEPHEN C. YEAZELL, 1998 FEDERAL RULES OF CIVIL PROCEDURE 134 (1998).

    On the other hand, GMD argued that since the Toll Road Notes were unrelated to the Guarantee Notes purchased by the Investors, Rule 65 was not applicable because the Investors did not claim an equitable interest in the Toll Road Notes. *Id*.

    The circuit court found that under New York law, an attachment is not available where the plaintiffs seek only monetary damages, and therefore Rule 64 was inapplicable. *Id*. at 693. However, the court determined that the purpose of Rule 65 preliminary injunction "is to preserve the status quo between parties pending final determination of the merits." *Id*. at 692. In addition, the district court "is vested with full discretion to determine whether to grant the injunction and its scope." *Id*. Thus, the Second Circuit held that the district court had acted within its authority in issuing the injunction. *Id*. at 693.

32. *See Grupo Mexicano*, 119 S. Ct. at 1967.

33. *Id*. at 1967.

interfere with the debtor's use of his property." However, the Court found that "the existence and scope of these exceptions is by no means clear," and that Respondent had not established any exception to the general rule relevant to this particular case.[34]

Moreover, this general rule was not changed by the merger of law and equity, since the merger did not alter substantive rights.[35] The Court found that even in the absence of "historical support," it would "not be inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be frozen by general creditor[36] claimants before their claims have been vindicated by judgment." Thus, this general rule was regarded as serving the "[p]rocedural end of assuring exhaustion of legal remedies," and the "substantive end of giving the creditor an interest in the property which equity could act upon."[37]

The Court then examined the post-merger cases of *Deckert v. Independence Shares*,[38] *United States v. First National City Bank*[39] and *DeBeers Consolidated Mines, Ltd. v. United States*,[40] and found each to support its view that the preliminary injunction, in this case, was beyond the District Court's equitable power.[41]

The Court also found significance in the fact that the English Court of Chancery did not provide a prejudgment injunctive remedy until 1975 and that its decision to do so has generally been considered "a dramatic departure from prior practice."[42] In 1975, in *Mareva Compania*

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34. *Id*. at 1968.

35. *Id*. at 1969.

36. *Id*. at 1969. A general creditor is one without a judgment. *Id*. at 1968.

37. *Id*. at 1969.

38. *See* Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). In *Deckert* the plaintiffs sought an order enjoining the defendant from disposing of any assets pending the conclusion of their damage action for fraudulent misrepresentation. However, the Court found that *Deckert* was not on point because in *Deckert* the plaintiff's complaint had stated a cause of action for equitable relief. *See Grupo Mexicano*, 119 S. Ct. at 1971.

39. *See* United States v. First National City Bank, 379 U.S. 378 (1965). In *First National* the United States sought to enjoin a bank from transferring the assets of a foreign corporation that allegedly owed United States income tax. The Court found *First National* distinguishable for, among other reasons, the fact that it did not involve the Court's general equitable powers under the Judiciary Act of 1789, but rather its power under the statute authorizing issuance of tax injunctions. *See Grupo Mexicano*, 119 S. Ct. at 1971.

40. *See* DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945). In *DeBeers* the government brought an antitrust suit against various corporations and sought a preliminary injunction to restrain the defendants from transferring their assets from the United States pending adjudication of the merits. The Supreme Court held that the injunction could be issued only where the frozen assets are of the "same character" as final relief. *Id*. In dictum, the Court observed, "[I]t is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. *Id*. No relief of this character has been thought justified in the long history of equity jurisprudence." *Id*.

41. *Id*.

42. *See Grupo Mexicano*, 119 S. Ct. at 1973.

Naviera S.A. v. International Bulkcarriers S.A.,[43] the English Court of Chancery held that a plaintiff could obtain a preliminary injunction, before judgment, against the assets of a defendant or potential defendant, which might later be required to satisfy a judgment in the plaintiff's favor.[44] Nevertheless, the Supreme Court in *Grupo Mexicano* believed that enjoining the debtor's ability to dispose of his property at the instance of a nonjudgment creditor is "incompatible with the [Court's] traditionally cautious approach to equitable powers, which leaves any substantial expansion of past practice to Congress. . . ."[45]

The Court concluded its analysis by acknowledging the compelling considerations on both sides of this issue; however, it considered that Congress, and not the Court, should decide it.[46]

The Supreme Court's decision forecloses a type of relief that is crucial to a plaintiff involved in an international dispute. Under current law, potential plaintiffs involved in an international dispute have limited recourse, and in some cases, no recourse at all under Rule 64. For example, under New York law, "a preliminary injunction is unavailable in an action for a sum of money only."[47] In addition, New York's attachment statute prevents attachment of assets not located within the state.[48] Adverse state attachment statutes will invariably promote

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43. [1975] 2 Lloyd's Rep. 509. In *Mareva*, the shipowners leased the vessel, Mareva, to charterers, who in turn subchartered it to the Indian government, for a trip to India and then to return to London. The purpose of the trip was to deliver fertilizer to India. The charterers made the first two installment payments to the shipowners, but defaulted on the third payment, even though they had received payment from the subcharterers. The subcharterers had made payment to the London account of the charterers. The shipowners feared that the charterers would remove the funds before they could execute a judgment. Therefore, they sought an injection prohibiting removal of the funds. Relying on section 45 of the Supreme Judicature Act of 1925 for authority, Lord Denning stated, "if it appears that [a] debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent [the debtor] disposing of those assets."

    Section 45 of the Judicature Act 1925, states: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient." *Id*.

44. Since its inception, the Mareva injunction and other ex parte orders have become common, with hundreds of orders being made each year with few applications being rejected. *See* Siporex Trade SA v. Comdel Commodities Ltd., [1986] 2 Lloyd's Rep. 428 (Q.B.). *See also* Kern Alexander, *The Mareva Injunction and Anton Pillar Order: The Nuclear Weapons of English Commercial Litigation*, 11 FLA. J. INT'L L. 487, 493 (1997).

45. *Id*. at 1973. In dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, argued that "[t]his case involves no judicial usurpation of Congress' authority. Congress, of course, can instruct the federal courts to issue preliminary injunctions freezing assets pending final judgment, or instruct them not to, and the courts must heed Congress' command." The dissent also noted that "the Legislature, however, has said nothing about preliminary freeze orders" and therefore the federal courts must rely on their "[f]lexible jurisdiction in equity . . . to protect all rights and do justice to all concerned." *Id*. at 1979. This "pro-plaintiff" approach is reminiscent of the position taken by Lord Denning in *Mareva*, in which he stated "In face of this danger, I think this Court ought to grant an injunction to restrain the defendants from disposing of these moneys now in the bank in London until the trial or judgment in this action. If the defendants have any grievance about it when they hear of it, they can apply to discharge it. But meanwhile the plaintiffs should be protected." See *Mareva,* [1975] 2 Lloyd's Rep. 509.

46. *Id*. at 1974.

47. *See Alliance Bond*,143 F.3d at 693.

48. *Id*.

venue shopping by plaintiffs involved in international disputes. But perhaps the most compelling argument for granting a *Mareva*-type injunction is to prevent a defendant from escaping its obligations by transferring assets with the intent of preventing a plaintiff from eventually executing a judgment against it.[49] This is particularly relevant in the modern day global economy where a debtor can elude a creditor and frustrate a court judgment with ease.[50]

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49. The dissent contended that such preliminary freeze orders "[w]ould be appropriate in damages actions only upon a finding that, without the freeze, the movant would be unable to collect [a money] judgment. The preliminary asset-freeze order, in short, would rank and operate as an extraordinary remedy." *See Grupo Mexicano*, 119 S. Ct. at 1977.

50. The dissent recognized that although equity courts "[t]raditionally have not issued preliminary injunctions stopping a party sued for an unsecured debt from disposing of assets pending adjudication," a more expansive and dynamic approach to the equitable powers of the federal courts was needed. Justice Ginsburg also noted "equity must evolve over time—to meet the requirements of every case and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed." *Id.*