

Survey of International Law & Trade

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SURVEY OF INTERNATIONAL LAW & TRADE

This survey provides brief digests of cases that represent a variety of aspects of international law and trade that have appeared in the United States Supreme Court, Court of Appeals for the Fourth Circuit and the District of Columbia Circuit, United States Court of International Trade, Federal District Court of the District of Columbia, Court of Appeals of Maryland, Supreme Court of Pennsylvania and Superior Court of Delaware. The cases are grouped in topical categories and references are given for further research.

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CONTRIBUTORS

Contributing to this survey were: Catherine Allen, Robert Bracknell, Jennifer Brune, John Doody, James Griffith, E. Franklin Haignere, John Harroun, David Jackson, Alexis Kramer, Jeffrey Miller, Jonathan Pasterick, Michael Rothman, Lori Schectel and Michael Stein. Survey Editor was Xiang Wang.

I. CRIMINAL LAW

EXHAUSTION OF STATE REMEDIES IS REQUIRED BEFORE APPLYING FOR FEDERAL WRIT OF HABEAS CORPUS UNDER THE VIENNA CONVENTION. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1997).

Francisco Breard, a citizen of both Argentina and Paraguay, was convicted and sentenced to death for the attempted rape and capital murder of Ruth Dickie in 1992. On May 1, 1995, Breard sought state collateral relief by filing for writ of habeas corpus. After that was denied, Breard sought federal collateral relief by filing a petition for writ of habeas corpus on August 30, 1996. This was six days after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, which created new Chapter 153 and 154 provisions which would be applicable to habeas proceedings against a state in capital cases; thus the AEDPA standards were held to apply in the case. Breard contended that his convictions and sentence should be voided because authorities failed to notify him that, as a foreign national, he had the right to contact

either the Consulate of Argentina or the Consulate of Paraguay pursuant to the Vienna Convention on Consular Relations, 21 U.S.T. 77. Breard failed to raise this issue in the state court proceedings. The district court held that, because Breard had never raised this claim in the state court, the claim was procedurally defaulted and that Breard had failed to establish cause to excuse the default.

Held: Affirmed. Judge Hamilton writing for the United States Court of Appeals for the Fourth Circuit affirmed the lower court's decision to deny Breard's petition for writ of habeas corpus. The court examined the impact of the AEDPA. Also, a state prisoner must exhaust all state remedies before filing for federal habeas relief. The exhaustion requirement is not satisfied if the petitioner presents new legal theories for the first time in his federal habeas petition. The court relied heavily upon *Murphy v. Netherlands*, 116 F.3d 97 (4th Cir. 1997), to conclude that Breard's contention that his Vienna Convention claim showing was insufficient to show it was unavailable. In reaching this conclusion, the court noted that a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant and that in previous cases claims under the Vienna Convention had been raised. Judge Butzner filed a concurring opinion which emphasized the importance of the Vienna Convention. While he agreed that the Convention was not violated in the case, he examined and explained the role and importance of the Vienna Convention and concluded that its "importance . . . cannot be overstated." *Significance:* A foreign national's failure to raise his Vienna Convention claim in state court brings into play the principles of exhaustion and procedural default.

II. ADMIRALTY

IT IS IMPORTANT TO DISTINGUISH BETWEEN THE "PRODUCT ITSELF" AND "OTHER PROPERTY." *Saratoga Shipping Company v. J.M. Martinac & Company*, 117 U.S. 1783 (1997).

In January 1986, the fishing vessel M/V Saratoga sunk when its engine room caught fire and flooded. Approximately 15 years prior to the Saratoga's sinking, J.M. Martinac & Company had built the vessel, installed its hydraulic system and sold it to a man by the name of Joseph Madruga. After purchasing the ship, Madruga decided to add extra equipment to it, and after adding various equipment to the ship, resold it to the Saratoga Shipping Company. Then, in 1987, after the accident, Saratoga Fishing Company filed a tort suit in admiralty against J.M. Martinac & Company and Marco Seattle, Inc. After a trial in the United States District Court for the Southern District of California, the district judge

determined that the hydraulic system had a design defect and as result awarded Saratoga Fishing damages. The damages compensated for the loss of equipment that Madruga had added after purchasing the ship new from J.M. Martinac & Company. Both Plaintiff and Defendant appealed this decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit subsequently reversed, holding that the district judge erred in determining that damages could be awarded for the added equipment. The Circuit Court reasoned that when Madruga resold the ship to Saratoga, the added equipment had become part of the defective product itself. However, a dissenting judge argued that the "product itself" was the original vessel when J.M. Martinac & Company first introduced it into the "stream of commerce."

Held: Reversed. Applying the *East River* admiralty tort doctrine, Justice Breyer reversed the Ninth Circuit's decision and sided with the Circuit's dissenting judge. The U.S. Supreme Court explained that when a manufacturer puts an item into the stream of commerce by selling it to an "Initial User," (in this case, Madruga) the item or the vessel is the "product itself." Breyer distinguished this product from the equipment Madruga added before he resold the ship, which the Court classifies as "other property." Simply because Madruga resold the vessel to another user does not alter the status of the ship as the "product itself" or the status of the added equipment as "other property." The Court considered the general principle of admiralty tort law that manufacturers can be held liable for damages for foreseeable physical harm caused by its own defects. A plaintiff cannot, however, recover from lost profits under general principles of contract law. Upon such consideration and in weighing *East River* Doctrine's distinction between the "product itself" and "other property," the Court concluded that the equipment added to the vessel after the initial sale to Madruga was not part of the product, the hydraulic system, that caused the physical damage to the ship. As a result, the Court awarded Saratoga Fishing Company damages for the physical destruction of the added equipment. *Significance:* This case turns on the *East River* Court's distinction between the "product itself" and "other property." Had the Court found the added equipment to be part of the original product initially placed into the stream of commerce by Martinac, the Saratoga would not have recovered any damages, as general tort law usually only allows recovery for other property.

THE PRESUMPTION THAT A MOVING VESSEL IS AT FAULT IN A COLLISION WITH A STATIONARY OBJECT DOES NOT APPLY WHERE THE OBJECT IS A VESSEL THAT IS NOT AT ANCHOR; ALSO, A CLAIM OF DAMAGES FOR A LOST CATCH LODGED BY A FISHING VESSEL OWNER, IS NOT SPECULATIVE

WHERE THE LOST PROFITS ARE PROVEN WITH REASONABLE CERTAINTY. *Yarmouth Sea Products Ltd. v. Scully*, 131 F.3d 389 (4th Cir. 1997).

The owner of a fleet of fishing vessels filed suit against the charterer of a sailing yacht to recover damages arising from a collision at sea. The United States District Court for the District of South Carolina entered judgement for the fleet owner following a bench trial. The defendant brought this appeal, challenging the doctrinal basis upon which the court assessed liability. The appellant also challenged the method applied for the calculation of damages. The Fourth Circuit affirmed the judgement, but vacated and remanded the issue of damages.

The appellee was a Canadian wholesale fish broker who frequently contracted his fleet to fishermen under the terms of a standard "lay share agreement." At the predawn time of the collision, the fishing vessel, named the "Lady Olive Marie," was drifting in stormy seas roughly 130 miles from Yarmouth, Nova Scotia. The Lady Olive Marie was equipped with two properly operating radars, operational VHF and SSB marine radios, and fully illuminated navigation and fishing lights. Also, one person was properly "on watch," in conformity with industry custom. The crew was waiting for the weather to subside so that they could begin fishing.

The appellant was sailing alone in the chartered yacht, the "Coyote," in order to qualify for a sailing competition later in the year. The Coyote was sailing without the benefit of an operational radar, radio, or navigation lights. Because of the complete absence of basic safety and emergency equipment, the lower court found the defendant completely at fault in the accident.

The district court applied the longstanding rule of admiralty that a moving vessel is presumed to be at fault when it collides with a stationary visible object.¹ In this situation, the appellant contended that this presumption was misapplied because the fishing vessel also was not at anchor. Even though not under power, a ship that is adrift cannot be characterized as "stationary." For this reason, the court held that the presumption of fault as allocated was not applicable in this circumstance. Amazingly, no authority previously existed covering a collision with a ship that has "stopped," but not at anchor. As a result, shifting the burden of proof to the appellant was improper, according to the Court of Appeals.

The correct statutory definition that this situation falls within is that of a power driven vessel "underway," because the ship was not "at anchor, or made fast to the shore, or ground."² The significance of this

1. *The Oregon*, 158 U.S. 186, 15 S.Ct. 804 (1895).

2. *Yarmouth Sea Products, Ltd. v. Scully*, 131 F.3d 389, 392. (4th Cir. 1997).

determination is that such a power driven vessel underway has a duty to avoid sailing crafts. This duty is conditioned upon the ships being visually observable. Here, the appellant's ship had no standard, operating navigation lights which effectively rendered him "unobservable." Even though the alternative duty is not applicable, the presumption of fault used by the district court also was not suitable. This would constitute a clear error requiring a reversal if the court considered the mistake prejudicial to the outcome of the litigation.

In this instance, the appellate court declined to overturn the decision of the trial court, considering the error to be harmless. A close reading of the record convinced them that the decision did not rest in any significant way upon the erroneous application of the fault presumption. The district court had based its decision upon the "totality of the circumstances" that were present. The sole proximate cause of the accident, as determined by the court, was Scully's failure to maintain a proper lookout immediately preceding the accident,³ and the absence of basic safety and navigation equipment that are customarily on board vessels. Because the court assigned fault based on "substantial evidence," the court applied the rule of admiralty requiring "a vessel that violates a rule of the road must prove that the violation could not have contributed to the collision to avoid liability."⁴ Ultimately, the court declined to reverse the judgement as to liability because of the undisturbed findings as to breach of duty and causation.

As to the second issue, the appellant disputed the method applied to measure damages from lost profits where fishing vessels and lost catches were at issue. More specifically, the appellant's contention was that assessing damages for lost catch was speculative and uncertain for proper inclusion into any claim of damages. The appellant argued further, that the damages assessed by the district court bore an "insufficient relationship" to previous voyages made by the *Lady Olive Marie*.

The court opened the discussion of this issue by citing Supreme Court authority for the proposition that "the loss of profits or the use of a vessel pending repairs, or other detention, arising from a collision or other maritime tort, . . . , is a proper element of damage."⁵ The asserted key to recovery in such cases, is the ability to prove the loss of profits "with reasonable certainty." What constitutes "reasonable certainty" is heavily fact-based and subject to case-by-case resolution. Further guidance provided by the court through *dicta*, relied on whether the

3. *Id.* at 393.

4. *Id.*

5. *Id.* at 395 (quoting *The Conqueror*, 166 U.S. 110 (1897)).

vessel has been engaged, or was capable of being engaged in profitable commerce, and the specific magnitude of that engagement. The resolution of this issue ultimately became one of evidentiary sufficiency.

The appellant argued that the damages were not proven with reasonable certainty. He further contended that "detention damages" accrued while repairs are being made to the ship, are normally measured by taking a fair average of a vessel's earnings over a number of pre-collision voyages. In this case, the lower court apparently failed to perform an in-depth analysis of the damages, complicated further by lack of a reasoned explanation for its findings. The court concluded that the evidence used for the lost catch determination in this case was based upon the catch of a "similarly situated ship" during the time period that the damaged vessel was out of action. No reference was made to any previous voyages made by the *Lady Olive Marie*. Thus, the court vacated the damage portion of the district court decision for further fact finding and consideration of the issue.

Held: Affirmed in part and vacated and remanded. The admiralty rule that shifts the burden of proof and presumes fault to rest with a moving vessel in a collision with a stationary, visible object does not apply where the stationary object is adrift. Also, damages to be assessed for lost catch of a fishing vessel are proper where the damages are proven with reasonable certainty. *Significance:* The Court of Appeals added a corollary to a long-standing rule of admiralty, covering situations where a vessel is neither anchored, nor affirmatively moving under its own power. The Court of Appeals also clarified the evidentiary burden when proving lost profits within the fishing industry where lost catch is the damage for recompense.

III. INTERNATIONAL TRADE AND COMMERCIAL LAW

MANUFACTURERS OF DENIM JEANS ARE NOT DENIED DUTY ALLOWANCE FOR DENIM FABRIC COMPONENTS ASSEMBLED AND GIVEN FINISHING WASH IN FOREIGN COUNTRY, AS LONG AS THE PROCESS IS INCIDENTAL TO ASSEMBLY. *Levi Strauss & Company v. United States*, 969 F. Supp. 75 (Ct. Int'l Trade 1997).

In this action before the United States Court of International Trade, Plaintiff, the Levi Strauss & Company (hereinafter "Levi") disputed the denial by the United States Customs Service (hereinafter "Customs") of a protest seeking duty allowances on cotton denim fabric components of U.S. origin, shipped to Guatemala for assembly and re-entered into the U.S. Levi, believing the cotton denim components qualified for partial duty allowances under subheading 9802.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"), argued that the subject mer-

chandise neither increased in value, nor improved in condition, notwithstanding the actual assembly or minor operations incidental to assembly. Customs, in contrast, argued that Levi's "enzyme washing" process, better known as "stonewashing," merited no duty allowances because this process exceeded the general rubric of things minor or incidental to assembly.

The sole question before the court, then, was whether Levi's finishing operations were either minor or incidental to assembly and, therefore, placed the subject merchandise within the purview of subheading 9802.00.80.

Held: 1) Enzyme wash is minor and incidental to assembly process; 2) Levi-Strauss & Company is entitled to duty allowance. The court began its discussion by noting that it reviews the question of classification of goods *de novo*, in contrast to a pure factual inquiry, where Customs' determination is entitled to a presumption of validity and subject to the "clearly erroneous" standard.¹ In this instance, the parties did not dispute the applicable tariff provision, nor the material facts. The question for adjudication pertained to whether the material facts satisfied the statutory standard on classification of goods, ultimately a mixed question of law and fact.

The relevant language of subpart (c) of subheading 9802.00.80 states in pertinent part, whether the goods "[h]ave not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting."² Both the court and the parties agreed that the first section of subpart (c) was not at issue because the enzyme wash increased the value and improved the condition of the subject merchandise. The case hinged on whether the enzyme wash fell within the purview of the exception of subpart (c), namely, if the enzyme wash was incidental to the assembly process.

In conducting its analysis, the court turned to the legislative history of HTSUS subheading 9802.00.80. It cited the four-part test espoused in *United States v. Mast Industries, Inc.*,³ noting that Congress intended a balancing test to determine whether an operation of a 'minor nature' is incidental to the assembly process. These four factors include: 1) whether the cost and assembly time incurred for the affected component, relative to the assembly of the finished product, were such that the operations

1. *Bausch & Lomb, Inc. v. United States*, 957 F.Supp. 281, 284 (Ct. Int'l Trade 1997).

2. There are two other subparts to subheading 9802.00.80, albeit, they are not at issue in this case.

3. 69 C.C.P.A. 47, 668 F.2d 501 (C.C.P.A., 1981).

should be considered minor; 2) whether the operations in question were necessary to the assembly process; 3) whether the operations were related to assembly, such that they were logically performed during assembly; and 4) whether the economic and practical considerations were performed practically during assembly.⁴

With respect to the cost and time comparisons, the court found that Levi used the same capital equipment for all of its washing operations. Thus, the capital investment and the cost of the enzyme wash relative to the denim fabric components were deemed minor and incidental to the assembly process. The assembly time comparisons provided concurring results. The court determined that the correct wash time per garment is determined by dividing the time of the wash by the number of garments washed.⁵ The enzyme wash, then, took .334 minutes per garment and was incidental to the assembly process.

The court found for Customs on the issue of necessity to the assembly process. It determined that in manufacturing other apparel, Levi sent fully assembled garments to separate washing facilities. Therefore, the enzyme-wash procedure performed in the same plant, in the court's judgment, was not necessary to the assembly process. Despite finding the finishing operation not necessary to the assembly process, the court nevertheless determined that the process was logically performed during assembly. It opined that the enzyme wash operation was logically performed at the situs of the assembly process where all other assembly and post-assembly steps were performed, and where the trained personnel were located.⁶

The court again found in Levi's favor with respect to the economic and practical considerations of the enzyme-wash process. In the court's judgement, performing the finishing operations on site made defects more readily discoverable after washing the garment. Further, that performing the enzyme wash on-site in Guatemala did reduce packaging costs and reduced the time it took to move the garments to the buyer.

In a final attempt, Customs argued that the United States' finishing industry might be seriously injured by the transfer of finishing operations abroad. The court noted that this argument cuts both ways because denying the duty allowance is a further incentive to U.S. companies to relocate their entire operation offshore. Given the frequent migration of U.S. companies abroad, such logic could further contribute to the demise of the U.S. industry base, which could not have been the intent of Congress.

4. *Id.*

5. *Levi Strauss & Company v. United States*, 969 F.Supp. at 79.

6. *Id.* at 80.

Finally, the court determined that the enzyme-wash was analogous to cleaning and painting, which the statute specifically lists as being minor and incidental to the assembly process. The court, therefore, held that the enzyme-wash was minor and incidental to the assembly process and fell within the purview of the exception to subpart (c) of subsection 9803.00.80 of the Harmonized Tariff Schedule of the United States. *Significance*: A product finished outside of the United States qualifies for duty allowances provided the company can show that the finishing process is minor and incidental to the overall assembly process.

LICENSING REQUIREMENT FOR REPRESENTING ENTITY FROM A FOREIGN SOVEREIGN, PROMULGATED BY EXECUTIVE AGENCY, DOES NOT PROSCRIBE FEDERAL COURT JURISDICTION. *Comet Enterprises Ltd. v. Air-A-Plane Corporation*, 128 F.3d 855 (4th Cir. 1997).

In 1995, President Clinton issued Executive Order No. 12959 prohibiting certain transactions with the government of Iran. This executive order was issued pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq. (1977). In response to this order, the Office of Foreign Assets Control ("OFAC") issued implementing regulations that included within the definition of the government of Iran "any entity controlled by" the government of Iran, and required legal counsel to obtain a license to represent persons in Iran in certain transactions.

In 1991, Air-A-Plane Corporation, a Virginia corporation, entered into a contract with Comet Enterprises, Ltd. ("Comet UK"), a UK corporation. This contract made Comet UK Enterprises the exclusive dealer of Air-A-Plane equipment in Iran. A dispute arose between Comet and Air-A-Plane over sales commissions due Comet Enterprises for sales to the airline of the Islamic Republic of Iran. Comet UK and Comet Enterprise, Ltd. ("Comet Iran"), an Iranian corporation under common management and control with Comet UK, commenced an action against Air-A-Plane in the U.S. District Court for the Eastern District of Virginia on September 14, 1995. The district court dismissed this action because 1) the court lacked jurisdiction over Comet Iran's claim since legal counsel for Comet Iran failed to obtain an appropriate license, and 2) Comet failed to state a claim upon which relief could be granted, since sales commissions to Comet would be a payment proscribed by the executive order.

Held: Reversed and remanded. Judge Motz for the U.S. Court of Appeals for the Fourth Circuit held that the licensing requirement was not a jurisdictional issue. The court cited prior authority relating to similar regulations that held licensing requirements were not jurisdictional in

nature. The court expressed concern that interpreting the licensing requirement to limit federal court jurisdiction would raise "serious constitutional concerns" because the requirement was promulgated by an executive agency. Furthermore, the court held the district court erred in dismissing the action for failure to state a claim upon which relief can be granted. Since exceptions to the executive order's ban existed, the court could not conclude that Comet was unable to prove facts supporting a claim entitling it to relief. This case was remanded to the district court for further proceedings. *Significance*: This case provides guidance in the Fourth Circuit regarding the jurisdictional effect of licensing requirements promulgated by executive agencies for representing entities from a foreign sovereign.

UNDER THE FREE TRADE ACT BETWEEN THE UNITED STATES AND CANADA, WHEN DETERMINING IMPOSITION OF IMPORT FEES, DOES "WHOLLY" REALLY MEAN WHOLLY? *Alcan Aluminum Corp. v. U.S.*, 986 F.Supp. 1436 (Ct. Int'l Trade 1997).

This case, which has been designated a "test case" under the rules of the U.S. Court of International Trade, involved a dispute over processing fees placed on imports (unwrought aluminum ingots) from Canada allegedly in contravention of the Free Trade Agreement ("FTA") between Canada and the United States. Only after completion of the administrative process and payment of all fees imposed by the U.S. Customs Service did the Plaintiff file suit. Plaintiff contended that the ingots should not be subjected to the higher fees. Although an additive to the ingots did not "wholly" originate in Canada, the amount was so minuscule that under the FTA, the doctrine of *de minimis non curat lex* would allow the products to qualify for a reduced processing fee. Alternatively, Plaintiff argued that even if the *de minimis non curat lex* doctrine was inapplicable, the additive underwent such a substantial transformation that the ingot should now be considered as a product "wholly" originating in Canada.

The court first considered the language of the FTA and its related legislation. It was clear from the language that under the FTA goods could only escape the increased fees if they "wholly" originated in the country of origin. The precise language was that "[g]oods originate in the territory of a party if they are wholly obtained or produced in the territory of either party or both parties." In construing the language, the court was guided by the principle that words are given their ordinary meaning to ensure the FTA's purpose is fulfilled. The court found the language clear and that there was no ambiguity which would allow the

ingots to escape the fees, as they were judged not “wholly” Canadian content.

Plaintiff argued that to allow imposition of the fees would destroy the purpose of the FTA, which was to eliminate trade barriers. The court remained unconvinced, as no evidence was presented that the FTA negotiators considered the fees violative of the agreement. Plaintiff furthered that the Department of Commerce, previously under different agreements, had waived fees from other countries when the incoming products were not “wholly” of origin from that country. Although Plaintiff was able to provide concrete examples, the court was unmoved. The court found that the U.S. government has discretion in administering the law of imports and that the Department of Commerce neither abused its discretion, nor violated the law. The court also noted that the recently negotiated North American Free Trade Agreement included a provision which specifically allowed products which were not “wholly” from the originating country to escape the fees.

Plaintiff also argued that there was a change in tariff classification which would allow the ingots to escape the fees. Again the court was undeterred and found that there was no evidence which indicated that any subsequent manufacturing had occurred. Further, the court would not allow Plaintiff to classify the ingots in contravention of the FTA. Accordingly, the court refused to conclude that the tariff classification had changed.

Plaintiff’s last contention was that the enactment of the FTA did not destroy an importer’s right to have the court apply the common law substantial transformation test. Plaintiff stated that the additive was a unique article of commerce which was substantially transformed into a new article when it was melted and molded into the cast of unwrought ingot. The government argued that the additive’s particles never underwent a physical transformation. When applying a test to determine if there was a transformation, the court indicated a number of different factors must be considered, (e.g., the cost of the transformation, whether the end product is no longer the essence of the original product, etc.). In sum, the court found that while the additive was dispersed throughout the molten aluminum, it was never substantially transformed during the processing.

Held: The U.S. Court of International Trade held that the ingots were not “wholly” from Canada and, therefore, the fees collected by the U.S. Customs Service were in accordance with the regulations under the FTA. *Significance:* A country cannot escape fees unless the import is “wholly” obtained or produced in the importing country. The court could have established exceptions where the import included a minuscule element not from the importing country, or where a transformation had oc-

curred in the manufacturing of the product. Here, however, the court refused to open a crack and, instead, insisted that "wholly" means wholly.

COMPANIES MUST COMPLY WITH 19 U.S.C. §1520(c) AND MAINTAIN A SUFFICIENT INTERNAL CONTROL STRUCTURE TO HAVE ENTRIES RELIQUIDATED. *Ford Motor Co. v. United States*, No. 92-03-00164, Slip Op. 97-121, 1997 WL 540789 (Ct. Int'l Trade 1997).

In the early 1980s, the Ford Motor Company ("Ford") began operation of a car and truck plant in Louisville, Kentucky to take advantage of operating in a Foreign Trade Subzone ("FTSZ"); operating in a FT SZ provides manufacturers with certain advantages in their duty fees. Ford used various imported parts, namely engines and transmissions, in these vehicles, and by operating in the FT SZ Ford was able to minimize the duties paid on the imported parts. The prevailing duty rates at the time were 3.3% ad valorem for imported engines and transmissions, 2.6% for completed cars, and 25% for completed trucks. To take advantage of the lower 2.6% rate on completed cars, Ford had to select "Non-Privileged Foreign" ("NPF") status on the customs forms. For NPF status Ford would pay the duty fees due on the cars upon completion. To receive the 3.3% rate with respect to its trucks, Ford had to select "Privileged Domestic" ("PD") status on its customs forms. Under PD status Ford paid the duty fees to U.S. Customs Service ("Customs") before the engines and transmissions entered the FT SZ. Moe Tullock was the Ford representative in charge of ensuring the custom's forms were filled out correctly and was instructed and trained accordingly. Between December 1985 and February 1986 Tullock made myriad errors, including not paying the duty fees and incorrectly characterizing the parts. These entries were liquidated on December 1, 1989, ultimately costing Ford more than \$5 million. Ford timely protested the liquidations. Customs asserted it timely sent Ford sixty-six Notices of Extension of Liquidation between 1986 and 1988; Ford denied receiving these Notices of Extension of Liquidation.

Held: Under 19 U.S.C. § 1520(c), a customs officer may reliquidate an entry to correct a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of law. Chief Judge Carman noted a clerical error exists when a person intends to do one thing but does something else. A mistake of law is defined as where a person knows the facts as they really are, but has a mistaken belief as to the legal consequences of the facts and acts on that mistaken belief. Finally, the court defined an inadvertence as an inattention, oversight, negligence, or lack of care. The court held Ford did not commit a clerical error that would allow it relief under the law because Tullock was required to exercise his own judgment to determine which parts were to be classified.

The court noted that no mistake of fact was committed, since Ford knew the nature of the merchandise, namely the engines and transmissions; rather, the mistake was one of law. In regard to the extension notices that Ford claimed it never received, the court held that while Customs satisfied the presumption that the extension notices were executed and delivered, Ford did not satisfy its burden in demonstrating that it in fact did not receive those notices.

Significance: The court based its decision on Ford's lack of a good faith effort to maintain a sufficient internal control system. Chief Judge Carman noted, "Ford is a sophisticated corporation which is accountable for its errors and cannot blame the Customs Service for its failure to reject the entries," and "Ford's internal record retention system falls woefully short" The court was willing to allow the reliquidation of certain entries, but the company who committed the error must satisfy the requirements of 19 U.S.C. § 1520(c) and maintain a sufficient internal control system in order to recognize a wrong entry and correct that entry within the time permitted under the statute.

WHEN A FEDERAL DISTRICT COURT REMANDS A CASE BACK TO A STATE TRIBUNAL BECAUSE IT APPEARED TO THE COURT THAT IT LACKED FEDERAL SUBJECT MATTER JURISDICTION, A U.S. COURT OF APPEALS ALSO LACKS JURISDICTION ON AN APPEAL FROM THAT ORDER. *Severonickel v. Gaston Reymenants*, 115 F.3d 265 (4th Cir. 1997).

Petitioners Gaston Reymenants, a Belgian citizen, and/or Kola International Limited Establishment ("Kola") were to serve as brokers to Severonickel, a Russian corporation, for the sale of 800 tons of nickel powder that was warehoused in Baltimore. In November of 1994 Severonickel filed a breach of contract claim in Maryland Circuit Court against Reymenants and Kola (hereinafter "Reymenants") claiming that they had failed to pay Severonickel for about \$3 million worth of nickel powder. Severonickel also wanted Reymenants to account for sales of the powder and to return any unsold powder. Reymenants removed the case to the United States District Court for the District of Maryland under 9 U.S.C. § 205. This statute authorizes the removal from state court to federal court of those actions which relate to arbitration agreements falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Severonickel maintained that there was no federal jurisdiction over the breach of contract claim and moved for a remand back to state court. Severonickel argued that the underlying contract did not include an arbitration clause and was not subject to any arbitration agreement. Reymenants argued that the nickel powder contract had been incorporated by

operation of a Protocol into a previous contract between the parties. Reymenant claimed that this earlier contract did contain an arbitration agreement. However, Severonickel contested the validity of both the Protocol and the previous contract. The previous contract was never introduced into evidence and Severonickel did not stipulate to its existence. Furthermore, the Protocol had never been signed by Severonickel.

After a hearing at which these issues were argued, the district court granted Severonickel's motion to remand to state court without prejudice because the court believed that it lacked subject matter jurisdiction over the case. Reymenants appealed the decision to remand the case back to state court, asserting that the court had incorrectly abstained from exercising its jurisdiction to decide whether it had subject matter jurisdiction.

Held: Dismissed. The U.S. Court of Appeals for the Fourth Circuit began its discussion by stating that 28 U.S.C. § 1447 bars appellate review of district court orders which remand removed cases back to state courts. Such orders are not reviewable as long as the district court remanded the case on the ground that it lacked subject matter jurisdiction. The court then proceeded to give two reasons as to why the district court had properly remanded for lack of subject matter jurisdiction. The first was that the district court's written order stated that the removal of the action "was demonstrably improvident, and that therefore subject matter jurisdiction is lacking in this case." Secondly, at the hearing the district court had criticized Reymenants' jurisdictional argument, stating that it rested on "what appears to be just the thinnest of conceivable bases, . . . far too thin a basis for this Court to exercise jurisdiction." The district court went on to declare that "federal jurisdiction, frankly, doesn't seem close on the record as it now exists, doesn't seem close. Doesn't seem close." This satisfied the Court of Appeals that the district court had dismissed for lack of subject jurisdiction because Reymenants had failed to meet his burden of establishing the existence of a valid and applicable arbitration agreement which would have supported federal jurisdiction. *Significance:* If a district court remands a case to a state tribunal on the ground that it lacks subject matter jurisdiction, then an appeal from that decision should be dismissed by a court of appeals for lack of appellate jurisdiction under 28 U.S.C. § 1447.

NORMALLY FORBIDDEN "ADULTERATED" DRUGS CAN BE EXPORTED IF THEY MEET A STRICT FOUR FACTOR TEST. *United States v. Kanasco, Ltd.*, 123 F.3d 209 (4th Cir. 1997).

Kanasco, a drug manufacturer, appealed the decision of the district court to grant summary judgment in favor of the government in a forfeiture action. In the original proceedings the government requested the

seizure and condemnation of adulterated bulk antibiotics subject to forfeiture under 21 U.S.C.A. § 334(a)(1). A drug is considered "adulterated" under 21 U.S.C. § 351(a)(2)(B) if "the methods used in, or the facilities or controls used for, its manufacture, processing, packing, or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice."

Kanasco conceded that the drugs were adulterated, but argued that the drugs were within an export exemption to the regulation. According to 21 U.S.C.A. § 381(e)(1), a drug that is intended for export can fall within the export exception only if it: "(A) accords to the specifications of the foreign purchaser, (B) is not in conflict with the laws of the country to which it is intended for export, (C) is labeled on the outside of the shipping package that it is intended for export, and (D) is not sold or offered for sale in domestic commerce." As the party seeking the benefit of the exemption, Kanasco had the burden of pleading and proving the applicability of the exemption. The district court found that this burden was not satisfied and stated that although there existed a factual dispute, it was immaterial since Kanasco could not satisfy the requirements of § 381(e)(1)(A) and (B). Summary judgment was granted, to which Kanasco appealed to the United States Court of Appeals for the Fourth Circuit.

Held: Affirmed. On appeal, Kanasco contended that § 381(e)(1) does not require that the drugs be manufactured for a specific foreign purchaser, or that they need to comply with "the laws of" a particular country. Kanasco argued that it should be enough that the company could find a foreign purchaser and they could meet the requirements of some foreign nations. The court, however, found that the use of the definite article "the" to describe the words "purchaser" and "country" to mean that an adulterated drug must comply with both the specifications of a particular foreign purchaser and the laws of a specific foreign country. A generalized assertion that the drugs could be sold to a foreign buyer and that the sale would be consistent with the laws of some foreign country was insufficient to satisfy the requirements of § 381(e)(1). The court held that the export exceptions should be narrowly construed, especially when a broad interpretation would seriously damage the overriding purpose of the law.

In the current action the court was particularly concerned that drug manufacturers would ignore the statutory quality requirements and produce adulterated drugs for sale in the United States because the export exemption would provide such manufacturers with an "escape hatch." Manufacturers could produce adulterated drugs for domestic sale, secure in the knowledge that if caught they could apply for the export exemption and satisfy its requirements by finding a foreign buyer for the drugs.

Significance: Drug manufacturers may not produce adulterated drugs and only then find buyers in countries that allow such drugs to be imported. Rather, manufacturers who want to produce adulterated drugs for export must first find specific buyers in countries whose laws permit such drugs to be sold before production may begin in the United States.

DUTCH PENSION PLAN HELD NOT WITHIN THE DEFINITION OF "LABOR ORGANIZATION" AS DESCRIBED IN SECTION 501(c)(5) OF THE INTERNAL REVENUE CODE AND, THEREFORE, WAS DENIED EXEMPTION FROM FEDERAL INCOME TAXATION. *Stichting Pensioenfonds Voor De Gezondheid, Geestelijke En Maatschappelijke Belangen v. United States*, 129 F.3d 195 (D.D.C. 1997).

Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen ("the Fund"), a Dutch pension plan jointly controlled by employers and unions and claiming to be a "labor organization" as described in section 501(c)(5) of the Internal Revenue Code, challenged the Internal Revenue Service's denial of its application for exemption status from federal income taxation.

The Fund had no principal place of business in the United States, nor did it engage in any trade or business in the U.S. The Fund did, however, invest in U.S. stocks and municipal funds, and in 1993 its U.S. security custodians withheld and paid to the U.S. Treasury over \$8 million dollars in income tax. The Fund then claimed tax-exempt status as a "labor organization" under section 501(c)(5) of the Internal Revenue Code and filed suit in the U.S. District Court for the District of Columbia for the \$8 million it paid in taxes. The District Court granted summary judgment for the United States, holding that the Fund had failed to satisfy its burden of proving an alleged tax exemption "unambiguously." *Stichting Pensioenfonds Voor De Gezondheid, Geestelijke En Maatschappelijke Belangen v. United States*, 950 F. Supp. 373, 374, 379 (D.D.C. 1996). The U.S. Court of Appeals for the District of Columbia Circuit reviewed the district court's grant of summary judgment *de novo*.

Held: Affirmed. The Court of Appeals upheld the district court's grant of summary judgment to the United States, holding that the Fund failed to meet its heavy burden of demonstrating unambiguous entitlement to tax-exemption. Due to the fact that the U.S. Constitution confers authority to lay taxes exclusively on Congress in Article I, the court pointed out that only Congress itself may create exemptions from federal tax laws. For this reason, the court would not infer an exemption unless Congress had clearly provided for it. The court reviewed the Internal Revenue Code § 501(c)(5), the Treasury Regulation defining labor organizations, 26 C.F.R. § 1.501(c)(5)-1(a) (1997), as well as prior IRS Reve-

nue Rulings, and found no indication that a jointly controlled pension plan governed by foreign law is a labor organization exempt from federal taxation.

Significance: Due to the fact that there is neither a Congressional mandate, nor an IRS Revenue Ruling which unambiguously states that any organization bearing some connection to a traditional labor union and performing traditional union functions is an exempt labor organization, the court will not infer that a foreign pension plan jointly owned by management and union is entitled to tax-exempt status.

FAA INTERIM FINAL RULE IMPOSING ANNUAL FEES ON FLIGHTS THAT NEITHER TAKE OFF FROM NOR LAND IN THE UNITED STATES IS PROCEDURALLY VALID AND NONDISCRIMINATORY, BUT THE METHODOLOGY USED TO ALLOCATE COSTS ARE IN VIOLATION OF THE AGENCY'S STATUTORY DIRECTIVE. *Asiana Airlines, et.al. v. Federal Aviation Administration*, 134 F.3d 393 (D.D.C. 1998).

On October 9, 1996, Section 273 of the Federal Aviation Re-authorization Act was enacted. The Act directed the Federal Aviation Administration ("FAA") to establish a fee schedule and collection process to cover "air traffic control and related services provided to aircraft other than military and civilian aircraft of the United States government or of a foreign government that neither take off from, nor land in, the United States." 49 U.S.C. § 45301(a)(1). The Statute directs the FAA to "ensure that each of the [required] fees . . . is directly related to the Administration's costs of providing the service rendered." 49 U.S.C. § 45301(b)(1)(B). Also, the statute calls for a special procedure: the FAA "shall publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule, pursuant to which public comment will be sought and a final rule issued." 49 U.S.C. § 45301(b)(2).

Acting according to an apparent message to take prompt regulatory action, the FAA issued an Interim Final Rule ("IFR") with an effective date of May 19, 1997. 62 Fed. Reg. 13496 (March 20, 1997). The IFR provided that the FAA would receive comments from interested parties up until July 18, 1997, at which time the FAA would develop a final rule.

Petitioners, several foreign airlines and an association of Canadian airlines, challenged the IFR and asked the court to vacate the Rule for several reasons. First, they claimed that the FAA had violated both the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and the consultation provisions of several international aviation agreements by making the new fee structure effective before considering their comments and ob-

jections. Second, they contended that the IFR violated the anti-discrimination provisions of international agreements by imposing fees on overflights which had a disparate impact on foreign airlines. Third, they argued that the IFR's allocation of fixed and common costs using "Ramsey pricing" (allocating costs based on value to the users) violated the statutory requirement that "each of the fees . . . [be] directly related to the Administration's costs of providing the service rendered". 49 U.S.C. §45301(b)(1)(B).

Held: Affirmed in part and vacated and remanded. The court held for the FAA on all claims, except the third claim. As to the violation of accepted APA procedure, the court ruled that the Federal Aviation Reauthorization Act plainly expressed a congressional intent to depart from normal APA procedures and, therefore, the FAA was not required to comply with the strict requirements of APA § 553. In addition, the court held the FAA did not violate any international aviation agreements because there was exchange of information and time for consultation provided. Prior to the effective date of the IFR, the court noted, the FAA held informal meetings as well as a public meeting with representatives of foreign airlines, provided copies of materials from the docket relevant to the IFR's development, and accepted forty comments on the Rule. As a result, the Court concluded that the procedure employed by the FAA by which it implemented fees for overflights was proper.

On the discrimination claim, the court held in favor of the FAA. The court noted that flights crossing through the United States require facilities and staff to manage them, and that such flights had never borne their share of the costs of services provided to them by the FAA. As a result, the court concluded that it is not discriminatory to charge such a group of users for these services for which they have never previously been charged, regardless of whether the group is disproportionately composed of foreign carriers. Finally, the court held in favor of Petitioners on their third and final claim. The FAA, using Ramsey pricing, based the fees to be imposed on the value to the recipient of services provided, rather than on costs. The court held that this was a violation of the clear mandate from Congress that the fee should be service based. As a result, the court vacated the fee schedule in its entirety and remanded to the FAA.

Significance: When the FAA is allocating annual fees for flights which neither take off from, nor land in the United States, even when the total amount recovered by the FAA would equal the FAA's total cost of providing services, the fee methodology is in violation of Congressional mandate as long as the fees charged a particular flight are not "directly related" to the Agency's cost of providing "each service."

IV. CIVIL PROCEDURE AND CONFLICTS OF LAW

WHEN THE DEATH OF THE HIGH SEAS ACT APPLIES, IT IS CONTROLLING AND LIMITS LIABILITY TO CONGRESS' STATUTORILY PRESCRIBED LIMITS. *In re Korean Air Lines Disaster of September 1, 1983, Philomena Dooley, et al. v. Korean Air Lines Co., Ltd.*, 117 F.3d 1477 (D.C. Cir. 1997).

On September 1, 1983, Korean Air Lines Flight KE007, en route from New York to Seoul via Anchorage, Alaska, was shot down over the Sea of Japan by a Soviet fighter plane. The Soviets claimed that the flight intruded into Soviet airspace and that the destruction of the unidentified airplane was necessary and justifiable. All 269 people aboard flight KE007 perished.

Subsequently, 137 plaintiffs brought suit against Korean Air Lines ("KAL"). In the interest of judicial economy, the joint liability phase of the trial against KAL was held in the U.S. District Court for the District of Columbia. A jury returned a verdict, finding that KAL had committed "willful misconduct."¹ The cases were then separated and each sent to its respective court of origin for the second phase of the proceedings, to determine compensatory damages for each plaintiff. This case is an interlocutory appeal in five damage phases that have not yet gone to trial in the District Court for the District of Columbia.

The trial court rejected the defendant airline's argument that the Death on the High Seas Act (hereinafter "DHSA"), 46 U.S.C. §761 et seq., restricted the amount of damages that the plaintiffs could recover to pecuniary losses. The district court looked to Article 17 of the Warsaw Convention,² which states that plaintiffs may recover for all damages, including "actual harm . . . experienced" as a result of the air crash. The district court was reversed by the Supreme Court, which held that the Warsaw Convention allows damages for harm, leaving the details to the applicable domestic law.³ The district court complied with the Court's *Zicherman* guidance, and engaged in a choice-of-law analysis, concluding that U.S. law applied in the damage suits. Further, the court held that the DHSA provisions were applicable and, as a result, the plaintiffs could not recover non-pecuniary damages.

The plaintiffs argued on interlocutory appeal that though the DHSA itself recognizes no right to recover non-pecuniary damages, such as a

1. Despite a jury's finding of "willful misconduct," the Court of Appeals vacated a punitive damages award.

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 3018.

3. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996).

decedent's pre-death pain and suffering, principles of "general maritime law" allow recovery on this theory. The plaintiffs also offered South Korean law, which permits recovery for pre-death damages and compensation for the mental grief of surviving relatives, to inform the trial court's decision on damage calculations, despite the court's determination that U.S. law applies.

The Court of Appeals held that the DHSA is clear in its terms that recovery is limited to pecuniary loss, and that pain and suffering are non-pecuniary. The court characterized the DHSA as a true "wrongful death statute," operating in favor of surviving relatives, rather than the decedent. However, the plaintiffs contended that the DHSA acts in concert with "general maritime law" principles which allow recovery for pre-death pain and suffering, pointing to *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which stated that general maritime law provided a wrongful death remedy caused by a violation of federal maritime regulations. However, the court noted that if a death occurs on the high seas, the DHSA controls.⁴ Applying *Mobil Oil*, the court then stated that there is no general maritime law survival action in cases in which the DHSA also applies. The court noted that DHSA controlled because Congress "affirmatively and specifically" acted to limit survivors to recovery of pecuniary damages. The court's holding affords significant deference to Congress' determinations in the area of maritime law. The court noted that the Supreme Court in *Mobil Oil* it "unthinkable that a legislatively-mandated class of beneficiaries could be judicially altered" beyond the statutorily prescribed class of plaintiffs, or that a court could extend a remedy beyond the pecuniary damages prescribed by Congress.

The Court of Appeals also rejected the plaintiff's contentions that South Korean law could augment the DHSA,⁵ noting that if this were so, plaintiffs could pick and choose among the most favorable of South Korean and U.S. provisions to fashion their legal theory. Further, the court noted that the plaintiffs did not appeal the district court's post-*Zicherman* ruling that U.S. law controlled. The court reasoned that because South Korean law did not apply, then it could not grant a right of action, as § 764 states. Only U.S. law was available to the plaintiffs.

Held: Affirmed. The Court of Appeals held that the Death on the High Seas Act limits recovery to pecuniary loss, and that pain and suffering are non-pecuniary. Additionally, § 764 of the Death on the High Seas

4. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

5. Section 764 of the DHSA states in part: "Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States"

Act does not require the abandonment of normal choice-of-law principles, allowing them to combine the most favorable elements of U.S. law and other nations' laws. Once a court determines that U.S. law applies, the inquiry is at an end. *Significance*: The Court of Appeals' holding establishes that when the Death on the High Seas Act applies, it is controlling and limits liability to Congress' prescribed limits. The court also reaffirmed a basic choice-of-law principle in an admiralty setting, stating that once a court makes a choice of law determination, it is binding. In sum, U.S. law may not be augmented by foreign law under the Death on the High Seas Act.

STATE OF DELAWARE IS FORUM NON CONVENIENS FOR A WRONGFUL DEATH ACTION AGAINST A DELAWARE CORPORATION WHERE THE TORT OCCURRED IN A FOREIGN COUNTRY. *In re: Nash v. McDonald's Corporation*, Slip Op. 96C-09-045-WTQ, 1997 WL 528036 (Del. Super. 1997).

On September 9, 1994, young Joanna Nash died of E coli bacteria poisoning. It was alleged by her parents, Nora and Stephen Nash, both citizens of the United Kingdom, that the E coli virus was contracted as a result of food items purchased at a McDonald's restaurant in Barcelona, Spain. On September 6, 1996, the Nashes' brought suit in Delaware court against McDonald's Corporation, McDonald's Restaurant Operations, Inc., and McDonald's Sistemas de Espana, Inc. ("McDonald's"), all Delaware corporations. They sought damages for their daughter's pain and suffering prior to death, as well as for their own mental anguish and pecuniary loss as a result of their daughter's death. After the filing of suit, McDonald's moved to dismiss the complaint based on the principle of *forum non conveniens*. McDonald's claimed that either the United Kingdom or Spain would provide a more appropriate forum for the claim against them. One reason that suit was filed in Delaware was that the statute of limitations had already run in Spain, although it was still running in the United Kingdom. McDonald's, however, had already agreed to waive any jurisdictional or statute of limitations defenses in either of those foreign nations if suit were to be filed there.

Held: Applying relevant Delaware law, the court granted the motion to dismiss based on *forum non conveniens*. The court employed six factors to determine whether Delaware was the appropriate forum to hear the claim: 1) whether Delaware law applies; 2) the relative ease of access of proof; 3) the availability of compulsory process for witnesses; 4) the possibility of viewing the premises; 5) the pendency or non-pendency of a similar action or actions in another jurisdiction; and 6) all other practical considerations which would make the trial easy, expeditious, and inexpensive. The court first dismissed the Plaintiff's contention that Dela-

ware was the appropriate forum due to an issue of institutional control of parent corporations over their subsidiaries. The court concluded that this was a simple wrongful death action. The crux of the court's argument focused on the second and sixth factors. Finding that all relevant evidence was situated in Spain, the court concluded that the ease of proof mitigated against Delaware as the proper forum. As to the sixth factor, the court doubted its ability to properly interpret Spanish law, if in fact that turned out to be the appropriate body of law. This conclusion was due to the civil law history of Spain, as opposed to the common law history of the United States, as well as the language barrier that using Spanish law would present. Another practical consideration which mitigated against Delaware as the appropriate forum was the fact that both Spain and the United Kingdom had a greater interest in the outcome of the case than Delaware did. *Significance*: In the long run, this case will most likely have little impact on the Delaware corporation. Of great significance was the fact that the Delaware Supreme Court had previously expressed disapproval of the use of Delaware incorporation as a decisive factor in deciding *forum non conveniens* motions. Thus, this decision did not open doors that were not already wide open with respect to the prospect of haling a Delaware corporation into courtrooms around the world. This case, if nothing else, mitigates against using Delaware incorporation as a shield against jurisdiction in foreign countries in the future.

SUPREME COURT OF PENNSYLVANIA FINDS BALANCING TEST INAPPROPRIATE IN CHILD CUSTODY MATTER WHEN THE FORUM STATE DOES NOT FIRST POSSESS JURISDICTION. *Dincer v. Dincer*, *Supreme Court of Pennsylvania*, 701 A.2d 210 (1997).

Meltem Dincer (mother) is an American citizen of Turkish Descent who was born and raised in Montgomery County, Pennsylvania. Fehmi Dincer (father) is a Turkish citizen who met Meltem while a student in Philadelphia, Pennsylvania. The two parties married in 1982 in Turkey and settled in Belgium where the father worked. They have three children, all born in Belgium attending Belgian schools. Every year the children visited the maternal grandparents for a month in Pennsylvania and their paternal grandparents in Turkey for a month.

On December 8, 1994, the mother and the children traveled to Pennsylvania with round-trip tickets to return to Belgium on December 29, 1994. However, on December 23, 1994, the mother filed a Complaint for Custody and Petition for Special Relief in the Pennsylvania trial court. The court entered an Order the same day granting physical custody on a temporary basis without prejudice. The complaint was served on the father on January 16, 1995. A hearing was scheduled for March 6, 1995.

On February 1, 1995, the father filed for divorce and custody in Belgium. The mother received notice of the custody hearing scheduled in Belgium for February 22 and 23, 1995, but she did not appear. Following the proceeding, the court granted provisional custody to the father and he registered the Order with Montgomery County, Pennsylvania.

The trial court in Montgomery County held a hearing on March 6, 1995. The court determined that Belgium, not Pennsylvania, had jurisdiction in the matter pursuant to the Uniform Child Custody Jurisdiction Act ("UCCJA").¹ Accordingly, it vacated the *ex parte* Temporary Custody Order, noting that the Belgian court's order must be given comity. The mother appealed the trial court's determination, while retaining custody, and the father also appealed the supersedeas grant to the mother of custody during the appeal. On September 5, 1995, the Superior Court of Pennsylvania affirmed the grant of custody during the appeal, but vacated the Order as to jurisdiction and remanded to the trial court for additional findings of fact.

Pending the appeal, the Belgian Court held a hearing in which both parties and their counsels attended. The court issued an order on October 17, 1995, affirming its jurisdiction in the matter and awarding custody to the father. The mother did not appeal the Order of the Belgian Court, but remained in Pennsylvania with the children.

Held: In its opinion, the Supreme Court of Pennsylvania held that Pennsylvania did not have jurisdiction to make a child custody determination, reversing in part the findings of the Superior Court of Pennsylvania. The Pennsylvania Supreme Court ruled that the UCCJA applied to international custody matters. In addition, the court upheld the trial court's findings that Pennsylvania was not the children's "home state" as defined in the UCCJA. Dismissing suggestions that the father had a "diminishing interest" in Belgium and acknowledging that the three week stay in Pennsylvania prior to the filing of the instant case did not confer jurisdiction on Pennsylvania, the Supreme Court affirmed the findings of the trial court.

Importantly, the Supreme Court of Pennsylvania found that the Superior Court had no basis for engaging in a balancing test of the child's interests with regard to Pennsylvania's exercise of jurisdiction over the children in this matter. *Significance:* The children had extensive contacts with Belgium and only after the Commonwealth of Pennsylvania found that it had jurisdiction would it then be possible for the State to measure its claim against another forum also having jurisdiction.

1. 23 Pa.C.S.A. §§ 5341-5366.

FOREIGN JUDGMENTS CONTRARY TO THE PUBLIC POLICY OF THE FORUM STATE WILL NOT BE RECOGNIZED OR ENFORCED UNDER PRINCIPLES OF COMITY. *Telnikoff v. Matusevitch*, 347 Md. 561 (1997).

On February 13, 1984, the London Daily Telegraph published a letter written by Vladimir Telnikoff, criticizing certain recruitment policies of the British Broadcasting Corporation. In response, Vladimir Matusevitch, a Maryland resident, submitted a letter that was published on February 18, 1984, in the London Daily Telegraph that was highly critical of Telnikoff. As a result, Telnikoff filed a defamation action in Great Britain's High Court of Justice. The Court granted Matusevitch's motion for judgement as a matter of law. However, on appeal, the House of Lords reversed in part, reasoning that the jury should examine the letter written by Matusevitch by itself and not in the context of Telnikoff's article. On remand the jury returned a 240,000 pound verdict in favor of Telnikoff.

Telnikoff attempted to have the judgement enforced in the United States. On January 27, 1995, the United States District Court for the District of Columbia entered judgement in favor of Matusevitch, finding that the cause of action underlying the English libel judgement was "repugnant to the public policy of the State of Maryland." On appeal, the United States Court of Appeals for the District of Columbia Circuit certified the following question to the Maryland Court of Appeals: "Would recognition of Telnikoff's foreign judgement be repugnant to the public policy of Maryland?"

Held: The Court of Appeals explained that the recognition of foreign judgements is governed by principles of comity. Nevertheless, courts will deny recognition and enforcement of those foreign judgements which are inconsistent with the public policies of the forum state. In this case, the Court of Appeals answered the certified question in the affirmative on the grounds that the principles governing defamation laws under English law, as applied to this suit, are contrary to Maryland defamation law and the policy of freedom of the press underlying Maryland law. In reaching this conclusion, the Court of Appeals noted that American and Maryland history reflect a public policy in favor of a much broader and more protective freedom of the press than ever provided for under English law. In fact, the court stated the contrast between English standards governing defamation actions and the present Maryland standard is striking. In making this determination, the Court went through a detailed analysis of the history and development of defamation laws in England and Maryland. In doing so, the Court of Appeals found that Maryland and English laws were substantially different for a number of reasons. First, since Telnikoff was a public figure, he would have to prove by

clear and convincing evidence that Matusевич acted with actual malice in publishing his letter. However, under the standard in England, Telnikoff was allowed to recover, even though no evidence supported a finding of actual malice. Moreover, in Maryland, Telnikoff would have been required to prove Matusевич's letter contained a false statement of fact, while in England, falsity is presumed. Finally, the English courts required Matusевич's letter to be read in isolation. In contrast, the Court of Appeals found that its prior decisions and the decisions by the United States Supreme Court would require that Telnikoff's original letter be taken into account. Therefore, the Court of Appeals found that the free flow of ideas and opinions on matters of public concern precluded Maryland's recognition of the judgement from the English courts. *Significance*: Maryland courts will scrutinize the historical application and policy reasons behind foreign causes of actions before recognizing a foreign judgement under the principle of comity.

THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION WHERE A CLAIMANT SEEKS ONLY RETROSPECTIVE RELIEF FOR AN ALLEGED VIOLATION OF AN INTERNATIONAL TREATY BY A STATE OFFICIAL, BUT DOES NOT CLAIM A CONTINUING VIOLATION OF FEDERAL LAW. *The Republic of Paraguay v. George Allen, Governor of Virginia, et al.*, 134 F.3d 622 (4th Cir. 1998).

The appellant moved for consideration from the United States Court of Appeals for the Fourth Circuit from a dismissal of their suit for declaratory and injunctive relief in the United States District Court for the Eastern District of Virginia. That court acted pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The Court of Appeals affirmed that dismissal.

This is another case originating from the 1993 conviction of Angel Breard for capital murder and attempted rape in the Commonwealth of Virginia. See survey of *Beard v Pruitt*. Despite being a citizen of Paraguay, Virginia authorities did not notify Breard of his right to contact the Paraguayan consulate at any time during his detention and subsequent trial. This omission was contrary to rights guaranteed by international agreement through Article 36(1) of the Vienna Convention on Consular Relations.¹ Breard received the death penalty, and with the aid of two court appointed attorneys, exhausted all appeals available to him.² At no

1. Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261.

2. This includes an appeal to the United States Supreme Court, where certiorari was denied. See 513 U.S. 971 (1994).

point during this process did Breard ever raise the issue of treaty violations incurred during his detention or trial. With the benefit of a new counsel, he then expended his state habeas corpus proceedings without alleging the violation of any treaty obligations. This issue was then raised for the first time in a failed federal habeas corpus petition. At this point, the appellant initiated this action on Breard's behalf.

The appellant was seeking relief in the form of a declaration that a treaty had been violated, the vacating of Breard's murder conviction and imposed sentence, and an injunction against further treaty violations. The Commonwealth of Virginia asserted that the plaintiffs lacked standing to sue, subject matter jurisdiction, and that the merits of the case made the desired relief inappropriate. The district court determined that subject matter jurisdiction was absent because the claimants were not alleging an "ongoing violation of federal law." Therefore, their cause of action did not fall within one of the exceptions to the doctrine of sovereign immunity in the Eleventh Amendment to the United States Constitution. As that court pointed out, the types of relief sought in this action were overtly prospective in nature, but in reality the net effect was the retrospective reversal of a past criminal conviction.

The Court of Appeals began by illuminating the framework principles that comprise the doctrine of sovereign immunity. The Eleventh Amendment to the Constitution imposes a "constitutional limitation on the federal judicial power over certain actions against unconsenting states of the Union."³ This immunity has been judicially construed to apply to actions by a state's own citizens and to foreign states. It extends not only to actions against States as named parties, but also state officials under color of office, where the litigation is in fact against the state as the real party in interest.

When sovereign immunity is invoked by a state official, it is subject to an exception where federal courts may exercise jurisdiction subject to two conditions: 1) the subject of the litigation must be an ongoing violation of federal law; and 2) the remedy must only be prospective in effect. The essence of these principles is that the precise moment the litigation is commenced is determinative. The violation of federal law or an accrued right arising from an international treaty must be currently active. Then, to complete the prerequisites for remedial action by a federal court, the petition must seek only prospective or forward-looking remedies.

3. *The Republic of Paraguay v. George Allen, Governor of Virginia*, 1134 F.3d 622 (4th Cir. 1998) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)).

The Court of Appeals then compared this doctrinal underpinning to the facts of the present case. The violation for which the appellant sought a remedy was the past treaty violation where Breard was not informed of his right to contact a representative of the Paraguayan embassy. This transgression occurred at a point in the past and was not ongoing in nature. Additionally, although the relief sought was injunctive and declarative and semantically prospective, the real effect to be obtained was the voiding of a past conviction and death sentence. This would clearly constitute a remedy that was distinctively retrospective in effect.

Held: Affirmed. The district court affirmed, dismissing the case for lack of subject matter jurisdiction because the complaint did not allege an ongoing violation of federal law where prospective relief could be attained. *Significance:* The basic doctrine of sovereign immunity, as judicially enunciated, is upheld within the Fourth Circuit, and is extended to cover violations of international treaty obligations by state officials.

UNAMENDED VERSION OF UNITED STATES TREASURY DEPARTMENT, OFFICE OF FOREIGN ASSETS CONTROL (OFAC) RULE DOES NOT PRODUCE A "RIGHT" TO DETERMINATION OF LICENSE APPLICATION UNDER THE RULE AS IT EXISTED AT THE TIME OF THE APPLICATION. *Bergerco Canada, A Division of Conagra, Ltd. v. United States Treasury Department, Office of Foreign Assets Control*, 129 F.3d 189 (D.C. Cir. 1997).

Bergerco Canada ("Bergerco"), a Canadian corporation, together with its U.S. affiliate Bergerco U.S., contracted with an Iraqi State company for the sale and delivery of two large pea and bean shipments. Bergerco received as payment a \$4 million letter of credit from an Iraqi banking institution, Rasheed Bank. Rasheed Bank named the Royal Bank of Canada as intermediary for the payment and designated the Bank of New York as the reimbursing bank. This essentially meant that for any payment made from the Royal Bank of Canada to Bergerco on Rasheed's behalf, the Royal Bank of Canada would look towards the Rasheed Bank's account at the Bank of New York for reimbursement. However, Rasheed Bank never asked the Bank of New York to be a "confirming bank." Had the Bank of New York accepted the role of "confirming bank" it would have had to exchange its credit for the credit of Rasheed Bank, and to assume the obligation to pay Bergerco or the Royal Bank.

Bergerco made both shipments and was paid for the first but before the second payment, Iraq invaded Kuwait and the U.S. President froze all Iraqi property interests in the United States under authority from the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (1997). Rasheed Bank's funds on deposit in the Bank of New York were included in the frozen assets. President Bush then issued an executive or-

der commanding the Department of the Treasury to distribute regulations governing the frozen assets and providing for their release to appropriate applicants. The Department of the Treasury then delegated the responsibility to the Office of Foreign Assets Control ("OFAC").

Bergerco, on August 21, 1990, applied for a license to collect payment on a debt from Iraqi assets which were frozen. OFAC was the licensing agency to which Bergerco applied. Under the set of rules at the time of Bergerco application, it was almost assured of securing a license. However, OFAC changed the rules subsequent to Bergerco's application and under the new rules, it stood no chance of securing the license. On November 20, 1990, OFAC denied Bergerco's application under the new rules. Bergerco sued OFAC seeking a declaration of its entitlement to a license. Bergerco argued to the D.C. Circuit court that OFAC's application of the new set of rules to its pending application constitutes retroactive rulemaking and is therefore invalid under *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

Held: The court stated that was its task to determine in what form the articulated in *Bowen* applied. The court stated that practically all changes in legal rule apply both prospectively and retroactively and that any legal system permitting change must stand for some degree of retroactivity. The court asserted that the Supreme Court in *Bowen* did not give a precise definition of what kind of retroactivity would require explicit authorization. The Supreme Court said not much more than "[r]etroactivity is not favored in the law." *Bowen*, 488 U.S. at 208. The D.C. Circuit Court went on to hold that nothing in the previous licensing rules gave Bergerco *Bowen*-protected rights. This was true because the new rules merely shifted the "locus of the risk" of non-payment from one party to another, unlike *Bowen* which dealt with a cost no one would have incurred without the rule change. *Significance:* This case stands for the premise that the OFAC and other rule-making authorities can change rules retroactively as long as the new rule does not conjure up new costs, but just shifts the "locus of the risk" around from one party to another.