JUDICIAL DECISIONS *

By Brunson MacChesney

Of the Board of Editors

Utilization of water wholly within territorial area of state but flowing towards neighboring state—interpretation of Treaty of Bayonne of May 26, 1866, and of Additional Act of the same date—rules for interpretation of international treaties—presumption of "good faith"—interpretation of diplomatic communication arising out of negotiations

Lake Lanoux Case (France-Spain).[1]

Arbitral Tribunal,[2] Geneva, November 16, 1957.

The border between France and Spain had been settled by various treaties culminating in the Treaty of Bayonne of May 26, 1866, which dealt with the border extending from the Valley of Andorra to the Mediterranean. On the same day, by an Additional Act (*Acte Additionnel*) it was agreed to make special provisions "for the enjoyment of waters of common use, provisions which, due to their general character claim a special place . . ." Insofar as the Additional Act provided for "The Regime and Enjoyment of Waters of Common Usage Between the Two Countries," these provisions required consultations and agreement before any interference with the rights or interests of any of the High Contracting Parties could be contemplated, whilst the rights of both parties within their respective territorial limits were respected.[3]

* The assistance of Egon Guttmann, Esq., LL.B., LL.M. [London], Ford Graduate Fellow, Northwestern University School of Law, with respect to the Lake Lanoux case and the British Commonwealth cases is gratefully acknowledged.

1 62 Revue Générale de Droit International Public 79–119 (1958). From a mimeographed copy of an unofficial translation of the decision prepared by Covington & Burling, Washington, D. C., and furnished to the editor through their courtesy.

2 Sture Petrén, President (appointed by King of Sweden, to whom the parties, in the absence of agreement between them, delegated the power to appoint a President), Plinio Bolla, Paul Reuter, Fernand de Visscher and Antonio de Luna.

3 The relevant articles of the Additional Act are Articles 8, 9, 11, 12 and 16.

Article 8: "All stagnant and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.

"Flowing waters change jurisdiction at the moment when they pass from one Country to the Other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow."

Article 9: "For watercourses which flow from one Country to the Other, or which constitute a boundary, each Government recognizes, subject to the exercise of a right of verification when appropriate, the legality of irrigations, of works and of enjoyments

In this border area lies Lake Lanoux, a lake of about 86 hectares surface area and storing approximately 17 million cubic meters of water. This lake, which is wholly in France, is fed by streams arising in and crossing only French territory. It is drained by the River Font-Vive, which is a source of the Carol River. The Carol River flows from France into Spain, where it joins the River Segre. On the French side of the border a canal takes off from the Carol River, which itself crosses the border at Puigcerda and irrigates agricultural projects in that area.

Since 1917 various schemes had been mooted for the utilization of the waters of Lake Lanoux. But, due to objections raised by Spain in the course of various diplomatic exchanges, these schemes never came to fruition. In February, 1949, the "International Commission for the Pyrenees"[4] met and agreed to set up a "Mixed Commission of Engineers" to study any proposals which might be made for the utilization of these waters. It was further agreed at this meeting not to alter the *status quo* until the two governments had decided to do so by common accord.

In 1950 *Electricité de France* requested a concession from the French Ministry of Industry to erect a barrier of 45 meters in height so as to raise the capacity of Lake Lanoux to 70 million cubic meters of water, to divert the waters of the lake to the River Ariège in order to take advantage

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for domestic uses currently existing in the other State, by virtue of concession, title or by prescription, with the reservation that only that volume of water necessary to satisfy the real needs will be used, that abuses must be eliminated, and that this recognition will in no way injure the respective rights of the Governments to authorize works of public utility, on condition that legitimate compensation is made."

Article 11: "When in one of the two States it is proposed to construct works or to grant new concessions which might change the regime or the volume of a watercourse whose lower or opposite part is being used by riparians of the other Country, prior notice will be given to the highest administrative authority of the Department or of the Province to which these riparians are subject, by the corresponding authority in the jurisdiction where such projects are proposed, so that, if they could threaten the rights of the riparians of the adjoining sovereignty, a timely complaint may be lodged with the competent authorities, and thereby all the interests that may be involved on both sides will be safeguarded. If the work and concessions are to be erected in a *Commune* contiguous to the border, the engineers of the other Country will have the option, upon proper notice given to them reasonably in advance, of inspecting the site together with those in charge of it."

Article 12: "The downstream lands are subject to receiving from the higher lands of the neighboring Country the waters which flow naturally from it together with what they carry, without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparians, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the lower lands."

Article 16: "The highest administrative authorities of the bordering Departments and Provinces will act in concert in the exercise of their right to set up regulations for the general interest and to interpret or modify their regulations whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments."

[4] Created after an exchange of notes between the French and Spanish governments in 1875.

of a drop of 780 meters for the generating of electricity, and to return the waters back to the River Carol by means of a tunnel connecting the rivers Ariège and Carol. The French Government, being of the opinion that only the amount of water actually needed by the Spanish riparian users need be restored, in 1953 instructed the Prefect of the Eastern Pyrenees to inform the Governor of the Province of Gerone of this scheme and to request him to investigate any question of indemnity which might arise. In these communications the "Mixed Commission of Engineers" was by-passed. The Spanish Government requested recourse to this "Mixed Commission" and also an undertaking that no work would be begun before this Mixed Commission had reported. The French Government agreed to these requests.

Subsequently the French Government reviewed its opinion and agreed to the earlier proposals of the *Electricité de France* that the total volume of water abstracted be returned to the River Carol. The French Government informed the Spanish Government of this change in policy and pointed out that, since the new scheme did not entail any change of the regime of the water on the Spanish side of the border, the matter was wholly within the competence of France. The French Government agreed, however, to a meeting of the "Mixed Commission of Engineers," since the Spanish Government still considered its interests prejudiced by the proposed scheme. A meeting of this Commission was held on August 5, 1955, but led to no result. During subsequent meetings of the International Commission on the Pyrenees, and of a further Mixed Commission set up in 1955, the French Government offered to vary its scheme still further, so as to safeguard the interests of Spain, by including therein provisions for a "Mixed Commission of Supervision," and for a Spanish engineer who was to be granted the privileges of a Consul, to check the volume of water abstracted and to see that this amount was duly returned to the River Carol. The French Government also offered to guarantee that, whatever the inflow into Lake Lanoux, no less than 20 million cubic meters of water per year would be returned to the River Carol, and that the diversion of water to this river would take account of the needs of Spanish riparian users, in that the flow would be regulated in such a manner as to coincide with their needs, irrespective of the daily inflow into Lake Lanoux.

The Spanish Government submitted counter-proposals which would not have involved a diversion of the flow of water from Lake Lanoux, but which would have resulted in a reduction of the expected output of electricity by 10%. These proposals were rejected by the French Government. No agreement having been reached, the French Government informed the Spanish Government that it intended to act in accordance with an earlier communication of November 14, 1955, wherein the French Government had reserved its right to "resume their freedom of action within the limits of their rights" unless an agreement was forthcoming within three months of that date. Throughout, the main Spanish argument had been that

> the execution of this project would be injurious to the interests and rights of Spain since, on the one hand, it alters the natural conditions

> of the hydrographic basin of Lake Lanoux by diverting its waters to the Ariège and by thus making restitution of the waters to the Carol physically dependent upon human will, which would result in the *de facto* preponderance of one party only, rather than in the preservation of the equality of the two parties as provided for by the Treaty of Bayonne of 26 May 1866 and by the Additional Act of the same date; and that, on the other hand, such project has, by its nature, the scope of an affair affected with a general interest [*asunto de convenencia general*] and as such dependent on Article 16 of the Additional Act and consequently requires the prior agreement of the two Governments for its execution, lacking which the State which proposes it does not have the freedom to undertake the works.

On the basis of an Arbitration Treaty of July 10, 1929, between France and Spain, by which the two countries agreed to settle by means of arbitration all disputes as to which the parties would reciprocally dispute a right, and which they could not resolve through diplomatic exchanges, a *Compromis* was signed in Madrid on November 19, 1956, by virtue of which the Arbitral Tribunal met in Geneva to resolve this conflict.

Finding as a fact that the totality of the work and most of its effects would be in France and would concern waters which the Additional Act submits to French territorial jurisdiction, the Tribunal considered Article 8 of the Additional Act and held:

> This text itself imposes a reservation on the principle of territorial sovereignty ("except for the modifications agreed upon between the two Governments"); some provisions of the Treaty and of the Additional Act of 1866 contain the most important of these modifications; there can be others. It has been contended before the Tribunal that these modifications should be strictly construed because they are in derogation of sovereignty. The Tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations.
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> The question is therefore to determine the obligations of the French Government in this case. The Spanish Government has endeavored to define them; the problem should be examined beginning from the Spanish contention.
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> The argument of the Spanish Government is of a general character and calls for some preliminary remarks. The Spanish Government bases its contention first of all on the text of the Treaty and of the Additional Act of 1866. Its contention thus falls exactly within the jurisdiction of the Tribunal as it has been defined by the *Compromis* (Article 1). But in addition, the Spanish Government bases its contention on both the general and traditional features of the regime of the Pyrenean boundaries and on certain rules of customary international law (*droit international commun*) in order to proceed to the interpretation of the Treaty and the Additional Act of 1866.
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> In another connection, the French *Mémoire* (page 58) examines the question put to the Tribunal in the light of general international law (*droit de gens*). The French *Contre-Mémoire* (page 48) does the same thing; but with the following reservation: "Although the question submitted to the Tribunal is clearly confined by the *Compromis* to the interpretation in the case in question of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date." In the

oral pleadings the representative of the French Government said: "The *Compromis* does not request the Tribunal to find out whether there are general principles of international law applicable in this context" (third session, page 7), and: "A treaty is interpreted in the context of positive international law of the times when it may be applied" (seventh session, page 6).

In an analogous case, the Permanent Court of International Justice (withdrawal of waters from the Meuse, Permanent Court of International Justice, series A/B 70, page 16) declared:

> "In the course of the debates, both written and oral, allusion has been made incidentally to the application of general rules of international river law. The Court notes that the litigated questions such as those presented by the Parties in the present case do not allow the Court to go beyond the framework of the Treaty of 1863."

Since the question presented by the *Compromis* relates solely to the Treaty and to the Additional Act of 1866, the Tribunal will apply the following rules for each particular point:

The clear provisions of treaty law do not require any interpretation; the text provides an objective rule which covers entirely the subject matter to which it applies; when the provisions call for interpretation this should be done according to international law; international law does not sanction any absolute and rigid method of interpretation; we may therefore bear in mind the spirit that guided the framing of the Pyrenean Treaties as well as the rules of customary international law.

The Tribunal may deviate from the rules of the Treaty and of the Additional Act of 1866 only if they referred expressly to other rules or had been modified with the clear intention of the Parties.

The Tribunal then characterized the essential issues in dispute as involving two questions: (a) Does the French project constitute a violation of the Treaty of Bayonne and of the Additional Act? And if not, the further question arises: (b) Can such works be undertaken without the prior agreement between the two High Contracting Parties, especially having regard to the Treaty and the Additional Act, Article 11?

(a) Referring to the Additional Act, and in particular to Articles 9 and 10, which require that legality of user is conditional upon such use being necessary for the satisfaction of actual needs, so that any surplus remaining at low-water level can be divided between the parties at the point where the water crosses the border, the Tribunal held:

> In effect, thanks to the restitution effected by the devices described above, none of the guaranteed users will be injured in his enjoyment of the waters (this is not the subject of any complaint founded on Article 9); at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, would at no time suffer a diminution; it may even be that by virtue of the minimum guarantee made by France it would benefit by an increase in volume assured by the waters of the Ariège which flow naturally to the Atlantic.
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> One might have attacked this conclusion in several different ways.
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> It could have been argued that the works would bring about a definitive pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain

could then have claimed that her rights had been impaired in violation of the Additional Act. Neither the *dossier* nor the debates of this case carry any trace of such an allegation.

It could also have been claimed that, by their technical character, the works envisaged by the French project could not in effect ensure the restitution of a volume of water corresponding to the natural contribution of the Lanoux to the Carol, either because of defects in measuring instruments, or in mechanical devices to be used in making restitution. The question was lightly touched upon in the Spanish *Contre-Mémoire* (page 86), which underlined "the extraordinary complexity" of procedures for control, their "very onerous" character, and the "risk of damage or of negligence, in the handling of the watergates and of the obstruction system in the tunnel." But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are spread all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighborly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, the character of this accident would be only occasional and, according to the two Parties, would not constitute a violation of Article 9.

Finding, however, that the Spanish Government based its claim on the ground that the French project "alters the natural conditions of the hydrographic basin of Lake Lanoux" and makes the "restitution of the waters of the Carol physically dependent upon human will," neither of which can be done without the prior agreement of the other party, the Tribunal felt that there were two points involved in this argument: a prohibition, in the absence of agreement, of compensation between two basins, despite the equivalence between diversion and restitution, and a prohibition, in the absence of agreement, of any act which would create a *de facto* inequality with a physical possibility of a violation of rights. The Tribunal stated:

These two points must now be examined successively.

The prohibition of compensation between the two basins, in spite of the equality between the diversion and the restitution, unless the change is consented to by the other Party, would lead to the absolute blocking of a withdrawal from a watercourse belonging to River Basin A for the benefit of River Basin B, even if this withdrawal is compensated for by a strictly equivalent restitution effected from a watercourse of River Basin B for the benefit of River Basin A. The Tribunal does not overlook the reality of each river basin which, from the point of view of physical geography, constitutes, as the Spanish *Mémoire* (page 53) maintains, "a whole." But this observation does not authorize the absolute consequences that the Spanish thesis would like to draw from it. The unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. The water which by nature constitutes a fungible item may be the object of a restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French project, does not change a state of affairs organized in function of the requirements of social life.

The state of modern technology leads to more and more frequent

justifications of the fact that waters used for the production of electric energy should not be returned to their natural course. Water is captured higher and higher up and it is carried ever further, and in so doing it is sometimes deviated to another river basin in the same State or in another country, in the heart of the same federation, or even to a third State. Within federations, the judicial decisions have recognized the validity of this last practice (Wyoming v. Colorado, United States Reports; volume 259, Cases adjudged in the Supreme Court, p. 419, and the instances cited by Dr. J. E. Berber, Die Rechtsquellen des internationalen Wassernutzungsrechts, p. 180, and by M. Sauser-Hall, L'Utilisation industrielle des fleuves internationaux, Hague Academy, Vol. 83, page 544, 1953; for Switzerland, Recueil des Arrêts du Tribunal Fédéral 78, Vol. 1, page 14, *et seq.*).

The Tribunal therefore believes that the diversion with restitution as envisaged in the French project and proposals is not contrary to the Treaty and to the Additional Act of 1866.

In another connection, the Spanish Government has contested the legitimacy of the works carried out on the territory of one of the signatory States of the Treaty and of the Additional Act, if the works are of such a nature as to permit that State, albeit in violation of its international pledges, to bring pressure to bear on the other signatory. This rule would derive from the fact that the Treaties concerned sanction the principle of equality between States. Concretely, Spain considers that France does not have the right to secure for herself, by works of public utility, the physical possibility of cutting off the flow of the waters of the Lanoux or the restitution of an equivalent quantity of water. The Tribunal's task is not to pronounce judgment on the motives or the experiences which may have led the Spanish Government to voice certain misgivings. But it is not alleged that the works in question have as their object, apart from satisfying French interests, the creation of a means to injure Spanish interests, at least should a proper occasion arise; that would be all the more improbable since France could only partially dry up the resources that constitute the flow of the Carol, since she would affect also all the French lands that are irrigated by the Carol, and since she would expose herself along the entire boundary to formidable reprisals.

On the other hand, the proposals of the French Government which form an integral part of its project carry "the assurance that in no case will it impair the regime thus established" (Annex 12 of the French *Mémoire*). The Tribunal must therefore reply to the question posed by the *Compromis* on the basis of this assurance. It cannot be alleged that, despite this pledge, Spain would not have a sufficient guarantee, for there is a general and well-established principle of law according to which bad faith is not presumed. Furthermore, it has not been contended that at any time one of the two States has knowingly violated, at the other's expense, a rule relative to the regime of the waters. At any rate, while inspired by a just spirit of reciprocity, the Treaties of Bayonne have only established a legal equality and not an equality in fact. If it were otherwise, they would have had to forbid on both sides of the boundary all installations and works of a military nature which might have given one of the States a *de facto* preponderance which it might use to violate its international pledges. But we must go still further; the growing ascendancy of man over the forces and the secrets of nature has put into his hands instruments which he can use to violate his pledges just as much as for the common good of all; the risk of an evil use has so far not led to subjecting

the possession of these means of action to the authorization of the States which may possibly be threatened. Even if we place ourselves solely on the ground of neighborly relations, the political risk alleged by the Spanish Government would not present a more abnormal character than the technical risk which was discussed *supra*. In any case, we do not find either in the Treaty and the Additional Act of 26 May 1866, or in customary international law, any rule that prohibits one State, acting to safeguard its legitimate interests, to put itself in a situation that would permit it in effect, in violation of its international pledges, to injure a neighboring State even seriously.

(b) Having reached the conclusion that the French project does not constitute a violation of the Treaty of Bayonne and of the Additional Act, the Tribunal had to consider the second issue. The Spanish Government had argued that a state wishing to undertake the type of project envisaged by the French Government would be subject to two obligations. First of all, it would have to reach an agreement with the other state, and secondly, the project would have to comply with the rules laid down in Article 11 of the Additional Act, or such project could not be carried out. The Spanish Government based this argument on the regime of *faceries* which exist in the Pyrenean boundary areas, and on the rules of customary international law. The Spanish argument was that, if applied to the interpretation of the Treaty of Bayonne and of the Additional Act, these aids will show the existence of these restrictions on the French Government. In addition these facts will demonstrate the existence of a general unwritten rule of international law to this effect. The Tribunal continued:

Before proceeding to an examination of the Spanish argument, the Tribunal believes it will be useful to make some very general observations on the very nature of the obligations invoked against the French Government. To admit that jurisdiction in a certain field can no longer be exercised except on the condition of or by an agreement between two States is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted in the presence of clear and convincing evidence. Without doubt, international practice does reveal some special cases in which this hypothesis has become reality; thus, sometimes two States exercise conjointly jurisdiction over certain territories (*indivision, co-imperium,* or *condominium*); likewise, in certain international arrangements, the representatives of States exercise conjointly a certain jurisdiction in the name of the States or in the name of the organizations. But these cases are exceptional and international judicial decisions do not willingly recognize their existence, especially when they impair the territorial sovereignty of a State, as would be the case in the present litigation.

In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In this case, it must be admitted that the State which is normally competent has lost its right to act singly as a result of the unconditional and arbitrary opposition of another State. This is the same as admitting a "right of assent," a "right of veto," that paralyzes the exercise of territorial competence of one State at the discretion of another State.

That is why international practice prefers to resort to less extreme

solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of this agreement. Thus, mention has been made, although often in an improper manner, of the "obligation of negotiating an agreement." In reality, the pledges thus taken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and can be sanctioned, for example, in the case of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, more generally in cases of violation of the rules of good faith (the Tacna-Arica case, Collection of Arbitral Awards, Vol. 11, page 92, *et seq.;* the case of Railway Traffic between Lithuania and Poland, Permanent Court of International Justice, A/B 42, page 108, *et seq.*).

In the light of these general observations, and with regard to the present case, we will now examine successively whether a prior agreement is necessary and whether the other rules laid down by Article 11 of the Additional Act have been observed.

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The Spanish Government has endeavored to demonstrate that "the demarcation line at the Pyrenean boundary constitutes a zone organized in conformity with a special law, customary in nature, incorporated in international law by the Boundary Treaties which have recognized it, rather than being a limitation on the sovereign rights of bordering States" (Spanish *Mémoire,* page 55). The most characteristic manifestation of this customary law would be the existence of "co-pasturages" or *faceries* (Hearings, fourth session, page 16) which are themselves the remnant of a more extensive communal system which, in the Pyrenean valleys, was founded on the rule that matters of common interest must be regulated by agreements that have been freely debated.

In effect, the French project does not impair at all the rights of pasturage on French territory guaranteed by the treaties for the benefit of certain Spanish Communes. It appears in particular, according to the replies of the Parties to a question put by the Tribunal, that the pasturage rights that the Spanish Commune of Llivia possesses on French territory in no way touch the waters of Lake Lanoux or of the Carol. The Spanish Government invokes also the regime of co-pasturages or rather that of the Pyrenean communal rights which have now disappeared, and of which the co-pasturages are the last trace, to retain essentially the spirit of this regime, based on understanding, on respect for common interests, and on a search for compromise by agreements which are freely negotiated and concluded. In this sense, it is in effect correct that the characteristics peculiar to the Pyrenean border induce the bordering States to be guided, more than for any other boundary, by a spirit of co-operation and of understanding indispensable to the solution of the difficulties which may be born of boundary relations, particularly in mountainous countries.

But one could not go any further; it is impossible to extend the regime of co-pasturages beyond the limits assigned to them by the treaties, or to deduce therefrom a notion of generalized "communal

rights" which would have a legal content of some sort. As for recourse to the notion of the "boundary zone," it cannot, by the use of a doctrinal vocabulary, add an obligation to those sanctioned by positive law.

Considering the argument of Spain that there is a rule of international custom, or a principle of international law, that states must negotiate before undertaking projects on waters wholly within their own territorial limits when such waters also flow into the territory of a neighboring state, the Tribunal felt that such negotiations may be desirable, but no more.

> . . . the rule according to which States may utilize the hydraulic force of international watercourses only on condition of a *prior* agreement between the interested States cannot be established either as a custom, or even less as a general principle of law. The history of the formulation of the multilateral Convention of Geneva of 9 December 1923, relative to the utilization of hydraulic forces of interest to several States, is very characteristic in this connection. The initial project was based on the obligatory and prior character of the agreements whose purpose was to harness the hydraulic forces of international watercourses. But this formulation was rejected, and the Convention, in its final form, provides (Article 1) that "[The present Convention] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires"; there is only provided between the interested signatory States an obligation to join in a common study of a development program; the execution of this program is obligatory only for those States which have formally subscribed to it.
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> Customary international law, like the Pyrenean traditions, does not supply evidence of a kind to orient the interpretation of the Treaty and of the Additional Act of 1866 in the direction of favoring the necessity of prior agreement, and even less to permit us to conclude that there exists a general principle of law or a custom to this effect.
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> As between Spain and France, the existence of a rule requiring prior agreement for the development of the water resources of an international watercourse can therefore result only from a Treaty. . . .

On the basis of the Treaty of Bayonne and of the Additional Act, the Spanish Government had argued that since the French project concerns the common and general interests of the two countries, there was a need for prior agreement. In order not to claim a regime of *indivision,* since such claim would be contradicted by the text of the Additional Act, Article 8, the Spanish Government had tried to draw a distinction between "communal rights of property" and "communal rights of usage," claiming the latter to be in existence by virtue of a heading in the Additional Act which referred to "The regime and enjoyment of waters of common usage between the two countries." The Tribunal held:

> In the matter of flowing waters, it is difficult to make a very great distinction between a communal right of property and a communal right of usage, both of which are in perpetuity. But above all, the expressions used in a title cannot in themselves embrace consequences contrary to the principles formally established by the articles grouped under that title. Now, the regime of the waters which results from

the Additional Act is not in a general manner favorable to *indivision* or communal rights, even of usage; it sets out precise rules for a division of waters; few international watercourses are subjected to such detailed rules as those of the Pyrenees; the object of these provisions is to divide and confine the rights so as to avoid the difficulties of the regimes of *indivision,* difficulties which the Pyrenean Treaties openly call attention to in their preambles (Treaty of 14 April 1862) and even in their text (Article 13 of the Treaty of 2 December 1856).

A second argument to establish the necessity for a prior agreement could be drawn from the text of Article 11 of the Additional Act (Spanish *Mémoire,* page 48). If Article 11 explicitly sets forth only an obligation of information, "the necessity for prior agreement . . . results implicitly from this obligation to inform which was considered above; this obligation cannot disappear by itself since its object is the protection of the interests of the other Party." In the opinion of the Tribunal, this reasoning lacks a logical basis. If the contracting Parties had wished to establish the necessity for a prior agreement, they would not have confined themselves to mentioning in Article 11 only the obligation to give notice. The necessity for notice from State A to State B is implicit if A is unable to undertake the work envisaged without the agreement of B; it would then, therefore, not have been necessary to mention the obligation of notice to B, if the necessity for a prior agreement with B had been established. In any case, the obligation to give notice does not include the obligation, which is much more extensive, to obtain the agreement of the State that has been notified; the purpose of the notice may be completely different from that of agreeing to allow B to exercise the right of veto; it may be quite simply (and Article 11 of the Additional Act states this) to allow B to safeguard, on the one hand, at the proper time, the rights of its riparians to indemnities, and on the other hand, insofar as is possible, its general interests. This is so true that, incidentally, and without abandoning on that account its main thesis, the Spanish *Contre-Mémoire* (page 52) admits that according to Article 11 "these works or new concessions may not alter the regime or flow of a watercourse except in the measure to which the conciliation of the interests compromised would be impossible."

The reasoning method apparent in the development of the Spanish thesis calls for a more general remark. The necessity for a prior agreement would derive from all the circumstances in which the two Governments are led to reach agreement; this would be the case in matters concerning the indemnities provided for by Article 9 of the Additional Act, and in the matter of the French proposals which, on account of the interplay of the guarantees which they provide, would presuppose an agreement with the Spanish Government. This reasoning is in contradiction with the most general principles of international law. It is up to each State to appreciate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in this case, a dispute arises which the Parties normally seek to resolve by negotiation or in the alternative by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights. The commencement of arbitral proceedings in the present

case illustrates perfectly these rules in function of the obligations subscribed to by Spain and France in the Arbitration Treaty of 10 July 1929.

Pushed to the extreme, the Spanish thesis would imply either the general paralysis of the exercise of State jurisdiction in the presence of a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either the one or the other of these consequences.

In final support of their contentions based upon the Treaty of Bayonne and the Additional Act, the Spanish Government claimed that Article 16 required such prior agreement. The Tribunal interpreted this article, however, as merely raising an obligation "to consult and to bring into harmony the respective actions of the two States when general interests are involved in matters of water utilization." It would also not be possible, according to the Tribunal, to invoke in aid of such argument for prior agreement the fact that the French Government had previously raised objections to a Spanish project which involved the diversion of certain waters without subsequent restitution of the waters so diverted. The Tribunal stated:

In a more general way, when a question gives rise to long controversies and to diplomatic negotiations which have been several times begun, suspended, and resumed at different times, it is appropriate, in order to interpret the meaning of diplomatic documents, to take into account the following principles.

As has been recognized by international judicial decisions, both by the Permanent Court of Arbitration, in the case of the North Atlantic Fisheries (1910), and by the International Court of Justice, in the Fisheries case (1951) and in the case regarding United States Nationals in Morocco (1952)—one must not seize upon isolated expressions or ambiguous attitudes which do not alter the legal positions taken by States. All negotiations tend to take on a global character; they concern simultaneously rights—recognized and contested—and interests; it is normal that in taking into consideration adverse interests, a Party does not show intransigence on all of its rights. Only thus can it have some of its own interests taken into consideration.

Further, in order for negotiations to proceed in a favorable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should take pledges to this effect. If these pledges were to bind them unconditionally till the conclusion of an agreement, they would lose the very right to negotiate by signing them; this cannot be presumed.

It is important to keep these considerations in mind when drawing legal conclusions from diplomatic correspondence.

In this case, it is certain that Spain and France have always maintained their essential theses concerning the necessity for prior agreement. As the Spanish *Mémoire* recognizes (page 35), neither of the two Governments has ever modified the position that it has taken from the beginning. The French Government has notably recalled its own position on several occasions, as shown in the dispatch of 1 May 1922 (Annex 25 of the Spanish *Mémoire*), and in the conversations set forth in a report of the meeting of 5 August 1955 of the Mixed Commission of Engineers (Annex 39 of the Spanish *Mémoire*). The Tribunal has not found in the diplomatic correspondence any elements

which involve recognition by France of the Spanish Government's interpretation according to which the execution of works such as those envisaged in the present case would be dependent upon a prior agreement between the two Governments.

In 1949 the French Government had given a pledge in the International Commission for the Pyrenees, that the Mixed Commission of Engineers established at this meeting "would be charged with studying the case and making a report to the respective Governments, while it is understood that the present state of affairs would not be modified until the Governments decided differently by common agreement." The Spanish Government now claimed that this pledge precluded the French Government from proceeding with its project on Lake Lanoux in the absence of such "common agreement." The French Government, however, contended that in the light of later developments, *i.e.*, the fact that the latest French project does not involve any interference with the regime of water on the Spanish side of the border, this pledge has no meaning and France could proceed in accordance with its intentions as manifested in the reservation of November 14, 1955, "to resume their freedom of action within the limits of their rights," if the new Special Mixed Commission then set up failed to reach an agreement. On this point the Tribunal stated:

> The good faith of both Parties being absolutely unchallenged, it falls to the Tribunal to make an objective search for the full significance of the pledge; it is not necessary in fact that it should determine its scope; it will suffice for it to establish its duration.
>
> In view of the circumstances surrounding its conclusion, it is normal to place this agreement within the framework of diplomatic negotiations. It was brought about by an act of the International Commission of the Pyrenees which possesses no power of its own to decide questions which are submitted to it, and whose competence is limited to making studies and giving information. The agreement contained not only the pledge to maintain the present state of affairs, but above all and essentially it established a Mixed Commission of Engineers whose rather vague mandate was to study the question of Lake Lanoux and to submit the result of its labors to the Governments. The pledge to maintain the *status quo* therefore appears to be an accessory consequence of the task entrusted to this Commission. The maintenance of the *status quo* is therefore, in some manner, a provisional measure which could last only on condition that the Mixed Commission of Engineers engaged in some real activity. But this Commission, after its first meeting held at Gerone on 29 and 30 August 1949, became dormant after having done no useful work at all. The pledge of the French Government came to a normal end at the moment when, faced with this default, it had recourse to a procedure, provided for by treaty, to refer a new project to Spain which comprised, unlike all the preceding ones, the restitution, at first partial and then total, of the diverted waters. Nevertheless, some doubts may persist, as both the French Note of 27 June 1953 and that of 18 July 1954 allude to a Mixed Commission of Engineers; and this body met at Perpignan on 5 August 1955 to put on record that it was definitely unable to accomplish anything. After this setback, it may be held as certain that the Commission disappears as an instrument for study and negotiation and that the pledges which were tied to its existence disappear

> with it. The International Commission of the Pyrenees met in November 1955 and set up a new procedure for negotiation, a Special Mixed Commission of new composition with its competence established by one of the two Governments for a period of three months. It sanctioned no pledge resembling that of 1949. The agreement of 1949, therefore, could not prolong its effect beyond the existence of the Mixed Commission of Engineers unless it was of indefinite duration. But in this last hypothesis it would lose its provisional character; it would subordinate the very right to execute the works to the necessity for an agreement, whereas such an agreement was simply to mark the moment when their execution might be begun.

Finally the Tribunal considered whether any other obligations can be claimed to arise out of Article 11 of the Additional Act, and interpreted that article as giving rise to an obligation to give notice of intended work as well as a further obligation to set up a system of claims and safeguards for all interests affected by such work. In the interpretation whether other interests are so affected, the Tribunal felt that "the State exposed to the repercussions of work undertaken by a neighboring State is the sole judge of its own interests," and thus could exact information regarding intended projects. The Tribunal found as a fact that France had given notice of its projects in relation to Lake Lanoux.

As regards the interests which must be safeguarded, the Tribunal found that such interests include all those "which might conceivably be affected by the work undertaken," whatever their nature and even though they do not correspond to a right. The question how they are to be safeguarded could not be answered by the Tribunal as involving the formal noting of protests or claims where meetings and discussions are contemplated by the parties. But the Tribunal was of the opinion

> that the upstream State has, according to the rules of good faith, the obligation to take into consideration the different interests at stake, to strive to give them all satisfactions compatible with the pursuit of its own interests, and to demonstrate that, on this subject, it has a real solicitude to reconcile the interests of the other riparian with its own.

Whether this has been done, the judge will appraise on the basis of the information furnished to him. The Tribunal continued:

> In the present case, the Spanish Government reproaches the French Government for not having based the development project of the waters of Lake Lanoux on a foundation of absolute equality; this is a double reproach. It attacks simultaneously form and substance. As to form, the French Government is claimed to have imposed its project unilaterally without associating the Spanish Government in it for a common search for an acceptable solution. Substantively, the French project is asserted not to maintain a just balance between the French interests and the Spanish interests. The French project, in the Spanish view, would serve perfectly French interests . . . but would not take into sufficient consideration Spanish interests in irrigation. According to the Spanish Government, the French Government refused to take into consideration projects which, in the opinion of the Spanish Government, would have necessitated a very small sacrifice of French interests and yielded great advantages for the rural economy of Spain. . . .

On a theoretical basis the Spanish thesis is unacceptable to the Tribunal; for Spain tends to put rights and simple interests on the same plane. Article 11 of the Additional Act makes this distinction and the two Parties have reproduced this distinction in the basic statement of their theses at the beginning of the *Compromis* . . .

* * * * *

France may make use of her rights; she cannot ignore Spanish interests.

Spain may demand that her rights be respected and that her interests be taken into consideration.

As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its projects. If, in the course of discussions, the downstream State submits projects to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own project, provided it takes into consideration in a reasonable manner the interests of the downstream State.

In the case of Lake Lanoux, France has maintained to the end the solution which consists in diverting the waters of the Carol to the Ariège with full restitution. By making this choice France is only making use of a right; the development works of Lake Lanoux are on French territory, the financing of and responsibility for the enterprise fall upon France, and France alone is the judge of works of public utility which are to be executed on her own territory, under the reservation of Articles 9 and 10 of the Additional Act, which the French project does not violate.

On her side, Spain may not invoke a right to obtain a development of Lake Lanoux based on the needs of Spanish agriculture. In effect, if France were to renounce all of the works envisaged on her territory, Spain could not demand that other works in conformity to her wishes be carried out. Therefore, she can only assert her interests to obtain, within the framework of the project decided upon by France, terms which reasonably safeguard those interests.

It remains to be established whether this requirement has been fulfilled.

Reviewing the various proposals made by France to safeguard Spanish interests and their rejection by the Spanish Government, the Tribunal concluded:

When one examines the question of whether France either in the course of the dealings or in her proposals has taken Spanish interests into sufficient consideration, it must be stressed how closely linked together are the obligations to take into consideration adverse interests in the course of negotiations, and the obligation to give a reasonable place to these interests in the adopted solution. A State which has conducted negotiations with understanding and good faith in accordance with Article 11 of the Additional Act is not dispensed from giving a reasonable place to adverse interests in the solution it adopts because the conversations had been interrupted, though owing to the intransigence of its partner. Conversely, in determining the manner in which a project has taken into consideration the interests involved, the way in which negotiations have developed, the total number of the interests which have been presented, the price which each Party was ready to pay to obtain the safeguard of those interests, are all essential factors in establishing, with regard to the obligations set out in Article 11 of the Additional Act, the merits of this project.

The Tribunal thus reached the conclusion that the French project did not violate the Treaty of Bayonne and the Additional Act of the same date, nor did the French actions in relation thereto contravene any rule of international law.

Passports—right to travel and due process—strict construction of statute restricting such right—invalidity of regulations denying passports to Communists and aiders of Communist causes—non-Communist affidavit requirement invalid

KENT and BRIEHL *v.* DULLES. 357 U. S. 116.
United States Supreme Court, June 16, 1958. Douglas, J.

Separate actions were filed for declaratory judgments that the plaintiffs were entitled to passports. Relief was denied in both courts below. See 52 A.J.I.L. 345 (1958). The Supreme Court, *per* Douglas, J., held that Sections 1185 [1] and 211a [2] of the statutes under which the Secretary had issued regulations did not authorize denial of passports to Communists and aiders of Communist causes, nor was the requirement of a non-Communist affidavit authorized. No constitutional questions were reached. Clark, J., dissented in an opinion in which Justices Burton, Harlan, and Whittaker joined. The opinion [3] of Mr. Justice Douglas for the Court stated in full:

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent who desired to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland. The Director of the Passport Office informed Kent that issuance of a passport was precluded by § 51.135 of the Regulations promulgated by the Secretary of State on two grounds: (1) that he was a Communist and (2) that he had had "a consistent and prolonged adherence to the Communist Party line." The letter of denial specified in some detail the facts on which those conclusions were based. Kent was also advised of his right to an informal hearing under § 51.137 of the Regulations. But he was also told that, whether or not a hearing was requested, it would be necessary, before a passport would be issued, to submit an affidavit as to whether he was then or ever had been a Communist. Kent did not ask for a hearing but filed a new passport application listing several European countries he desired to visit. When advised that a hearing was still available to him, his attorney replied that Kent took the position that the requirement of an affidavit concerning Communist Party membership "is unlawful and that for that reason and as a matter of conscience," he would not supply one. He did, however, have a hearing at which the principal evidence against him was from his book It's Me O Lord, which Kent agreed was accurate. He again refused to submit the affidavit, maintaining that any matters unrelated to the question of his citizenship were irrelevant to the Department's consideration of his application. The Department advised him that no further consideration of his application would be given until he satisfied the requirements of the Regulations.

[1] 8 U.S.C.A. § 1185.
[2] 22 U.S.C.A. § 211a.
[3] Footnotes omitted.

Thereupon Kent sued in the District Court for declaratory relief. The District Court granted summary judgment for respondent. On appeal the case of Kent was heard with that of Dr. Walter Briehl, a psychiatrist. When Briehl applied for a passport, the Director of the Passport Office asked him to supply the affidavit covering membership in the Communist Party. Briehl, like Kent, refused. The Director then tentatively disapproved the application on the following grounds:

> "In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated."

The Director advised Briehl of his right to a hearing but stated that, whether or not a hearing was held, an affidavit concerning membership in the Communist Party would be necessary. Briehl asked for a hearing and one was held. At that hearing he raised three objections: (1) that his "political affiliations" were irrelevant to his right to a passport; (2) that "every American citizen has the right to travel regardless of politics"; and (3) that the burden was on the Department to prove illegal activities by Briehl. Briehl persisted in his refusal to supply the affidavit. Because of that refusal Briehl was advised that the Board of Passport Appeals could not under the Regulations entertain an appeal.

Briehl filed his complaint in the District Court which held that his case was indistinguishable from Kent's and dismissed the complaint.

The Court of Appeals heard the two cases *en banc* and affirmed the District Court by a divided vote. 101 U. S. App. D.C. 278, 248 F. 2d 600; 101 U. S. App. D.C. 239, 248 F. 2d 561. The cases are here on writ of certiorari. 355 U. S. 881, 78 S.Ct. 140, 2 L.Ed. 2d 111.

The Court first noted the function that the passport performed in American law in the case of *Urtetiqui* v. *D'Arbel*, 9 Pet. 692, 699, 9 L.Ed. 276, decided in 1835:

> "There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only

> to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."

A passport not only is of great value—indeed necessary—abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States. See *Browder* v. *United States*, 312 U. S. 335, 339, 61 S.Ct. 599, 602, 85 L.Ed. 862; 3 Moore, International Law Digest (1906), § 512. But throughout most of our history—until indeed quite recently—a passport, though a great convenience in foreign travel, was not a legal requirement for leaving or entering the United States. See Jaffe, The Right to Travel: The Passport Problem, 35 Foreign Affairs 17. Apart from minor exceptions to be noted, it was first made a requirement by § 215 of the Act of June 27, 1952, 66 Stat. 190, 8 U.S.C § 1185, 8 U.S.C.A. § 1185, which states that, after a prescribed proclamation by the President, it is "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." And the Proclamation necessary to make the restrictions of this Act applicable and in force has been made.

Prior to 1952 there were numerous laws enacted by Congress regulating passports and many decisions, rulings, and regulations by the Executive Department concerning them. Thus in 1803 Congress made it unlawful for an official knowingly to issue a passport to an alien certifying that he is a citizen. 2 Stat. 205. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to "cross the frontier" into enemy territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, "without a passport first obtained" from the Secretary of State or other designated official. 3 Stat. 199–200. The Secretary of State took similar steps during the Civil War. See Dept. of State, The American Passport (1898), 50. In 1850 Congress ratified a treaty with Switzerland requiring passports from citizens of the two nations. 11 Stat. 587, 589–590. Finally in 1856 Congress enacted what remains today as our basic passport statute. Prior to that time various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law. By the Act of August 18, 1856, 11 Stat. 52, 60–61, 22 U.S.C. § 211a, 22 U.S.C.A. § 211a, Congress put an end to those practices. This provision, as codified by the Act of July 3, 1926, 44 Stat., Part 2, 887, reads,

> "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

Thus for most of our history a passport was not a condition to entry or exit.

It is true that, at intervals, a passport has been required for travel. Mention has already been made of the restrictions imposed during the War of 1812 and during the Civil War. A like restriction, which was the forerunner of that contained in the 1952 Act, was imposed by Congress in 1918.

The Act of May 22, 1918, 40 Stat. 559, made it unlawful, while a Presidential Proclamation was in force, for a citizen to leave or enter the United States "unless he bears a valid passport." See H.R. Rep. No. 485, 65th Cong., 2d Sess. That statute was invoked by Presidential Proclamation on August 8, 1918, 40 Stat. 1829, which continued in effect until March 3, 1921. 41 Stat. 1359.

The 1918 Act was effective only in wartime. It was amended in 1941 so that it could be invoked in the then-existing emergency. 55 Stat. 252. See S.Rep. No. 444, 77th Cong., 1st Sess. It was invoked by Presidential Proclamation No. 2523, November 14, 1941, 55 Stat. 1696. That emergency continued until April 28, 1952. Proc. No. 2974, 66 Stat. C31, 50 U.S.C.A. Appendix, note preceding section 1. Congress extended the statutory provisions until April 1, 1953. 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary of State issued the Regulations here complained of.

Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is "a discretionary act" on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. See *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545, 74 S.Ct. 745, 750–751, 98 L.Ed. 933; *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310, 77 S.Ct. 343, 345, 1 L.Ed. 2d 347. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution of 1787 (1956), 171–181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *State of Nevada*, 6 Wall. 35, 44, 18 L.Ed. 744; *Williams* v. *Fears*, 179 U. S. 270, 274, 21 S.Ct. 128, 129, 45 L.Ed. 186; *Edwards* v. *People of State of California*, 314 U. S. 160, 62 S.Ct. 164, 86 L.Ed. 119. "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful

conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." Id., at 197.

Freedom of movement also has large social values. As Chafee put it:

> "Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." Id., at 195–196. And see Vestal, Freedom of Movement, 41 Iowa L.Rev. 6, 13–14.

Freedom to travel is, indeed, an important aspect of the citizen's "liberty." We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.

The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." 32 Stat. 386, 22 U.S.C. § 212, 22 U.S.C.A. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States? See 3 Moore, International Law Digest (1906), § 512; 3 Hackworth, Digest of International Law (1942), § 268; 2 Hyde, International Law (2d rev. ed.), § 401.

The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around

the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 72 S.Ct. 863, 96 L.Ed. 1153.

In a case of comparable magnitude, *Korematsu* v. *United States,* 323 U. S. 214, 218, 65 S.Ct. 193, 195, 89 L.Ed. 194, we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of "the gravest imminent danger to the public safety." There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.

Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than "request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection" to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 420–430, 55 S.Ct. 241, 248–252, 79 L.Ed. 446. Cf. *Cantwell* v. *State of Connecticut,* 310 U. S. 296, 307, 60 S.Ct. 900, 904, 84 L.Ed. 1213; *Niemotko* v. *State of Maryland,* 340 U. S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo,* 323 U. S. 283, 301–302, 65 S.Ct. 208, 218, 89 L.Ed. 243. Cf. *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586; *United States* v. *Rumely,* 345 U. S. 41, 46, 73 S.Ct. 543, 97 L.Ed. 770. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here. We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective. It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations.

To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Reversed.

NOTE: In *Dayton* v. *Dulles*, 357 U. S. 144 (U. S. Supreme Court, June 16, 1958, Douglas, J.), case below noted in 51 A.J.I.L. 645 (1957), *Kent* v. *Dulles, supra*, was applied in upsetting the denial of a passport to alleged aider of Communist causes. The dissenters in *Kent* again dissented.

Discovery—Swiss law against production of records—dismissal of action with prejudice for failure to produce records—Federal Rules of Civil Procedure.

SOCIÉTÉ INTERNATIONALE etc. *v.* ROGERS. 357 U. S. 197.
United States Supreme Court, June 16, 1958. Harlan, J.

Action was brought by the Swiss holding company to recover assets seized as alleged enemy property. Plaintiff had been ordered to produce the records of a Swiss banking house. The Swiss Government approved a plan for a neutral investigator to inspect the records for relevancy and to secure production of the relevant records by letters rogatory. The courts below held this to be insufficient compliance with the discovery order, and the complaint was dismissed with prejudice after seven years of litigation. See 51 A.J.I.L. 818 (1957). The Supreme Court, *per* Harlan, J., held that, where plaintiff's failure of compliance was due to the possibility of violating Swiss law and not to circumstances under its control, dismissal of the complaint with prejudice was not justified. Justice Harlan's opinion [1] for the Court stated in full:

[1] Footnotes omitted.

The question before us is whether, in the circumstances of this case, the District Court erred in dismissing, with prejudice, a complaint in a civil action as to a plaintiff that had failed to comply fully with a pretrial production order.

This issue comes to us in the context of an intricate litigation. Section 5(b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C. Appendix, § 5(b), 50 U.S.C.A. Appendix, § 5(b), sets forth the conditions under which the United States during a period of war or national emergency may seize ". . . any property or interest of any foreign country or national. . . ." Acting under this section, the Alien Property Custodian during World War II assumed control of assets which were found by the Custodian to be "owned by or held for the benefit of" I. G. Farbenindustrie, a German firm and a then enemy national. These assets, valued at more than $100,000,000, consisted of cash in American banks and approximately 90% of the capital stock of General Aniline & Film Corporation, a Delaware corporation. In 1948 petitioner, a Swiss holding company, also known as I. G. Chemie or Interhandel, brought suit under § 9(a) of the Trading with the Enemy Act, 40 Stat. 419, as amended, 50 U.S.C. Appendix, § 9(a), 50 U.S.C.A. Appendix, § 9(a), against the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States, to recover these assets. This section authorizes recovery of seized assets by "[a]ny person not an enemy or ally of enemy" to the extent of such person's interest in the assets. Petitioner claimed that it had owned the General Aniline stock and cash at the time of vesting and hence, as the national of a neutral power, was entitled under § 9(a) to recovery.

The Government both challenged petitioner's claim of ownership and asserted that in any event petitioner was an "enemy" within the meaning of the Act since it was intimately connected with I. G. Farben and hence was affected with "enemy taint" despite its "neutral" incorporation. See *Uebersee Finanz-Korp., A. G.* v. *McGrath,* 343 U. S. 205, 72 S.Ct. 618, 96 L.Ed. 888. More particularly, the Government alleged that from the time of its incorporation in 1928, petitioner had conspired with I. G. Farben, H. Sturzenegger & Cie, a Swiss banking firm, and others "[t]o conceal, camouflage, and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany."

At an early stage of the litigation the Government moved under Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A., for an order requiring petitioner to make available for inspection and copying a large number of the banking records of Sturzenegger & Cie. Rule 34, in conjunction with Rule 26(b), provides that upon a motion "showing good cause therefor," a court may order a party to produce for inspection nonprivileged documents relevant to the subject matter of pending litigation ". . . which are in his possession, custody, or control. . . ." In support of its motion the Government alleged that the records sought were relevant

to showing the true ownership of the General Aniline stock and that they were within petitioner's control because petitioner and Sturzenegger were substantially identical. Petitioner did not dispute the general relevancy of the Sturzenegger documents, but denied that it controlled them. The District Court granted the Government's motion, holding, among other things, that petitioner's "control" over the records had been *prima facie* established.

Thereafter followed a number of motions by petitioner to be relieved of production on the ground that disclosure of the required bank records would violate Swiss penal laws and consequently might lead to imposition of criminal sanctions, including fine and imprisonment, on those responsible for disclosure. The Government in turn moved under Rule 37(b) (2) of the Federal Rules of Civil Procedure to dismiss the complaint because of petitioner's noncompliance with the production order. During this period the Swiss Federal Attorney, deeming that disclosure of these records in accordance with the production order would constitute a violation of Article 273 of the Swiss Penal Code, prohibiting economic espionage, and Article 47 of the Swiss Bank Law, relating to secrecy of banking records, "confiscated" the Sturzenegger records. This "confiscation" left possession of the records in Sturzenegger and amounted to an interdiction on Sturzenegger's transmission of the records to third persons. The upshot of all this was that the District Court, before finally ruling on petitioner's motion for relief from the production order and on the Government's motion to dismiss the complaint, referred the matter to a Special Master for findings as to the nature of the Swiss laws claimed by petitioner to block production and as to petitioner's good faith in seeking to achieve compliance with the court's order.

The Report of the Master bears importantly on our disposition of this case. It concluded that the Swiss Government had acted in accordance with its own established doctrines in exercising preventive police power by constructive seizure of the Sturzenegger records, and found that there was ". . . no proof, or any evidence at all of collusion between plaintiff and the Swiss Government in the seizure of the papers herein." Noting that the burden was on petitioner to show good faith in its efforts to comply with the production order, and taking as the test of good faith whether petitioner had attempted all which a reasonable man would have undertaken in the circumstances to comply with the order, the Master found that ". . . the plaintiff has sustained the burden of proof placed upon it and has shown good faith in its efforts [to comply with the production order] in accordance with the foregoing test."

These findings of the Master were confirmed by the District Court. Nevertheless the court, in February 1953, granted the Government's motion to dismiss the complaint and filed an opinion wherein it concluded that: (1) apart from considerations of Swiss law petitioner had control over the Sturzenegger records; (2) such records might prove to be crucial in the outcome of this litigation; (3) Swiss law did not furnish an adequate excuse for petitioner's failure to comply with the production order.

since petitioner could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum; and (4) that the court in these circumstances had power under Rule 37(b) (2), as well as inherent power, to dismiss the complaint. 111 F.Supp. 435. However, in view of statements by the Swiss Government, following petitioner's intercession, that certain records not deemed to violate the Swiss laws would be released, and in view of efforts by petitioner to secure waivers from those persons banking with the Sturzenegger firm who were protected by the Swiss secrecy laws, and hence whose waivers might lead the Swiss Government to permit production, the court suspended the effective date of its dismissal order for a limited period in order to permit petitioner to continue efforts to obtain waivers and Swiss consent for production.

By October 1953, some 63,000 documents had been released by this process and tendered the Government for inspection. None of the books of account of Sturzenegger were submitted, though petitioner was prepared to offer plans to the Swiss Government which here too might have permitted at least partial compliance. However, since full production appeared impossible, the District Court in November 1953 entered a final dismissal order. This order was affirmed by the Court of Appeals, which accepted the findings of the District Court as to the relevancy of the documents, control of them by petitioner, and petitioner's good-faith efforts to comply with the production order. The court found it unnecessary to decide whether Rule 37 authorized dismissal under these circumstances since it ruled that the District Court was empowered to dismiss both by Rule 41(b) of the Federal Rules of Civil Procedure, and under its own "inherent power." It did, however, modify the dismissal order to allow petitioner an additional six months in which to continue its efforts. 96 U.S.App.D.C. 232, 225 F. 2d 532. We denied certiorari. 350 U. S. 937, 76 S.Ct. 302, 100 L.Ed. 818.

During this further period of grace, additional documents, with the consent of the Swiss Government and through waivers, were released and tendered for inspection, so that by July of 1956, over 190,000 documents had been procured. Record books of Sturzenegger were offered for examination in Switzerland, subject to the expected approval of the Swiss Government, to the extent that material within them was covered by waivers. Finally, petitioner presented the District Court with a plan, already approved by the Swiss Government, which was designed to achieve maximum compliance with the production order: A "neutral" expert, who might be an American, would be appointed as investigator with the consent of the parties, District Court, and Swiss authorities. After inspection of the Sturzenegger files, this investigator would submit a report to the parties identifying documents, without violating secrecy regulations, which he deemed to be relevant to the litigation. Petitioner could then seek to obtain further waivers or secure such documents by letters rogatory or arbitration proceedings in Swiss courts.

The District Court, however, refused to entertain this plan or to inspect the documents tendered in order to determine whether there had been substantial compliance with the production order. It directed final dis-

missal of the action. The Court of Appeals affirmed, but at the same time observed: "That [petitioner] and its counsel patiently and diligently sought to achieve compliance . . . is not to be doubted." 100 U.S.App.D.C. 148, 149, 243 F. 2d 254, 255. Because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari. 355 U. S. 812, 78 S.Ct. 61, 2 L.Ed. 2d 30.

I.

We consider first petitioner's contention that the District Court erred in issuing the production order because the requirement of Rule 34, that a party ordered to produce documents must be in "control" of them, was not here satisfied. Without intimating any view upon the merits of the litigation, we accept as amply supported by the evidence the findings of the two courts below that, apart from the effect of Swiss law, the Sturzenegger documents are within petitioner's control. The question then becomes: Do the interdictions of Swiss law bar a conclusion that petitioner had "control" of these documents within the meaning of Rule 34?

We approach this question in light of the findings below that the Swiss penal laws did in fact limit petitioner's ability to satisfy the production order because of the criminal sanctions to which those producing the records would have been exposed. Still we do not view this situation as fully analogous to one where documents required by a production order have ceased to exist or have been taken into the actual possession of a third person not controlled by the party ordered to produce, and without that party's complicity. The "confiscation" of these records by the Swiss authorities adds nothing to the dimensions of the problem under consideration, for possession of the records stayed where it was and the possibility of criminal prosecution for disclosure was of course present before the confiscation order was issued.

In its broader scope, the problem before us requires consideration of the policies underlying the Trading with the Enemy Act. If petitioner can prove its record title to General Aniline stock, it certainly is open to the Government to show that petitioner itself is the captive of interests whose direct ownership would bar recovery. This possibility of enemy taint of nationals of neutral powers, particularly of holding companies with intricate financial structures, which asserted rights to American assets was of deep concern to the Congress when it broadened the Trading with the Enemy Act in 1941 ". . . to reach enemy interests which masqueraded under those innocent fronts." *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 485, 68 S.Ct. 174, 176, 92 L.Ed. 88. See Administration of the Wartime Financial and Property Controls of the United States Government, Treasury Department (1942), pp. 29–30; H.R.Rep. No. 2398, 79th Cong., 2nd Sess. 3.

In view of these considerations, to hold broadly that petitioner's failure to produce the Sturzenegger records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had "control" over them, and thereby from ordering their production, would

undermine congressional policies made explicit in the 1941 amendments, and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records. The District Court here concluded that the Sturzenegger records might have a vital influence upon this litigation insofar as they shed light upon petitioner's confused background. Petitioner is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order, and indeed to that end it has already made significant progress. United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability where the requested records promise to bear out or dispel any doubt the Government may introduce as to true ownership of the assets.

We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order.

II.

We consider next the source of the authority of a District Court to dismiss a complaint for failure of a plaintiff to comply with a production order. The District Court found power to dismiss under Rule 37(b) (2) (iii) of the Federal Rules of Civil Procedure as well as in the general equity powers of a federal court. The Court of Appeals chose not to rely upon Rule 37, but rested such power on Rule 41(b) and on the District Court's inherent power.

Rule 37 describes the consequences of a refusal to make discovery. Subsection (b), which is entitled "Failure to Comply With Order," provides in pertinent part:

> "(2) . . . If any party . . . refuses to obey . . . an order made under Rule 34 to produce any document or other thing for inspection. . . , the court may make such orders in regard to the refusal as are just, and among others the following:
>
> . . . . .
>
> "(iii) An order striking out pleadings or parts thereof . . . , or dismissing the action or proceeding or any part thereof. . . ."

Rule 41(b) is concerned with involuntary dismissals and reads in part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule

37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is "just." There is no need to resort to Rule 41(b), which appears in that part of the Rules concerned with *trials* and which lacks such specific references to discovery. Further, that Rule is on its face appropriate only as a defendant's remedy, while Rule 37 provides more expansive coverage by comprehending disobedience of production orders by any party. Reliance upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, or upon "inherent power," can only obscure analysis of the problem before us. See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col.L.Rev. 480.

It may be that the Court of Appeals invoked Rule 41(b), which uses the word "failure," and hesitated to draw upon Rule 37(b) because of doubt that Rule 37 would cover this situation since it applies only where a party "*refuses* to obey." (Italics added.) Petitioner has urged that the word "refuses" implies willfulness and that it simply *failed* and did not *refuse* to obey since it was not in willful disobedience. But this argument turns on too fine a literalism and unduly accents certain distinctions found in the language of the various subsections of Rule 37. Indeed subsection (b), as noted above, is itself entitled "*Failure* to Comply with Order." (Italics added.) For purposes of subdivision (b) (2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.

III.

We turn to the remaining question, whether the District Court properly exercised its powers under Rule 37(b) by dismissing this complaint despite the findings that petitioner had not been in collusion with the Swiss authorities to block inspection of the Sturzenegger records, and had in good faith made diligent efforts to execute the production order.

We must discard at the outset the strongly urged contention of the Government that dismissal of this action was justified because petitioner conspired with I. G. Farben, Sturzenegger & Cie, and others to transfer ownership of General Aniline to it prior to 1941 so that seizure would be avoided and advantage taken of Swiss secrecy laws. In other words, the Government suggests that petitioner stands in the position of one who deliberately courted legal impediments to production of the Sturzenegger records, and who thus cannot now be heard to assert its good faith after this expectation was realized. Certainly these contentions, if supported by the facts, would have a vital bearing on justification for dismissal of the action, but they are not open to the Government here. The findings

below reach no such conclusions; indeed, it is not even apparent from them whether this particular charge was ever passed upon below. Although we do not mean to preclude the Government from seeking to establish such facts before the District Court upon remand, or any other facts relevant to justification for dismissal of the complaint, we must dispose of this case on the basis of the findings of good faith made by the Special Master, adopted by the District Court, and approved by the Court of Appeals.

The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey* v. *Elliott,* 167 U. S. 409, 17 S.Ct. 841, 42 L.Ed. 215, and *Hammond Packing Co.* v. *State of Arkansas,* 212 U. S. 322, 29 S.Ct. 370, 53 L.Ed. 530. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.) p. 4325.

In *Hovey* v. *Elliott, supra,* it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree *pro confesso* without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was substantially modified by *Hammond Packing Co.* v. *State of Arkansas, supra,* where the Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The *Hovey* case was distinguished on grounds that the defendant there was denied his right to defend "as a mere punishment"; due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence ". . . was but an admission of the want of merit in the asserted defense." 212 U. S. at pages 350–351, 29 S.Ct. at page 380. But the Court took care to emphasize that the defendant had not been penalized ". . . for a failure to do that which it may not have been in its power to do." All the State had required "was a *bona fide* effort to comply with an order . . . , and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . ." of the order. 212 U. S. at page 347, 29 S.Ct. at page 378.

These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. *Tot* v. *United States,* 319 U. S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519. Certainly substantial constitutional questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff,* cannot be deemed to be in the customary role of a party invoking the aid of a

court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant,* for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr* v. *Wallace,* 255 U. S. 239, 245–246, 41 S.Ct. 293, 296, 65 L.Ed. 604; *Guessefeldt* v. *McGrath,* 342 U. S. 308, 318, 72 S.Ct. 338, 344, 96 L.Ed. 342; cf. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489, 51 S.Ct. 229, 231, 75 L.Ed. 473.

The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. Of course this situation should be distinguished from one where a party claims that compliance with a court's order will reveal facts which may provide the basis for criminal prosecution of that party under the penal laws of a foreign sovereign thereby shown to have been violated. Cf. *United States* v. *Murdock,* 284 U.S. 141, 149, 52 S.Ct. 63, 76 L.Ed. 210. Here the findings below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws. In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws. Petitioner has sought no privileges because of its foreign citizenship which are not accorded domestic litigants in United States courts. Cf. *Guaranty Trust Co. of New York* v. *United States,* 304 U. S. 126, 133–135, 58 S.Ct. 785, 82 L.Ed. 1224. It does not claim that Swiss laws protecting banking records should here be enforced. It explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its *inability* to comply because of foreign law.

In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

This is not to say that petitioner will profit through its inability to tender

the records called for. In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an "enemy" within the meaning of the Trading with the Enemy Act. The Government already has disputed its right to recovery by relying on information obtained through seized records of I. G. Farben, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner. It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. So much indeed petitioner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.

On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. We decide only that on this record dismissal of the complaint with prejudice was not justified.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice CLARK took no part in the consideration or decision of this case.

BRITISH COMMONWEALTH CASES *

Shipping—charter-party incorporating United States Carriage of Goods by Sea Act, 1936

The House of Lords held that, although the United States Carriage of Goods by Sea Act, 1936, is expressly stated to be inapplicable to charter-parties, the parties, by incorporating the Act into their contractual relationship, must have intended to give some effect to such incorporation. They could not have intended to incorporate a nullity into their relationship. The provision of the incorporated U. S. "Paramount Clause," insofar as it refers to "bills of lading," should therefore be treated as *falsa demonstratio* and read as referring to the charter-party. The House of Lords further held (Lords Morton and Reid dissenting) that the United States Act applies to the totality of the charter-party and not just to voyages to and from United States ports. On the interpretation of the words "loss or damage" in Section 4(1) and (2) of the Act, the House of Lords held unanimously that this is not limited to physical loss or damage to the goods but only to the limitations imposed in Section 2 of the Act. Although the ship was unseaworthy, this was due to mechanical

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breakdowns for which the incompetence of the engine-room staff was to blame. The owners, having exercised due diligence in appointing such staff, escaped liability under the provisions of the Act (Section 4(1) and (2) as incorporated). *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.*, [1958] 1 All E.R.725 (House of Lords, Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow, March 6, 1958).

Foreign legislation—effect of foreign legislation on debt governed by English law—characterization into law of succession or law governing status

The National Bank of Greece had unconditionally guaranteed the due payment of principal and interest and the due performance of all the conditions of sterling mortgage bonds issued in England by the National Mortgage Bank of Greece. By Law No. 2292 the National Bank of Greece and the Bank of Athens were amalgamated, both ceased to exist and a new entity, the National Bank of Greece and Athens S.A., came into existence, which was "substituted *ipso iure* . . . in all rights and obligations of the said amalgamated banks as their universal successor." In *National Bank of Greece and Athens S.A.* v. *Metliss*, [1957] 3 W.L.R.1056, 3 All E.R.608, it was held that English courts will give effect to that law and the new entity will be held liable on the debts of any one of the previous banks. On July 16, 1956, the Greek Government passed Decree No. 3504 whereby the National Bank of Greece and Athens S.A. was to be absolved from all liabilities, whether as principal or guarantor, on any loans through bonds payable in gold or foreign currency. This law was to have retroactive effect as if contained in the earlier law No. 2292. The National Mortgage Bank of Greece having defaulted on the payment of interest, the defendant National Bank of Greece and Athens S.A. claimed exemption under Decree No. 3504. Diplock, J., held that this new law (No. 3504) was not a law of succession so as to regulate the rights and liabilities of the successor, but was a law attempting to discharge contractual liabilities governed by English law. Had this restriction been in the original Law No. 2292, it would not have been possible to hold the new entity liable on the liabilities of the previous two banks whose dissolution would have to be recognized, whatever rights against the assets might be available in England on the winding up of the two banks. Law No. 3504 was passed after the National Bank of Greece and Athens S.A. had come into being and had been held the universal successor of the previous banks. Thus it is not a law laying down the attributes of the fictitious person created by a foreign state, but is a law which attempts to affect rights governed by English law to which a foreign successor is subject. As such it cannot be considered as binding in England, even though the foreign law attempts by a fiction to read these new provisions into an earlier law which set up the successor. Such fiction may have to be given effect in the forum of the foreign legal system, but is not binding in England, for it cannot alter the true fact that the successor is already in existence and liable and this is an attempt to dis-

charge its liability. *Adams* v. *National Bank of Greece and Athens S.A.*, [1958] 2 W.L.R.588, 2 All E.R. 3 (Q.B.D., Diplock, J., March 13, 1958).

Diplomatic immunity—family of diplomat—ward of court

Subsequent to the death of the mother of his child, the father had married an English woman who looked after the child, although he had ceased to live with her. The father, a member of the Greek Diplomatic Service, acknowledged as such by the British Foreign Office, now wished to send the child to Greece to be educated. His wife objected to the interruption in the child's schooling and attempted to prevent such interruption by making the child a ward of court by issuing an originating summons under the Law Reform (Miscellaneous Provisions) Act, 1949, Section 9. The father entered a conditional appearance to have the action stayed on the ground of diplomatic immunity. Harman, J., held that the father is entitled, under the shield of diplomatic immunity, to reject "the paternal jurisdiction of the Crown, exercised through the court of Chancery," for judicial jurisdiction is also included in such immunity. He then considered whether making the child a party to the summons would give the court jurisdiction, but found that the child was a member of the family of a diplomat within the Diplomatic Privileges Act, 1708, as explained by Lord Phillimore in *Engelke* v. *Musmann*, [1928] A.C.432 at 450, since the father had never given up his parental rights when he allowed the child to remain with his wife. *In re C.* (An Infant), [1958] 3 W.L.R. 309, 2 All E.R.656 (Ch.D., June 10, 1958).

C.I.F. contract—shipping by customary route—closing of Suez Canal —frustration of contract for the sale of unascertained goods

The sellers were under an obligation to supply cattle food from Port Sudan, c.i.f. Belfast, shipment October–November, 1956. Due to hostilities the Suez Canal was closed from November 2, 1956, until April 9, 1957. On a special case stated by the Board of Appeal of the London Cattle Food Association, acting as arbitrators in the dispute which had arisen due to non-shipment by the sellers, McNair, J., held that the contract had become frustrated. At the time the contract was entered into, the usual route for shipment was through the Suez Canal. But in a c.i.f. contract the seller has the right to delay shipment to the last date available to him under the contract. Thus the usual route for shipment available in November would have been via the Cape. It was therefore not possible to claim that frustration occurred because the *usual route* was not available. On the other hand, shipping these goods around the Cape route, which is two and a half times as long, could not have been in the mind of the parties when they entered into the contract, since this would involve obligations which were fundamentally different from those involved in a shipment through the Suez Canal. Thus the provision that shipment would be through the Canal was of so fundamental a nature that the contract

became frustrated when that became impossible. The doctrine of frustration is not excluded merely by the fact that the contract involves unascertained goods. *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115 (Q.B.D., McNair, J., July 18, 1958).

United Kingdom income tax—checks drawn on American account sold to authorized dealer not income

On an appeal from the Special Commissioners of Income Tax, Wynn-Parry, J., held that where a resident in the United Kingdom sells a dollar check to an authorized dealer, he is not receiving an income nor being paid the proceeds "arising from securities out of the United Kingdom" and thus is not liable to United Kingdom taxation. The proceeds are purchases, not income. Case iv, Schedule D, Income Tax Act, 1918, is inapplicable. Further, as he did not bring any dollars into the United Kingdom, such dollars, if any, being brought into the country by the Bank of England to whom the authorized dealer transferred the dollars, there is nothing taxable as income arising from foreign possessions. Case v, of Schedule D, Income Tax Act, 1918, is inapplicable. *Thomson* (*Inspector of Taxes*) v. *Moyse*, [1958] 3 All E.R.225 (Ch.D., Wynn-Parry, J., July 22, 1958).

Taxation—interest in property in foreign government—use for public purpose—principle of immunity of foreign state

The decision below, noted in 52 A.J.I.L.529 (1958), holding that property acquired by a Canadian firm on behalf of the United States Government for the construction of the Pine Tree Line of defense was not subject to taxation in the Province of New Brunswick, was unanimously affirmed by the Supreme Court of Canada. The Supreme Court agreed on the finding of fact that the property, chattels real and personal, had been acquired on behalf of the United States, *i.e.*, a foreign sovereign, and was in Canada at the express invitation of the Parliament of Canada under powers vested in it by Section 91(7) of the British North America Act. Rand, J. (with whom Abbott, J., concurred), pointed out that new contacts and relations between states demanded the rejection of the fiction of extraterritoriality and the acceptance of the test basing the rights of foreign sovereigns or of their representatives on the circumstances of the invitation and its acceptance to enter the inviting state. Thus, since public work of this sort is not normally subject to taxation, such work is not taxable when carried out jointly for the defense of both Canada and the United States. Lock, J. (with whom Cartwright, J., concurred), based himself on the more traditional theory as laid down in the *Parlement Belge*, [1880] 5 P.D.197, and further held it to be immaterial whether the United States granted equal immunities to other countries. Fauteux, J., also agreed. *Municipality of the City and County of St. John, Logan and Clayton* v. *Fraser-Brace Overseas Corp. et al.*, [1958] 13 D.L.R. (2d) 177 (Supreme Court of Canada, Rand, Lock, Cartwright, Fauteux and Abbott, JJ., April 1, 1958).

Conflict of laws—capacity to enter into polygamous marriage—recognition of polygamous marriage in bar to monogamous marriage

Petition was filed for annulment of marriage. The respondent had been domiciled in India when she married one Argen Singh, who was domiciled in British Columbia. The marriage was potentially polygamous, but was valid by the *lex loci celebrationis, i.e.,* the Punjab, India. Brown, J., held that, although Argen Singh was domiciled in British Columbia, the marriage entered into in the Punjab was a valid marriage which, though not giving right to either party in the courts of British Columbia, would be recognized as a bar to any subsequent marriage. Brown, J., claimed to be following *Berthiaume* v. *Dastous,* [1930] A.C.79 at 83, per Viscount Dunedin, that the rule of *locus regit actum* governed so as to enable Argen Singh to enter into the potentially polygamous marriage. *Kaur* v. *Ginder, Ginder* v. *Kor,* [1958] 13 D.L.R.(2d) 465 (British Columbia Supreme Court, April 14, 1958).

Conflict of laws—proof of foreign law—expert evidence

In a petition for the annulment of a marriage entered into in Minnesota between persons domiciled in Ontario, the ground alleged was that the petitioner had been under twenty years of age at the time of the marriage and thus was under age to enter into a marriage without the consent of his legal guardians. No such consent having been obtained, expert evidence was given by a lawyer practicing in Minnesota that failure to produce such consent would make the marriage voidable by the law of Minnesota. Ferguson, J., held that, although capacity to marry is governed by the *lex domicilii* of the parties (*Re Bethell,* (1888) 38 Ch. D. 220), the necessity for consent has been characterized in the conflict of laws as a question of procedure and is thus governed by the *lex loci celebrationis* (*Sottomayor* v. *De Barros,* (1877) 3 P.D. 1). In giving evidence of the foreign law the expert witness gave his interpretation of the relevant codified provisions of Minnesota. Indicating that an expert witness can only give evidence of fact and not of interpretation of the law, Ferguson, J., noted that merely to state the wording of the law may lead to its wrong comprehension, and thus an expert witness is allowed to state what law results from the wording of such law. The opinion of what the courts of Minnesota would do was thus accepted as a fact, and the marriage held voidable and a decree issued. *Hunt* v. *Hunt,* [1958] 14 D.L.R. (2d) 243 (Ontario High Court, Ferguson, J., June 23, 1958).

NOTES

Liability for governmental atomic explosions—Federal Tort Claims Act—State law

In *Bartholomae Corporation* v. *U. S.,* 253 F.2d 716 (U. S. Ct.A., 9th Circuit, Aug. 15, 1957, rehearing denied Jan. 11, 1958, Fee, Ct. J.), the court held that damage to private property from governmental atomic explosion was not a "taking," that there was no liability without fault on

these facts, that evidence sustained no negligence, and that, if there were, it depended on the State law of the place of the accident under the jurisdictional provision [1] of the Federal Tort Claims Act.

Treaties—eminent domain

In *Guerrero-Zapata Bridge Company* v. *U. S.*, 252 F.2d 116 (U. S. Ct.A., 5th Circuit, Feb. 11, 1958, *Per Curiam*), on the basis of the opinion below, 157 F.Supp. 150 (Allred, D. J.), the court held that the 1944 treaty with Mexico [2] constituted an implied repeal of the Act of Congress [3] which had authorized the toll bridge and reserved a right to repeal the Act.

Territory under trusteeship a "foreign country" within Federal Tort Claims Act

The decision below, noted in 52 A.J.I.L. 137 (1958), that Kwajalein Island in the Marshalls, of which the U. S. was administering authority under a strategic trusteeship agreement,[4] was a "foreign country" under the Federal Tort Claims Act,[5] was affirmed by a divided court. *Callas* v. *U. S.*, 253 F. 2d 838 (U. S. Ct.A., 2nd Circuit, April 1, 1958, Galston, D.J.). Hincks, Ct. J., concurred, and Lombard, Ct. J., dissented.

Admiralty—barratry by crew under marine insurance policies—defection to Communist China of vessels owned by Chinese Nationalists

The decision below, 151 F.Supp. 211 (1957), opinion digested in 52 A.J.I.L. 120 (1958), holding there was barratry and not seizure when master and crew of vessels defected, was affirmed, and the decision that defection by the crew alone was not barratry was reversed. *National Union Fire Ins. Co.* v. *Republic of China*, 254 F.2d 177 (U. S. Ct.A., 4th Circuit, April 8, 1958, Soper, Ct. J.).

International Claims Settlement Act—denial of claim as non-national not reviewable

In *Zutich* v. *Gillilland*, 254 F.2d 464 (U. S. Ct.A., 6th Circuit, April 29, 1958, *Per Curiam*), denial of award to claimant as a non-national was held non-reviewable under the terms of the International Claims Settlement Act of 1949,[6] and said Act was held to supersede the provision for declaratory judgment in the Immigration and Nationality Act of 1952.[7]

NOTE: In *First National City Bank of New York* v. *Gillilland*, 257 F.2d 223 (U. S. Ct.A., Dist. of Col. Circuit, June 12, 1958, Madden, J., Ct. Claims, sitting by designation), a finding by the Claims Commission that

[1] 28 U.S.C.A. § 1346 (2) (b).
[2] 59 Stat. 1219.
[3] 45 Stat. 387.
[4] 61 Stat. 3301.
[5] 28 U.S.C.A. § 2680 (k).
[6] 28 U.S.C.A. § 1623 (h).
[7] 8 U.S.C.A. 1503 (a).

the plaintiff did not meet the statutory requirements for recovery was held non-reviewable under the Act.

Aviation—Warsaw Convention—liability for omission and right to indemnity

In *Orlove* v. *Philippine Air Lines,* 257 F.2d 384 (U. S. Ct. A., 2nd Circuit, June 25, 1958, Clark, C. J.), the court held that liability limitations for acts of other carriers in tariff and Warsaw Convention [8] did not shield against the carrier's own omission, but that it could recover over against the carrier primarily at fault.

Aviation—relation of airplane death action to Federal question jurisdiction

In *Winsor* v. *United Air Lines,* 159 F.Supp. 856 (U.S. Dist. Ct., D. Del., Jan. 30, 1958, Layton, D. J.), action for airplane death under Colorado Death Act which pleaded but did not rely primarily on the Warsaw Convention,[9] was held not removable as a Federal question. Defendant conceded that the Warsaw Convention itself does not create a cause of action, but argued Federal question jurisdiction on the ground that the treaty would have to be construed. See notes, 52 A.J.I.L. 346, 347 (1958).

NOTE: In *Nello L. Teer Company* v. *J. A. Jones Construction Co.,* 160 F.Supp. 345 (U. S. Dist. Ct., M. D., N. C., April 4, 1958, Stanley, D. J.), the fact that a treaty might be raised as a defense was held no ground for Federal question jurisdiction.

Jurisdiction—civilian employee of armed forces abroad and capital offense—constitutionality of court-martial

In *Grisham* v. *Taylor,* 161 F.Supp. 112 (U. S. Dist. Ct., M. D., Pa., April 22, 1958, Follmer, D. J.), France having waived jurisdiction, petitioner, a civilian Army employee, was convicted by court-martial of murder. On habeas corpus, the court held that Article 2 (11) of the Uniform Code of Military Justice [10] as so applied was constitutional. See also *U. S.* v. *McElroy,* 158 F.Supp. 171, noted in 52 A.J.I.L. 536 (1958).

Declaration of war in international law and in charter-party—Suez affair

In *Navios Corporation* v. *The Ulysses II,* 161 F.Supp. 932 (U. S. Dist. Ct., D. Md., April 30, 1958, Thomsen, C. J.), time charter-parties provided for cancellation "if war is declared" against any NATO country. The court construed the clause as requiring more than being "engaged in war" or a "state of war." It held that war had been "declared" by the speech of President Nasser within the business and international law meanings of the phrase.

[8] 49 Stat. (2) 3000 *et seq.*

[9] 49 Stat. (2) 3000 *et seq.*

[10] 10 U.S.C. § 802 (11).

Compensation for taking of property of U. S. citizen abroad—executive agreement and Fifth Amendment

In *Seery* v. *U. S.*, 161 F.Supp. 395 (U. S. Ct. Claims, May 7, 1958, Madden, J.), plaintiff, U. S. citizen, was awarded compensation for damage to her property in Austria caused by personnel of the U. S. Armed Forces. The Government's renewed challenge to the jurisdiction on the ground, *inter alia,* that an executive agreement with Austria [11] defeated the right to compensation, was rejected without discussion on the basis of the former opinion in 127 F.Supp. 601 (1955), digested in 49 A.J.I.L. 410 (1955), and discussed in editorial, 49 A.J.I.L. 362 (1955).

Customs—trade agreements—Proclamation denying benefits to imports directly or indirectly from Communist areas of products from such areas

In *Dessy Enterprises* v. *U. S.*, 162 F.Supp. 947 (U. S. Customs Court, 1st Div., May 15, 1958, Millison, J.), the Collector of Customs, acting under Section 5 of the Trade Agreements Extension Act of 1951 [12] and Presidential Proclamation [13] of August 1, 1951, classified imports from the Western Sector of Berlin as of Communist area origin. The court held that the cited provisions apply only to imports which were the product of the area at the *time* of Communist domination, and held further that the imports involved, which had been purchased from a West Berlin dealer, were not imported "directly or indirectly" from the Communist area. Oliver, C. J., dissented.

Treaties—right of aliens to inherit realty—construction of treaties—effective date

In *Lazarou* v. *Moraros,* 143 A.2d 669 (New Hampshire Supreme Court, July 1, 1958, Lampron, J.), a naturalized citizen died intestate on July 12, 1954, leaving New Hampshire realty. At all relevant times all the survivors except the defendant were alien residents and nationals of Greece. The court held that the defendant, an American citizen, was entitled to sole ownership. The 1937 Treaty of Establishment [14] was held not to affect inheritance, giving great weight to an opinion of the State Department to that effect. A new commercial treaty,[15] superseding the earlier treaty, entered into force October 13, 1954. The court cited the old cases holding treaties governing private rights as operative only from the final effective date rather than at the time of signature.

Sovereign immunity—scope of waiver

In a general assignment proceeding for benefit of creditors, assignee moved to enjoin a foreign sovereign from prosecuting plenary action for conversion of funds brought by said sovereign against assignor and said

[11] 61 Stat. 4168.
[12] 65 Stat. 72.
[13] 86 T. D. 300.
[14] 51 Stat. 230 (1937).
[15] T.I.A.S., No. 3057.

assignee. The court denied the motion, holding *National City Bank of New York* v. *Republic of China,* 348 U. S. 356, inapplicable. *In re Hughes & Company,* 172 N.Y.S. 2d 441 (Sup. Ct., Spec. Term, N. Y. County, Part I, Oct. 29, 1957, McGivern, J.).

Illegal contracts—exchange controls—Bretton Woods Agreement

In *Southwestern Shipping Corp.* v. *National City Bank,* 173 N.Y.S. 2d 509 (Sup. Ct., Special and Trial Term, N. Y. County, Part III, March 17, 1958, Backer, J.), the court held that an agreement and assignment in Italy, contrary to Italian exchange control regulations, for the transfer of dollars in New York was illegal and unenforceable both under the Bretton Woods Agreement[16] and general contract law.

Constitutionality of State statute prohibiting use of name of United Nations without consent of Secretary General

In *People* v. *Wright,* 173 N.Y.S. 2d 160 (Court of Special Sessions of City of New York, New York County, April 22, 1958, Gassman, J.), the constitutional validity of a New York statute[17] prohibiting use of the name "United Nations" without the consent of the Secretary General was upheld.

Treaties—third-party beneficiary and agency

Plaintiff, the alleged victim of Nazi persecution, sued the defendant, an agency for the distribution of funds under an agreement between Israel and the Federal Republic of Germany in 1952. The complaint was dismissed on the ground that plaintiff failed to establish himself as a third-party beneficiary and that the Luxembourg Agreements of 1957 did not create the agency. *Revici* v. *Conference of Jewish Material Claims,* 174 N.Y.S. 2d 825 (Sup. Ct., Spec. Term, N. Y. County, Part III, May 9, 1958, Hofstadter, J.).

NOTE: A similar conclusion was reached in *Application of Jewish Secondary Schools Movement,* 174 N.Y.S. 2d 560 (Sup. Ct., Spec. Term, N. Y. County, Part I, May 1, 1958, Hecht, J.).

AMERICAN CASES ON ENEMY PROPERTY AND TRADING WITH THE ENEMY

Société Internationale v. *Rogers,* 357 U. S. 197 (June 16, 1958), reprinted *supra,* p. 177, dismissal of complaint with prejudice not justified where failure to comply with pretrial production order was not due to own fault but to the fact that it might violate Swiss law; *Illinois Cen. R.R.* v. *Rogers,* 253 F.2d 349 (D.C. Cir., Feb. 27, 1958), where claim of Japanese company was not paid but correctness undisputed at time of war, title passed to custodian; *Herrmann* v. *Rogers,* 256 F.2d 871 (9th Cir., April 2, 1958), even though trustee had discretion to pay if he found the property not subject

[16] Art. VIII, Sec. 2 (b).

[17] Sec. 964-a of the Penal Law.

to confiscation, the interests of the beneficiary were within the seizure power; *Willenbrock* v. *Rogers,* 255 F.2d 236 (3rd Cir., April 22, 1958), "enemy" contemplates something more than mere physical presence but something less than domicile; *Kammholz* v. *Allen,* 256 F.2d 437 (2nd Cir., June 13, 1958), contingent future interests properly seized by Alien Property Custodian; *Dix* v. *Brownell,* 159 F.Supp. 163 (E.D.N.Y., Feb. 19, 1958), corporations were "nationals" and thus purchase without license could vest no rights in the purchaser; *Kind* v. *Rogers,* 162 F.Supp. 197 (W.D.N.Y., April 23, 1958), insufficient identity of interest, issues and parties to find *res judicata* in subsequent action where issues concerned alleged personal status of plaintiff-trustee as constructive enemy alien; *Kuerschner & Rauchwarenfabrik* v. *N. Y. Trust Co.,* 162 F.Supp. 481 (S.D.N.Y., June 2, 1958), bank depositor could not recover damages since loss was unforeseeable when deposit was made before 1941 and funds were later frozen; *In Re Ronkendorf's Estate,* 324 Pac.2d 941 (Calif. App., May 6, 1958), Attorney General entitled to succeed to property after termination of war and claim of American claimant rejected; *In Re Camac's Estate,* 172 N.Y.S. 2d 29 (Surr. Ct., N. Y. Cty., Jan. 30, 1958), Alien Property Custodian entitled to income only after accepting such a distribution for sixteen years; *In Re Stock's Estate,* 172 N.Y.S. 2d 927 (Surr. Ct., N. Y. Cty., March 5, 1958), vesting order vested both vested and contingent remainders in Attorney General.