"TO BE OR NOT TO BE": A LOOK AT THE TREATY/STATUTE CONFLICT INVOLVED IN THE *UNITED STATES V. PALESTINE LIBERATION ORGANIZATION*

Conflicting treaties and statutes are discussed often in the legislative history of our country.[1] Treaties are called the supreme law of the land,[2] but it is a recognized rule that a later enacted statute may supersede a prior treaty, when Congress expresses its clear intent for the statute to prevail.[3] This rule is addressed once again in *United States v. Palestine Liberation Organization*.[4]

In this case, the court had to decide whether a 1988 federal statute was in conflict with a treaty executed between the United States and the United Nations in 1947.[5] The United States asserted that the new

---

1. *See* Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. INT'L L. REV. 393 (1988) n.2. (citing an exhaustive list of cases involved in such a conflict).

2. U.S. CONST. art. VI, cl. 2. "Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ." *Id.*

3. Cook v. United States, 288 U.S. 102 (1933). A treaty can also supercede a statute. *See infra*, text accompanying notes 9, 43, and 44.

4. 695 F. Supp. 1456 (S.D.N.Y. 1988).

5. United Nations Headquarters Agreement, June 26, 1947, United States-United Nations, 61 Stat. 756, T.I.A.S. No. 1676 [hereinafter Headquarters Agreement].

November 21, 1947

Excellency:

I have the honor to refer to section 28 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed at Lake Success June 26, 1947, which provides for bringing that Agreement into effect by an exchange of notes. Reference is made also to the provisions of the United States Public Law 357, 80th Congress, entitled "Joint Resolution Authorizing the President to bring into effect an agreement between the United States and the United Nations for the purpose of establishing the permanent headquarters of the United Nations in the United States and authorizing the taking of measures necessary to facilitate compliance with the provisions of such agreement, and for other purposes," which was approved by the President of the United States of America on August 4, 1947.

Pursuant to instructions from my Government, I have the honor to inform you that the Government of the United States of America is prepared to apply the abovementioned Headquarters Agreement subject to the provisions of Public Law 357.

I have been instructed by my Government to propose that the present note and your note of this date be considered as bringing the Headquarters Agreement into effect on the date hereof.

Accept, Excellency, the renewed assurances of my highest consideration.

statute, The Anti-Terrorism Act[6], was in direct conflict with the treaty, entitled the Headquarters Agreement.[7]

In *United States v. Palestine Liberation Organization,*[8] the District Court for the Southern District of New York reaffirmed a long standing rule: when interpreting new legislation which involves an existing treaty, a court should attempt to reconcile the legislation and the treaty. If the statute and treaty directly conflict, whichever of the two was created "last in time"[9] will prevail. In order for a statute to prevail over a prior

---

(signed)
Warren R. Austin
United States Representative
to the United Nations

Letter from Warren R. Austin to His Excellency Trygve Lie, Secretary General of the United Nations (Nov. 21, 1947). *Id.*

6. Foreign Relations Authorization Act for Fiscal Years 1988-89, Title X, 22 U.S.C.A. § 5201-5205 (West Supp. 1988) Pub. L. 100-204, § 1001-1005, 101 Stat. 1331, 1406-07.

7. Headquarters Agreement, *supra* note 5, at 13.

8. United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988).

9. *See* Paust, *supra* note 1, at 394. Professor Paust asserts that there are "well-documented exceptions to the 'last in time' rule." *Id.* at 394-96. He believes it is necessary to recognize these exceptions in order to "facilitate more harmonious international relations" and to protect human rights. *Id.* at 397. Professor Paust lists several exceptions to the "last in time" rule: 1) the indirect incorporation exception, 2) the executed or vested exception, 3) the rights under treaties exception, and 4) the war powers exception.

The executed or vested exception is discussed as it could be applied to the PLO case in order to illustrate one way in which these exceptions work.

Applying the executed or vested exception, Professor Paust claims the courts have recognized this exception to the "last in time rule" from Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 601-02 (1889). In this case, the Supreme Court said that whatever rights or property which had obtained a "permanent character" under treaties would not be subject to later enacted laws. *Id.* "In that respect the abrogation of the obligations of a treaty operates, like the repeal of a law, only upon the future, leaving transactions executed under it to stand unaffected." *Id.* Professor Paust points out that Justice Fields, who delivered the *Chae Chan Ping* opinion, and other judges who quoted the opinion in later cases, (*see* Fong Yue Ting v. United States, 149 U.S. 698 (1893)), believed this executed or vested exception applied only to rights and interests that were "connected with and lie in property, capable of sale and transfer. . . ." Paust, *supra* note 1, at 408. With this in mind, an interesting hypothetical can be illustrated using the facts of the Palestine Liberation Organization case.

Applying this executed or vested exception, the PLO members could assert that they obtained vested property rights under the Headquarters Agreement. They could claim the Agreement allowed them to establish homes and offices in the New York area, thus creating a property right. They would declare that this right could not be destroyed or impaired by subsequent legislation. This claim might allow the PLO members to maintain their homes or other property owned in the United States; however, securing the right to physically remain in the United States under this exception could be viewed conversely.

It is clear from the language in *Chae Chan Ping, supra,* that Justice Field believed these vested or executed treaty rights did not apply to "personal" or "untransferable" rights. *Chae Chan Ping,* 130 U.S. at 609. In that case and another that followed, concerning the rights of the Chinese to remain in the United States, the Justices concluded that there was no vested right to remain in the United States. For this reason, it could be argued that even if the PLO members had acquired property within the United States, this development alone would not be enough to give them the right to physically remain. (It must be noted that the analogy drawn between the Chinese immigrant cases and the PLO members can be distinguished; the Chinese immigrant cases dealt with issued certificates which allowed the Chinese to re-enter or remain

treaty, the statute must include language which clearly indicates Congress intended for it to overrule a conflicting treaty. The court concluded that the treaty and the statute were both valid since Congress had failed to state the express intent necessary for the statute to override the treaty.

This note will analyze the *Palestine Liberation Organization* decision. The facts of the case are presented in Part I. Part II discusses how the court reached its decision. Part III compares and contrasts other cases with the *Palestine Liberation Organization* case. Finally, in Part IV, the note concludes that the court, by following long standing interpretations of conflicting treaties and statutes, was correct in determining that the Anti-Terrorism Act was not intended to override the Headquarters Agreement.

PART I — BACKGROUND AND CASE SUMMARY

In 1947, the United States and the United Nations (U.N.) entered into an agreement establishing the right of the U.N. to maintain its headquarters in the United States.[10] As a result, one hundred and fifty nine of the U.N.'s permanent mission members established headquarters in New York.[11] The U.N. also allowed and continues to allow participation by non-member mission observers. Non-member mission observers include "non-member nations, intergovernmental organizations, and other

---

in the Unitd States, whereas, the PLO members entered in accordance with the guidelines set out in the Headquarters Agreement.) Therefore, this exception to the "last in time rule" could arguably result in a decision for either the United States or the PLO members, depending on how the court interpreted "vested property rights."

Professor Paust also suggests another theory, rather than an exception, that deserves attention. In his discussion concerning the war powers exception, Professor Paust sets forth the "clash with custom" theory. Paust, *supra* note 1, at 418. He suggests that the war powers exception "was not limited to treaties, but was expressed in terms of the law of nations or international law and must therefore include primacy of customary international law." *Id.* Concluding, of course, that the war powers exception was applicable only when war powers were active, Paust ponders whether customary international law should apply at times when the war powers are dormant. *Id.* He states that customary international law would not really be a "last in time" exception because customary international law is actually the "last in time". "Custom is either constantly re-enacted through a process of recognition and behavior involving patterns of expectation and practice or it loses its validity and force as law. Thus, custom would always prevail." *Id.* This theory supports the evidence Justice Palmieri noted in his decision.

In discussing the United States' obligations under the Headquarters Agreement, Justice Palmieri reminded the United States that for fourteen years it had consistently recognized the PLO's right to establish offices under the terms of the Agreement. He believed this evidence provided important evidence in interpreting the Agreement. *Palestine Liberation Organization*, 659 F. Supp. at 1466. Such a period of recognition could easily be construed as "custom" and could be viewed as the prevailing law. This construction would, in turn, have the same effect as the court's decision to construe the treaty and the statute consonantly; it would allow the PLO members to remain in the United States.

10. Headquarters Agreement, *supra* note 5, at 13. The court stated that the Headquarters Agreement would be referred to as a treaty, citing Weinberger v. Rossi, 456 U.S. 25, 29-30 (1982) as authority.

11. *Palestine Liberation Organization*, 695 F. Supp. at 1458.

organizations."[12]

In 1974, the U.N. invited the Palestine Liberation Organization (PLO) to join the mission observers. This invitation was protested under United States law.[13] In *Anti-Defamation League of B'nai B'rith v. Kissinger,*[14] the court upheld the PLO's right to have representation at the U.N. However, the court issued some entrance visa restrictions which limited the movement of PLO personnel to within a twenty-five mile radius from Columbus Circle in Manhattan.[15]

The PLO continued to operate as a mission observer without any interference until October 1986, when several members of Congress requested that the PLO's offices be closed.[16] The request was denied. The congressmen then pressed for legislation which, in effect, would close the PLO's New York offices.[17] Congress added the legislation, entitled the Anti-Terrorism Act, (ATA)[18] as a rider to the Foreign Relations Authorization Act for Fiscal Years 1988-1989[19] without any committee hearings.[20]

On March 21, 1988, the ATA became effective.[21] Ten days prior to the Act's effective date, the Attorney General of the United States wrote a letter[22] to the Chief of the PLO mission. The letter stated that unless

---

12. *Id.* at 1458-59.

13. *Id.*

14. Civil Action No. 74 C 1545 (E.D.N.Y. Nov. 1, 1974).

15. *Palestine Liberation Organization*, 695 F. Supp. at 1459. In fact the court went on to say "[t]his problem must be viewed in the context of the special responsibility which the United States has to provide access to the United Nations under the Headquarters Agreement. It is important to note for the purposes of this case that a primary goal of the United Nations is to provide a forum where peaceful discussions may displace violence as a means of resolving disputed issues. At times our responsibility to the United Nations may require us to issue visas to persons who are objectionable to certain segments of our society." *Id.*, Anti-Defamation League, *supra* note 14, transcript at n.37, *partially excerpted in* Department of State, 1974 *Digest of United States Practice in International Law,* 27, 28."

16. *Palestine Liberation Organization*, 695 F. Supp. at 1459-60.

17. *Id.* at 1460. The court noted "[w]e have been unable to find any comparable statute in the long history of Congressional enactments." *Id.*

18. Foreign Relations Authorization Act, *supra* note 6. The ATA is also known as the Grassley Amendment. *See generally* Palestine Liberation Organization, 695 F. Supp. at 1460.

19. Foreign Relations Authorization Act, *supra* note 6. The Foreign Relations Act provides funds for the State Department and for the United States' mission to the United Nations. *See Palestine Liberation Organization*, 695 F. Supp. at 1460.

20. *Id.*

21. Foreign Relations Authorization Act, *supra* note 6, at 15.

22. *See* 27 International Legal Materials (I.L.M.) 787. *Letter dated March 11, 1988 from the Attorney General of the United States to the Permanent Observer of the Palestine Liberation Organization to the United Nations*

> I am writing to notify you that on March 21, 1988, the provisions of the "Anti-Terrorism Act of 1987" (Title X of the Foreign Relations Authorization Act of 1988-89; Pub. L. No. 100-204, enacted by the Congress of the United States and approved Dec. 22, 1987 (the "Act")) will become effective. The Act prohibits, among other things, the Palestine Liberation Organization ("PLO") from establishing or maintaining an office within the jurisdiction of the United States. Accordingly, as of

the Chief complied with the ATA, the United States would take court action.[23] On the day the ATA became effective, the United States filed a lawsuit requesting the United States District Court for the Southern District of New York to issue an injunction prohibiting further operation of the PLO offices. The suit named as defendants the PLO and four individuals: Zuhdi Labib Tezi, Riyad H. Mansour, Nasser Al-Kidwa, and Veronica Kanaan Pugh.[24]

These defendants claimed that the court had no subject matter or personal jurisdiction over them. They claimed the court would be in violation of section 21 of the Headquarters Agreement[25] if it attempted to "adjudicate the ATA's applicability" to the PLO Mission.[26] The defendants also contended that the ATA itself violated the Headquarters Agreement. One defendant, Mansour, moved to dismiss the suit for "failure to state a claim upon which relief can be granted" under 12(b)(6) of the Federal Rules of Civil Procedure. The United States moved for summary judgment.[27]

PART II — REACHING THE DECISION

Justice Palmieri delivered the opinion of the court. The first issue addressed was whether the court had personal jurisdiction over the defendants. The court concluded that under the requirements set out in *International Shoe Co. v. Washington,*[28] the PLO employees' offices, telephone listings, employment, and "continuous presence in New York" were sufficient to provide the court with personal jurisdiction.[29]

Justice Palmieri then addressed the issue of the United States' duty to arbitrate. The U.N. and the PLO both argued that the court should not make a decision concerning the ATA until an arbitral tribunal had

---

March 21, 1988, maintaining the PLO Observer Mission to the United Nations in the United States will be unlawful.

The legislation charges the Attorney General with the responsibility of enforcing the Act. To that end, please be advised that, should you fail to comply with the requirements of the Act, the Department of Justice will forthwith take action in United States federal court to ensure your compliance.

If you have any questions concerning this matter, you may contact the Department of Justice at (202) 633-2051.

(Signed)
Edwin Meese III
Attorney General

Id.

23. *Id.*

24. *Palestine Liberation Organization*, 695 F. Supp. at 1460.

25. Headquarters Agreement, *supra* note 5. Section 2(a) states that the United States has an obligation to arbitrate any dispute with the United Nations.

26. *Palestine Liberation Organization*, 695 F. Supp. at 1461.

27. *Id.*

28. 326 U.S. 310 (1945).

29. *Palestine Liberation Organization*, 695 F. Supp. at 1461.

ruled on whether the United States must submit to arbitration.[30] The court determined that the Headquarters Agreement would be treated as if it were a treaty[31] and concluded that section 21 of the Headquarters Agreement[32] (requiring arbitration) was not applicable in this situation. The court stated that "these proceedings are not in any way directed to settling any dispute, ripe or not, between the United Nations and the United States."[33] The court then said it could not instruct the United States to yield to arbitration in this matter without going beyond its powers under Article III of the Constitution.[34] The court explained that matters dealing with foreign relations, sometimes referred to as political questions, were powers strictly delegated to the executive branch.[35] Therefore, the court would be overstepping its bounds if it decided whether or not the United States should submit to arbitration.[36] Nevertheless, the court stated that, although it had no power to force the United States to arbitrate, it was within its power to interpret the ATA.[37] "As a matter of domestic law, the interpretation of these international obligations[38] and their reconciliation, if possible, with the ATA is for the courts"[39] to decide.[40]

---

30. *Id.* at 1462.

31. Headquarters Agreement, *supra* note 5; *Palestine Liberation Organization*, 695 F. Supp. at 1458 n.2. "We refer to the Headquarters Agreement as a treaty, since we are not concerned here with making a distinction among different forms of international agreements. The applicable law implicates all forms, including the Headquarters Agreement." Weinberger v. Rossi, 456 U.S. 25, 29-30 (1982).

32. Headquarters Agreement, *supra* note 5. As the court noted, section 21(a) provides that "any dispute *between the United Nations and the United States* concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators. . . ." *Palestine Liberation Organization*, 695 F. Supp. at 1462 (emphasis added by court).

33. *Palestine Liberation Organization*, 695 F. Supp. at 1462. *Id.*

34. *Id.*

35. *Id.* at 1463. The court based this decision on the holding of Baker v. Carr, 369 U.S. 186, 211-13 (1962).

36. *Palestine Liberation Organization*, 695 F. Supp. at 1463. "It is for these reasons that the ultimate decision as to how the United States should honor its treaty obligations with the international community is one which has, for at least one hundred years, been left to the executive to decide." *Id.* (citing Goldwater v. Carter, 444 U.S. 996, 996-97 (1979), vacated with instructions to dismiss an attack on the President's action in teminating a treaty with Taiwan).

37. *Palestine Liberation Organization*, 695 F. Supp. at 1463.

38. *Id.* The court was referring to the United Nations Charter and the Headquarters Agreement.

39. *Id.* at 1464.

40. *Id.* Like the issue of conflicting treaties and statutes, the political question doctrine is also a much discussed topic in our legislative history. It is beyond the scope of this article to analyze this doctrine, but a short discussion of similar cases will further explain Justice Palmieri's decision. Recently, the political question issue arose concerning the court's jurisdiction to interpret a legislative act in the case of South African Airways v. Dole, 817 F.2d 119 (D.C. Cir. 1987). This case involved the issuance of an order by the Secretary of Transportation which revoked a permit allowing air travel between the United States and South Africa. The revoking order was issued in accordance with the Comprehensive Anti-Apartheid Act of

The court went on to interpret the ATA in conjunction with the

---

1986, Pub. L. No. 99-440, 100 Stat. 1086. South African Airways (SAA) asserted that the Secretary's action was a direct violation of an agreement entered into by the two countries in 1947. *South African Airways*, 817 F.2d at 123.

The *South African Airways* court, like the *Palestine Liberation Organization* court, determined that it certainly had the "competence" to interpret the meaning of the litigated sections of the act in question.. The only question was whether the court would be "trespass[ing] on territory reserved to the political branches. . . ." *South African Airways*, 817 F.2d. at 123. The *South African Airways* court also looked to Baker v. Carr, 369 U.S. 186 (1962).

Baker set out six qualifications for determining whether an issue is deemed a "political question." The Baker court stated that

> [p]rominent on the surface of any case held to involve a political question is found
>
> 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> 2) or a lack of judicially discoverable and manageable standards for resolving it;
>
> 3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> 4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> 5) or an unusual need for unquestioning adherence to a political decision already made;
>
> 6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

The Court determined that "unless one of these six formulations is inextricable from the case at bar, there should be no dismissal on the ground of a political question's presence." If the issue is not a political question, the case is justiciable. *Id.* at 217. Finding that none of these qualifications existed, the *South African Airways* court determined it had jurisdiction to interpret the Act.

A similar situation also arose in the case of Japan Whaling Assoc. v. Amer. Cetacean Soc., 478 U.S. 221 (1986). This case concerned the interpretation of an executive agreement made between the United States and Japan. Because the International Whaling Commission (IWC) was unable to effectively enforce the regulations set out in the International Convention for the Regulation of Whaling (ICRW), Congress passed two amendments to assist in enforcing these regulations. The Pelly and the Packwood amendments allowed the Secretary of Commerce "to certify to the President if nationals of a foreign country are conducting fishing operations in such a manner as to 'diminish the effectiveness' of an international fishing conservation program." *Japan Whaling Assoc.*, 478 U.S. at 173 (construing the Pelly amendment to the Fisherman's Protection Act of 1967, 22 U.S.C. § 1978 (1971) and the Packwood amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821 *et seq.* (1982 ed. and Supp. III)). The President could then impose sanctions on the certified nation.

The controversy arose when Japan exceeded the whale harvesting quotas set by the ICRW. In exchange for certifying Japan for this violation, the United States entered into an executive agreement with Japan in 1984. Under the agreement, Japan promised to abide by the ICRW limits and to halt all commercial whaling by 1988. Before the agreement could be finalized, a number of wildlife conservation groups filed suit, claiming that the Secretary must certify Japan as a violator in accordance with the amendments. The district court ordered the Secretary to certify Japan and the court of appeals affirmed. *Japan Whaling Assoc.*, 478 U.S. at 228. The Supreme Court granted certiorari to determine whether the Secretary must automatically certify a nation once a violation of the agreement has been proven.

In their petition, the Japanese asserted that interpretation of these agreements by the court was "unsuitable for judicial review because they involve foreign relations. . . ." *Id.* at 229. The Japanese claimed that one of the tenets set out in *Baker*, "embarrassment from multifarious pronouncements. . . .", prohibited judicial review. *Id.*

The Court replied that the *Baker* decision clearly indicated that the courts have the authority to construe treaties and executive agreements. "[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . [U]nder

Headquarters Agreement. The court began by noting that if the ATA were interpreted as Congress intended, it "would fly in the face of the Headquarters Agreement . . . and would abruptly terminate the functions the Mission ha[d] performed for many years."[41] Because the two laws conflicted, precedent required "the court to seek out a reconciliation"[42] of the two.

The court began the reconciliation process by referring to the considerable precedent in United States law of interpreting conflicting statutes and treaties. The court reiterated that when a later enacted statute and a prior treaty were in conflict, the treaty would only be superseded by the statute if Congress "clearly evinced an intent"[43] for this to occur. The court recognized Congress' power to enact a statute which supersedes a prior treaty or international obligation, but said, unless the intent to abrogate the prior agreement was made "unequivocally" clear, the court had a duty to reconcile the two.[44] Based on these considerations, the court concluded that the Headquarters Agreement and the ATA could only be reconciled by "finding the ATA inapplicable to the PLO Observer Mission."[45] In arriving at this decision, Justice Palmieri discussed the obligations created under the Headquarters Agreement. He pointed out that not only did the language of the agreement establish the right of transit, entry, and access, and the right to establish offices for

---

the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have political overtones." *Japan Whaling Assoc.*, 478 U.S. at 230.

It is clear that Justice Palmieri relied on the language of *Baker*, *South African Airways*, and *Japan Whaling Assoc.* in deciding that he had the authority to interpret the Anti-Terrorism Act. *See Palestine Liberation Organization*, 695 F. Supp. at 1462-64. Therefore, he was correct in determining that he did not have to wait for a decision from an arbitral tribunal. *Id.* at 1464.

41. *Id.*

42. *Id.*

43. *Id., citing* Chew Heong v. United States, 112 U.S. 536 (1884); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Edye v. Robertson (The Head Money Case), 112 U.S. 580 (1884); South African Airways v. Dole, 817 F.2d 119 (D.C. Cir.), *cert. denied*, 108 S.Ct. 229, (1987); Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

44. *Palestine Liberation Organization*, 695 F. Supp. at 1465 citing Weinberger v. Rossi, 456 U.S. at 32 ("It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . .' "). The court also noted an unbroken line of Supreme Court authority was reflected in the recently revised RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES:

> § 115 Inconsistency Between International Law or Agreement and Domestic Law: Law of the United States.
>
> (1)(a) "An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled."

Palestine Liberation Organization, 695 F. Supp. at 1465, *citing* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1988).

45. *Palestine Liberation Organization*, 695 F. Supp. at 1465.

mission observers and U.N. members; forty years of United States tradition of allowing these activities had established these rights as well.[46] Citing the United States' objection to the PLO's being invited to become a mission observer in 1974, he reminded the United States that for fourteen years it had "acted in a manner consistent with a recognition of the PLO's rights under the Headquarters Agreement."[47] Justice Palmieri believed this acquiescence to the PLO's presence in the United States was "important evidence" of the agreement's meaning.[48] He also elaborated on numerous letters, conversations, and reports of meetings taking place in 1987 and early 1988, in which United States governmental officials discussed the ATA's conflict with the Agreement.[49] Apparently, the court believed this correspondence indicated that the lawmakers knew the ATA and the Agreement were in conflict, but did not take the appropriate steps to specifically word the ATA so as to sufficiently abrogate the prior agreement.

The court next considered the problem of construing the statute so as not to conflict with the Agreement. After discussing how various courts had dealt with this problem,[50] Justice Palmieri said that abrogation of a prior treaty requires the "clearest of expressions on the part of Congress."[51] In the ATA, Congress had failed to clearly express such an intent.[52] With these findings, Justice Palmieri held that the ATA must be determined to be inapplicable as to the PLO. However, the statute could remain "a valid enactment of general application."[53] Moreover, the Headquarters Agreement would remain "a valid and outstanding obligation of the United States."[54] Therefore, the ATA would not mandate closing the PLO's offices, nor impair its continued participation in the Mission Observer program.[55]

PART III — ANALYZING THE DECISION

In analyzing the court's decision not to enforce the ATA as applied to the PLO, it is helpful to discuss a few notable cases concerning the same issue of conflicting treaties and statutes.

46. *Id.* at 1465-66.
47. *Id.* at 1466.
48. *Id.*
49. *See supra* note 22 at 712-808.
50. *See infra* text accompanying notes 57-104.
51. *Palestine Liberation Organization*, 695 F. Supp. at 1468.
52. *Id.*
53. *Id.* at 1471.
54. *Id.*
55. *Id.*

A. Establishing Clear Intent

In one of the oldest cases to embrace this issue, *Chae Chan Ping v. United States (The Chinese Exclusion Case)*,[56] the Supreme Court held that a newly enacted statute was specifically drafted to abrogate a prior treaty.[57] In this opinion, the Court dealt with a statute designed to prevent Chinese laborers, who had previously resided in the United States, from returning to the United States after October 1, 1888.[58] The 1888 Act, it was argued, impaired a vested right granted in the Treaty of 1880[59] and under statutes passed in 1882 and 1884.[60] The Court concluded that the 1888 Act superseded the previous treaties and statutes because "[t]he treaties were of no greater legal obligation than the act of Congress. . . [a] treaty. . . can be deemed. . . the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress."[61] Another important point to note is how the 1888 Act was entitled: "An act a supplement to an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved the sixth day of May, eighteen hundred and eighty-two."[62] The title clearly indicates that this Act was to pertain directly to the prior law. Here, the Court apparently construed the title to mean that any conflicting terms between the Act and the prior law were meant to be superseded by the later Act.[63]

One hundred years later, the same reasoning is being followed, as shown in the recent decision in *South African Airways v. Dole.*[64] In this case, South African Airways (SAA) was contesting an order issued by the Secretary of Transportation.[65] The order[66], derived from the Anti-Apartheid Act (AAA)[67] would have revoked the airline's permit to furnish air transportation service between South Africa and the United States.[68] SAA objected to the order on the grounds that it was in direct conflict with an Executive Agreement made between the United States

56. 130 U.S. 581 (1889).
57. *Chae Chan Ping*, 130 U.S. at 600.
58. 25 Stat. 504 (1888). The intent of the act was to limit the number of lower class Chinese immigrants coming into the United States. There had been much concern for the safety of west coast citizens as well as concern over the competition for work between Americans and the Chinese. *See generally Chae Chan Ping*, 130 U.S. at 594.
59. 22 Stat. 826 (1880). This was a treaty between the U.S. and China concerning immigration.
60. 22 Stat. 58, c. 126 (1882); 23 Stat. 115, c. 220 (1884).
61. *Chae Chan Ping*, 130 U.S. at 600.
62. *Id.* at 599.
63. *Id. See supra* note 57 and accompanying text.
64. 817 F.2d 119 (D.C. Cir. 1987), *cert. denied* 108 S.Ct. 229 (1987).
65. *Id.* at 121.
66. *Id.* The order was issued pursuant to section 306(a) of the Comprehensive Anti-Apartheid Act of 1986. *See*, Pub. L. No. 99-440, 100 Stat. 1086.
67. Comprehensive Anti-Apartheid Act of 1986, *supra* note 66.
68. *Id.*

and South Africa on May 23, 1947.[69] Under Section 306(b)(1) of the AAA, the Secretary of State was authorized to terminate the agreement's provision relating to air travel[70] between the two countries with a one year notice.[71] A subsequent Executive Order allowed the Department of Transportation, pursuant to section 306 (a)(2) of the AAA, to issue Final Order 86-11-29.[72] Under the final order, revocation of the agreement was valid within ten days notice instead of within one year's notice. SAA claimed the court must construe the AAA and the agreement consonantly in order not to "violate the law of nations."[73]

To resolve the conflict, the court looked at the clear meaning of the language in the AAA. The court noted such language as "immediately notify," "ten days later," and "revoke the right." The court decided that, "[g]iven the evident urgency of those instructions, it is hard to believe that Congress intended the Secretary to wait another 365 days before actually suspending petitioner's permit."[74] The court concluded that the clear meaning of the AAA's words, in conjunction with the lack of a demonstration of contrary intent by Congress, gave the Secretary the right to revoke the permit within ten days.[75]

The *South African Airways* court next addressed the issue of construing the AAA so that it would not violate the Agreement. In doing so, the court relied on language from *Whitney v. Robertson*:[76] "[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will."[77] The *South African Airways* court believed the "will of the sovereign" had been clearly expressed in the Act by the ten day notice provision. The court held that the AAA was therefore intended to supersede the prior agreement.[78]

These two cases establish the language and the intent necessary for a later enacted law to override a previous treaty or agreement. Before analyzing how the *Palestine Liberation Organization* case compares with

69. Agreement between the Government of the United States of America and the Government of the Union of South Africa relating to Air Services Between Their Respective Territories, May 23, 1947, 61 Stat. § 3057, T.I.A.S. No. 1639, *as amended by* Agreement between the United States of America and the Union of South Africa, Nov. 2, 1953, 4 U.S.T. 2205, T.I.A.S. No. 2870, and Air Transport Services Agreement, June 28, 1968, United States-South Africa, 19 U.S.T. 5193, T.I.A.S. No. 6512 (substituting "Republic" for "Union" throughout the Agreement, as amended).

70. *See supra* note 66. Article XI of the Agreement provides for termination upon one year's notice.

71. *South African Airways*, 817 F.2d at 121.

72. *South African Airways*, 817 F.2d at 121.; Exec. Order No. 12,571, 3 C.F.R. 238 (1986).

73. *South African Airways*, 817 F.2d at 124-25.

74. *Id.*

75. *Id.*

76. 124 U.S. 190, 195 (1888).

77. *Id.* at 195; *South African Airways*, 817 F.2d at 125.

78. *South African Airways*, 817 F.2d at 124, 126.

these decisions, it is useful to examine two cases in which clear intent sufficient to allow a statute to supercede a prior treaty was not found.

B. *Lack of Intent to Abrogate*

In *Cook v. United States*,[79] a conflict arose over whether the reenactment of section 581 in the Tariff Act of 1930[80] superseded the corresponding section in the Treaty of 1924.[81] The Treaty set the distance limits for the seizure of a British vessel suspected of smuggling intoxicating liquors into the United States. The limit was set at three maritime miles or within one hour sailing distance from the coast.[82] Section 581 of the Tariff Act of 1930, reenacted exactly as it had been stated in section 581 of the Tariff Act of 1922, set the seizure limit at four leagues or twelve miles.[83] The Court reasoned that the Treaty of 1924 had not been abrogated by the 1930 reenactment of section 581 because

> [a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. (citations omitted) Here, the contrary appears. The committee reports and the debates upon the Act of 1930, like the re-enacted section itself, make no reference to the Treaty of 1924.[84]

The Court explained that section 581 of the Tariff Act of 1930 would be applied in a more narrow manner so as to be consistent with the Treaty. Section 581 would continue to apply to all countries with which the United States had no relevant treaties and to those situations not related to intoxicating liquors.[85] In other words, the court reconciled the two laws.

In 1968, a similar approach was applied in the case of *Menominee Tribe of Indians v. United States.*[86] In 1854, the Menominee Tribe was granted a reservation in Wisconsin by the terms of the Treaty of Wolf River.[87] This treaty provided land for the tribe to continue its way of life.[88] Although nothing in the language of the treaty specifically mentioned hunting and fishing, the court construed the language "to be held as Indian lands are held" to include hunting and fishing rights.[89] In

79. 288 U.S. 102 (1933).
80. 46 Stat. 590, 747 (1930).
81. 43 Stat. 1761 (1924).
82. *Cook*, 288 U.S. at 110-11.
83. 42 Stat. 858, 979 (1922); Cook, 288 U.S. at 107.
84. *Id.* at 120.
85. *Id.*
86. 391 U.S. 404 (1968).
87. 10 Stat. 1064 (1854).
88. *Menominee Tribe of Indians*, 391 U.S. at 405-06.
89. *Id.* at 406.

1954, the Menominee Indian Termination Act was passed.[90] The Act contained no express language as to hunting and fishing rights. However, the Wisconsin courts interpreted it to mean the Indians would be subject to the hunting and fishing laws of the state.[91] The tribe brought a lawsuit to reclaim its rights in the Court of Claims. The suit eventually appeared before the U.S. Supreme Court. In its review of the facts, the Court noted that the same Congress that had passed the Termination Act had also passed Public Law 280.[92] Public Law 280 provided in part that "[n]othing in this section. . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing*. . ." (emphasis added by court).[93] The Court held that the two laws must be treated so as to coexist.[94] In the Termination Act, all statutes which affected Indians because of their status as Indians were terminated.[95] The Court interpreted this termination to apply only to federal supervision and not to treaties.[96] Since the Court found no clear intent on the part of Congress to abrogate a treaty, the statute and the treaty were reconciled.

C. Finding No Clear Intent

These findings make it easy to compare and contrast the *Palestine Liberation Organization* decision. First, Justice Palmieri found no clear legislative intent on the part of Congress to supersede the Headquarters Agreement.[97] He was correct in arriving at this decision for two reasons. First, as the case of *Cook v. United States* illustrates, when a statute makes no reference to a prior treaty, the statute cannot be interpreted to have replaced the treaty.[98] Section 5202 of the ATA states:

> It shall be unlawful,. . . (3)notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by, the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof."[99]

90. 68 Stat. 250 (1954), amended by 25 U.S.C. 891-902 (*repealed* 1973).
91. *Menominee Tribe of Indians*, 391 U.S. at 407.
92. *Id.*, 67 Stat. 588 (1953), amended by 18 U.S.C. § 1162 (1982).
93. *Menominee Tribe of Indians*, 391 U.S. at 410-11.
94. *Id.* at 411.
95. *Id.* at 412.
96. *Id.*
97. *Palestine Liberation Organization*, 695 F. Supp. at 1465.
98. Cook, 288 U.S. at 120.
99. Anti-Terrorism Act, *supra* note 6.

Although the meaning of this language seems specific, it is obvious that there is no mention of any act, law, or treaty that the ATA is to replace. If the ATA had included even one sentence (as did the amendment in *Chae Chan Ping v. United States, supra)* stating something to the effect that the ATA was intended to abrogate the Headquarters Agreement, the court could have ruled that the ATA replaced the prior treaty. Justice Palmieri seems to believe that even the mention in the statute of the word 'treaty', instead of 'law', might have been enough to override the treaty.[100] Second, nothing in the correspondence surrounding the statute's enactment indicated that Congress intended the statute to override the prior treaty; nothing in this correspondence or in the statute itself demonstrated a *clear* intent to override the treaty. In fact, most of the correspondence indicates that the legislators knew the statute was in conflict with the treaty. However, none of them took the necessary step of including in the statute language showing an intent to override the treaty.[101] As mentioned in the cases discussed above, a court will always look to the discussions and debates surrounding an item of legislation and the language of the legislation itself in determining whether the requisite intent exists to supersede a prior treaty. Because there is nothing in the surrounding correspondence or the Act itself to suggest that the ATA was to specifically override the Headquarters Agreement, Justice Palmieri was correct in finding that no clear intent existed to replace the Headquarters Agreement with the ATA.

D. Reconciliation

In analyzing the decision for methods of reconciling a conflicting treaty and statute, more ingenuity is needed. When no clear intent exists to abrogate a treaty, if at all possible, the latter enacted law should be interpreted in harmony with the treaty.[102] The court in this case did so by stating that the statute as applied to the PLO Mission would be inapplicable.[103] The court further stated that, although the ATA did not apply to the U.N. Mission Observer program, it did have a general application. This declaration seems to stretch the reconciliation of the treaty and the statute. The court's interpretation appears to destroy the purpose of the ATA, which was to force the PLO out of New York. Using this same degree of stretching, however, the ATA could be interpreted to apply to any other activity in which the PLO was engaged within the United States, besides those necessary to maintain the PLO

100. *Palestine Liberation Organization*, 695 F. Supp. at 1468-69.
101. *See generally*, 27 I.L.M. 712-808 (1988).
102. *Palestine Liberation Organization*, 695 F. Supp. at 1465.
103. *Id.*

Observer Mission. Although the court's reconciliation is somewhat weak, courts often go to great lengths in order to prevent a conflict with an existing treaty.[104]

PART IV — CONCLUSION

In its decision in the *Palestine Liberation Organization* case, the United States district court has continued to follow a long line of precedent established in conflicting treaty and statute cases. Although it seems to be a recognized, general rule that the treaty or statute "last in time" prevails, this can only be true if the latter treaty or statute expresses clear and unequivocal intent to replace the previous treaty or statute. If no clear intent is present, the court must try to reconcile the two. As was seen in this case, the reconciliation can leave the "last in time" treaty or statute practically ineffective. Nevertheless, despite such an effect, the court in this case was successful in interpreting and applying prior case law. The court was correct in deciding that the ATA should not override the Headquarters Agreement.

Nancy Bolin Vassallo

---

104. *See* Justice Field's dissent in *Chew Heong*, 112 U.S. 560 (1884), *partially reprinted in* Palestine Liberation Organization, 695 F. Supp. at 1468.

> I am unable to agree with my associates in their construction of the act . . . restricting the immigration into this country of Chinese laborers. That construction appears to me to be in conflict with the language of that act, and to require the elimination of entire clauses and the interpolation of new ones. It renders nugatory whole provisions which were inserted with sedulous care. The change thus produced in the operation of the act is justified on the theory that to give it any other construction would bring it into conflict with the treaty; and that we are not at liberty to suppose that Congress by its legislation intended to disregard any treaty stipulations.