CORRESPONDENCE

TO THE EDITOR-IN-CHIEF

Having had an opportunity, through your courtesy, to study an advance copy of Dr. Dan Ciobanu's addenda [1] to my Note on *United States v. F/V Taiyo Maru No. 28*,[2] perhaps I may be permitted a few further words on the subject.

First, Dr. Ciobanu states that the District Court in the *Taiyo Maru* case "had to determine whether, under general international law," the United States has "the right to establish [an] exclusive fisheries [zone] on the high seas close to [its] coasts." I question whether this issue was before Judge Gignoux. Congress created such a zone in 1966,[3] and unless there was an applicable exception for the Japanese activities in question,[4] or a subsequent inconsistent treaty, I understand the federal rule to be that the District Court is bound to apply the statute.[5] The question, then, before the District Court was not the affirmative one posed by Dr. Ciobanu, but the negative one asserted by the owners and master of the *Taiyo Maru No. 28*, contested by the government, ruled on by the court, and discussed in my Note.

What, however, of customary international law? The owners and master did not claim that the seizure was in violation of customary international law, but rather that it was "in violation of the territorial limitations imposed by international agreements on the power of the United States to pursue and seize foreign vessels for violation of domestic fisheries law." [6] In their Reply Memorandum, the owners and master expressly disclaimed, for purposes of their motions to dismiss, any "contention that the contiguous fisheries zone created by the United States violates customary international law." [7] In doing so they were correct, since under federal law, where the argument is made that a principle of customary international law conflicts with a statute of the United States, the courts will apply the statute.[8]

With respect to the decision of the International Court of Justice in the *Fisheries Jurisdiction* cases,[9] it is perhaps worth noting that the government in the *Taiyo Maru* case also quoted the language reproduced by Dr.

[1] *Supra* p. 549.

[2] 70 AJIL 95 (1976).

[3] 16 U.S.C. §§1091 *et seq.* (1970).

[4] *See* id. §1981. There will be no specific decision in the *Taiyo Maru No. 28* case on the argument that tuna fishing was permitted in the contiguous fisheries zone surrounding islands near the mainland of the United States under the 1972 executive agreement with Japan (see 70 AJIL 96 n.6 (1970)), as the parties have advised the District Court that the case is being settled. On May 12, 1976, the District Court was informed that the parties had agreed to the entry of a $130,000 judgment in the civil forfeiture action with an admission of the averments in the complaint and to a dismissal of the criminal proceedings against the master of the ship.

[5] The Head Money Cases, 112 U.S. 580 (1884); Whitney v. Robertson, 124 U.S. 190 (1888).

[6] Motion to Dismiss the Complaint for Forfeiture and to Grant the Demand for Restitution at 1.

[7] Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Jurisdiction at 8.

[8] *See, e.g.*, Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960); The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925).

[9] [1974] ICJ REP. 3.

Ciobanu, adding immediately thereafter: "Because it was asserted by Congress and is consistent with the principles of customary international law the right of the United States to seize the *Taiyo Maru 28* within 9.5 miles of Monhegan Island is established." [10] In my view, the government should have either stopped after stating the seizure was authorized by federal law or added only that it was not inconsistent with treaty obligations.

For these reasons I cannot agree with Dr. Ciobanu's suggestion that the District Court "should have supported its conclusion on the existence, under general international law, of the exclusive fisheries zone with the [indicated] pronouncement in the *Fisheries Jurisdiction* cases," any more than I can agree with him that the case was other than "rooted in" the 1958 Conventions.

Two other points deserve mention. A careful reading of my Note makes it quite plain that I have not sought to justify the action of the District Court by my reference to the availability, under the Informal Single Negotiating Text, of hot pursuit initiated in waters superjacent to the continental shelf or within an economic zone. My suggestion was rather that a treaty along those lines would move the law beyond the point reached in the case under examination.

Finally, Dr. Ciobanu and I obviously have a philosophical difference as to what constitutes a landmark case. Because he sees the case as a clarification of international law, in his view it is hyperbole to call it a landmark. In my view, the case represents a development of not inconsiderable importance. Among other things, it is the first reported opinion of any kind under the Bartlett Act, as well as a case of first impression on the question of hot pursuit under the Contiguous Fisheries Zone Act. I must conclude that whether a case qualifies as a landmark rests, in some degree, in the eye of the beholder.

EUGENE R. FIDELL
Of the District of Columbia Bar

TO THE EDITOR-IN-CHIEF:

I write to request equal opportunity for the expression of a view that differs in a single respect from the view expressed by the authors of the valuable article that appeared in the April, 1976 issue of the *Journal,* entitled "H.R. 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action." [1] I would not have had to seek equal time if the article had included any evidence that there are dissenting views from "the most salient feature" of the Bill, namely, the portion "that places determination of immunity in the judicial system rather than in the present arena, the Department of State." I could not find a single citation of any opinions opposing that portion of the Bill, although there are some obvious ones. My own are found in 48 *Cornell L.Q.* 461 (1963) and 8 *The International Lawyer* 442 (1974).

My own opposition is simply explained. The immunity of foreign sovereigns from suits in domestic courts arises out of the policy of the foreign affairs branch of the government to prevent the embarrassment of forcing foreign governments and rulers into the domestic courts of another country. Nations have for a long time felt free to make exceptions to that general policy, where the embarrassment was not too great a strain on relations between the two nations. The "Tate letter," eliminating immunity when

[10] *Supra* note 7, at 12.

[1] Atkeson, Perkins, & Wyatt, 70 AJIL 298 (1976).

sovereigns engage in commercial activities in the United States, is an example of such a determination. The privilege of waiver, either directly or by counterclaiming, is another.

If the State Department now feels that the elimination of even more of the immunity is desirable, all it has to do is to stop suggesting immunity in the cases that it considers inappropriate for such immunity. Congressional legislation is not needed, since the courts, ever since John Marshall's decision in the *Schooner Exchange* in 1812, have recognized the prerogative of the Department of State in that policy-dominated area. I cannot help feeling that those State Department advocates of the pending legislation are afraid that the Department's backbone will be weakened by the intrusions of strong foreign policy considerations from country desks and regional bureaus. The place to stiffen the Department's backbone, however, is in Foggy Bottom, not on Capitol Hill, and then the stiffness can be readily relaxed when an emergency demands.

The rest of H.R. 11315, dealing with methods of service on foreign sovereigns and states, is timely and desirable.

If the *Journal* does not insist on references by its authors to articles that have taken opposing views, I think the holders of those views are entitled to a bit of space in the "Letters to the Editor" section.

MICHAEL H. CARDOZO
Of the District of Columbia Bar

TO THE EDITOR-IN-CHIEF

The reaction in this column to my note on the Glomar Explorer's adventure [1] does not seem to raise any argument not anticipated and answered in the original note. But I would like to point out to those who dispute the existence in reality of the legal questions I raised concerning the continuity of property rights in state vessels that have been sunk, the decision of the High Court of Singapore, October 24, 1974, upholding the property rights of an assignee of the Federal Republic of Germany in a U-Boat sunk in the Straits of Malacca in 1944.[2] Since the German vessel was sunk in wartime, the asserted "abandonment" of property rights in a Soviet vessel that sank in apparent peacetime would seem to present an a fortiori situation in favor of the continuance of Russian rights. Now, since the generalities of international law have usually been conceived to apply to all sovereign equals alike, how would the United States close its courts to a Russian assignee or distinguish the Singapore case, the tradition on which it rests, and the U.S. position with regard to its own sunken naval vessels, from the situation involved in the Glomar Explorer's operation?

That it may have been in the overall interest of the United States to ignore apparent Russian rights seems irrelevant. But it is distressing that those responsible for the American actions did not seem to realize that apparent Russian rights were being ignored, and that their actions raised legal questions that cannot be confined to the particulars of the case.

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[1] A. Rubin, *Sunken Soviet Submarines and Central Intelligence: Laws of Property and the Agency*, 69 AJIL 855 (1975); 70 *id.* 111 and 338 (1976).

[2] Hans L. Simon v. G. J. Taylor *et al.*, Case No. 43 of 1973, Judge F. A. Chua. For a learned comment on the case, see Ress, *Die Bergung Kriegsversenkter Schiffe im Lichte der Rechtslage Deutschlands*, 35(2) ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 364 (1975).