

re remedial measures for the plaintiffs' preservation and conservation of Ainu culture by all, including the national government who participating party, as well as the government of Hokkaido, and the community council of Biratori Township. And we can hope that his time forward the national government and these others will try sufficient consideration to the problems relating to the culture of Ainu people. Taking these and all of the other circumstances of the matter into consideration, we find that reversal of the Confiscatory Administrative Rulings would not correspond to the public welfare accordingly, in the instant matter, we apply the provisions of Article 1 of the Administrative Litigation Law.

Conclusion

accordance with the above circumstances, the Confiscatory Administrative Rulings were illegal. Applying the provisions of Article 31 of the Administrative Litigation Law, we proclaim the illegality of Confiscatory Administrative Rulings while rejecting each of the plaintiffs' complaints in the instant matter, we apply Administrative Litigation Law Article 7 and Civil Procedure Law⁸⁹ Article 89, the proviso of Article 92, and Article 94 with us to responsibility for court costs.

Accordingly, we enter judgment as stated in our Formal Ruling.

[Reports: 4 IELR 298 (extract); 38 ILM 394 (1999)]

NOTE.—On 1 July 1997 the Japanese Government enacted a Law for the Protection of the Ainu Culture and for the Dissemination and Advocacy for Traditions of the Ainu and the Ainu Culture.

MINSOHŌ.

State immunity — Jurisdictional immunity — Claim in tort against foreign State — Claim arising out of operation of ship for military purposes — Whether constituting sovereign activity — Whether foreign State entitled to jurisdictional immunity — The law of the Netherlands

UNITED STATES OF AMERICA v. EEMSHAVEN PORT AUTHORITY

The Netherlands, Supreme Court. 12 November 1999

SUMMARY: *The facts:*—In November and December 1990 the seagoing motor vessel *Cape May*, which sailed under the flag of the United States, berthed in the Dutch port of Eemshaven. The ship was owned by the United States. The berthing had taken place on conditions contained in a document drawn up by the Port Authority, which had been signed in confirmation of the agreement of the United States by Mijne and Barends BV for or on behalf of OMI Corporation in New York. While the ship was berthed a number of boiler tubes fell overboard during loading. The Port Authority was involved in the salvage of these tubes and incurred costs in this connection. Subsequently, in the period from 10 to 12 November 1990 the *Cape May* broke away from its moorings on a number of occasions and drifted, colliding with quayside walls belonging to the Port Authority and causing damage. The Port Authority sued the United States before the District Court of Groningen, claiming compensation for the items of damage estimated at a total of NLG 104,250.50. In an interim action the United States claimed that the District Court lacked jurisdiction. The District Court rejected this defence by a judgment of 29 July 1994. The United States appealed against this interim judgment to the Court of Appeal of Leeuwarden. In its ruling of 10 December 1997 the Court of Appeal upheld the judgment. The United States then appealed in cassation against this ruling to the Supreme Court.

Held:—The United States was entitled to jurisdictional immunity.

(1) As international law stood at present, foreign States were not subject to the jurisdiction of the Dutch courts in respect of claims arising in the Netherlands as the result of the operation of ships which belonged to or were operated by them and which were used in the performance of a typical government function (such as military activity). The nature of the act or event that gave rise to the claim was not of importance in this connection.

(2) This view was not only supported in the practice of States, judicial rulings in various other countries and authoritative literature on international law but also underlay the provisions regarding ships used for government service in Article 3 of the Brussels Convention for the Unification of Certain Rules

relating to the Immunity of State-Owned Vessels of 1926,¹ Article 30 of the European Convention on State Immunity of 1972² and Article 16 of the Draft Articles on Jurisdictional Immunities of States and their Property, adopted by the International Law Commission in 1991.³

The following is the text of the judgment of the Court:

PROCEDURE

1. The defendant in cassation ("the Port Authority") summoned the plaintiff in cassation ("United States") by notice of 22 November 1991 to appear before the District Court of Groningen and demanded that the United States be ordered to pay to the Port Authority an amount of NLG 104,250.50 plus statutory interest from 1 July 1991, or at the latest from the date of the notice. The United States submitted an exceptional statement arguing that the District Court lacked jurisdiction to hear this claim. The Port Authority submitted a reply disputing the arguments submitted by the United States.

By a judgment of 29 July 1994, the District Court decided that it had jurisdiction to hear the dispute and ordered that the parties continue the proceedings. The United States lodged an appeal against this judgment with the Court of Appeal in Leeuwarden. By a judgment of

¹ Art. 3(1) reads: "The provisions of the two preceding Articles shall not be applicable to ships of war, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*. Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity: (1) in case of actions in respect of collision or other accidents of navigation; (2) in case of actions in respect of assistance, salvage and general average; (3) in case of actions in respect of repairs, supplies, or other contracts relating to the vessel."

² Art. 30 reads: "The present Convention shall not apply to proceedings in respect of claims relating to the operation of seagoing vessels owned or operated by a Contracting State or to the carriage of cargoes and of passengers by such vessels or to the carriage of cargoes owned by a Contracting State and carriage on board merchant vessels."

³ Report of the ILC on the work of its 43rd session, 29 April-19 July 1991, UNGAOR, A/46/10, Art. 16 reads: "1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if at the time the cause of action arose the ship was used for other than government non-commercial purposes. 2. Paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to other ships owned or operated by a State and used exclusively on government non-commercial service. 3. For the purposes of this Article, the proceeding which relates to the operation of the ship means, *inter alia*, any proceeding involving the determination of a claim in respect of: (a) collision or other accidents of navigation; (b) assistance, salvage and general average; (c) repairs, supplies and other contracts relating to the ship; (d) consequences of pollution of the marine environment."

10 December 1997, the Court of Appeal affirmed the judgment of the District Court...

2. The United States lodged an appeal to the Supreme Court against the judgment of the Court of Appeal. The summons to appear before the Supreme Court is attached to this judgment and is hereby incorporated by reference. The Port Authority submitted a statement arguing that the petition for cassation must be rejected. Counsel for both sides submitted argument.

The Solicitor-General, Mr Strikwerda, submitted a statement arguing that the judgment of the Court of Appeal in Leeuwarden should be reversed and that the matter should be referred to another Court of Appeal for further proceedings.

FACTS AND ARGUMENTS OF THE PARTIES

3.1. In these cassation proceedings the following facts may be assumed:

- (i) The United States owns the sea-going vessel *Cape May*, which sails under the American flag.
- (ii) Through the efforts of a private agent, in November 1990 the *Cape May* was moored in the Eemshaven under the conditions set out in a document drawn up by the Port Authority and dated 5 November 1990. This document was signed on behalf of the United States by Wijnne en Barends BV, which was acting on behalf of OMI Corporation in New York.
- (iii) The *Cape May* was moored in the Eemshaven in November and December 1990.
- (iv) Several boiler tubes fell overboard as they were being loaded onto the *Cape May*. The Port Authority was involved in retrieving these tubes and incurred costs in those activities.
- (v) In the period from 10 to 12 December 1990, the *Cape May* broke free of its moorings several times in the Eemshaven and was adrift. As a result, the *Cape May* collided with the harbour walls, which are the property of the Port Authority. Damage resulted.
- (vi) The claim submitted by the Port Authority against the United States is for compensation for the damages referred to in points (iv) and (v) above. The Port Authority estimates these damages at a total amount of NLG 104,250.50.

3.2. After the Port Authority summoned the United States on a basis of Article 126 paragraph 3 of the Code of Civil Procedure [which

allows a foreign-based defendant to be summoned before the court of the domicile of the plaintiff] and submitted the claim referred to above in paragraph 1, the United States invoked the privilege of immunity from jurisdiction and argued:

- A. that the *Cape May*, at the time the damage was caused, was part of the "Ready Reserve Force Vessels" of the United States Navy, and was deployed in that capacity in the implementation of the military operations Desert Shield and Desert Storm, which were being carried out pursuant to resolutions of the United Nations Security Council;
- B. that the *Cape May* was in the Eemshaven to load military goods that were to be transported to the Gulf area;
- C. that the *Cape May* was a warship on the basis of Naval Warfare Publication 9a and was therefore not a commercial ship, and furthermore was not performing commercial activities at the time of the occurrence that caused damage.

As a secondary argument, the United States submitted that a claim such as that asserted by the Port Authority must be made against the Dutch State (the receiving State) on the basis of the NATO Status of Forces Agreement.

The Port Authority disputed the privilege of immunity and argued that, even if the *Cape May* was a warship, the United States could not invoke immunity from jurisdiction in this matter because the wrongful act committed by the United States against the Port Authority is not an act *jure imperii* in nature. Furthermore the Port Authority disputed that the *Cape May* was a warship and that the NATO Status of Forces Agreement was applicable in this matter.

GRÖUNDS

The District Court rejected the plea of immunity and decided that the United States could not invoke this privilege because the wrongful act committed by the United States was in nature not an act performed in the exercise of its governmental tasks. In addition, the District Court held that the NATO Status of Forces Agreement did not apply.

The Court of Appeal affirmed the judgment of the District Court on the question of jurisdiction. The petition in cassation disputes the judgment of the Court of Appeal.

3.3. The Court of Appeal decided in paragraph 10 of its judgment that the wrongful acts allegedly committed while the *Cape May* was in the Eemshaven must be assessed in the context of the contract in

respect of the mooring arrangements in the Eemshaven and that the act of making mooring arrangements in a foreign harbour was in nature not an act that can be considered as *jure imperii* since it cannot be viewed as conduct that is characteristic of conduct by a government in its governmental capacity.

In paragraphs 11 to 13 of its judgment, the Court of Appeal rejected the arguments advanced by the United States regarding the NATO Status of Forces Agreement. Furthermore, in paragraphs 15 to 19 of its judgment, the Court of Appeal rejected the arguments advanced by the United States regarding the Brussels Convention of 10 April 1926. The Court of Appeal did not make a decision on whether the *Cape May* was a warship or equivalent military supply ship.

3.4. Part 1 of the petition for cassation disputes the decision by the Court of Appeal that the wrongful act alleged by the Port Authority cannot be viewed as an act *jure imperii*. The main point of this Part is the argument advanced in Subparts A and B to the effect that the Court of Appeal erred by failing to include the status and task of the *Cape May* in its analysis of the question whether the United States can invoke the privilege of immunity from jurisdiction. The United States submitted allegations concerning the status and task of the *Cape May* but the Court of Appeal did not investigate these allegations.

Accordingly, this part raises the question whether unwritten rules of public international law permit the United States to invoke immunity from jurisdiction in relation to a claim which arose in the Netherlands in the context of use by the United States of a vessel belonging to or operated by the United States, if this vessel at the time when the claim arose had the status of a warship or military supply ship and was exclusively used in the fulfilment of military (i.e., non-commercial) governmental tasks.

The answer to this question is "yes". Under current public international law, foreign States are not subject to the jurisdiction of the Dutch Courts in relation to claims that arise in the Netherlands in the context of the operation of vessels belonging to or operated by foreign States, where such vessels are used in the fulfilment of a typical governmental task, such as military activity. The nature of the act or occurrence that gave rise to the claim is irrelevant.

This view is not only supported by the practice of States, judicial opinion in various countries and authoritative public international law literature, but also provides the basis for the rules concerning State ships used for governmental tasks set out in Article 3 of the Brussels Convention of 1926. This Convention led to the European Convention on State Immunity signed on 16 May 1972 in Basle. This Convention

provides that disputes concerning claims relating to the operation of sea-going vessels owned or operated by a signatory State are excluded from the application of the Convention (Article 30). The report by the International Law Commission, referred to in Paragraph 21 of the Opinion of Solicitor-General Strikwerda, also provides support for this view.

The arguments advanced in part 1, A and B, are therefore well-founded. The rest of this Part does not require discussion.

3.5. Part 2 of the petition disputes the decision by the Court of Appeal in paragraph 13 of its judgment that the NATO Status of Forces Agreement cannot be decisive in these proceedings on the question of immunity because application of that Agreement would in any event result in jurisdiction of the Dutch Courts and at most the Port Authority's claim would have to be dismissed since the Port Authority summoned the United States and not the Dutch State.

This part cannot result in reversal of the judgment of the Court of Appeal as the United States lacks interest in such a decision. The claim asserted by the Port Authority can only be viewed as a claim related to the navigation or operation of a ship as referred to in Article VIII, Paragraph 5, Point H of the NATO Status of Forces Agreement, so that the provisions of that Paragraph concerning third-party claims do not apply.

3.6. Part 3, which disputes the interpretation by the Court of Appeal of the provisions of Article 3, Paragraph 1, Sections 1 and 2 of the Brussels Convention of 1926, must also be rejected for lack of interest. Even if this provision were to be interpreted as argued by the United States, it would not add anything in the present matter to the rules of unwritten public international law concerning the immunity of State ships used exclusively in the fulfilment of the non-commercial governmental tasks (see paragraph 3.4 above). Accordingly, it is not necessary to decide whether Article 6 of that Convention permits the United States to invoke that Convention's provisions even though it is a non-signatory State.

3.7. In the light of the considerations set out in paragraph 3.4 above, the judgment of the Court of Appeal must be reversed. This matter must be referred to another Court of Appeal for further investigation into the status of the *Cape May* at the time of the events that caused damage.

On these grounds, the Supreme Court:

Reverses the judgment of the Court of Appeal of Leeuwarden of 10 December 1997;

Refers this matter to the Court of Appeal of Arnhem for further proceedings and decision; and
Orders the Port Authority to pay the costs incurred by the United States in these Supreme Court proceedings in the amount of NLG 705 in expenses and NLG 3,500 in salary ...

[Report: Unpublished (in Dutch)]