## Legal Research Memorandum

## What Constitutes a "Foreign" Claim?

Questions have arisen regarding whether the asbestos exposure of certain claimants "took place outside the United States and Canada," making their claims eligible for valuation only through Individual Evaluation under Manville TDP Section C.1(b).

The Trust, after consultation with the Selected Counsel for the Beneficiaries and the Legal Representative of Future Claimants, engaged Professor George A. Bermann, an expert in international law at Columbia Law School, for advice on these questions. Professor Bermann performed research and prepared an extensive written memorandum.

Professor Bermann found United States territory to be limited to the land of the United States as well as its ports, harbors, bays and other enclosed areas of the sea, as well as a marginal belt of the sea extending from the coast line outward by three geographic miles. Following Supreme Court precedent, everything other than this is "outside the United States."

There are places where the United States might sometimes exercise *jurisdiction* over people or activities which are nonetheless *outside* the United States territorially. This includes ships flying the US flag on the high seas or in foreign waters. People on those ships are not inside the United States, even though they might for some purposes be subject to its laws. This appears to be as true for publicly owned US ships like US Navy vessels as for US-registered private merchant ships.

For those who are interested, Professor Bermann's written memorandum is attached.

# MANVILLE TRUST: WHAT IS U.S. TERRITORY FOR PURPOSES OF TRUST ADMINISTRATION?

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## I. INTRODUCTION

The Manville Trust Distribution Process (TDP) draws a distinction between injuries taking place within U.S. territory and those taking place outside. If exposure to asbestos took place within U.S. territory (or Canada), the resulting claim is eligible for valuation under the Section D Schedule of the Manville Trust. On the other hand, if exposure took place outside the United States (or Canada), the claim is assessed through the Individual Evaluation method provided for under TDP Section C. Section C provides that, for evaluation purposes, "the claimant may elect as the 'claimant's jurisdiction' either (a) the jurisdiction in which the claimant resides at the time of diagnosis or when the claim is filed with the Trust; or (b) jurisdiction in which the claimant had exposure to Manville asbestos."[1] While American courts by definition have jurisdiction in virtually all cases that arise out of exposure on territory that geographically forms part of the United States, there may be instances in which U.S. territory is defined to include territory outside the formal geographic boundaries of the United States.[2] When asbestos exposure took place in territory that may be considered U.S. territory, though not geographically part of the U.S., the claimant may utilize Section C to elect the method of evaluation provided by Section D.

If a claimant asserts that exposure occurred in a locale that is situated geographically outside the U.S., but nevertheless should be considered legally U.S. territory, the Trust must determine whether the locale may indeed be considered as constituting U.S. territory, for compensation purposes.

Experience under the TDP suggests five recurring scenarios, each of which will be examined in this memorandum. The scenarios are the following:

- **SCENARIO 1: Foreign shipyard workers are exposed to asbestos in part aboard active U.S. Navy ships while docked at foreign shipyards**

- **SCENARIO 2: Foreign shipyard workers are exposed to asbestos in part aboard private (not government-owned) U.S.-flag ships while docked at foreign shipyards**

- **SCENARIO 3: Foreign workers are exposed to asbestos aboard U.S. Navy ships at naval bases abroad run by the U.S. Navy, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: Rota Naval Base in Spain)**

- **SCENARIO 4: Foreign non-ship workers are exposed to asbestos at military bases abroad run by the U.S. military, but which, by treaty (e.g., NATO Status of Forces Agreement) or**

[1] 2002 Trust Distribution Process, Section C. 3.
[2] United States v. Yousef, 327 F.3d 56, 96 (2d Cir. 2003).

**otherwise, remained sovereign territory of the receiving country (ex: U.S. Army or Air Force bases in Germany)**

- **SCENARIO 5: Foreign seamen are exposed to asbestos at high sea aboard civilian ships flying the U.S. flag**

In the absence of any authoritative indication in the TDP, this memorandum approaches the problem from two angles. It first explores whether any particular locales outside the geographic bounds of the U.S. are considered *generically* to constitute U.S. territory – that is, whether such locales are treated as the U.S. for virtually all purposes. It then examines other discrete U.S. regulatory regimes that expressly make occurrence of a particular event on U.S. territory a condition for securing the relief or benefit that those regimes provide. If a locale outside the geographical bounds of the U.S. is *specifically* deemed U.S. territory for purposes of such a regime, that determination – absent compelling reasons for drawing a distinction between that regime and the TDP – may plausibly be relied upon for evaluating TDP claims arising under analogous circumstances.

## II. GENERIC TERRITORIAL DETERMINATIONS: FOREIGN BASES AND U.S.- FLAG SHIPS ABROAD

Certain locales outside the geographic bounds of the U.S. have been considered more or less generically as to whether they may be regarded as constituting U.S. territory. Foremost among these are (a) NATO military bases, (b) flag vessels in international waters, and (c) flag vessels in the internal waters or ports of another State.

### (A) The NATO SOFA

The legal framework under which U.S. military forces operate in a foreign country is commonly referred to as Status of Forces Agreement (SOFA).[3] These agreements typically cover all matters related to the personnel working at military bases abroad.[4] However, each SOFA may be supplemented by additional agreements concluded between the U.S. and the other nation or nations concerned or, in the case of NATO, between Supreme Headquarters and individual nations.[5] To analyze jurisdictional aspects of asbestos exposure at a U.S. military base abroad, one must consult the SOFA pertaining to that specific base, as the ground rules may differ from base to base.

While there exists a wide variety of ground rules, they may be primarily divided into three categories.

Under some SOFAs, as supplemented, the United States has exclusive jurisdiction over all criminal or disciplinary matters. The SOFA between the U.S. and the Government of Mongolia is an example.[6] Other SOFAs establish a regime of shared jurisdiction, in which jurisdiction over a given scenario is determined by reference to a particular allocation set forth in the SOFA, as supplemented. The

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[3] R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?,* Congressional Research Services.
[4] Id. at 1.
[5] NATO Legal Deskbook, Second Edition, 2010.
[6] T.I.A.S., Agreement on Military Exchanges and Visits Between The Government of the United States of America and The Government of Mongolia, agreement dated June 26, 1996.

NATO SOFA, which will be discussed in greater detail below is a prominent example.[7] Still, other SOFAs are silent on the issue. Such SOFAs typically state nothing more than that U.S. personnel are to be accorded the status generally accorded to U.S. personnel in that country. The Dayton Agreement related to Bosnia and Herzegovina is one such example, as it provides that diplomatic protections for "technical experts"[8] shall be subject to the Vienna Convention on Diplomatic Relations.[9]

It should be noted that none of the SOFA regimes outlined above afford the United States sovereignty over its military bases; rather, they merely delineate jurisdiction as between the U.S. and the host country.[10] But while no active SOFA appears to recognize a military base as U.S. territory, courts in some instances have nevertheless regarded foreign U.S. bases as constructively U.S. territory and subject to U.S. jurisdiction as United States territory. Thus, in the case of the *United States v. Holmes*, involving the legal status of U.S. military bases in Japan, the court stated that it would consider "whether the United States enjoys such control over the area that the law should constructively regard it as United States territory.'"[11] The court concluded that, since the SOFA with Japan did not limit the ability of federal courts to exercise jurisdiction over U.S. bases and since it left the U.S. with "substantially greater authority to regulate conduct than the host country," those bases could be considered as constituting U.S. territory. In another case involving U.S. bases in Japan, the Fourth Circuit laid down a two-part inquiry for deciding whether a U.S. base abroad should be constructively regarded as U.S. territory. The outcome depended on whether the land in question was reserved or acquired for the use of the United States and whether the United States enjoys exclusive or concurrent jurisdiction in the territory at issue.[12] The court in that case concluded that the bases should be "constructively regarded as United States territory."[13]

As the preceding discussion reveals, there is a complicated and uncertain relationship between jurisdiction and territory. However it is safe to say that the more jurisdictional authority accorded to the United States in a given military base, the more likely that base will be constructively regarded as U.S. territory. At the very least, where the relevant SOFA accords the U.S. exclusive jurisdiction, without exception, over all conduct taking place on a U.S. base, that base may be treated as if U.S. territory. But where there prevails a complex system of concurrent jurisdiction, the military base is less likely to be regarded as part of the U.S.

With this background, I turn to the bases subject to the NATO SOFA. Under Article VII, the sending State (here the U.S.) has the right to exercise full criminal and disciplinary jurisdiction, and to do

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[7] 4 U.S.T. 1792; T.I.A.S. 2846.

[8] Donald P. Oulton, *Deployment of U.S. Military, Civilian and Contractor Personnel to Potentially War Hazardous Areas from a Legal Perspective*, The DISAM Journal, Summer 2001.

[9] Mason, supra note 3, at 5.

[10] However, it is conceivable for the U.S. to attain sovereignty over another nations lands, as was the case with the bases in the Philippines in mid-20th century. As the court pointed out in Heller v. United States, "the United States retained sovereignty over its military bases in the Philippine Islands after World War II", however in 1979 the two countries "amended the latter agreement to provide for the return of sovereignty over these military bases" to the Philippines. Heller v. United States, 776 F.2d 92, 96 (3rd Cir. 1985).

[11] United States v. Holmes, 618 F.Supp.2d 529, 542 (E.D. Va. 2009).

[12] United States v. Corey, 232 F. 3d 1166, 1177 (9th Cir. 2000).

[13] 232 F.3d. at 1178. Similarly in United States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973), the court concluded that there is "a proper grant of special territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States under its concurrent jurisdiction. .

so pursuant to its law, though this prerogative is limited to persons subject to the military law of the sending State.[14] Article VII(4) specifically provides that the sending State does not have jurisdiction over the nationals of the receiving State unless they are members of the force of that same State. At the same time, the receiving State has jurisdiction over members of force or civilian components with respect to offences within its territory and punishable by its law.[15] Moreover, both the sending and receiving States have exclusive jurisdiction over matters that are not covered by the laws of the other State.[16] Article VII(3) deals with offenses that are subject to the concurrent jurisdiction of both States, indicating how they should be treated.

Based on this account, it may be concluded that the NATO SOFA does not afford the United States sufficiently predominant jurisdictional status vis-à-vis the receiving State to justify treating U.S. bases abroad operating under the aegis of NATO as per se constructively part of U.S. territory. Accordingly, claims arising out of exposure at U.S. NATO bases presumptively fall under TDP Section C. This presumption may be overcome only if the situation in which the exposure arose is one that, under the specific provisions of Article VII of the NATO SOFA, falls within the jurisdiction, exclusive or concurrent, of the United States. As it turns out, in both scenarios with which I have been presented the SOFA specifically provide that sovereignty remains with the host country.

**(B) SHIPS ON THE HIGH SEAS**

A second scenario in which jurisdictional generalizations can more or less reliably be made is one of ships sailing on the high seas. Since such ships are not located in the territory of any individual nation, properly viewed, the question of their nationality is governed in principle by international law. The United Nations Convention on the Law of the Sea (UNCLOS) is the instrument that principally establishes international law in this regard. The number of parties to UNCLOS is 163, including China, Russia, and the European Union, making UNCLOS one of the most widely adopted international conventions in force. While the United States has signed but not ratified the convention (due chiefly to disagreements over its provisions pertaining to ownership of ocean resources), it generally recognizes other aspects of UNCLOS as customary international law.[17] UNCLOS therefore is the starting point for analyzing the territoriality of ships on the high seas.

Article 91 of UNCLOS establishes that ships have the "nationality of the State whose flag they are entitled to fly" unless there is no genuine link between the state and the ship. Moreover, Article 92 requires that ships sail under the flag of one state only, and be subject to its "exclusive jurisdiction on the high seas." Correspondingly, Article 94 places a duty on the flag state to "assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew." Under this regime, any ship flying a U.S. flag is subject to U.S. jurisdiction while sailing on the high seas.

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[14] NATO Treaty, Article VII(1)(a).

[15] NATO Treaty, Article VII(1)(b).
[16] Id., Article VII(2)(a).
[17] Restatement (Third) of Foreign Relations Law Part V. (Except for deep sea mining provisions, the "substantive provisions of the Convention" are accepted by "express or tacit agreement" and "consistent practice" as statements of customary law binding upon them apart from the Convention.")

The question then arises whether, in establishing the nationality of a vessel on the high seas, and even in allocating jurisdiction over it, Articles 91, 92, and 94 also recognize that ships on the high seas constitute part of the territory of the country whose flag they fly. The U.S. Supreme Court stated in *Cunard Steamship Co., Ltd. v. Mellon* that "a merchant ship is part of the territory of the country whose flag she flies, and that actions aboard that ship are subject to the laws of the flag state."[18] However, the Court immediately proceeded to describe this assimilation of a flag ship to territory of the country of flag as "metaphoric" only.

> [T]his, as has been aptly observed, is a figure of speech, a metaphor. The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry, and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty.

The Court held that U.S. territory is confined to "the regional areas – of land and adjacent waters – over which the United States claims and exercises dominion and control as a sovereign power."

> It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land area under its dominion and control, its ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.[19]

The Court concluded that the notion that a ship forms part of the territory of the country whose flag it flies is a "fiction." It ultimately held that a ship flying the U.S. flag on the high seas was not part of the territory of the United States for purposes of the Prohibition Amendment to the Constitution and implementing legislation.

262 U.S. at 122.

The *Cunard* decision relied in turn on the Court's earlier decision in *Scharrenberg v. Dollar Steamship Co*.[20] There, the Court ruled that foreign laborers performing work on U.S.-flag merchant vessels on the high seas could not be considered as performing labor in the United States, within the meaning of the statutory prohibition on the hiring of alien labor:

> Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States. … It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative … and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible.[21]

Lower federal courts, such as the Fifth Circuit in *United States v. Jho*,[22] have taken much the same position. *Jho* cites with approval the statement in *Cunard* "that the territory subject to [U.S.]

[18] *See* Cunard S. S. Co., Ltd. v. Mellon, 262 U.S. 100, 123 (1923).
[19] 262 U.S. at 122.
[20] 245 U.S. 122 (1917).
[21] 245 U.S. at 127.
[22] 534 F. 3d 398, 405 (5th Cir. 2008).

jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles." It also relied on *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 11 (1887) ("the *Widenhus* Case"), according to which "[i]t is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding." While conceding that the Marshall Islands, where the ship was registered, could exercise jurisdiction over it, the court in *Jho* concluded that the offense in that case – failing to maintain required oil record books – occurred in U.S. ports and thus clearly within the territory of the United States. The court reiterated that the "traditional" supposition that á merchant ship is part of the territory of the country whose flag she flies" did not mean that the ship was part of the territory of the Marshall Islands. It was enough to justify application of U.S. law, hence U.S. prescriptive jurisdiction, that the offending conduct took place in U.S. ports.

These decisions support the view that while Article 91 UNCLOS gives a ship a nationality, and while Articles 92 and 94 establish the exclusive jurisdiction of the flag state on the high seas, none of these provisions makes a vessel on the high seas, even one carrying the U.S. flag, the territory of the United States. The fact that a country may – and indeed must – exercise jurisdiction over a particular locale does not make that locale part of the "territory" of that country.

The question would not appear to be answered any differently even where the vessel in question is a war ship or is owned by a state and used only for non-commercial governmental purposes. Such vessels undoubtedly belong to the United States. (Articles 95 and 96 of UNCLOS provide that such a ship enjoys complete immunity from the jurisdiction of any State other than the flag State.) But, again, neither ownership of a vessel nor the right to exercise jurisdiction over it equates with incorporation of the vessel into the territory of the state in question.

### (C) SHIPS IN THE INTERNAL WATERS OR PORTS OF ANOTHER STATE

If U.S. flag vessels do not constitute U.S. territory while on the high seas, they can scarcely be thought to do so while in the internal waters or ports of another State. In the first place, the law of the flag doctrine "is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign."[23] Thus, territorial claims by the U.S. become measurably weaker and potentially non-existent in those circumstances. This conclusion comports with the fact that there is no general right of access of ships across the territorial waters of another state (as distinct from the high seas). The coastal State retains its full criminal, civil, and administrative jurisdiction over ships entering its territory, irrespective of the ship's flag.

[23] Cunard S. S. Co., Ltd.. v. Mellon, 262 U.S. 100, 123 (1923). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 502, cmt. d (1987) ("The flag state['s] ... jurisdiction is not exclusive when the ship is in a port or internal waters of another state.").

The Supreme Court decision in *United States v. Flores*[24] is not to the contrary. The Court there ruled that if a crime is committed on U.S.-flag ship within foreign waters, it is subject to the criminal jurisdiction of the United States It is true that the opinion contains language that could be read as treating a U.S-flag vessel in foreign waters as part of U.S. territory. It refers to merchant vessels as "deemed to be a part of the territory of [the flag state] and not to lose that character when in navigable waters within the territorial limits of another sovereignty."[25] However, it seems clear from the context that the Court was referring in its decision not to the question of territory but rather to the question of the exercise of jurisdiction. The quoted language is preceded by the phrase "for purposes of the jurisdiction of the courts of the sovereignty whose flag [the ship] flies." Moreover, the Court at several places describes this exercise of jurisdiction as "extra-territorial." It is difficult on that basis to conclude that the Court considered a U.S.-flag vessel in the inland waters of the then Belgian Congo, where the crime was committed, as part of the territory of the United States. The Court clearly contemplated the possibility that the presence of flagged vessels in foreign waters would give rise to concurrent and even competing jurisdictional claims, but there is no reason to suppose that the vessel is part of the territory of any state other than the one in whose territorial waters it finds itself.

The fact that a foreign state might choose not to exercise jurisdiction over asbestos exposure on vessels in its territorial waters does not lessen the fact that the vessel remains in the territory of that state or cause it to become the territory of the flag State.

### (D) TENTATIVE CONCLUSIONS

Based strictly on the foregoing general propositions, I conclude that U.S. bases outside the United States do not constitute U.S. territory, unless the particular SOFA Agreement gives a strong indication to that effect, which is rarely the case. In our scenarios, the SOFAs in question specifically acknowledge that sovereignty remains with the host country.

Despite allusions to the effect that ships carrying a nation's flag on the high seas constitute that nation's territory, United States Supreme Court case law ultimately rejects that supposition as a fiction. Rather than literally treat the vessel as U.S. territory, the law merely authorizes the exercise of jurisdiction over the vessel or occurrences taking place on it. That exercise of jurisdiction is best understood as an exercise of extra-territorial, rather than territorial, jurisdiction.

This is a fortiori the case of a U.S. flag vessel within the territorial waters of another State. The U.S. may once again exercise jurisdiction over the vessel, concurrent with the State in whose waters it finds itself. But the vessel is not, territorially, the United States.

## III. U.S. TERRITORIALITY IN ANALOGOUS STATUTORY REGIMES

In order to test the generalizations that emerged from the preceding analysis, I consulted various other statutory regimes in which the applicability of U.S. law – and more specifically entitlement to a particular benefit or right – is contingent on a particular event having occurred in the territory of the United States. For each regime, an attempt was made to determine whether decision-makers (typically

[24] 289 U.S. 137 (1933).

[25] 289 U.S. at 155-56.

U.S. courts) consider that the occurrence of a particular event in the place indicated in each of the five scenarios outlined at the outset means that the event occurred in U.S. territory. In the sections that follow, I present, for each statutory regime in turn, the evidence as to whether the five scenarios represent scenarios unfolding in the territory of the United States. As may be expected, under some statutory regimes, there have been no cases showing treatment of the "U.S. territoriality" issue in one or more of the five scenarios. Where that is the case, it is noted.

### (A) THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (FTCA) establishes statutorily the liability of the United States for tort suits, but recognizes a number of exceptions to that presumptive liability. One such exception is that for claims arising in another country. In determining whether a tort claim arose in the United States or in another country, U.S. courts effectively determine what does and does not constitute the territory of the U.S. In considering the FTCA, it should be borne in mind that it represents special legislation entailing the loss of immunity of the United States to suits in tort. As such, the exceptions are to be strictly construed. The term "foreign country" appearing in the FTCA tort exception needs to be interpreted in light of this consideration.[26]

- **SCENARIO 1: Foreign shipyard workers are exposed to asbestos in part aboard active U.S. Navy ships while docked at foreign shipyards**

There is apparently no case under the FTCA in which the injury in question was sustained onboard a U.S. Navy ship docked at a foreign shipyard. It therefore cannot be determined whether that injury would come within the purview of the "foreign country" exception to the FTCA's tort exception.

- **SCENARIO 2: Foreign shipyard workers are exposed to asbestos in part aboard private (not government-owned) U.S.-flag ships while docked at foreign shipyards.**

The FTCA would in principle simply have no application in this scenario, due to the fact that the FTCA applies only to acts of the Government and its employees. See 28 U.S.C.A. § 1346(b), which contemplates only "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of *any employee of the Government* while acting within the scope of his office or employment…." (emphasis added).

- **SCENARIO 3: Foreign workers are exposed to asbestos aboard U.S. Navy ships at naval bases abroad run by the U.S. Navy, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: Rota Naval Base in Spain)**

In an earlier section, I concluded that claims arising out of exposure at U.S. NATO bases presumptively fall under TDP Section C, and that this presumption may be overcome only if the situation in which the exposure arose is one that, under the specific provisions of Article VII of the NATO SOFA, falls within the jurisdiction of the United States. Cases under the FTCA generally support this conclusion.

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[26] Courts have time and again held that the FTCA represents a 'limited waiver' of sovereignty by the US Government. See Smith v. United States, 702 F. Supp. 1480 (D. Ore. 1989).

As an initial matter, it might well be supposed that the US maintains *de facto* sovereignty over its military bases and that such bases on that account amount to U.S. territory. The Supreme Court held in the case of *Boumediene v. Bush*[27] *et al.,* that the U.S. enjoys *de facto* (as opposed to *de jure*) sovereignty over Guantanamo Bay and that the writ of habeas corpus could accordingly be issued. However, the FTCA cases do not support an extension of *Boumediene* to the asbestos exposure scenario. In the recent case of *Talal Al-Zahrani v. Rumsfeld,*[28] the court determined that because Cuba maintained *de jure* sovereignty over the Guantanamo Naval Base, an accident occurring there fell within the purview of the "foreign country" exception and the U.S. could not be sued under the FTCA.

Similarly, in *United States v. Spelar*,[29] the issue was whether the U.S. government could be sued under the FTCA for the allegedly wrongful death of a person occurring at the U.S. airbase in Harmon Field, Newfoundland, a base that had been leased to the U.S. for a period of 99 years. The Court held that since the lease arrangements did not transfer sovereignty from Great Britain to the U.S., the sovereignty remained with the "foreign country," so that the claim failed. Thus military bases, even though occupied by the U.S., retain their *de jure* sovereignty and form part of a "foreign country" within the meaning of the FTCA.

- **SCENARIO 4: Foreign non-ship workers are exposed to asbestos at military bases abroad run by the U.S. military, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: U.S. Army or Air Force bases in Germany)**

In *Laskero v. Moyer,*[30] the plaintiff brought an FTCA action against the U.S. for injuries sustained as a result of a collision with a motor vehicle, which was being driven by an on-duty sergeant. The accident occurred at RAF, Alconbury, United Kingdom. The U.S. Government successfully invoked the "foreign country" exception in order to have the complaint dismissed. This result is consistent with the other findings reported here.

- **SCENARIO 5: Foreign seamen are exposed to asbestos at high sea aboard civilian ships flying the U.S. flag**

As in the case of Scenario 3, an FTCA claim is unlikely to arise here, as the U.S. government will not ordinarily be the defendant under the circumstances contemplated in this scenario. Further, were such a case to arise, it would be complicated by the fact that the FTCA's venue provision, § 1402(b), provides that, if the plaintiff is not a U.S. resident, his or her claim under the FTCA may be brought "only in the judicial district … wherein the act or omission complained of occurred." It would be difficult to know in which judicial district, if any, a tort committed on a U.S-flag vessel on the high seas may be said to have been committed. For lack of a better alternative, that place may be taken to be the place in the U.S. in which the vessel is registered.

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[27] 553 U.S. 723 (2008).
[28] 684 F.Supp.2d 103, 119 (D. D.C. 2010).
[29] 338 U.S. 217 (1949).
[30] 1990 U.S. Dist. LEXIS 7373 (June 15, 1990).

In the case of *Smith v. United States*,[31] the Supreme Court admitted that, although Antarctica is a region without a sovereign, it cannot be regarded as a "foreign country" Yet the Court denied coverage under the FTCA because the statute calls for application of the tort law of the place where the tort occurred,[32] and Antarctica does not in any event have an ascertainable tort law of its own. The case shows that a locale can be outside the United States, but still not be part of a "foreign country." Even so, the fact that Antarctica cannot be considered U.S. territory hardly means that a U.S.-flag vessel on the high seas cannot be considered U.S. territory either. The vessel is carrying a U.S. flag, whereas Antarctica may be assimilated to a vessel sailing on the high seas without any flag at all. Neither Antarctica nor such a vessel can reasonably be considered part of the territory of the United States. [33]

I nevertheless conclude that there is no basis in FTCA case law on which to cast doubt on the general conclusion that U.S.-flag vessels on the high seas are not U.S. territory.

### (B) U.S. NATIONALITY BY PLACE OF BIRTH

U.S. citizenship may be acquired at birth either through parentage (*jus sanguine*) or place of birth (*jus soli*), or both. According to the Fourteenth Amendment of the Constitution, place of birth entails two criteria. One must be "born … in the United States" and also "subject to the jurisdiction thereof."

**SCENARIO 1: Foreign shipyard workers are exposed to asbestos in part aboard active U.S. Navy ships while docked at foreign shipyards**

There is apparently no case raising the nationality status of a birth onboard a US Navy ship docked at a foreign shipyard. One must look far and wide for analogies on which to draw. It appears that at common law in England, a child born during army operations abroad acquired English nationality.

In the case of *United States v. Wong Kim Ark*,[34] the Supreme Court confronted the situation in which a child was born to an alien while the alien was physically in the United States. It upheld the grant of a writ of habeas corpus in favor of an individual who had been born in the United States to resident alien parents of Chinese nationality, and had previously established domicile in the U.S., to prevent his exclusion from the United States under the Chinese Exclusion Act. The Supreme Court ruled that the Fourteenth Amendment enshrined the traditional English common law rule of citizenship by birth within the territory. But here, there was no question that the birth occurred in the continental United States.

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[31] 507 U.S. 197 (1993).

[32] Under the FTCA (§ 1346(b)), liability in tort may be imposed on the U.S. only "under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred*." (emphasis added).

[33] The Court in *Smith* admitted that Antarctica is a sovereign-less tract of land and thereby does not fall within the common meaning of the term "country." However, it thought it bizarre to include Antarctica within the coverage of FTCA since "in accordance with the law of the place where the act or omission occurred" would imply the law of Antarctica, which admittedly does not have a law of its own. 507 U.S. at 201-02.

[34] 169 U.S. 649 (1897).

We might derive some understanding of the matter by inquiring as to whether the U.S. considers as having U.S. nationality a person born on a foreign public vessel while within the waters of the U.S. That circumstance arose in the case of *Re Look Tin Sing*.[35] There, the court stated:

> Persons born on a public vessel of a foreign country, while within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted [from citizenship by birth]. They are considered as born in the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States.[36]

If a child born to aliens on a public vessel in U.S. waters does not under U.S. law acquire U.S. citizenship, it seems likely that, conversely, the U.S. would consider a child born on a U.S. public vessel in foreign waters to be a citizen of the country to which the vessel belongs. But this is a highly indirect argument, at best. Moreover, it is dictum only since the petitioner in the case was in fact born on land in the United States.

More telling is the *Dauntless* episode,[37] which suggests an unwillingness to confer U.S. citizenship on the basis of birth on a U.S. flag vessel outside the territorial waters of the U.S., even if in close proximity to the U.S. There the INS, acting on the unanimous agreement of counsel from several departments and agencies, determined that a child, Wislene Theresias, born to a Haitian mother on a U.S. coast guard vessel 540 miles off of Florida did not, on that account, acquire U.S. citizenship. The INS took the view that U.S. public vessels are not "floating pieces of U.S. territory." Although no subsequent immigration judge ruling in the case could be found, the ruling offers strong support for the view that birth on a U.S. flag vessel on the high seas does not confer citizenship by birth and that the vessel does not constitute territory of the United States.

- **SCENARIO 2: Foreign shipyard workers are exposed to asbestos in part aboard private (not government-owned) U.S.-flag ships while docked at foreign shipyards**

Existing case law seems uniform in suggesting that a child born onboard a privately-owned U.S.-flag ship while docked at a foreign shipyard does not thereby obtain U.S. citizenship. In the case of *In re Lam Mow*,[38] a case regarding a birth on the high seas (see infra), the court referred to the case of *Scharrenberg v. Dollar S.S. Co.*,[39] which had held that an alien seaman employed aboard a U.S. registered merchant boat was not in violation of U.S. immigration and alien labor law because the ship was not part of the territory of the United States. The Supreme Court in *Scharrenberg* considered it "unallowable …that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country.'"[40]

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[35] 21 F. 905 (D. Cal. 1884).
[36] 21 F. at 906.
[37] See Comment, *The Dauntless Incident: Should a United States Public Vessel be Declared a "Floating Piece" of United states Territory for Citizenship Purposes*, 21 Inter-Am. L. Rev. 121 (1989).
[38] 24 F.2d 316 (9th Cir. 1928).
[39] 245 U.S. 122 (1917).
[40] 245 U.S. at 127.

- **SCENARIO 3: Foreign workers are exposed to asbestos aboard U.S. Navy ships at naval bases abroad run by the U.S. Navy, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: Rota Naval Base in Spain)**

  No case law on nationality by birth in this scenario could be found.

- **SCENARIO 4: Foreign non-ship workers are exposed to asbestos at military bases abroad run by the U.S. military, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: U.S. Army or Air Force bases in Germany)**

According to the discussion of "Birth on U.S. Military Base Outside of the United States or Birth on U.S. Embassy or Consulate Premises Abroad" in the State department's Foreign Affairs Manual:

> Despite widespread popular belief, U.S. military installations abroad (…) are not part of the United States within the meaning of the 14th Amendment. A child born on the premises of such a facility is not born in the United States and does not acquire U.S. citizenship by reason of birth.[41]

This clearly suggests that a U.S. military base abroad is not U.S. territory for the purpose of acquiring U.S. citizenship, and that may be so irrespective of any express acknowledgment by the U.S. that the foreign State preserves sovereignty over the base.[42]

- **SCENARIO 5: Foreign seamen are exposed to asbestos at high sea aboard civilian ships flying the U.S. flag**

Turning to birth on a U.S.-flag vessel on the high seas, the major case is *In re Lam Mow*, 24 F.2d 316 (9th Cir. 1928), in which "the single question for consideration [was] whether a child born on a merchant vessel of American registry, on the high seas, of parents of the Chinese race and subjects of China, but domiciled in the United States, to which country they are returning from China at the time of the child's birth, is a citizen of the United States." The court stated:

> Undoubtedly petitioner's theory that a merchant ship is to be considered a part of the territory of the country under whose flag she sails finds a measure of support in statements made in some of the decided cases and in texts upon international law. But no one of the decisions brought to our attention involved the precise question here presented, and the general statement, or its equivalent, that a vessel upon the high seas is deemed to be a part of the territory of the nation whose flag she flies, must be understood as having a qualified or figurative meaning.

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[41] 7 For. Aff. Manual (Dept. of State) 1113 (c)1.

[42] In Downes v Bidwell, 182 U.S. 244 (1901), Justice Gray, concurring in the judgment, stated that "[s]o long as Congress has not incorporated foreign territory into the United States, neither military occupation nor cession by treaty makes conquered territory domestic territory." Although the *Downes* case concerned taxation, the logic expressed by Justice Gray suggests that a U.S. military base abroad, which is not incorporated into the U.S. by an act of Congress, is not U.S. territory.

24 F.2d at 317. The court held that the phrase of the Fourteenth Amendment, "in the United States," was intended to have no wider scope than the Supreme Court had given to the notion of United States “territory” in two earlier cases: *Scharrenberg v. Dollar S. S. Co*., 245 U.S. 122, 127 (1917); *Cunard S. S. Co. Ltd. v. Mellon*, 262 U.S. 100, 122 (1923) .

This conclusion derives support from the remark in an official policy manual of the United States to the effect that births on ships outside U.S. territorial waters do not in themselves confer nationality:

> A U.S.-registered or documented ship on the high seas or in the exclusive economic zone is not considered to be part of the United States (…) A child born on such a vessel does not acquire U.S. citizenship by reason of the place of birth.”[43]

### (C) THE LONGSHORE AND HARBOR WORKER’S COMPENSATION ACT

The Longshore and Harbor Worker’s Compensation Act (LHWCA) provides compensation for disability or death of an employee resulting from injury occurring “upon the navigable waters of the United States.”[44] The United States is defined as the “several States and Territories and the District of Columbia, including the territorial waters thereof.”[45] The phrase, “navigable waters of the United States,” however, remains undefined and various circuits have split on its territorial reach.

To qualify for LHWCA coverage, employees must meet both status and situs requirements. The status requirement will not be covered here as it does not address issues of territoriality. The situs requirement, on the other hand, can give insights on the territorial boundaries of the United States.

- **SCENARIO 1: Foreign shipyard workers are exposed to asbestos in part aboard active U.S. Navy ships while docked at foreign shipyards**

Foreign shipyards clearly do not constitute part of the “navigable waters of the United States.” The only possible way in which they might in this scenario is if U.S. Navy ships are considered to be extensions of U.S. territory, wherever they may happen to be located. That is not the case.

- **SCENARIO 2: Foreign shipyard workers are exposed to asbestos in part aboard private (not government-owned) U.S.-flag ships while docked at foreign shipyards**

The LHWCA defines the “United States” as the “several States and Territories and the District of Columbia, including the territorial waters thereof,”[46] without any mention of U.S. ships. The definition appears to focus on the territory and territorial waters of the United States, thus leaving little if any room for viewing U.S.-flag ships as an extension of U.S. territory.

[43] 7 For. Aff. Manual 1113 (a) “Birth on U.S. Registered Vessel On High Seas or in the Exclusive Economic Zone” applies to these cases.
[44] Longshore and Harbor Worker’s Compensation Act, 33 U.S.C. § 903(a).
[45] 33 U.S.C. § 902(9).
[46] Id.

The majority of courts have confirmed this interpretation. In *Kollias v. D & G Marine Maintenance*,[47] the claimant sought recovery under the LHWCA, arguing that "because he was injured on an American flag vessel and because the law of the flag governs the internal affairs of a vessel," the ship was "in effect a United States territory."[48] The Second Circuit declined to characterize a U.S.-flag ship "as a kind of floating United States territory, where application of the LHWCA would not be extraterritorial."[49] The fact that the ship flew a U.S. flag had no bearing on the territorial application of the LHWCA. A fortiori, under this view, an injury on a U.S.-flag ship docked in a foreign port would not be considered injury in the territory of the United States. Even more on point, the Ninth Circuit in *Keller Foundation/Case Foundation v. Tracy* held that the LHWCA did not cover injuries suffered in the ports of Indonesia and Singapore. The court could find no indication in the LHWCA that Congress meant "navigable waters of the United States" to include territorial waters of foreign sovereigns.[50] Absent any explicit statements of extraterritorial applicability, the LHWCA could not be applied to injuries suffered in foreign ports.

Notwithstanding that fact, the Court of Appeals of Washington held that an employee injured off Sakhalin Island, Russia fulfilled the LHWCA's situs requirement.[51] It relied on an administrative determination by the Benefits Review Board of the U.S. Department of Labor's Office of Workers' Compensation Programs in the case of *Weber v. S.C. Loveland Co,* [52] which had decided that an employee injured on a barge in the port of in the port of Kingston, Jamaica, fulfilled the LHWCA's situs requirement. That decision, however, relied heavily on cases that had extended the scope of application of the Death on High Seas Act (DOHSA) and the Jones Act from the high seas to foreign territorial waters. Considering that the LHWCA, DOHSA and Jones Act all derive their authority from federal admiralty jurisdiction conferred by Article III of the Constitution, the Benefits Review Board extended the LHWCA's coverage to foreign territorial waters. However, the cases relied upon in *Weber* all concerned the question of whether jurisdiction under the relevant maritime statute could be extended extraterritorially, [53] not on what does or does not constitute the territory of the United States. Essentially, the Board based its reasoning for extending the LHWCA to foreign ports on the ground that doing so would serve "the policy concern expressed by the various courts by providing uniform coverage and protection for American workers working in foreign waters when all contacts but the situs of injury are with the United States."[54] This represented essentially a prudential extension of the LHWCA's proper scope of application.

[47] 29 F.3d 67 (2d Cir. 1994).
[48] 29 F.3d at 72.
[49] Id.
[50] 696 F.3d 835, 845-46 (9th Cir. 2012).
[51] Grennan v. Crowley Marine Services, Inc., 116 P.3d 1024, 1026, 1029 (Wash. Ct. App. 2005).
[52] 28 BRBS 321, 1994 WL 712512 (Ben. Rev. Bd. 1994).
[53] According to the Board's reasoning, "[w]here, as here, the injury occurs in the territorial waters of a foreign nation and claimant is a citizen of the United States, employer is based in the United States, the ship was under American flag, no choice of law issue was raised by the parties, and claimant meets the status requirement of the Act, we hold that the Longshore Act applies." *Weber*, 1994 WL 712512 at *9.
[54] Id.

In *Pena v. Keystone Shipping Co.*,[55] the federal district court for the Southern District of Texas granted a summary judgment motion against a plaintiff-employee who brought general maritime claims against the owner of the vessel on which he suffered injury. The central issue was whether the LHWCA applied to the plaintiff; if it did, the plaintiff was barred from recovering on the basis of his general maritime claims, as the LHWCA precludes most of those remedies. In response to the plaintiff's allegation that the situs of his injury, somewhere in the Pacific Ocean, rendered him beyond the reach of the LHWCA, the court responded that the plaintiff's failure to submit evidence that "he suffered injury while within the territorial reach of a foreign nation" made him a subject of the LHWCA.[56] The implied standard for the application of the LHWCA excludes areas that are within the "territorial reach" of a foreign nation. A U.S.-flag ship docked in a foreign port is clearly within the territorial reach of a foreign nation, hence the LHWCA would not apply.

In sum, despite suggestions to the contrary, foreign ports may not fairly be included within the LHWCA's definition of "navigable waters of the United States." That a ship in that situation happens to carry the U.S. flag does not alter the result. Unless a foreign port can somehow be said to lie within the "several States and Territories and the District of Columbia, including the territorial waters thereof,"[57] it is not within the territorial boundaries of the United States.

- **SCENARIO 3: Foreign workers are exposed to asbestos aboard U.S. Navy ships at naval bases abroad run by the U.S. Navy, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: Rota Naval Base in Spain)**

There are apparently no cases under the LHWCA dealing with the territorial status of U.S. Navy ships. The passage of the Defense Base Act (DBA), however, suggests that foreign bases, whether owned, operated or acquired from foreign countries, are not included in the "navigable waters of the United States" under the LHWCA. Enacted in 1941, fourteen years after the LHWCA, the DBA extended the LHWCA[58] to employees working:

> (1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or
> (2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone) ….[59]

These extensions suggest that the LHWCA excluded overseas military bases from the "navigable waters of the United States." Had the LHWCA covered overseas military bases within the definition of the "United States," Congress would not have needed to include those areas in the DBA. The DBA's enactment is a clear sign that the LHWCA excluded overseas military bases from the "navigable waters of the United States," regardless of the ownership status of the base. If the LHWCA did not apply to naval

[55] 142 F.Supp.2d 801 (S.D. Tex. 2001).
[56] 142 F.Supp. 2d at 804.
[57] 33 U.S.C. § 902(9).
[58] See Republic Aviation Corp. v. Lowe, 164 F.2d 18, 19 (2d Cir. 1947).
[59] Defense Base Act, 42 U.S.C. § 1651(a)(1)-(2).

bases *acquired* by the United States, or land occupied in a Territory or possession outside the continental United States, it certainly would not apply to a naval base that *remained sovereign territory* of another country. In any case, the DBA extended the LHWCA's coverage to overseas bases in which the United States exercised territorial sovereignty. The LHWCA could not have applied to naval bases that remained under a foreign sovereign's control.

- **SCENARIO 4: Foreign non-ship workers are exposed to asbestos at military bases abroad run by the U.S. military, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: U.S. Army or Air Force bases in Germany)**

The analysis of this scenario is essentially no different than the preceding. This scenario does not fall within the definition of "navigable waters of the United States" because it involves injury that occurs on a foreign U.S. military base. The scenario does not even contain a reference to U.S. Navy ships and so is entirely incapable of falling within the LHWCA's definition of "navigable waters of the United States."

- **SCENARIO 5: Foreign seamen are exposed to asbestos at high sea aboard civilian ships flying the U.S. flag**

All three cases that extend the LHWCA's application to the high seas do so, not on the basis of what constitutes U.S. territory, but on the basis that that the Act may be applied to occurrences *even if* not taking place on U.S. territory. The first is the *Kollias* case, discussed earlier, in which the plaintiff-appellees asked the court to find that "the presumption against extraterritorial application of statutes does not bar the application of the high seas in these cases,"[60] without making any argument for the territorial application of the LHWCA based on the situs of the injury, the high seas. Although the two other cases – *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*[61] and *Cove Tankers Corp. v. United Ship Repair, Inc.*[62] – did not explicitly frame the issue as one of extraterritoriality, they relied on the definition of the phrase, "navigable waters of the United States," in admiralty cases to reach their conclusions.[63] The admiralty cases, once again, deal with the question of jurisdiction and choice-of-law issues, which are irrelevant to the determination of the territorial status of a particular waterway. The *Reynolds* court found that Congress actually meant to extend the LHWCA's application to the high seas.[64]

All in all, these cases display discomfort with the notion that the United States enjoys territorial sovereignty over the high seas. On the other hand, it must be observed that in none of the cases is any specific mention of the nationality of the ship's flag, much less any indication that the ship was flying a U.S.-flag.

### (D) THE FOREIGN SOVEREIGN IMMUNITIES ACT

[60] 29 F.3d at 70, 75.
[61] 788 F.2d 264 (5th Cir. 1986).
[62] 528 F.Supp. 101 (S.D.N.Y. 1981).
[63] 788 F.2d at 268; F.Supp. at 106.
[64] 788 F.2d at 268.

The Foreign Sovereign Immunities Act affirms the sovereign immunity of the United States from suit in U.S. courts, subject to specified exceptions. One such exception consists of claims arising out of a tort committed in the United States.[65] While there is some doubt in the cases as to when exactly a tort claim arises, the decisions do squarely address whether the place where the claim arose was or was not part of the United States.

- **SCENARIO 1: Foreign shipyard workers are exposed to asbestos in part aboard active U.S. Navy ships while docked at foreign shipyards**

No case law reflecting this scenario could be found, but it follows *a fortiori* from the outcome of scenario 2 that the exposure in this case would not have occurred in the United States.

- **SCENARIO 2: Foreign shipyard workers are exposed to asbestos in part aboard private (not government-owned) U.S.-flag ships while docked at foreign shipyards**

In *Lazaro Perez v. The Bahamas*,[66] the appellant, while aboard a U.S. fishing vessel in the territorial waters of the Bahamas, was severely injured when Bahamian governmental gunboats fired on the vessel. In the subsequent action, the Government of the Bahamas invoked sovereign immunity, while appellant asserted that the incident occurred within the U.S. and that the FSIA's tort exception to sovereign immunity applied. The case is of limited interest for present purposes since the claimant did not base his claim on the vessel's flag but rather on the vessel's location. In fact, the Court rejected the argument that the event occurred within the "special maritime and territorial jurisdiction of the United States," precisely because "the shooting incident involved in this case occurred less than a half mile from an island of The Bahamas, the Great Isaac Cay, in Bahamian territorial waters [and accordingly] the tort did not occur in the United States."[67]

- **SCENARIO 3: Foreign workers are exposed to asbestos aboard U.S. Navy ships at naval bases abroad run by the U.S. Navy, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: Rota Naval Base in Spain)**

There are apparently no cases under the FSIA dealing with this precise scenario. The closest analogy is the one that arose in the case of *Persinger v. Islamic Republic of Iran*,[68] in which the court ruled that the U.S. embassy in Iran did not constitute United States territory for purposes of the FSIA. "We are persuaded by the language of the statute, its legislative history, and by the consequences of adopting a contrary position that section 1605(a)(5) does not remove Iran's immunity here."[69]

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[65] The tort exception denies immunity in a case "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U. S. C. § 1605(a)(5).

[66] 652 F.2d 186 (1981).
[67] 652 F.2d at 188-89.
[68] 729 F.2d 835 (1983).
[69] 729 F.2d at 839.

Significantly, the court then expressly suggested, in dictum, that the same result would obtain had the tort occurred on U.S. military or naval bases abroad.

> A principle revoking sovereign immunity on our embassy grounds abroad would also, presumably, have the *same effect as to our military and naval bases around the world*, since the United States exercises jurisdiction in such locations…. Embassies may be, as appellants argue, unique in their inviolability but that does not distinguish them from *military facilities*, libraries, AID missions, and the like with respect to the criteria of the statute"[70]

Significantly, the court's conclusion did not even apparently depend on whether the relevant treaty with the foreign government provided that the base remained sovereign territory of the host country, as in this scenario. Significantly as well, Persinger (unlike the injured party in this scenario) was a U.S. citizen.

- **SCENARIO 4: Foreign non-ship workers are exposed to asbestos at military bases abroad run by the U.S. military, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: U.S. Army or Air Force bases in Germany)**

There is no reason in principle why the outcome should be any different here than under scenario 3. Nothing, it would appear, turns on whether the injured party is a ship or a non-ship worker, or whether the base is naval or military.

- **SCENARIO 5: Foreign seamen are exposed to asbestos at high sea aboard civilian ships flying the U.S. flag**

In *Argentine Republic v. Amerada Hess Shipping Corporation*,[71] two Liberian corporations sued Argentina to recover damages for a tort allegedly committed by Argentine armed forces on the high seas in violation of international law. The question was whether Argentina enjoyed sovereign immunity in those circumstances or whether the tort exception to immunity applied. The case went to the Supreme Court, which reiterated that the tort exception under the FSIA applied only to actions occurring within the U.S. The Court held that "because respondents' injury unquestionably occurred well outside the 3–mile limit then in effect for the territorial waters of the United States, the exception for noncommercial torts cannot apply."[72]

However, in the *Amerada Hess* case, the vessels in question were flying the Liberian, not the U.S., flag. There is little reason to expect a different result if the vessel had been flying a U.S. flag, given the consistent position of the courts that U.S.-flag vessels do not, on that basis alone, constitute U.S. territory (see section II (B), supra).

## IV. OTHER POTENTIAL ANALOGIES CONSULTED

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[70] 729 F.2d at 841 (emphasis added).
[71] 488 U.S. 428 (1989).
[72] 488 U.S. at 441.

To shed further light on the matter, I considered a range of additional statutory regimes. I concluded that they lacked a sufficient analogy to the problem at hand for the reasons indicated below.

**(A) DEATH ON THE HIGH SEAS ACT (DOHSA)**

The Death on High Seas Act (DOHSA) is a blanket worker's compensation statute that covers death caused by "wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States. . . ."[73]

The pertinent statutory provision that indicated the possibility of DOHSA's relevance to the Asbestos Project stated that DOHSA would not apply "to the Great Lakes or to any waters within the territorial limits of any State. . . ."[74] DOHSA could serve as an analogy if a court declined the applicability of DOHSA to an injury occurring in a foreign U.S. naval base or U.S. navy ship because the naval base or ship was considered to come "within the territorial limits of any state." However, no such case exists. There were DOHSA cases involving foreign military bases, but the injury occurred well within the high seas, beyond the "territorial limits of any State."

**(B) THE PUBLIC VESSELS ACT (PVA)**

The Public Vessels Act "…waives the government's immunity with respect to personal and property damages caused by a public vessel belonging to the United States."[75] Section 781 of the PVA provides that "[A] libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States." Thus, from a bare reading of the provision, it is clear that the PVA applies to the "public vessels" of the United States.

Case law suggests that Navy ships are considered as "public vessels" under the PVA. The Supreme Court in *Santos v. RCA Service Co.*,[76] held that "[a]lthough there are few decisions interpreting the meaning of public vessel in the Public Vessels Act, those decisions suggest that a vessel with a military function are public vessels within the meaning of that Act."[77] And in *United States v. United Continental Tuna, Corp.*,[78] the Court recognized that a naval destroyer is likewise a "public vessel." The PVA has little pertinence to the problem at hand, since its application does not depend on the location of any particular event, but simply on what is and is not U.S. government property.

**(C) OCEAN DUMPING ACT**

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[73] 46 U.S.C. §761(a).
[74] 46 U.S.C. §767.
[75] The Late Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Joan E. Steinman, Catherine T. Struve, Vikram David Amar, *Federal Practice & Procedure Jurisdiction And Related Matters*, 14 Fed. Prac. & Proc. Juris. § 3656 (3d ed.).
[76] 603 F.Supp. 943 (E.D. La. 1985).
[77] 603 F.Supp. at 946.
[78] 425 U.S. 164 (1976).

The Ocean Dumping Act[79] regulates the intentional dumping of materials into the ocean. Before dumping material transported from "outside the United States" into the U.S. territorial sea or contiguous zone, one must obtain a permit from the Environmental Protection Agency, which must deny a permit if disposition of the material would unreasonably impair navigation in the territorial sea of the U.S. The reference to transportation from outside the U.S. could conceivably give rise to discussion of what constitutes "inside" or "outside" U.S. territory. However, there appears to be no case entailing a decision whether a particular locale, either of the origin of material or of impairment, was within or without the United States.

## V. CONCLUSION

This memorandum concludes with a recommendation, based on all the information reported above, as to whether exposure to asbestos should be regarded in each of the five scenarios as having occurred in the United States.

- **SCENARIO 1: Foreign shipyard workers are exposed to asbestos in part aboard active U.S. Navy ships while docked at foreign shipyards**

What little evidence we have suggests that foreign shipyard workers exposed to asbestos aboard active U.S. navy ships while docked at foreign shipyards do not suffer exposure in the territory of the United States. If a child born on a U.S. coast guard vessel on the high seas does not thereby acquire U.S. nationality, neither would one born on such a ship while docked at a foreign shipyard. There is no case law under the FTCA or other statutory regimes considered to conclude to the contrary.

- **SCENARIO 2: Foreign shipyard workers are exposed to asbestos in part aboard private (not government-owned) U.S.-flag ships while docked at foreign shipyards**

Given the conclusion stated immediately above, it follows, *a fortiori*, that foreign workers exposed to asbestos while onboard privately-owned U.S.-flag vessels are not exposed in the United States.

- **SCENARIO 3: Foreign workers are exposed to asbestos aboard U.S. Navy ships at naval bases abroad run by the U.S. Navy, but which, by treaty (e.g., NATO Status of Forces Agreement) or otherwise, remained sovereign territory of the receiving country (ex: Rota Naval Base in Spain)**

It seems reasonably clear that U.S. Navy ships at naval bases that remain the sovereign territory of another State are not within the territory of the United States. In order for the result to be otherwise, the United States must affirmatively assert sovereignty over the naval bases in question. By definition, it will not have done so.

- **SCENARIO 4: Foreign non-ship workers are exposed to asbestos at military bases abroad run by the U.S. military, but which, by treaty (e.g., NATO Status of Forces Agreement) or**

[79] 33 U.S.C. §§1401-45.

**otherwise, remained sovereign territory of the receiving country (ex: U.S. Army or Air Force bases in Germany**)

There is no reason to reach a result at variance with the result reached in Scenario 3

- **SCENARIO 5: Foreign seamen are exposed to asbestos at high sea aboard civilian ships flying the U.S. flag**

Despite the commonly heard remark that vessels carrying the U.S. flag on the high seas constitute U.S. territory, U.S. Supreme Court and lower federal court case law distance themselves substantially from that proposition, characterizing it as metaphoric only and even a fiction.

The cases under the specific statutory regimes examined in this memorandum do not cast serious doubt upon that conclusion. The sole FTCA case (*Smith v. United States*) involved not a vessel, but Antarctica itself, which can only with great difficulty be equated to a U.S.-flag vessel. For its part, the FSIA case (A*rgentine Republic v. Amerada Hess Shipping Corporation*) appears to have concerned a Liberian-flag, not a U.S.-flag, vessel. The most telling cases arise in the nationality by birth cases. Both the *Dauntless* episode and the *Lam Mow* case offer strong evidence that birth on a U.S.-flag vessel on the high seas does not confer U.S. nationality. Read against the background of the consistent Supreme Court case law cited earlier (notably *Cunard*, *Scharrenberg* and *Flores*), these cases lead to the conclusion that foreign seamen exposed to asbestos at high sea aboard civilian ships flying the U.S. flag are not to be considered as having been exposed to asbestos in U.S. territory.