INTERNATIONAL LAW—JUSTICIABILITY—APPELLANTS HAVE STANDING TO SEEK INJUNCTION AGAINST UNITED STATES TRADE WITH SOUTHERN RHODESIA, BUT THEIR SUIT STATES A CLAIM INCAPABLE OF JUDICIAL RESOLUTION.

Acting under the 1971 Byrd Amendment[1] to the Strategic and Critical Materials Stock Piling Act,[2] the President authorized the issue of licenses[3] for the importation of metallurgical chromite from Southern Rhodesia, in violation of the United Nations embargo[4] of that country, which the United States had previously supported.[5] Plaintiff-appellants[6] sought declaratory and injunctive relief concerning such importation. The district court granted defendant-appellees' motion to dismiss based on appellants' lack of standing and the nonjusticiability of the issues raised. On appeal, *held* affirmed. Although the appellants have standing to bring this action, the cause of action is incapable of judicial resolution because the courts can not interfere with the power of Congress to abrogate treaty obligations. *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 93 S.Ct. 1897 (1973).

Before a court can hear a case, two requirements must be met: 1) the plaintiff party must have standing to sue, *i.e.*, he must be a proper party to request the adjudication of an issue[7] and 2) the issue must be justiciable, *i.e.*, capable of resolution by the judicial process.[8]

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[1]50 U.S.C. § 98h-1 (1971), amending 50 U.S.C. § 98-98h (1946):

> Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (section 1202 of Title 19), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law.

[2]50 U.S.C. § 98-98h (1946).

[3]The Office of Foreign Assets Control actually issued to the corporate appellees a General License authorizing the importation of various materials from Southern Rhodesia.

[4]21 U.N. SCOR, 1340th meeting 1 (1966).

[5]The United States had affirmatively voted to adopt the resolution at the Security Council meeting. *See* note 4 *supra*. Exec. Orders No. 11,322, 3 C.F.R. 430 (Supp. 1969), 22 U.S.C. § 287c (1967), and No. 11,419, 3 C.F.R. 442 (Supp. 1969), 22 U.S.C. § 287c (1968), prohibited all trade with Southern Rhodesia.

[6]The appellants determined by the court to have standing are M'Gabe and Zimbabive, who were unable to return to their homeland; Diggs, Conyers, Rangel, Stodes, and Frank, who have been denied entry into Southern Rhodesia; the American Committee on Africa, whose chairman has been denied entry; the Council for Christian Social Action of the United Church of Christ, whose missionaries have been arrested and deported from Southern Rhodesia; and Vidal, an author, who has had the sale of one of his books banned in Southern Rhodesia.

[7]United Public Workers v. Mitchell, 330 U.S. 75 (1947) (government employees not charged with violation of Hatch Act cannot bring Declaratory Judgment action to determine its validity); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (appellee who had not applied for or was denied membership in appellant private club had no standing to contest appellant's membership practices).

[8]The most publicized of recent cases dealing with this point are those concerning the validity of

The standing issue arises from the cases and controversies language in the Constitution.[9] Federal judicial authority is limited in part to present or possible adverse parties.[10] Traditionally, adverseness is demonstrated by direct and substantial injury unique to the claimant.[11] An early concept of the type of injury required for standing involved injury in fact which entailed the invasion of a legal interest,[12] usually an economic interest. However, this narrow interpretation of standing has been relaxed, allowing analysis of the party himself, as opposed to the issues involved. The size of the injury in terms of money, although relevant, is no longer controlling in determining standing,[13] and, al-

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the Vietnam war. The Supreme Court has consistently refused to hear cases on this subject. Sarnoff v. Connally, 457 F.2d 809 (9th Cir.), *cert. denied*, Sarnoff v. Shultz, 409 U.S. 929 (1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). Mr. Justice Douglas has favored granting of certiorari in these cases because he believes that as taxpayers these plaintiffs have standing under the holding in Flast v. Cohen, 392 U.S. 83 (1968).

[9]U.S. CONST. art. III, § 2.

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting ambassadors . . . ; to Controversies to which the United States shall be a Party; . . . between Citizens of different States; . . . .

See also Baker v. Carr, 369 U.S. 186 (1961).

[10]Chicago & G.T.F. Co. v. Wellman, 143 U.S. 339 (1892). The idea of the necessity of adverse parties is based on the principles that (1) a person in the honest and actual antagonistic assertion of rights against another will result in the best possible presentation of the case and (2) that the decision of a court must be narrowed to a particular fact situation in order to be useful as a legal precedent. *See* Muskrat v. United States, 219 U.S. 346 (1911).

[11]In Frothingham v. Mellon, 262 U.S. 447 (1923), it was held that the plaintiff there had no standing because she could show no injury different from that of any other taxpayer *i.e.*, there was no unique injury. *But see* Baker v. Carr, 369 U.S. 186 (1962) where standing was held sufficient even though the plaintiffs as voters were part of a large group because the facts alleged showed that they had been injured as individuals by a Tennessee apportionment statute. *See also* Colegrove v. Green, 328 U.S. 549 (1946).

[12]Tennessee Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 137-38 (1939). Standing denied because right allegedly injured was not "a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[13]*Compare* Frothingham v. Mellon, 262 U.S. 447 (1923) *with* Flast v. Cohen, 392 U.S. 83 (1968). Both cases were brought by taxpayers to protest use of tax money. The *Frothingham* decision restated the hard-line standing requirement that there be some clear injury to the plaintiff-taxpayer which would distinguish him from other taxpayers but *Flast* abolished this requirement and substituted a two pronged test. The taxpayer must be able to establish a logical link between that status and the type of legislative enactment attacked and he must establish a nexus between that status and the precise nature of the constitutional infringement alleged. The *Frothingham* Court noted that the injury was an insubstantial one at some uncertain time in the future whereas the *Flast* Court resolves the question of standing by an analysis of the adversary setting without regard to the size of the harm. However, it should be noted that *Flast* did not overrule *Frothingham*. The Court disintuished *Frothingham* from *Flast* on the basis that *Frothingham* did not meet the second requirement of the two pronged test. The taxpayer's suit was based on a protestation of the Maternity Act in *Frothingham*; in *Flast*, the taxpayer's suit was based on the complaint that federal funds were being allocated to church-affiliated schools in violation of the

though financial injury is sufficient, it is not necessary to the concept of adverseness. More and more, the sufficiently large injury requirement yields to one of personal interest,[14] guaranteeing concrete adverseness.[15] Sufficient personal interest can be found in aesthetic, recreational or conservational motis.[16] Once injury in fact, either financial, aesthetic, recreational or conservational, is alleged, one must show he is within the zone of interest to be protected under the statute serving as a basis for his claim.[17] Moreover, there must be a logical relationship between the status asserted[18] and the claim sought to be adjudicated.[19] The concept of standing is a rather complicated one consisting of three basic elements: 1) sufficient personal interest to confer adversary status on the plaintiff; 2) an interest within the zone of interest protected by the statute on which the claim is based; and 3) the establishment of a nexus between the status

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Establishment Clause. The Court in *Flast* held that there was no specific constitutional prohibition against supporting mothers but there was a ban against supporting churches. *See also* Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1939) (since an increased tax bill is not "a right of person or property" and involves the political issue of taxation, the Court held itself unable to afford relief), *and* Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229 (1968).

[14]Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 615 (2d Cir. 1965) ("The 'case' or 'controversy' requirement of Article III, § 2 of the Constitution does not require that an 'aggrieved' or 'adversely affected' party have a personal economic interest."); Office of Communications of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) (standing allowed to challenge license renewal in hearing before F.C.C.).

[15]Flast v. Cohen, 392 U.S. 83, 101 (1968): ". . . [I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

[16]Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966). Conservation groups held to have standing as an aggrieved party to challenge a license given by the Federal Power Commission for a hydro-electric power plant when there was evidence that such plant would harm the ecology. The court felt that such groups had evidenced sufficient personal interest by heir activities and conduct to give them adversary status. There can also be a spiritual stake in First Amendment values sufficient to give standing. *See, e.g.*, Abbington School District v. Schemp, 374 U.S. 203 (1963).

[17]*See* Chicago Junction Case, 264 U.S. 258 (1924) (The plaintiffs were held to have standing because the Judicial Code § 212 declares that any party to a proceeding before the Interstate Commerce Commission may become a party to a suit involving an order by the Commission. Plaintiffs were such parties and thus came within the zone of interest protected by the Judicial Code). Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) (The court held that the respondents, being within the class of private utilities that § 15d of the TVA Act was designed to protect from TVA competion, had standing to sue). Association of Data Processing Service v. Camp, 397 U.S. 150 (1969) (the Court found that the appellants had standing to contest an administrative regulation issued by appellee Camp allowing national banks to make available their data processing equipment to other banks and bank customers, allegedly in contradiction of § 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864 (1962)).

[18]That of a party suffering an injury.

[19]Flast v. Cohen, 392 U.S. 83 (1968) ennuciated that principle of standing with force, saying that the plaintiff must show that the challenged enactment exceeds *specific* constitutional limitations, not simply that the enactment is generally beyond the powers delegated to Congress by U.S. CONST. art. I, § 8. There were five different opinions written by the Court on the *Flast* case but the final result was a widening of the concept of standing.

and the exact nature of the claim. As evidenced by the holdings in *Flast v. Cohen*[20] and *Association of Data Processing Service v. Camp*,[21] the present trend is to enlarge the category of injured persons who have standing to invoke federal judicial power.[22]

The substantive issues do not have to be justiciable[23] for a party to have standing.[24] The Supreme Court recognized in *Luther v. Borden*[25] that certain questions[26] are exclusively within the domain of one (or both) of the other branches of government, therefore being incapable of judicial resolution on the basis of separation of powers, *e.g.* a "political question."[27] Often a political question arises in the broad field of foreign relations.[28] The courts do have judicial power in the field of foreign relations when the litigation concerns private property rights;[29] however, in situations concerning public foreign af-

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[20]392 U.S. 83 (1968).

[21]397 U.S. 150 (1969) (hereinafter referred to as *Data Processing*).

[22]*Flast* amended the idea of "unique injury" by abolishing the requirment of some clear injury to plaintiff taxpayer that would distinguish him from other taxpayers. *Data Processing* extended the idea of what law could bring a plaintiff within its zone of interest. The Court held that an administrative regulation was sufficient to extend the protection, which if violated, could provide the proper zone of interest.

[23]Flast v. Cohen, 392 U.S. 83, 102 (1968). *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where appellee had no standing to contest appellant's membership practices but did have standing to litigate the constitutional validity of appellant's discriminatory policies towards members' guests. *See also* McGowan v. Maryland, 366 U.S. 420 (1961), a Sunday closing law case where appellant had no standing to complain that the laws prohibited the free exercise of religion guaranteed by the First Amendment, but appellant had standing to challenge these statutes as laws respecting an establishment of religion contrary to the First Amendment.

[24]Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937): "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."

[25]48 U.S. (7 How.) 1 (1847). This case arose as a result of Dorr's rebellion in Rhode Island in 1840-1841. Luther brought an action against Borden for damages for trespass. Borden justified his tortious breaking and entering on the ground that he was the lawful agent of the state, which at the time was under marital law. The issue for the Court to decide was which government was the lawful one. The Court refused to make such a decision.

[26]As early as 1812 in Schooner Exchange v. McFadden, 11 U.S. (7 Cranch.) 116 (1812), the Court refused to accept jurisdiction in a case dealing with a citizen's *in rem* claim to a French warship stranded in American waters. Dictum in the case said that relations between sovereign nations traditionally have been within the domain of the sovereign of such nations.

[27]The areas in which "political questions" arise are generally—foreign relations: Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (recognition of foreign government), Clark v. Allen, 331 U.S. 503 (1947) (termination of treaties); Validity of enactments; Field v. Clark, 143 U.S. 649 (1892) (need for finality and certainty about status of a statute makes it political question). *But see* Gardner v. Barney, 73 U.S. (6 Wall.) 499 (1867) (political question doctrine not applied so as to promote disorder); status of Indian tribes: United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865), United States v. Sandoval, 231 U.S. 28 (1913) (not a political question in instance of manifestly unauthorized exercise of power).

[28]Laylin, *Justiciable Disputes Involving Acts of States*, 7 INT'L LAW. 513-29 (1973).

[29]Smith American Corp. v. Bendex Aviation Corp., 140 F. Supp. 46 (D.C. Cir. 1956). (Issue of obligation to pay damages under cross patent agreement held justiciable in spite of State Department intervention questioning the validity of alleged release granted by plaintiff. Court held this to be an issue of private property.) Z & F Assets Realization Corp. v. Hall, 72 App. D.C. 234,

fairs, the courts will defer to the legislative and executive branches.[30] In the area of public foreign affairs the further enumeration of responsibilities under a treaty may[31] or may not[32] be undertaken by either the executive or legislative bodies, and, even though courts have the power to interpret treaties,[33] they have traditionally followed the interpretation of the executive, particularly in regard to matters of foreign policy.[34] In disposing of cases involving "political questions" the Court has not always been careful in distinguishing[35] the inquiry into standing and the inquiry concerning nonjusticiability under the "political questions" doctrine.[36] But in *Baker v. Carr*[37] the Court set down criteria[38] for determining "political questions."

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114 F.2d 464, *affirmed* 311 U.S. 470 (1941). (Court found justiciable issue as to amount owed plaintiff under two treaties between the United States and Germany. An international commission determined the amount to be paid; as an amount due it is arguably a property right).

[30]Coleman v. Miller, 307 U.S. 433 (1939) (recognition of a foreign government presents a political question necessitating a uniform and final determination); *see* Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972).

[31]*See* Taylor v. Morton, 67 U.S. (2 Black) 481 (1854), where the legislature had provided a specific tariff for most favored nations, which was applicable to hemp imports from Russia, allowed by an earlier treaty stating that Russia should be charged tariff on the same schedule as a most favored nation.

[32]Vermilya—Brown Co. v. Connell, 335 U.S. 377 (1948), involved a suit for overtime by employees of contractor building a military base in Bermuda. The district court dismissed, holding that the applicability of the minimum wage depended on sovereignty of United States jurisdiction. The legislative and executive branches indicated the base was not under sovereign jurisdiction. The base was leased, the terms of which gave lessor power to determine maximum and minimum wages. In reversing, the Supreme Court held the problem to be one of interpretation of the lease agreement in the context of additional legislation extending similar wage benefits to Guantanamo Bay, Cuba and the Canal Zone.

[33]U.S. CONST. art. III, § 2.

[34]*See The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law*, 53 MINN. L. REV. 389 (1968).

[35]Usually these issues are handled as one, with standing generally assumed.

[36]Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Frost v. Corporation Comm'n., 378 U.S. 515 (1929); Pierce v. Society of Sisters, 268 U.S. 510 (1925). These cases and others dealing with this problem are discussed in Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433 (1962).

[37]369 U.S. 186 (1962).

[38]*Id.* at 210. The Court said, "The nonjusticiability of a political question is primarily a function of the separation of powers." The elements which could identify an issue as a function of the separation of power are:

> (1) a textually demonstrable constitutonal committment of the issue to a coordinate political power;
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> (2) a lack of judicially discoverable and manageable standards for resolving the question;
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> (3) the impossibility of deciding without an initial policy determination of the kind clearly for nonjudicial discretion;
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> (4) the impossibility of the Court acting without showing a lack of respect due coordinate branches of government;
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> (5) an unusual need for adherence to a political decision already made;

In the instant case the Court of Appeals of the District of Columbia very properly considered the two elements of standing and nonjusticiability separately. The opinion followed the recent trend towards the expansion of the concept of standing. However, in an exercise of judicial restraint consistent with Supreme Court decisions concerning foreign policy matters,[39] the Court of Appeals affirmed the district court's dismissal of the case as involving a nonjusticiable "political question."[40]

The court of appeals agreed with the district court that the appellants had suffered sufficient personal injury to meet the injury in fact element of standing.[41] These injuries in all but one instance were noneconomic injuries, involving a restriction on appellants' freedom of movement to and from Southern Rhodesia. The right to exclude persons from Southern Rhodesia would seem to be a valid element of that country's sovereign rights, but both the district court and the court of appeals apparently felt that these particular exclusions were invidious and therefore discriminatory.

The two courts split on the logical relation between the appellants' injury and their cause of action against the appellees. The district court felt that the appellants should seek redress from Southern Rhodesia, as their quarrel was with that country.[42] The district court concluded that it had no power to hear any claims the appellants had against Southern Rhodesia and dismissed the action, holding that the appellants had no standing and implying that the issue was nonjusticiable.[43]

The court of appeals refused to accept this conclusion, stating that the district court holding confused standing with issues incapable of judicial resolution.[44] In doing so it expanded the holding of *Data Processing* even further by holding that standing was conferred on appellants who were within the zone of interests to be protected, not by the Constitution, a law, or a treaty of the United States, but by a United Nations Security Council resolution agreed to by the United States[45] and enforced by two executive orders.[46]

As far as the dismissal of the case for failure to state a claim upon which

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(6) The potentiality of embarassment from multifarious pronouncements by various departments on one question.

[39]*See* note 8 *supra.*

[40]Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1973).

[41]*Id.* at 464.

[42]*Id.*

[43]*Id.* at 463.

[44]*Id.* at 464, n.2.

[45]Undoubtedly the Security Council resolution would be considered a treaty under International Law. *See* 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-14 (1970), for definitions of "treaty". However, U.S. CONST. art. II, § 2 states that the President "shall have power, by and wih the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." Since neither the resolution nor the executive orders were ratified by the Senate, they cannot be considered treaties as far as the United States is concerned,but only "internatonal agreements".

[46]*See* note 5 *supra.*

relief could be granted, the court followed well established precedent.[47] It is clear that Congress can abrogate treaties by enactment of a later law,[48] and where there is uncertainty concerning the status of a treaty vis-a-vis a later statute, the courts cannot force a particular interpretation of the treaty upon the United States which goes against the clear implications of the statute.[49]

As a practical matter the court would have no way to enforce its decision if it had not dismissed the case. This is the essence of the "political question" doctrine. Matters of foreign policy are constitutionally committed to the other branches of government, and for the court to rule in this case would be to show a lack of respect for the legislative and executive branches. Also, to render a decision where the other branches of government have already declared a policy could create a potentially embarrassing situation. Under the standards declared in *Baker v. Carr*,[50] the court wisely refrained from interfering with concerns committed to another branch.[51]

Despite its refusal to hear the case on its merits, the District of Columbia Court of Appeals in *Diggs v. Shultz* made an important extension of the concept of standing, which could prove to be very important in the proper fact situaton.[52] The decisions in *Data Processing* and *Diggs v. Shultz* will permit more plaintiffs to have the merits of their cases heard by the federal courts.

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[47]Baker v. Carr, 369 U.S. 186 (1962), Octjen v. Central Leather Co., 246 U.S. 297 (1918), Terlinden v. Ames, 184 U.S. 270 (1902), Holmes v. Laird, 459 F.2c 1211, *cert. denied* 409 U.S. 869 (1972); *Cf.* Epstein v. Resor, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970). (". . . [T]he question of what is desirable in the interest of national defense and foreign policy is not the sort of question courts are designed to deal with. *Id.* 421 F.2d at 933). See note 8, *supra.*

[48]*See, e.g.* Clark v. Allen, 331 U.S. 503 (1947), where the Court held that a subsequent Trading with the Enemy Act was not incompatible with the right of inheritance portion of the prior Treaty of Friendship Commerce and Consular Rights with Germany. However the second enactment abrogates the parts dealing with the liquidation of inheritance and the withdrawal of the proceeds. *See also* the Head Money Cases (Edye v. Robertson) 112 U.S. 580 (1884) (per capita tax on immigrants assertedly violative of treaties with friendly countries).

[49]Botiller v. Dominquez, 130 U.S. 238 (1889), in which the court refused to set itself up as an instrumentality for enforcing a treaty with a foreign nation which the government of the United States has chosen to disregard in passing a later statute. Chinese Exclusion Case (Chau Chan Ping v. United States), 130 U.S. 581 (1889). *See also* Moser v. United States, 341 U.S. 41 (1941).

[50]369 U.S. 186 (1962). *See* note 27 *supra.*

[51]Diggs v. Shultz, 470 F.2d 461, 466 (D.C. Cir. 1972).

[52]Baker v. Carr, 369 U.S. 186, 211-12 (1962), where the Supreme Court did not preclude the possibility of judicial cognizance of foreign policy matters.