CORRESPONDENCE

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TO THE CO-EDITORS IN CHIEF:

Bernard H. Oxman's article, *Complementary Agreements and Compulsory Jurisdiction* (95 AJIL 277 (2001)), raises important points regarding the possible impact of the *Southern Bluefin Tuna* case on third-party dispute settlement in international law. I will not comment on the legal issues involved in the case, but I would like to identify some other important secondary effects of the commencement of such dispute settlement procedures that complement the views brought forward by Professor Oxman.

In my opinion, the case demonstrates, in four ways, that the initiation of these procedures can be a useful and effective step in resolving the disputes concerned. First, it constitutes a significant development in relations between the disputants. It also engages the attention of higher levels of government and ensures that the issues involved will be examined in a broader context than may have been the case previously. This effect alone may bring about a greater impetus to settle the disagreement and assures resort to the highest levels of knowledge and experience regarding techniques that may assist in that resolution.

Second, the submission of the dispute to settlement procedures immediately levels the playing field between the parties. They become aware that their actions will be considered against objective legal standards rather than their relative power with respect to the issue.

Third, the sense of a watching eye can help to ensure that parties will avoid actions that might escalate the dispute and it will generally act as a moderating influence on their behavior.

Fourth, the process of preparing and arguing a case before international tribunals forces the parties to analyze the issues and the differences between them in greater detail, from a wider range of perspectives, and with the involvement of additional people. It also brings those issues and differences into public focus.

All of these consequences promote the peaceful resolution of international disputes, whether within the context of a judgment or award or through a negotiated settlement. In the instant case, these consequences, combined with the binding provisional measures ordered by the International Tribunal for the Law of the Sea and the comments to the parties in the award of the arbitral tribunal, contributed significantly to the process of resolving the issues at the heart of the dispute. This is the goal set down in the United Nations Charter and shared by states generally.

WILLIAM R. MANSFIELD*

TO THE CO-EDITORS IN CHIEF:

Monroe Leigh ably points out many of the reasons why the United States should accept the Rome Statute of the International Criminal Court (ICC) in *The United States and the Statute of Rome* (95 AJIL 124 (2001)). However, his comment requires some clarification regarding the Clinton administration's policy and the significance of the U.S. signature of the Rome treaty on December 31, 2000.

The United States conducted bilateral explorations with other governments of some "binding formula," such as a protocol (soon discarded as unrealistic), an addition to the Rules of Procedure and Evidence (only partly useful), and finally a provision in the Relationship

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Agreement between the United Nations and the ICC, but never formally submitted at the Preparatory Commission any United States proposal that would have the effect of automatically exempting certain U.S. nationals from the application of the court's jurisdiction. The first relevant proposal officially put forward by the United States was Rule 195(2), which was negotiated and then adopted by consensus on June 30, 2000, as part of the Rules of Procedure and Evidence. Its companion proposal, designed for the Relationship Agreement and actually falling short of full exemption for nonparty nationals, had been discussed from March through June 2000 with other governments but was never submitted, as the consultations had indicated that it would be futile to do so.[1]

At the November–December 2000 session of the Preparatory Commission, the U.S. delegation worked closely with other key delegations and formally submitted a proposal centered on the exercise of the right of complementarity under the Rome Statute.[2] That proposal, quite different from the concept discussed earlier in the year in diplomatic channels, is a treaty-friendly approach in the Relationship Agreement that relies entirely on admissibility procedures already permitted by the Rome treaty, relates only to international conflicts, and has the further effect of encouraging domestic courts to complete their task of investigating charges of genocide, crimes against humanity, and war crimes. It would have the practical effect of insulating U.S. service members from surrender to the ICC.

The principal American legal objection to the treaty centering on the rights of a nonparty state did *not* challenge well-established principles of territorial jurisdiction or universal jurisdiction regarding international crimes. The United States argued that customary international law does not *yet* entitle a state, whether as a party or a nonparty to the Rome treaty, to *delegate* to a *treaty-based international criminal court* its own domestic authority to bring to justice aliens who commit crimes on its sovereign territory or can be prosecuted domestically under enforceable universal jurisdiction, without the consent of that individual's state of nationality, either through ratification of the Rome treaty or by special consent. Significantly, we offered to put the legal argument behind us, provided we could find a pragmatic arrangement that satisfied legitimate U.S. interests.

The fact that the United States signed the treaty is more significant than many appear to believe, for it introduces leverage that can be employed to enhance the court's legitimacy and universality and to protect U.S. interests. While the United States in many respects can strengthen its hand by ratifying the Rome treaty, the important task under current circumstances is to remain constructively engaged in the negotiations of the Preparatory Commission and to undertake critical initiatives that I discuss elsewhere.[3]

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[1] The text of the companion proposal is available online at <http://www.iccnow.org/html/us2000.html> (visited Aug. 21, 2001). I described further U.S. flexibility regarding that proposal in an address at American University, Evolution of U.S. Policy Toward the International Criminal Court (Sept. 14, 2000), *at* <http://www.state.gov/www/policy_remarks/2000/2000_index.html>.

[2] UN Doc. PCNICC/2000/WGICC–UN/DP.17.

[3] David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 10–19 (2001).

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