Vanderbilt Journal of Transnational Law

Volume 14
Issue 3 *Summer 1981*

Article 5

1981

Recent Decisions

Kevin P. Hishta

J. Clifton Cox

Shari D. Olenick

Stephen B. Hatcher

Ann M. Bell

RECENT DECISIONS

ALIENS—EXECUTIVE SUSPENSION OF ALIEN'S DEPORTABLE STATUS FINAL AS CONGRESSIONAL VETO MECHANISM VIOLATES CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS

I. FACTS AND HOLDING

Petitioner,[1] a native of Kenya and holder of a British passport, sought review of a final deportation order of the Immigration and Naturalization Service (INS) issued pursuant to a congressional resolution overriding executive suspension of petitioner's deportable status.[2] Petitioner lawfully entered the United States but expiration of his student visa prompted an INS hearing.[3] At the

---

1. Jagdish Rai Chadha.

2. The statutory scheme of the Immigration and Nationality Act (INA) regulating the process for the suspension of deportation of aliens is as follows:

(a) Subsequent to a show cause order a special inquiry officer conducts a hearing on whether the alien should be deported. Immigration and Nationality Act, § 242(b), 8 U.S.C. § 1252(b) (1976).

(b) During the hearing an alien may apply to the special inquiry officer for suspension of deportation. The principal statutory prerequisities that must be met to entitle an alien to be considered for the discretionary grant of suspension include a period of residence in the United States, good moral character, and some type of hardship. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a) (1976). The burden of proof is on the alien to demonstrate satisfaction of the preceding criteria and to demonstrate the equity of suspending deportation. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9e (rev. ed. 1980). The special inquiry officer's determination can be appealed to the Board of Immigration Appeals (BIA) and a final deportation order issued by the BIA is subject to review in the court of appeals for the circuit in which the hearing occured. Immigration and Nationality Act, § 106(a), 8 U.S.C. § 1105a(a) (1976).

(c) Cases in which suspension is granted are submitted by the Attorney General for congressional consideration. Both judiciary committees study the Attorney General's report to decide if a recommendation of further action is warranted. The Attorney General's action is ratified unless either house of Congress passes a resolution of disapproval. Immigration and Nationality Act, § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976).

3. Petitioner Chadha entered the United States as a nonimmigrant student in 1966. His student visa expired in 1972 after he received his bachelor's and

hearing, petitioner conceded his deportability, but was granted a suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act (INA) because it was determined that petitioner would suffer extreme hardship if deported.[4] Nevertheless, the House of Representatives, pursuant to INA section 244(c)(2), passed a resolution disapproving the suspension.[5] Deportation proceedings were reconvened and the special inquiry officer entered a final order of deportation. Petitioner claimed that the procedure for congressional disapproval provided by section 244(c)(2) unconstitutionally violated the separation of powers doctrine. Both the special inquiry officer and the Board of Immigration Appeals (BIA) concluded they had no power to decide the constitutionality of statutes.[6] On appeal[7] to the United States Court of Appeals for the Ninth Circuit, *order invalidated. Held:* Section 244(c)(2), which allows either house of Congress to veto a suspension of deportation, violates the constitutional doctrine of separation of powers as it intrudes upon both the executive authority to execute faithfully the laws[8] and the judicial power to determine cases or controversies.[9] *Chadha v. Immigration & Naturalization Service,* 634 F.2d 408 (9th Cir. 1980).

II. LEGAL BACKGROUND

The technique of annulling suspensions by congressional resolution (hereinafter disapproval device) provided in section 244(c)(2) has its origin in the Alien Registration Act of 1940

---

master's degrees. In 1974 the INS issued an order to show cause why Chadha should not be deported.

4. The determination was made by a special inquiry officer (executive branch) who granted Chadha's request because he found that it would be extremely difficult, if not impossible, for Chadha to return to Kenya or go to Great Britain since he had East Indian ancestry.

5. On December 16, 1975, the House of Representatives passed House Resolution 926 disapproving the suspension of Chadha's deportation. H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

6. On the petition for review, respondent INS agreed that § 244(c)(2) was unconstitutional.

7. Immigration and Nationality Act, § 106(a), 8 U.S.C. § 1105a(a) (1976), states that a petition for review in the court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation" made under Immigration and Nationality Act, § 242(b), 8 U.S.C. § 1252(b) (1976).

8. U.S. CONST. art. II, § 3.

9. U.S. CONST. art. III, § 2.

(ARA).[10] Until 1940, deportation of aliens illegally within the United States was mandatory. Permanent ceilings on the permissible yearly number of immigrants and the repeal of the statute of limitation for the deportation of those who had entered the United States illegally[11] hastened the call for reform.[12] Consequently, the ARA authorized the Attorney General to suspend the deportation of aliens to avoid hardship to resident dependents. Suspensions of more than six months, however, were subject to disapproval by concurrent resolution of the two houses.[13] In 1952 congressional enactment of section 244(c)(2) of the INA modified the original technique for disapproving suspensions and provided that either house action alone[14] could override the Attorney General's suspension of deportation.[15] Authorities suggest that such

---

10. Alien Registration Act of 1940, ch. 439, 54 Stat. 679 (1940).

11. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924).

> The 1924 Act, as amended, contained two quota provisions. The first one, in effect until June 30, 1929, set the annual quota of any nationality at 2 per cent of the number of foreign-born persons of such nationality residing in the continental United States in 1890. The second provision regulating quotas from July 1, 1929, to December 31, 1952, introduced the much-debated national origins quota system. Under it the annual quota for any country or nationality had the same relation to 150,000 as the number of inhabitants in the continental United States in 1920 having that national origin had to the total number of inhabitants in the continental United States in 1920.

F. AVERBACH & F. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 13 (3rd ed. 1975). Prior to 1924, the statute of limitations for prosecution of aliens who entered in violation of law generally was three or five years from date of entry. Under the 1924 Act, those who entered in violation of the visa and quota requirements were deportable without time limitation. 1 C. GORDON & H. ROSENFIELD, *supra* note 2, § 1.2c.

12. *See* 634 F.2d at 426.

13. Alien Registration Act of 1940, ch. 439, 54 Stat. 672 (1940).

14. The decision to adopt the one-house disapproval mechanism did not produce much controversy at the time. Although President Truman vetoed the Act, his veto message did not specifically focus on § 244(c)(2). The Report of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome 213-14 (1953), did, however, state that the provision "is contrary to our fundamental constitutional doctrine of separation of legislative, executive, and judicial powers. . . . [It] is obstructive of good government and destructive of fundamental principles. In immigrations matters, in particular, it frustrates proper administration and puts a premium on extraneous considerations in the determination of legal rights."

15. Schwartz, *Legislative Veto and the Constitution,* 46 GEO. WASH. L. REV. 351, 365 (1978).

provisions are inconsistent with modern theory on the proper role of the legislature and raise serious constitutional questions not present in review of executive and administrative acts that are legislative in nature, such as reorganization plans or administrative rules and regulations.[16] Nonetheless, the constitutionality of section 244(c)(2) has not been directly challenged in the courts prior to the instant case.[17] Tangential constitutional arguments, though, have developed from the principle that Congress is precluded from intervening in a controversy adjudicable only by the courts.[18] It has been suggested that extension of the premise precludes Congress from using the veto mechanism to control the

16. *Id.* at 365-66. *See also* Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 470-71 (1978); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 469-71 (1962). It cannot be overemphasized that this comment deals specifically with congressional veto of administrative adjudicatory decisions. This type of legislative veto differs substantially from the more common type of veto described in the Reorganization Acts. The latter type of veto occurs when the assigned executive officer follows general guidelines passed by the legislature but is required to rely on his discretion to determine significant matters of legislative policy. The exercise of that delegated authority, essentially postenactment lawmaking by the executive branch, is then subjected to the scrutiny inherent in the legislative veto. Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455, 456 (1977). Perhaps a more concise definition is a statutory mechanism that renders the implementation of executive proposals, advanced in pursuance of statute, subject to some further form of legislative consideration and control. Cooper & Cooper, *supra*, at 467. The principal constitutional argument against this type of legislative veto is that all congressional action involves an exercise of legislative power; therefore, it must be subject to the President's veto. It has been strongly argued that such an assumption rests on an outmoded application of the separation of powers doctrine since modern constitutional law allows for some blending of powers. Consequently, legislative disapproval of an administrative rule or other executive action should not be viewed as an exercise of the power to enact a law within the meaning of the veto clause, but rather as a condition that the legislature may attach to delegated powers. Schwartz, *supra* note 15.

17. In fact, two earlier Supreme Court opinions recognized the congressional veto procedure in the immigration acts and, although the provisions were not contested, the Court in either case never hinted at any constitutional problems. Jay v. Boyd, 351 U.S. 345, 351 (1955); McGrath v. Kristensen, 340 U.S. 162, 167 (1950).

18. Javits & Klein, *supra* note 16, at 476 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 146-48 (1872)). In *Klein*, Congress was precluded from prescribing to the judiciary rules of decision to be applied in pending cases. Allowing such suggestions would constitute an impermissible interference with judicial power.

outcome of quasi-judicial administrative determinations.[19] The Fifth Circuit adopted a variation of this analysis in *Pillsbury Co. v. Federal Trade Commission*,[20] holding that congressional intrusion into the adjudicatory process of a regulatory agency as a result of a critical examination of administrators prior to a final decision deprived the defendant of procedural due process.[21] Although the intrusion in *Pillsbury* was into "pending" proceedings, it can be analogized to situations where the veto is based on criteria ruled impermissible by a reviewing court. The alien is effectively deprived of uniform application of the statute by the executive. The reviewing court's decision is also undermined, thus raising the question of whether judicial interpretations of the INA are essentially impermissible advisory opinions.[22]

---

19. Javits & Klein, *supra* note 16, at 476. Such proceedings are not legislative in nature and therefore fall outside the proper reach of congressional oversight. *Id.*

20. 354 F.2d 952 (5th Cir. 1966). The *Pillsbury* principle has been widely adopted in order to monitor legislative interference with administrative adjudicatory decisions. Am. Pub. Gas Assoc. v. Fed. Power Comm'n, 567 F.2d 1016 (D.C. Cir. 1977); Gulf Oil Corp. v. Fed. Power Comm'n, 563 F.2d 588 (3rd Cir. 1977); D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972). In *Gulf*, the Third Circuit noted that although the courts must not tolerate undue legislative interference with an administrative agency's adjudicative functions, they must be sensitive to the legislative importance of oversight and investigation and that their interest in the objective and efficient operation of regulatory agencies serves a legitimate and necessary function that should not be interfered with lightly. 563 F.2d at 610.

21. The court noted that when a congressional investigation

> focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.

354 F.2d at 964. The court later noted that its conclusion "preserve[d] the integrity of the judicial aspect of the administrative process," citing United States v. Morgan, 313 U.S. 409 (1941). *Id. See also* Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

22. See Hayburn's Case, 1 U.S. (2 Dall.) 409 (1792), in which the view was expressed that it was essential that judicial decisions be final rather than tentative and not be subject to revision by either the executive or legislative branches. *Id.* at 411. See also Chicago & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948), in which it was noted that,

> Judgments within the powers vested in courts by the Judiciary Article of

The unicameral nature of legislative vetoes has also been criticized as violating the bicameral principle.[23] Dissimilar sentiments, however, have also been expressed. Former Attorney General Griffin Bell, discussing the one-house veto in the Reorganization Act of 1977,[24] stated that the "one-house veto would be the functional equivalent of an affirmative bicameral veto because both houses have equal power with respect to the congressional decision to accept or reject the reorganization plan."[25] This "equal power (opportunity)" argument can be applied to section 244(c)(2) in a similar manner. In *Atkins v. United States*,[26] the Court of Claims held that a one-house veto barring an increase in salary for federal judges was constitutional.[27] The majority argued that despite the failure of the legislative veto to comply with the formal bicameral requirements, the unilateral reversal was authorized by the "necessary and proper" clause. The court stated that "where there has been no violation of the separation of powers principles or of any specific provisions of the Constitution, the necessary and proper clause can authorize a given method of obtaining a desired result, as well as serve as grounds for a substan-

---

> the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government. To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form. . . . This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.

Id. at 113-14.

23. The bicameral principle dictates that both houses participate in legislative action: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST., art. I, § 1.

24. 5 U.S.C. §§ 901-913 (1976).

25. OP. ATT'Y GEN. No. 10, *reprinted in Providing Reorganization Authority to the President: Hearings Before the Subcomm. on Legislation and National Security of the House Government Operations Comm.*, 95th Cong., 1st Sess. 45-46 (1977).

26. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1977).

27. 556 F.2d at 1061. The constitutional basis of the veto was found in "a combination of article I, section 1, placing the legislative power in Congress, and article I, section 8, clause 18, the so-called 'necessary and proper' clause." *Id.* The *Atkins* court decided the issue by a four-to-three margin.

tive provision."[28] Despite the continuing fear of congressional intrusion, the legislative veto has withstood major attacks in recent years in the context of the Federal Election Commission litigation.[29] Although a direct challenge was not mounted,[30] the Ninth Circuit opened the door for a constitutional attack on section 244(c)(2) with its decision in *Asimakopoulos v. Immigration & Naturalization Service*.[31] The Ninth Circuit held that the Board of Immigration Appeals' reliance on a congressional report opposing suspension for aliens was a failure to exercise statutory discretion constituting reversible error.[32] *Asimakopoulos* thus suggested that Congress could not attempt to establish a policy of narrowing the grounds for the suspension of deportations through a se-

---

28. *Id.* Such a reading effectively gives Congress the power to amend the Constitution by enacting a statute. Traditionally, the "necessary and proper clause" has been interpreted to give Congress the authority to legislate in areas beyond the scope of article I, § 7, in order to effectuate the goals underlying the article I, § 7 grant of power. The clause does not suggest that Congress may legislate other than in conformity with article I, § 1 and article I, § 7. Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. LEGIS. 735, 749 (1979).

29. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), and Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (per curiam), *aff'd mem. sub nom.*, Clark v. Kimmitt, 431 U.S. 950 (1977), raised the congressional veto issue in the Federal Election Commission (FEC) litigation. Under the appropriate statute, the FEC's implementing regulations had to be submitted to Congress, and either house could nullify the regulations by majority vote within thirty legislative days. The Supreme Court, however, was able to sidestep the veto issue by holding the initial version of the FEC statute unconstitutional under the appointments clause of article II. Buckley v. Valeo, 424 U.S. at 143. After Congress amended the statute by providing for presidential appointment of all voting members of the FEC, Ramsey Clark, then a New York senatorial candidate, continued to attack the statute on the grounds that the congressional veto mechanism was unconstitutional. Clark v. Valeo, 559 F.2d at 647. The Court of Appeals for the District of Columbia dismissed the suit, in a *per curiam* opinion, based on lack of ripeness. *Id.* at 650. An excellent discussion of this litigation appears in Dixon, *supra* note 16, at 458-63.

Several judges have expressed opinions on the legislative veto. Compare Buckley v. Valeo, 424 U.S. at 284-86 (White, J., concurring in part and dissenting in part) (one-house veto constitutional) with Clark v. Valeo, 559 F.2d at 678, 684-90 (Mackinnon, J., dissenting) (one-house veto unconstitutional).

30. *See* note 14 *supra*.

31. 445 F.2d 1362 (9th Cir. 1971). Though this litigation did not involve the type of legislative veto in the instant case, it does indicate the legislature's intransigence on the issue.

32. *Id.* at 1364.

ries of vetoes. If Congress was so permitted, the original delegation of powers would be modified by a cooperating agency attempting to avoid vetoes.[33] Such ongoing modification of the statutory criteria could be viewed as congressional usurpation of the executive power to execute the laws.[34] Importantly, *Asimakopoulos* stirred up serious questions on the role of the legislative veto in the context of the INA. Section 244(c)(2) was no longer viewed as an incontestable technique of congressional control over deportation proceedings.

III. INSTANT OPINION

In the instant case the court prefaced its analysis by considering the elementary principles of separation of powers and the constitutional ramifications of violations of these principles.[35] The

---

33. Dixon, *supra* note 16, at 470 n.216. Undoubtedly, this does not raise a delegation problem as the Supreme Court has not held any delegation by Congress to be unconstitutional since 1935. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schecter Bros. Poultry Corp. v. United States, 295 U.S. 495 (1935). The key issue is the modification of the original delegation.

34. "The Executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. "[The President] shall take care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. *See* Henry, *supra* note 27, at 756. The most recent separation of powers case is Buckley v. Valeo, 424 U.S. 1 (1976)(per curiam), in which the Court held that Congress could not appoint its own members to the rule-making Federal Election Commission. Such appointments had to be made by the President. Henry argues that as the *Buckley per curiam* opinion defined "Officers of the United States" to mean those appointees who exercise "significant authority pursuant to the laws of the United States," if Congress is barred by the incompatibility clause, U.S. CONST. art. I, § 6, from installing its members as executive employees, it would seem that legislative vetoes that give Congress the power to exercise "significant authority" would be unconstitutional under the reasoning of *Buckley*. *Id.* at 759-60 n.83. Additionally, Henry notes that § 244(c)(2) may well be a bill of attainder. *Id.* at 756 n.68. A bill of attainder is a special act of the legislature that inflicts capital punishment upon a person supposedly guilty of a high offense, such as treason and felony, without a conviction in the ordinary course of judicial proceedings. Such a bill is prohibited by article I, § 9 of the Constitution. BLACK'S LAW DICTIONARY 116 (5th ed. 1979).

35. The instant court deemed this necessary as no authority could be found to support the proposition that the legislature has impermissibly invaded the prerogative of the executive or the judiciary absent a clause in the Constitution that confers the power upon another branch with great specificity. Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 420 (9th Cir. 1980). The court also recognized that although the allocation of powers among the three branches is general in its terms, it "comprises an explicit textual recognition of the sepa-

instant court observed that the Supreme Court has firmly stated that the doctrine of separation of powers is vital for constitutional government.[36] It further noted that the doctrine is at once pervasive and fluid; there will necessarily be instances where the proper means for its enforcement rests with the mutual respect that each branch of the Government must extend to the other branches. Nevertheless, the instant court realized that in cases where transgressions are more patent it is the duty of the judicial branch to resolve disputes with or among the other component parts of the Government.[37] Two principal purposes of the separation of powers rule were identified by the court. First, an unnecessary and dangerous concentration of power in one branch must be avoided.[38] Such concentration of authority in one branch inevitably causes structural decomposition of the other branches, including dispersion of the original powers.[39] Second, the court noted that the framers of the Constitution emphasized the practical motive of administrative efficiency, which was accomplished by assigning numerous labors to designated authorities.[40] The court derived a judicial standard encompassing these twin purposes to

---

ration of powers principle." *Id.* at n.11. Prior to discussing the merits of the case, the court established jurisdiction and justiciability. Contentions of nonstanding, political question, and lack of necessary adverseness were dismissed. *Id.* at 411-20. A consideration of these issues is beyond the scope of this comment.

36. *Id.* at 421. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 441-46 (1977).

37. 634 F.2d at 422; *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

38. 634 F.2d at 422. The court at this point quoted Jefferson: "[T]he powers of government should be so divided and balanced among several body of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others." T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (W. Peden ed. 1955); and Madison:

> This policy of supplying by opposite and rival interests, the defect of better motives might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on each other; that the private interest of every individual, may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.

THE FEDERALIST No. 51 (J. MADISON) 349 (J. Cooke ed. 1961); 634 F.2d at 422.

39. 634 F.2d at 423.

40. *Id.*

govern attempted exercise of authority by one branch that contravenes the doctrine of separation of powers. The court stated that a constitutional violation of the separation of powers is the assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the government.[41]

Armed with the preceding standard, the court embarked upon an application of its concept of violation of the doctrine of separation of powers to section 244(c)(2). First, the disapproval device was interpreted to be congressional correction of judicial or executive misapplication of the statute.[42] The court found such supervening legislative action to be "a radical alteration of the role of federal courts in the field of administrative law."[43] Judicial interpretations of section 244, the court reasoned, are impermissible advisory opinions.[44] Aliens are deprived of the benefits of articulated reason and stare decisis in the interpretation of the INA.[45] Second, the court viewed the disapproval device as an ongoing means for sharing the administration of the statute with the executive. It concluded that such involvement trespasses upon central functions of the executive, undercutting efficient administration.[46] The executive decision is given careful attention; it is entitled to the weight and dignity normally accorded deliberative decisions of the executive branch.[47] The court stressed that summary rever-

41. *Id.* at 425. The court also noted that "[i]f an exercise of functions at the center of another branch is attempted on a long-term and routine basis, a violation of the constitutional rule requiring separation of powers is more easily established." *Id.*

42. *Id.* at 429-30.

43. *Id.* at 430. The court noted that the duty of the judiciary under this and numerous other statutory schemes is to determine at the conclusion of the administrative proceedings whether the executive branch has correctly applied the statute establishing its authority. *Id.*

44. *Id.*

45. *Id.* at 431. The court characterizes this as vertical disruption, *i.e.*, legislative disruption of the judiciary's relation to the alien. Such vertical disruption, the court emphasized, diminishes the strength of the judiciary's structural check on the executive. Furthermore, the court identified horizontal disruption in which the judiciary's duty to decide cases becomes subject to review by the legislature, undermining the former's integrity. *Id.* at 431-32.

46. *Id.* at 432.

47. The court noted that there was both a quasi-judicial hearing and a re-

sal of a suspension of deportation without an indication of a need to change the standards or rules to be applied detracts from the authority of the executive and undermines its powers.[48] Third, the contention that the disapproval is the exercise of a residual legislative power to define substantive rights operating only after executive and judicial procedures have been completed was dismissed.[49] The unicameral aspect of the statutory mechanism, the court surmised, precluded justifying congressional action as a separate and independent way of adjudicating the status of aliens outside the executive and judicial processes.[50] Despite the absence of a malevolent design or purpose in the congressional disapproval mechanism, the constitutional doctrine of separation of powers compelled the court to cancel deportation proceedings pursuant to section 244(c)(2) of the INA.

---

view by the Attorney General. *Id.*

48. 634 F.2d at 432. The court characterized this disruption as horizontal, *i.e.*, legislative assumption of executive power. Additionally, the court identified vertical disruption, which although secondary, is constitutionally important. The vertical aspect is the legislature's overriding an administrative process that has developed procedural protection for aliens, characterized by administrative stare decisis. *Id.*

49. The court noted that this argument was based on the great power allocated to Congress by article I of the Constitution: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, . . . [and] [t]o establish an uniform Rule of Naturalization, . . . [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." U.S. CONST., art. I, § 8, cls. 1, 3, 4, 18. The authorization to "make all laws," however, does not allow Congress to exercise power in any way it deems convenient. As the instant court recognized, a power committed to Congress does not sustain an unconstitutional form in the exercise of the power. *Id.* at 433.

50. *Id.* According to the court, a reading of the Federalist Papers necessarily leads one to conclude that bicameralism was intended to be one of the most fundamental checks on govermental power. Upon examination of the bicameral notion, the court articulated two reasons that Congress' article I power over aliens could not be relied on to sustain the disapproval of petitioner's suspension of deportation. First, plenary power for making laws does not authorize revision of particular administrative dispositions. Second, the power to "make all laws" has important formal and procedural limitations. Significantly, *both* houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights. U.S. CONST., art. I, § 7. Enactment by mere executive recommendation (not a final exercise of specifically delegated power to alter substantive legal rights), followed by legislative inaction, does not suffice. Consequently, the court rejected the analogy of the one-house disapproval to the failure of one house to vote affirmatively on a private bill before it, *i.e.*, the nonobjection of both houses changes the law. *Id.* at 434-35.

IV. COMMENT

The instant court's invalidation of section 244(c)(2) is the inevitable extension of the trend toward curbing legislative interference in quasi-judicial proceedings. Although the type of legislative veto employed by the Reorganization Acts may be retained because of the absence of judicial aspects and the need for congressional oversight, the section 244(c)(2) disapproval technique clearly cannot be sustained on these grounds. The Ninth Circuit's carefully written opinion clearly articulates the separation of powers doctrine and the unique problems it presents with respect to adjudicatory proceedings pursuant to the INA. The court correctly recognizes that the most serious problem resulting from the application of section 244(c)(2) is that aliens are no longer guaranteed uniform application of the INA because judicial adjudications can be overturned at the whim of the legislature.[51] Judicial interpretations of the criteria in section 244 are rendered impermissible advisory opinions by the *Chadha* decision. It is indeed remarkable that this argument has managed to evade the courts for over forty years. The astute observation that there is no indication that the judiciary is incapable of discerning abuses of the Attorney General's discretion or improper applications of a statutory standard[52] strongly reinforces the foregoing conclusion. Perhaps the most important part of the opinion is the discussion of section 244(c)(2) as congressional intrusion into the executive branch. Although *Buckley* reasserted the executive's right to independence, prior to the instant case the boundaries of executive power were nebulous at best. The instant case indicates that congressional intrusion into the executive's sphere will be carefully scrutinized for possible constitutional infringements and serves notice that intrusions upon the power to execute the laws will not be immune from such review. The discussion on executive independence further stresses the need for predictability in the administration of the INA. The court notes that without a principled basis on which the executive could determine how it had erred, the legislative action of summarily reversing suspension of a deportation order was both disruptive and unnecessary to sound administration.[53] The court's concern with the policies underlying

51. 634 F.2d at 430-31.
52. *Id.* at 431.
53. *Id.* at 432.

the INA and with the administrative realities facing the INS adds legitimacy to the court's conclusions. Although not the determinative issue, the court conducted a thorough analysis of the unicameral character of the veto mechanism.[54] Undoubtedly, the decision will lend further support to the view that the internal check of bicameralism should not be undermined. The court perceptively observed that section 244(c)(2)'s potential for discriminatory treatment of individual aliens, coupled with the drastic nature of the sanction, raises serious bill of attainder and equal protection problems.[55] The court's conclusion is a long-awaited and favorable result coupled with a commendable constitutional analysis of the separation of powers. It is likely that further guidance will be forthcoming from the Supreme Court on this most delicate issue.[56] Presently, however, aliens subject to the deportation process and legal scholars alike can applaud this decision.

Kevin P. Hishta

54. *Id.* at 435.

55. *Id.* at 435 n.42.

56. Attorney General William French Smith has stated that the Reagan Administration plans to use the *Chadha* case to obtain a definitive Supreme Court ruling that at least some legislative vetoes are unconstitutional. *See* Taylor, *Reagan Aides Seek to Outlaw Legislative Vetoes Curbing a President's Power*, New York Times, Mar. 19, 1981, at 13, col. 1.

SOVEREIGN IMMUNITY—IRANIAN IMMUNITY FROM PREJUDGMENT ATTACHMENTS TERMINATED UNDER INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

I. FACTS AND HOLDING

Plaintiffs[1] sued the Government of Iran and organizations it owned or controlled seeking damages for uncompensated expropriations and breach of contracts.[2] Plaintiffs moved to confirm prejudgment orders of attachment of Iranian assets, and defendants cross-moved for their vacation.[3] Plaintiffs asserted that Iran waived its immunity from prejudgment attachment in the Treaty of Amity, Economic Relations, and Consular Rights (Treaty of Amity) between the United States and Iran,[4] and that even if Iran did not waive immunity, the Executive Order[5] freezing Iranian assets under the International Emergency Economic Powers Act (IEEPA)[6] empowered the court to attach Iranian property as security before rendering judgment. Defendants claimed immunity from prejudgment attachment by virtue of the

---

1. The instant court did not identify the 96 unrelated plaintiffs.

2. Plaintiffs filed 96 individual complaints, the majority of which were based on repudiation of contract. Other complaints sought damages for conversion of business property resulting from Iran's nationalization of plaintiffs' business ventures. All the complaints asserted causes of action for defendants' expression of intent to avoid just debts.

3. The court granted a majority of the petitions for attachment without notice to the defendants, recognizing that restricted communication between the United States and Iran made actual notice impracticable. The New York procedural law requiring a party seeking an *ex parte* order of attachment to move to confirm the attachment within five days after receipt of notice by the defendant, however, shifts the procedural burden of moving to vacate the attachments to the defendant. N.Y. CIV. PRAC. LAW & R. §§ 6211(b), 6223(a). All defendants eventually retained counsel and ultimately received effective notice. Although the Federal Rules of Civil Procedure require federal courts to apply the attachment provisions of the states in which the courts are located, they also provide that "any existing statute of the United States governs to the extent to which it is applicable." FED. R. CIV. P. 64.

4. Treaty of Amity, Economic Relations, and Consular Rights, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

5. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C. § 1701 (Supp. II 1978).

6. 50 U.S.C. §§ 1701-1706 (Supp. II 1978).

Foreign Sovereign Immunities Act of 1976 (FSIA)[7] and asserted that Iran did not waive immunity in the Treaty of Amity. In the United States District Court for the Southern District of New York, *attachments confirmed. Held*: Neither the Treaty of Amity nor the Foreign Sovereign Immunities Act terminated Iran's immunity from prejudgment attachment, but the Executive Order invoking the International Emergency Economic Powers Act suspended Iranian immunities and authorized prejudgment attachment of assets within the jurisdiction of the United States. *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980).

II. LEGAL BACKGROUND

A. *Waiver and Doctrines of Judicial Restraint*

Respect for the sovereignty of foreign nations is a basic principle of international law and comity.[8] This respect has led to recognition of two related principles of judicial restraint: the act of state doctrine and the doctrine of sovereign immunity. The *Restatement (Second) of Foreign Relations Law of the United States (Restatement)* distinguishes the act of state doctrine from sovereign immunity: the act of state doctrine precludes consideration of a claim filed against a person other than the sovereign when the claim is based on the sovereign's public acts; sovereign immunity bars consideration of the merits of a claim brought against the sovereign, its agencies, or instrumentalities.[9] The act of state doctrine was first articulated in *Underhill v. Hernandez*,[10] in which the United States Supreme Court held that a United States citizen could not sue an ex-official of Venezuela for unlawful detention since courts may not judge acts of a foreign

---

7. 28 U.S.C. §§ 1602-1611 (1976).

8. Underhill v. Hernandez, 168 U.S. 250, 252-53 (1897).

9. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41(e) (1965).

10. Chief Justice Fuller wrote the first clear statement of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

168 U.S. at 252.

government performed within its territory. Recent judicial decisions and statutes that permit adjudication of claims based on a sovereign's ministerial acts,[11] commercial activity,[12] and expropriations in violation of international law[13] limit the applicability of the act of state doctrine. The Second Circuit has indicated, however, that the act of state doctrine retains vitality as a principle of judicial restraint based on separation of powers and continues to preclude examination of a sovereign's motives for public acts.[14]

The *Restatement* indicates that the doctrine of sovereign immunity applies to the state itself, its government or governmental agencies, and corporations which are created under its laws and which exercise functions comparable to those of governmental agencies.[15] The Tate Letter[16] is the basis for United States treatment of sovereign immunity and is codified in the Foreign Sovereign Immunities Act.[17] In the Tate Letter, the Acting Legal Adviser for the Secretary of State reviewed the classical (or abso-

---

11. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). Plaintiff Timberlane purchased a Honduran enterprise that was indebted to the defendants. The defendants assigned their claims to a third party who sued in Honduran court for appointment of an intervenor. Relief was granted by court order and police officers seized Timberlane's Honduran property and arrested its manager. Timberlane sued in the United States arguing that defendants conspired to prevent it from controlling its new enterprise. The Ninth Circuit held that the act of state doctrine does not apply to the ministerial activity of government enforcement of a judicial order. *Id.* at 608.

12. *See, e.g.*, Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1975). The court there considered the issue of whether the act of state doctrine precluded judgment in a case in which respondents failed to return to petitioner Alfred Dunhill of London, Inc., funds mistakenly paid by petitioner for cigars that had been sold to it by certain expropriated Cuban cigar companies. The court concluded that a sovereign's repudiation of a purely commercial obligation does not constitute an act of state. *Id.* at 695.

13. Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2379(e)(2) (1976).

14. Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977). Plaintiff claimed that defendants caused Libya to nationalize his interests. The court held that the act of state doctrine precludes the examination of government motives that would be necessary to prove that defendants induced the foreign sovereign to seize plaintiff's holdings. *Id.* at 78.

15. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965).

16. 26 DEP'T STATE BULL. 984-85 (1952) (letter from Jack B. Tate, Acting Legal Advisor for the Secretary of State, to Acting Attorney General Philip B. Perlman (May 19, 1952)).

17. 28 U.S.C. §§ 1602-1611 (1976).

lute) theory of immunity, which provided that a sovereign could not, without its consent, be made a respondent in the courts of another sovereign. After reviewing the growing international acceptance of a restrictive theory of immunity that recognized sovereign immunity for public acts (*jure imperii*) but not for private or commercial transactions (*jure gestionis*), he concluded that the Department of State would begin to apply the restrictive theory to assertions of sovereign immunity.[18] Section 1602 of the FSIA adopted the restrictive theory enunciated in the Tate Letter:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.[19]

Despite its adoption of a restrictive theory of sovereign immunity, the FSIA explicitly preserved immunity from prejudgment attachment except when:

> (1) the foreign state has explicitly waived its immunity from attachment prior to judgment, . . . and (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.[20]

The FSIA qualified the requirement of an explicit waiver of immunity from prejudgment attachments by provisions subjecting attachments to existing international agreements to which the

---

18. 26 DEP'T STATE BULL. 985 (1952). The Tate Letter indicated the Department of State's recognition of the rapid changes developing in international trade and commerce. Mr. Tate acknowledged that governments through various internally organized trading ministries and organizations frequently engaged in commercial enterprise. He thus concluded that it was not unfair to allow United State courts to adjudicate the rights of individuals doing business with foreign sovereigns.

19. 28 U.S.C. § 1602 (1976). The federal rule clearly recognizes prejudgment attachment as an available remedy:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held.

Id.

20. 28 U.S.C. § 1610(d) (1976).

United States was a party.[21] In 1956 the United States ratified the Treaty of Amity with Iran.[22] The Treaty of Amity recognized the policy of "encouraging mutually beneficial trade and investments and closer economic intercourse generally."[23] Article XI, paragraph 4, provided that both the United States and Iran waived immunity "from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject" resulting from commercial activities of the sovereign, its agencies, or instrumentalities.[24] The United States District Court for the District of New Jersey considered these provisions in *Behring International, Inc. v. Imperial Iranian Air Force*,[25] and concluded that the Treaty of Amity waived immunity from prejudgment attachments. The court recognized that

---

21. 28 U.S.C. § 1609 (1976).

22. Treaty of Amity, Economic Relations, and Consular Rights, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

23. Preface to Treaty of Amity, at 8 U.S.T. 901.

24. At least eight other treaties to which the United States is a party contain substantially identical waivers of sovereign immunity. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Republic of Korea, art. XVIII, para. 2, 8 U.S.T. 2217, T.I.A.S. No. 3947; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. XVIII, para. 2, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Republic of Italy, art. XXIV, para. 6, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. XV, para. 3, 2 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. XVIII, para. 3, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, art. XIV, para. 5, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. XVIII, para. 3, 12 U.S.T. 908, T.I.A.S. No. 4797. It appears, however, that no appellate court has construed waiver of immunity provisions in any of these treaties.

25. 475 F. Supp. 383 (D.N.J. 1979). Behring contracted to store property purchased by defendants and to deliver it to an airport for transportation to Iran. Defendants agreed to pay Behring for these services with letters of credit executed by Manufacturer's Hanover Trust Co. Defendants refused to pay any bills after the Shah of Iran was deposed, including bills for goods that had already been delivered to Iran. Plaintiffs alleged that unpaid invoices totaled $390,494, and that there were sufficient funds under the letters of credit to pay all invoices. Plaintiffs sought attachment of defendant's property remaining in the United States and a restraining order forbidding cancellation of the letter of credit.

the Treaty of Amity did not constitute the explicit waiver required for attachments under the FSIA, but observed that the FSIA was subject to all international agreements to which the United States was a party.[26] The *Behring* court construed the Treaty of Amity's waiver of immunity from "execution of judgment" to include attachments securing a judicial decree.[27] The court assumed that it was not intended that the provision waiving immunity from "execution of judgment or other liability" be redundant; the court concluded that "or other liability" must refer to remedies other than attachment after entry of judgment, including such provisional remedies as prejudgment attachments.[28] Therefore, the *Behring* court held, the Treaty of Amity waived immunity from prejudgment attachments.

Another argument that immunity has been waived under the Treaty of Amity was rejected by the United States District Court for the Northern District of Texas in *E-Systems, Inc. v. Islamic Republic of Iran.*[29] Pursuant to an agreement guaranteeing performance of its contract to repair Iranian military aircraft, the *E-Systems* plaintiff sought attachment of a liability it owed directly to an Iranian bank. The court noted that the Treaty of Amity recognized that absolute immunity from attachments of a foreign sovereign's assets could exist even though the foreign sovereign was not entitled to jurisdictional immunity.[30] Since Iran did not expressly waive immunity from prejudgment attachment in the contract agreement, the court concluded that Iran did not intend to waive immunity.[31] Furthermore, the court found that the Treaty of Amity did not constitute the explicit waiver of immunity necessary to permit prejudgment attachments under the FSIA.[32] Despite the absence of waiver, the opinion also noted, Texas law permitted attachment only of property that was subject to levy under writ of execution;[33] the blocked Iranian account was not subject to levy because it consisted of a debt owed indi-

26. *Id.* at 393.
27. *Id.* at 395.
28. *Id.*
29. 491 F. Supp. 1294 (N.D. Tex. 1980).
30. *Id.* at 1300 (citing Del Bianco, *Execution and Attachment Under the Foreign Sovereign Immunities Act of 1976*, 5 YALE STUDIES IN WORLD PUBLIC ORDER 109, 110-11 (1978)).
31. *Id.*
32. *Id.* at 1302.
33. *Id.*

rectly to defendant[34] and because Iranian asset control regulations prohibited execution against blocked accounts without an express license from the Treasury Department.[35] The United States District Court for the District of Columbia has found, however, that the Treaty of Amity terminated Iran's immunity from liability for uncompensated expropriations.[36] Plaintiffs in *American International Group, Inc. v. Islamic Republic of Iran*[37] represented United States insurance companies whose interests were nationalized by Iran in 1979. The court found that the Treaty of Amity provisions requiring prompt and reasonable compensation for expropriations were self-executing and provided plaintiffs with a right of action;[38] thus, Iran violated the Treaty of Amity by failing to compensate plaintiffs and neglecting to provide a mechanism for paying compensation or determining amounts owed.[39] The court found that the *American International* opinion held that neither the act of state doctrine nor the FSIA precluded judicial review: Iran clearly violated the Treaty, and plaintiffs' claims were based on commercial rather than public activity.[40]

The legislative history of the Treaty of Amity does not resolve the rift in the district courts concerning whether the drafters intended to waive immunity. Thorston V. Kalijarvi, Deputy Secretary of State for Economic Affairs, observed that negotiations with underdeveloped countries are so difficult that they necessitate use of uncomplicated treaties, and further noted that the Treaty of Amity with Iran was similar to the Treaty of Amity with Ethiopia and other treaties being negotiated with foreign countries.[41] Political expediencies often create situations which produce treaties with less than meticulously worded definitions. A

---

34. *Id.*

35. *Id.*

36. 493 F. Supp. 522 (D.D.C. 1980).

37. *Id.* at 525.

38. *Id.* Property of nationals and companies of the United States and Iran "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall . . . represent the full equivalent of the property taken . . . ." Treaty of Amity, *supra* note 23, at art. IV, para. 2.

39. *Id.*

40. *Id.* at 525-26.

41. *Hearings on Executive E Before the Senate Comm. on Foreign Relations*, 84th Cong., 2d Sess. 19 (1956) (statement of Thorston V. Kalijarvi).

senator speaking on the subject noted the political and business[42] expendiencies involved in negotiating the Treaty of Amity:

> It [the Treaty of Amity] is modified in particular to meet conditions in the more underdeveloped countries . . . . Establishment of a comprehensive basis for the protection of American commerce and citizens, and their business and other interests in the underdeveloped areas should be an incentive to our citizens to aid in the development of those areas. Insofar, therefore, as such treaties can be negotiated with underdeveloped countries, the interests of the United States are advanced. The Iranian treaty affords a substantial degree of protection to American citizens, enterprises, and products.[43]

The goals of protecting United States business interests and of encouraging investment abroad contrast with policies articulated by the Committee on Foreign Law of the New York City Bar Association.[44] Although the Bar Committee did not specifically consider waiver of immunity from prejudgment attachment, it suggested a broad construction of provisions waiving immunity from taxation. The Committee adopted the restrictive theory of sovereign immunity[45] and recognized that the Treaty of Amity did not provide criteria for distinguishing between public and private acts. The Bar Committee concluded: "Given the terms of the treaty, it may be expected that immunity will not be granted except in very clear cases of activities of purely governmental character."[46]

B. *Property Rights and Attachments*

The President's broad powers to conduct foreign affairs may extend in times of emergency to the control of rights of foreign nationals over property located in the United States. The

---

42. 102 CONG. REC. 12,287 (1956).

43. *Id.* Senator George emphasized that the reciprocal provisions in the Treaty of Amity would provide more benefit to the United States than to Iran because there were more United States citizens engaged in business in Iran than Iranian citizens engaged in business in the United States. *Id.*

44. *Hearings on Executive E Before the Senate Comm. on Foreign Relations*, 84th Cong., 2d Sess. 12, 15-16 (1956).

45. *See* notes 15 & 17 *supra* and accompanying text.

46. *Hearings on Executive E Before the Senate Comm. on Foreign Relations*, 84th Cong., 2d Sess. 15-16 (1956).

IEEPA[47] gives the President emergency authority

> to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.[48]

Under IEEPA, once the President declares a national emergency he has the authority to void or restrict any right or property interest enjoyed within the jurisdiction of the United States by a foreign country or its nationals.[49] IEEPA authorizes the President to promulgate all necessary regulations.[50] In 1979 President Carter issued Executive Order Number 12,170 in which he declared a national emergency to deal with the Iranian crisis, ordered all Iranian assets within the United States blocked, and authorized the Security of the Treasury to use all powers delegated to the President to carry out the Executive Order.[51] The Treasury Department promulgated regulations expressly authorizing prejudgment attachments, but prohibiting payment of blocked prop-

---

47. 50 U.S.C. §§ 1701-1706 (Supp. I 1977). IEEPA developed when the 94th Congress discovered that four emergency proclamations issued in 1933, 1950, 1970 and 1971 were still in effect. S. REP. No. 94-1168, 94th Cong., 2d Sess. 9, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2288, 2295. Congress then resolved to terminate the Executive's emergency powers under the approximately 470 emergency statutes then in force, to provide guidelines for future declarations of national emergency, and to consolidate remaining emergency powers statutes. S. REP. No. 94-1168 at 2, [1976] U.S. CODE CONG. & AD. NEWS at 2288. In developing IEEPA, the legislature balanced competing concerns: the need to provide the President with power to meet true emergencies and the need to maintain accountability to Congress. *See* Note, *The National Emerging Dilemma: Balancing the Executive's Emergency Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453 (1979).

48. 50 U.S.C. § 1701 (Supp. I 1977).

49. 50 U.S.C. § 1702(a)(1) (Supp. I 1977) provides:

> [T]he President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
> . . . (B) void, prevent or prohibit, any acquisition, . . . use, transfer, withdrawal, . . . or exportation of, . . . or exercising any right, power, or privilege with respect to . . . any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

50. *Id.* § 1704.

51. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C. § 1701 (Supp. I 1977).

erty without a specific license.[52] Any such prejudgment attachments must be analyzed in light of constitutional requirements for prejudgment attachments. In *Fuentes v. Shevin*[53] the Court held that notice and hearing must precede even a temporary deprivation of property except in extraordinary situations. The Court indicated that the unusual situations justifying absence of prior notice and hearing have three common characteristics: first, the seizure is necessary to secure an important public interest; second, prompt action is necessary; third, the state retains its monopoly of legitimate force.[54] In *Mitchell v. W.T. Grant Co.*[55] the Supreme Court balanced competing interests, indicated that mere postponement of judicial inquiry is not a denial of due process when only property rights are involved, and found that Louisiana procedures adequately protected defendant's interests. Before the instant decision, the courts had not had an opportunity to consider the effect of the Treaty of Amity and IEEPA on the validity of prejudgment attachments.

---

52. 44 Fed. Reg. 75,353 (1979).

53. 407 U.S. 67 (1972). The court invalidated Florida and Pennsylvania statutes that authorized *ex parte* issuance of writs of replevin. *Id.* at 83. The Florida statute authorized the clerk of the Small Claims Court to issue a writ ordering state agents to seize a person's possessions whenever another person posted a security bond and submitted to the clerk a form in which he claimed a right to the property. FLA. STAT. ANN. §§ 78.01, 78.07, 78.08 (West Supp. 1972-73). The Pennsylvania statute provided that a person seeking a writ was not required to initiate any court action or even to claim that he was lawfully entitled to the property; he merely had to file an affidavit stating the value of the property to be replevied, and to post a security bond for twice the property's value. PA. STAT. ANN. tit. 12 § 1821 (Purdon). The Court applied a traditional due process analysis and recognized the constitutional deficiency of these procedures. *Id.* at 82.

54. *Id.* at 91.

55. 416 U.S. 600 (1974). The Louisiana Code of Civil Procedure permits a lienholder to obtain a writ of sequestration to prevent waste of encumbered property. Although a creditor may obtain a writ without notice to the debtor, the writ may be issued only after the creditor posts an adequate security bond and submits a verified petition or affidavit. LA. CODE CIV. PRO. ANN. arts. 3574, 3501 (West). The affidavit must indicate the amount and the grounds for petitioner's claim. LA. CODE CIV. PRO. ANN. art. 3501 (West). The affidavit must also assert that petitioner has a right to possession or that he has a lien on the property and that the debtor has the power to conceal, encumber, or dispose of the property. LA. CODE CIV. PRO. ANN. art. 3571 (West). If the person whose property is replevied objects, the writ of replevin must be dissolved immediately unless the petitioner establishes in a hearing that he is entitled to the writ. LA. CODE CIV. PRO. ANN. art. 3507 (West).

III. INSTANT DECISION

In the instant opinion Judge Duffy recognized that Congress, under the FSIA, delegated to the judiciary authority to determine whether a foreign sovereign should be immune from suit for claims resulting from its commercial activities.[56] Since the instant disputes result from commercial transactions of Iranian defendants rather than from public acts of the Iranian sovereign[57] the FSIA could be applied. The opinion noted that the FSIA expressly preserved existing treaty obligations[58] and that the Treaty of Amity between the United States and Iran waived immunity from "taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject. . . ."[59] The court further observed that the FSIA preserved immunity from prejudgment attachment unless the defendant sovereign explicitly waived such immunity.[60] Judge Duffy noted that prejudgment attachment is a harsh remedy[61] and that courts should construe strictly a waiver of immunity from such a procedure.[62] The court concluded that the lack of an explicit textual waiver in the Treaty of Amity of immunity from prejudgment attachment indicated that the drafters did not contemplate such waiver;[63] this lack of explicit waiver preserved immunity from the FSIA. The court recognized, however, that the IEEPA empowered the President upon a declaration of a national emergency to prevent foreign nationals from exercising any rights to property within the jurisdiction of the United States.[64] The relevant IEEPA provisions were buttressed by Treasury Department regulations expressly authorizing prejudgment attachments[65] under authority of the Executive Order freezing Iranian assets.[66] Judge Duffy held that the Treasury regulations required confirmation of the orders of attachments.

---

56. 502 F. Supp. at 124.
57. *Id.* at 125.
58. *Id.*
59. *Id.*
60. *Id.* at 126.
61. *Id.* at 127.
62. *Id.*
63. *Id.*
64. *Id.* at 128.
65. *Id.* at 130.
66. *Id.* at 128.

IV. COMMENT

The instant court narrowly construed treaty provisions waiving sovereign immunity. The need for a single voice in foreign affairs and the Executive's constitutional authority in the foreign affairs field are compelling justifications for rigorous limitations on a court's power to adjudicate claims arising from acts by foreign sovereigns. Adjudication of claims publicizes positions of litigants, making it more difficult, on a political level, for recalcitrant parties to compromise. As Chief Justice Fuller explained in *Underhill v. Hernandez*, redress of grievances should be conducted by diplomacy between sovereigns themselves.[67] The instant court also recognized the importance, in the absence of unambiguous positive law compelling the exercise of jurisdiction, of judicial restraint in actions against foreign sovereigns. Because of the certainty engendered by the instant court's narrow construction of treaty provisions that purport to waive sovereign immunity, the present decision will further diplomatic efficiency and judicial predictability. The Department of State has recognized that the difficulty of negotiating treaties with underdeveloped countries[68] often requires the use of simply worded agreements similar to the Treaty of Amity between the United States and Iran[69] and has acknowledged that the United States was negotiating similar agreements with other countries.[70] A holding contrary to that of the present case—that the Treaty's implicit waiver of immunity authorizes invocation of harsh provisional remedies—could well make the negotiations underlying subsequent treaties far more difficult. A contrary holding would also defeat a key policy motivating the drafters because reciprocal application of provisional remedies would discourage and endanger foreign commercial enterprises in the United States and United States investments abroad. This is especially significant in light of the fact that Congress felt that the United States would receive more benefits under the Treaty than Iran since the United States had more businesses desiring to invest abroad.[71]

The present court did not discuss the act of state doctrine but assumed that all plaintiffs' claims were based on commercial acts.

---

67. *See* note 10 *supra.*
68. *See* text accompanying note 41 *supra.*
69. *Id.*
70. *Id.*
71. *See* text accompanying note 43 *supra.*

Plaintiffs, however, alleged not only breach of contracts, but also the uncompensated nationalization of their property in Iran.[72] Although the court made no relevant findings of fact, plaintiffs' allegations indicate that even if such alleged confiscations are construed as public acts, they may still be adjudicable under the Hickenlooper Amendment.[73] The District Court for the District of Columbia, considering an analogous situation, found that the Treaty of Amity expressly prohibited uncompensated nationalization of property of United States citizens in Iran.[74] The instant court neither confronted nor considered the possibility that prejudgment orders of attachment issued after declaration of national emergency under the IEEPA might violate plaintiffs' due process rights, but the problem seems moot since defendants had notice and an opportunity to defend their property interests.[75] Furthermore, dicta in *Fuentes v. Shevin*[76] indicated that even if the current procedures did not satisfy due process, this was an extraordinary situation justifying attachments without notice and hearing. The Treasury regulations and the Executive Order promulgated under the IEEPA are evidence that the instant attachments served an important governmental interest in national security. The Executive Order recognized the special need for prompt action to prevent removal of Iranian assets and the defrauding of creditors. Judge Duffy's logical analysis may be a conceptual framework for future decisions construing the many treaty provisions that purport to waive sovereign immunity. The use of the relatively unambiguous provisions of the IEEPA, rather than the unclear interpretation of the Treaty of Amity as a basis for confirming the attachments, furthered judicial predictability and diplomatic effectiveness.

J. Clifton Cox

---

72. *See* note 2 *supra* and accompanying text.

73. *See* text accompanying note 13 *supra.*

74. American International Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980); *see* notes 36-40 *supra* and accompanying text.

75. *See* text accompanying notes 57-58 *supra.*

76. *See* text accompanying note 52 *supra.*

SOVEREIGN IMMUNITY—GOVERNMENT SHIPPING COMPANY OF THE PEOPLE'S REPUBLIC OF CHINA IS AN "AGENCY OR INSTRUMENTALITY" FOR THE PURPOSES OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

I. FACTS AND HOLDING

Plaintiff cargo owner, a United Kingdom corporation,[1] brought suit on bills of lading[2] against Mitsui O.S.K. Lines, a Japanese corporation,[3] and the China Ocean Shipping Corporation (COSCO)[4] to recover for damages occurring when the carrier sank[5] after COSCO transshipped goods enroute from the People's Republic of China (PRC) to Nigeria. Plaintiff moved for a default judgment, claiming that defendant had waived any defense of sovereign immunity by agreeing to a New York choice of forum clause in the bill of lading.[6] Defendant contended that it was im-

---

1. The plaintiffs are Paterson, Zochonis Ltd., a United Kingdom corporation, and thirty-nine other foreign corporations or foreign entities. This action arose when the owners of a ship that sank filed to limit their liability. The cargo owners then filed suit against all of the shipping entities involved. Default judgment was entered against the owners of the ship, but did not settle matters with the other shipper defendants. Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A., 493 F. Supp. 621, 623 n.3 (S.D.N.Y. 1980).

2. The China Ocean Shipping Company (COSCO) issued "through bills of lading" to plaintiffs. During transshipment, "memo" bills of lading were later issued to COSCO by the Sea Queen Co. For further discussion of the liabilities arising from this action, see the companion case to the instant case, also styled Paterson, Zochonis, (U.K.) Ltd. v. Compania United Arrow, S.A., 493 F. Supp. 626, 627 nn.4 & 5, 629 nn.10, 11 & 12 (S.D.N.Y. 1980).

3. Mitsui O.S.K. Lines, Ltd.

4. COSCO is a shipping line organized under the laws of the People's Republic of China (PRC). It is "the only Chinese line that operates its own shipping outside territorial waters," and it controls a merchant fleet of 391 vessels of various types with a total cargo capacity of seven million tons. COSCO also operates chartered foreign ships. 2 EUROPA Y. B. 130 (1980). COSCO's main offices are located in Chang An Jie and Beijing. *Id.*

5. The goods were shipped from the PRC to Hong Kong on a COSCO ship and transshipped and loaded aboard the *M.V. Sea Queen I*, a ship not owned or operated by COSCO. The Sea Queen was owned by a Peruvian company, Compania United Arrow, S.A., and was operated by a Hong Kong corporation, Sea Queen Co., Ltd. 493 F. Supp. at 627 n.3 (companion case to the instant case).

6. *See* note 1 *supra*. At the time of transshipment, Sea Queen Co. issued "memo" bills of lading, listing the holders of the original COSCO bills as

mune under the Foreign Sovereign Immunities Act of 1976 (Act).[7] The Southern District of New York, in a case of first impression, upheld defendant's motion to dismiss. *Held*: When a state-owned shipping organization is found to be an agency or instrumentality within the meaning of the Act, the commercial activities exception does not apply to the shipping activities of such an entity and the filing of required Federal Water Pollution documents and concommitant appointment of an agent for service of process does not constitute a waiver of sovereign immunity. *Paterson, Aochonis (U.K.) Ltd. v. Compania United Arrow, S.A.*, 493 F. Supp. 621 (S.D.N.Y. 1980).

II. LEGAL BACKGROUND

The concept of sovereign immunity[8] is grounded in notions of sovereign infallibility and independence; the equality and dignity of all nations;[9] international comity, reciprocity, and privilege.[10] Early United States cases, such as the *Schooner Exchange v. McFadden*,[11] articulated the classical doctrine of absolute immunity: acts of a sovereign are public acts (*jure imperii*), to be distin-

---

cosignees. Sea Queen's agents in Nigeria had instructions to surrender the cargo to holders of the COSCO bills. Plaintiffs never possessed the Sea Queen bills, which were intended to act as receipts evidencing the fact that that cargo described therein had been loaded on the Sea Queen. 493 F. Supp. at 624.

7. 28 U.S.C. §§ 1602-1611 (1980 Supp.).

8. The concept of sovereign immunity differs from diplomatic immunity, which is in issue when an individual diplomat is sued. H.R. REP. No. 94-1487, 94th Cong., 1st Sess. 8 (1976) [hereinafter cited as H.R. REP.]. The H.R. REP. and S. REP. No. 94-1310, 94th Cong., 2d Sess. (1976) are the same reports but use different pagination.

9. The concept of sovereign immunity developed from the rule *par in parem non habet imperium*—no state can claim jurisdiction over another. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901, 930 n.85 (1969).

10. *See generally* Comment, *The Impact of S. 566 on the Law of Sovereign Immunity*, 6 LAW & POL'Y INT'L BUS. 179 (1974). The fact that bringing a foreign sovereign into court hampers the conduct of foreign relations is another justification advanced for the concept of sovereign immunity. Fenstenwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 616-17 (1950).

11. 11 U.S. (7 Cranch) 116 (1812). The doctrine of absolute immunity was stated by Chief Justice Marshall. The doctrine is justified because "the acts of a State can have but one end in view—the defense of the public interest. Therefore, all acts of a sovereign are public acts (*jure imperii*); none are private acts (*jure gestionis*)." Fenstenwald, *supra* note 10, at 616.

guished from private acts (*jure gestionis*) of non-sovereign entities. After World War I, foreign courts adopted a restrictive theory of sovereign immunity which allowed the assertion of jurisdiction over foreign sovereigns in certain circumstances.[12] The United States Supreme Court first asserted jurisdiction over a vessel owned by a foreign government in *Republic of Mexico v. Hoffman*.[13] The impetus for the increasing assertions of jurisdiction over government-owned agencies was caused in part by a realization of "the increasing tendency of nations to assume economic functions outside of the traditional framework of administration and management."[14] In 1952 the United States officially embraced the restrictive theory of sovereign immunity for reasons[15] explained in the Tate Letter.[16] Even with the restrictive

---

12. Under the restrictive theory of sovereign immunity, immunity is granted with regard to sovereign or public acts of a state (*jure imerii*), but not with regard to the private acts of the state (*jure gestionis*). Letter from Jack B. Tate to Phillip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952) [hereinafter cited as Tate Letter].

13. 324 U.S. 30 (1943). In this case, the Court denied immunity to a merchant vessel belonging to the Mexican government while it was in the "possession, operation, and control" of a private Mexican corporation. The history of sovereign immunity issues in cases involving vessels differs from the general case law development of sovereign immunity. When dealing with public vessels, the courts have taken two different positions on the issue of immunity. First, the floating island theory holds that a ship must be treated as part of the territory of the sovereign state it represents. A second theory grants immunity on the basis of local law. Furthermore, the treatment of commercial vessels is different from the treatment of public vessels. J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 297 (8th ed. 1977). In addition to these general theories of the sovereignty of vessels, conventions and conferences are constantly examining and redefining the state of the international law regarding vessels.

14. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 645 (2d ed. 1976).

15. The Tate Letter noted that there was an international trend towards use of the restrictive theory, that the restrictive theory had supporters even in countries continuing to adhere to the absolute theory, and that many of the countries still supporting the classical theory of immunity were parties to the Brussels Convention of 1926, which declared that government vessels would no longer be viewed as immune. Tate Letter, *supra* note 12, at 984-85. This document also contains a strong implication that adoption of a restrictive theory would counter the "Soviet Union and its satellites" which continued to accept the absolute theory. *Id.* at 985; *see* STEINER & VAGTS, *supra* note 14.

16. Although the Tate Letter is viewed as the fountainhead of the concept of restrictive sovereign immunity in the United States, it offered no specific guidelines for differentiating between a sovereign's public and private acts.

theory of immunity, a foreign state had to engage in a "complex and confusing" process to assert claims of immunity.[17] The process grew increasingly complex when the entity seeking immunity was a state-owned entity or corporation.[18] The courts' authority to consider variables, including the place of the foreign state-owned corporation's incorporation, the percentage of stock owned by the foreign government, and the manner in which the company could sue and be sued in its own country,[19] while examining a request for immunity compounded the uncertainty inherent in applying a doctrine reflecting capitalistic distinctions between public and private activities. Thus, courts developed a distinction between public acts and private acts[20] to determine whether to

---

Lowenfeld, *supra* note 9, at 906-09. Furthermore, the Letter did not identify the party empowered to decide whether a particular act is *jure imperii* or *jure gestionis. Id.*

17. Recent Development, *Yessenin Volpin v. Novosti Press Agency and Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 5 BROOKLYN J. INT'L L. 191, 195 n.29 (1979). The process was described in Ex Parte Peru, 318 U.S. 578, 581 (1943). The foreign state raising the defense first brought its claim to the Department of State and requested that the Department advise the attorney general to grant immunity. The attorney general then had the option of instructing the United States Attorney General to file a suggestion in court. For a general discussion of the confusion during this time, see Legislative Note, *Jurisdiction Immunities of Foreign States*, 23 DE PAUL L. REV. 1225, 1226, 1232-34 (1974).

18. Indeed, the involvement of states in commercial and trade activities was an impetus for the shift from the absolute doctrine of sovereign immunity to the restrictive doctrine. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 36-37 (1978). One source has stated that when the Union of Soviet Socialist Republics became powerful, nations that had been reluctant to assert jurisdiction over an unwilling foreign state "tore aside the veil and saw beneath the garments of the sovereign a powerful economic competitor of national business firms, which should not be allowed to handicap private enterprise by the claim of sovereign prerogative." *Id.* at 37 n.17 (citing E. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS, 301-02 (1933)). Before the enactment of the Foreign Sovereign Immunities Act of 1976, a corporation owned by a foreign government was not entitled to the same immunity as was the sovereign. *See, e.g.*, United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Coale v. Société Co-operative Suisse des Charbons, 21 F.2d 180 (S.D.N.Y. 1921). For further discussion of the significance of trading and immunity, see Timberg, *Sovereign Immunity, State Trading, Socialisms and Self Deception*, 56 NW. U.L. REV. 109 (1961).

19. Hannes v. Kingdom of Roumanian Monopolies Institute, 260 A.D. 189, 198, 20 N.Y.S.2d 825, 834 *appeal denied*, 260 A.D. 1006, *order resettled*, 260 A.D. 1058, 26 N.Y.S.2d 856 (1940).

20. *See generally* Lowenfeld, *supra* note 9.

accord immunity to a foreign state's commercial activities. The nature of the governmental act involved, as opposed to its purpose, constituted the crux of a court's inquiry when confronted with a question of the immunity of a foreign sovereign. In *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*,[21] the court further delineated the notion of sovereign immunity and held that immune sovereign acts were those acts which could not be performed by an individual.[22] The court rejected the traditional "nature" of the act test used to determine whether a government entity's acts were commercial, and thus not immune, in favor of a specific enumeration of five functions which could be performed only by government entities and were thus granted immunity.[23] After a prolonged effort[24] to draft legislation to clarify and simplify the law of sovereign immunity, Congress enacted the Foreign Sovereign Immunities Act of 1976,[25]

---

21. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In *Victory Transport*, appellant, a branch of the Spanish Ministry of Commerce, chartered the *S.S. Hudson* from the appellees to transport a cargo of surplus wheat from Alabama to Spain under a contract that included a New York choice of forum clause. The court held that because the Comisaria General acted more like a private trader than a public trader, the appellant should be denied immunity.

22. The Second Circuit noted that the criterion involved in "nature" of the act test is "relatively easy to apply, [but] it ofttimes produces rather astonishing results, such as the holdings of some European courts that purchases of bullets or shoes for the Army, the erection of fortifications for defense, or the rental of a house for an embassy, are private acts." 336 F.2d at 359.

23. The court noted that acts are sovereign and thus immune if they are one of the following types of acts which cannot be performed by individuals:

(1) internal administrative acts, such as the expulsion of an alien;
(2) legislative acts, such as nationalization;
(3) acts concerning the armed forces;
(4) acts concerning diplomatic activity;
(5) public loans.

Id. at 360. Recently, a district court has said that the Act supersedes the five *Victory Transport* classifications. United Euram Corp. v. Union of Soviet Socialist Republics, 461 F. Supp. 609, 612 (S.D.N.Y. 1978). *But see* Gittler v. German Information Center, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978).

24. The Act was originally introduced by Senators Hruska and Scot on January 26, 1973, as S. 566, 93d Cong., 1st Sess., 119 CONG. REC. 2213-15 (1973). The original bills never became law, mainly because of problems relating to admiralty law. *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973). A new bill was introduced in December, 1975 in the House and in June, 1976 in the Senate. This new bill became the 1976 Act.

25. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90

which became effective on January 19, 1977.[26] The Act embodies the restrictive theory of sovereign immunity as expressed in the Tate Letter,[27] and shifts the onus of determining jurisdiction from the executive to the judiciary.[28] Under the Act, federal district courts now have original *in personam* jurisdiction[29] without regard to the amount in controversy[30] over claims involving possible questions of the immunity of foreign states.[31] While the *Victory Transport* court classified acts as public or private to determine whether an entity was immune,[32] the Act established a different procedure. First, the circumstances giving rise to a claim of sovereign immunity must involve the activity of a foreign sovereign, its agency or instrumentality.[33] Second, there must be a

---

Stat. 2891 (1979) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), and 1602-1611, *amending* 28 U.S.C. §§ 1332, 1391, 1441 (1976)). Constitutional authority for the enactment of this type of legislation derives from the legislature's power to describe the jurisdiction of the federal courts, U.S. Const. art. 1, § 8, cl. 9, art. III, § 1; to define offenses against the "law of Nations," *id.* art. I, § 8, cl. 10; to regulate commerce with foreign nations, *id.* art. I, § 8, cl. 3.; and "to make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested . . . in the government of the United States," including the judicial power of the United States over controversies "between a State, or the Citizens thereof, and foreign States. . . ." *Id.* art. I, § 8, cl. 18, art. III, § 2, cl. 1. H.R. REP., *supra* note 8, at 12.

26. On October 22, 1976, President Ford signed H.R. 11315, the Foreign Sovereign Immunities Act of 1976, into law.

27. H.R. REP., *supra* note 8, at 7-8. *But see* Delaume, *Sovereign Immunity in America: A Bicentennial Accomplishment*, 8 J. MAR. L. & COM. 349 (1977), in which the author notes that there may be some question as to whether the Act actually codifies the restrictive doctrine of sovereign immunity or whether it merely contains substantive rules that are to be defined and refined in subsequent judicial interpretations. *Id.* at 352.

28. H.R. REP., *supra* note 8, at 7.

29. The grant of jurisdiction is original, not exclusive. 28 U.S.C. § 1605(a) (1976). Section 1605(a) provides guidance as to when a court may exercise *in personam* jurisdiction. Section 1330(b) provides a federal long-arm statute for jurisdiction over foreign states. It is patterned after the District of Columbia long-arm statute enacted as Pub. L. No. 92-358, § 132(a), 84 Stat. 549 H.R. REP., *supra* note 8, at 13. There are many limits on this jurisdiction, such as the requirement of minimum contacts and adequate notice. *Id.* The underlying fear seems to be that our courts will turn into a "small 'international court of claims.'" *Id.* at 7.

30. H.R. REP., *supra* note 8, at 7.

31. See note 25 *supra* and accompanying text.

32. For a discussion of the differences between the *Victory Transport* classifications and the classifications in the Act, see von Mehren, *supra* note 18.

33. 28 U.S.C. §§ 1603(a)-(b) (1976). A foreign state includes a political subdi-

determination of whether or not a commercial act,[34] defined as using a "nature of the act" test,[35] has occurred. Finally, the sover-

---

vision of a foreign state. 28 U.S.C. § 1603(a) (1976). It also includes an "agency or instrumentality" of the foreign state that is (1) a "separate legal person, corporate or otherwise . . ." and is (2) an organ of a "foreign state or political subdivison thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision . . ." and (3) "is neither a citizen of a State of the United States as defined in section 1332(c) and (d). . . ." Neither the Act nor the legislative history defines the term "organ." Recent Development, *Foreign Sovereign Immunity—the Status of Legal Entities in Socialist Countries as Defendants Under the Foreign Sovereign Immunities Act of 1976*, 12 VAND. J. TRANSNAT'L L. 165 (1979). Since the Act extends immunity to state organizations that are not generally accorded immunity under international law, the Act may represent a retreat towards the absolute theory of sovereign immunity. Note, *Sovereign Immunity — Limits of Judicial Control — The Foreign Sovereign Immunities Act of 1976*, 18 HARV. J. INT'L L. 429, 437 n.28 (1977).

34. 28 U.S.C. § 1605(a) (1976). This is commonly referred to as the "commercial activities exception" to the Act. *See* notes 38-40 *supra* and accompanying text.

35. "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1976). The problem with this "definition" is, of course, that it is not really a definition at all. The framers of the Act recognized this when they said, "We realize that we probably could not draft legislation which would satisfactorily delineate that line of demarcation between commercial and governmental. We . . . leave it to the courts. . . ." *Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) [hereinafter cited as *Hearings on H.R. 11315*]. The lack of a firm definition of a "commercial activity" may pose special problems when dealing with many types of governments. Governments have different ways of handling internal affairs. In some countries, government departments conduct all of their business through their own offices. In others, the government sets up corporations to do business. "This difference in internal arrangements ought not affect the availability of immunity in international law." Trendtex Trading Co. v. Cent. Bank of Nigeria, [1977] 2 W.L.R. 356, *reprinted in* 16 INT'L LEGAL MATERIALS, 471, 483-84 (1977). This source notes, however, that "[i]t is no longer necessary or desirable that what are truly matters of trading rather than of sovereignty should be hedged about with special exoneration and fenced off from the processes of the law by the attribution of a perverse and inappropriate notion of sovereign dignity." *Id.* One author writing about the Act noted that the ambiguous nature test will have two important effects on socialist states: (1) socialist states and their state corporations cannot avoid jurisdiction under the guise of a "governmental purpose," and (2) difficulties inherent in looking to the motive and purpose of a foreign state can

eign, agency or instrumentality is not immune if the activity falls into one of the following six categories of Section 1605 of the Act:[36]

> Situtations where there have been
> (1) waivers of immunity;[37]
> (2) actions based on commercial activity carried on in the United States; actions performed in the United States in connection with a commercial activity of the foreign sovereign elsewhere; actions occurring outside of the United States having a direct effect in the United States;[38]

---

be avoided. Note, *"Commercial Activity" in the Foreign Sovereign Immunities Act of 1976*, 16 J. INT'L L. & ECON. 165, 167-68 (1979). Still, many sources have criticized the use of the nature of the act test to determine whether the commercial activities exception applies, claiming the test is unworkable. *See, e.g.*, Comment, *The Impact of S. 566 on the Law of Sovereign Immunity*, 6 LAW & POL'Y INT'L BUS. 179, 203 (1974). Certainly this test stands in stark contrast to the thirteen specific factors used by the European Convention on State Immunity and Additional Protocol, *done* May 16, 1972, *reprinted* in 11 INT'L LEGAL MATERIALS 470-89 (1972). For animated discussions of the relative merits and demerits of the nature test and purpose test, see United Euram Co. v. Union of Soviet Socialist Republics, 461 F. Supp. 609 (S.D.N.Y. 1978); Outboard Marine Co. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978); Carey v. Nat'l Oil Corp., 453 F. Supp. 697 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979); Yessenin Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978); Gittler v. German Information Center, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978); Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 236 (1979); Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. J. INT'L L. 429, 438 (1977).

36. 28 U.S.C. §§ 1603(a), (b) (1976).

37. Though this comment focuses on the commercial activities exception to the Act, it should be noted that the instant court devoted over half of its discussion to the question whether defendants waived any existing sovereign immunity.

38. 28 U.S.C. § 1605(a)(2), clause 3, is commonly referred to as the "direct effect" clause, and guarantees that there will be sufficient contacts if the United States decides to assert jurisdiction in these cases. Official commentary indicates that § 1605(a)(3) should be interpreted in light of RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18 (1974), which lists four examples of a direct effect:

> (1) the conduct and its effect are constituent elements of the activity to which the rule applies;
> (2) the effect within our territory is substantial;
> (3) the event is a direct and foreseeable result of the conduct outside the territory;
> (4) the rule is not inconsistent with "principles of justice generally recog-

(3) actions involving property taken in violation of international law;
(4) actions involving rights in property in the United States acquired by gift or succession;
(5) actions involving certain claims for money damages;
(6) actions involving certain maritime matters.

The list of non-immune transactions in section 1605 indicates "the necessary contacts which must exist before our courts can exercise personal jurisdiction."[39] Because Congress intended that the Act[40] codify the restrictive theory of sovereign immunity that had developed in the United States, the difference between the *Victory Transport* analysis and the procedures provided by the

---

nized by states that have reasonably developed legal systems."
H.R. REP., *supra* note 8, at 19.
The section-by-section analysis of the Act yields the following examples of a "direct effect": (1) the air or water pollution in the United States caused by a factory operated commercially by a foreign state on foreign soil; and (2) tidal wave damage in South America caused by Atomic Energy Commission underground nuclear tests. One court has tried to graphically define the term "direct effect," explaining that something has a direct effect if it "has no intervening element, but rather, flows in a straight line without deviation or interruption." Upton v. Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979). In Carey v. Nat'l Oil Co., 592 F.2d 673, 676-77 (2d Cir. 1979), an action for failure to deliver oil, the court used an "entering the marketplace" test to determine whether there was a direct effect. A small but growing body of precedent is quickly establishing a list of items that will not be viewed as the "direct effect" of acts on foreign soil. Negotiations, without more, are insufficient for an assertion of personal jurisdiction. E. Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 389 (S.D.N.Y. 1979); Textile Museum v. F. Eberstadt & Co., Inc., 440 F. Supp. 30 (D.D.C. 1977); Bueno v. La Compania Peruana de Radio-Difusion, 375 A.2d 6 (D.C. Ct. App. 1977). These case law interpretations of the "direct effect" clause are necessarily couched in terms of minimum contacts. The court must analyze whether the quality and nature of an activity's relations with a forum state indicate that the state has "projected itself" into the home state. 440 F. Supp. 30, 32 (D.D.C. 1977). Indirect injurious consequences within this country through an out-of-country act are not sufficient contacts to satisfy the "direct effect" provisions. Harris v. V.A.O. Intourist, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979). Using this analysis, injury to an American abroad is beyond the scope of the "direct effect" clause. 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979). Of course, "[e]ven if an act outside the United States causes a direct effect in the United States, that circumstance would not be sufficient to confer jurisdiction unless the plaintiffs' cause of action arises out of the effect." Kahale & Vega, *supra* note 35, at 248-49.

39. E. Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 387 (S.D.N.Y. 1979).

40. Note 25 *supra* and accompanying text.

Act is notable. Although the court in *Gitler v. German Information Center*[41] relied on the *Victory Transport* criteria as an aid in interpreting the newly passed Act,[42] other courts have subsequently held that the Act supersedes the *Victory Transport* classifications.[43] Although one purpose of the Act is to facilitate bringing suits against entities organized under the law of socialist[44] and non-capitalist[45] countries, several courts[46] have wrestled with the question of whether organizations established under those laws are immune, often simply trying to decide whether a case involves an "agency or instrumentality" of a foreign sovereign.[47] Courts have taken varying approaches in deciding whether

---

41. 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978).

42. *Id.* at 790, 408 N.Y.S.2d at 602.

43. United Euram Corp. v. Union of Soviet Socialist Republics, 461 F. Supp. 609, 612 (S.D.N.Y. 1978). *See also* von Mehren, *supra* note 18, at 48-54.

44. For the purposes of this comment, the term "socialist" is used with the same breadth as it is used in the case law. Legal opinions rarely quibble over fine distinctions in political terminology, and the result may be an overly broad usage of the term "socialist" which is justified only by the need for the expedience of general terminology. The term "socialist" also troubled the framers of the Act. One authority noted, "Congress may not have intended to include every single entity of a socialist country within the definition. On the other hand, it seems clear that the application of the definition was intended to be almost mechanical, obviating any intricate functional analysis which could give rise to factual disputes and uncertainities regarding . . . the law." Kahale & Vega, *supra* note 35, at 221, 228. For further discussion of whether the actions of an entity organized under a socialist government fall within the parameters of 28 U.S.C. § 1603(a)-(b), see Yessenin Volpin v. Novosit Press Agency, 443 F. Supp. 849, 852 (S.D.N.Y. 1978); H.R. REP., *supra* note 8, at 7; Kahale & Vega, *supra* note 35, at 226-29; Timberg, *supra* note 18, at 111; Note, *supra* note 33, at 438; Recent Development, *supra* note 17, at 199-200.

45. The term "non-capitalist" is used in conjunction with "socialist" to indicate that the definitional problems with regard to the agency/instrumentality distinction and the commercial exception test are manifest when dealing with both "socialist" governments and with governments that are not organized similarly to that of the United States. The Chinese economic system has many of the traditional indicia of a socialist system, including a high amount of planning from the Planning Commission of the State Council. Note, *Legal Aspects of China's Foreign Trade Practices and Procedures*, 12 J. INT'L L. & ECON. 105, 108 (1977). The framers were aware that the Act would make it easier for United States citizens to sue state trade companies. Hearings on H.R. 11315, *supra* note 35, at 56.

46. *See, e.g.*, Yessenin Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978); Edlow Int'l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 887 (D.D.C. 1977).

47. The problem presented is that the entities organized under socialist or

state-owned entities constitute agencies or instrumentalities for the purpose of the Act. On the one hand, the decision of the Court for the Southern District of New York in *Yessenin Volpin v. Novosti Press Agency*[48] analyzed the status of a state-owned organization in terms of the system of property ownership in the Union of Soviet Socialist Republics.[49] On the other hand, in *Edlow Int'l Co. v. Nulkearna Eldtrarna Krsko*[50] the court considered both the system of property ownership and the extent to which the foreign government controlled the company's operations,[51] and held that the development and distribution of electrical power in Yugoslavia was not a governmental function. Confronted with a similar question involving a state-owned travel company, the District Court for the Eastern District of New York in *Harris v. V.A.O. Tinnourist*[52] used the *Yessenin* ownership-oriented analysis[53] combined with a structural analysis of the Russian government[54] and its various agencies. The New York Supreme Court, when confronted with a claim against the German Information Center,[55] a section of the Consulate General of the Federal Republic of Germany, focused on whether the activity involved was a "uniquely governmental" function and thus entitled to immunity.[56] Prior to the instant decision, the courts had had neither the opportunity to decide an "agency or instrumentality" question under the Act in a claim against the People's Republic of China nor the time to develop a consensus as to the basic analysis to be applied in deciding whether an entity was an agency or

---

non-capitalist systems may not be suited for analysis under the "agency or instrumentality" framework. Yessenin Volpin v. Novosit Press Agency, 443 F. Supp. 849, 852 (S.D.N.Y. 1978).

48. 443 F. Supp. 849 (S.D.N.Y. 1978).

49. *Id.* at 852-54.

50. 441 F. Supp. 27 (D.D.C. 1977).

51. *Id.* at 832.

52. 481 F. Supp. 1056 (E.D.N.Y. 1979).

53. *Id.*

54. *Id.* at 1057-58.

55. Gittler v. German Information Center, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978). In October 1976 the court decided to withhold judgment on plaintiff's motion to dismiss pending advice from the Department of State as to whether sovereign immunity would be granted to the defendants. The Foreign Sovereign Immunities Act became effective before the Department of State offered its opinion. The court chose to consider the opinion "as something akin to expert testimony. . . ." *Id.* at 789, 408 N.Y.S.2d at 601.

56. *Id.* at 790, 408 N.Y.S.2d at 602.

instrumentality.

III. THE INSTANT OPINION

Rather than apply an identifiable analysis to determine COSCO's status as an agency or instrumentality, the instant court simply noted that it "seemed clear" that COSCO was an agency or instrumentality of the PRC[57] and thus immune. There was no indication that any party presented information concerning the Chinese Communications Ministry under which COSCO is organized, the economic ownership of COSCO, or any aspect of the complex Chinese governmental structure.[58] Similarly, there was no indication that the court considered any of these governmental and economic variables when determining whether COSCO could be accorded agency or instrumentality status. The court refrained from drawing parallels between its analysis of COSCO's status and its treatment of Novosti Press Agency's status in *Yessenin-Volpin*.[59] The court noted that only two of the exceptions to the general rule of immunity could "conceivably" be applied to COSCO's activities.[60] First, the court considered the commercial activities exception, finding that "plaintiffs point to no direct effect on the United States caused by the events surrounding these lawsuits and the court concludes that there were no such effects."[61] Second, the court decided that defendants had not waived their immunity even though they had taken the following steps: filing an "Application for Certificate of Financial Responsibility," selecting an agent for service of process,[62] and accepting a

57. Paterson, Zachonis (U.K.) Ltd. v. Compania United Arrow, S.A. 493 F. Supp. 621, 623 (S.D.N.Y. 1980). The court noted that plaintiffs never disputed this point. *Id.*

58. For a further discussion of the interrelationships between the various ministries of the Chinese government, see KAPLAN, ENCYCLOPEDIA OF CHINA TODAY 61-66 (1979).

59. *See* text accompanying notes 49 & 50 *supra.*

60. 593 F. Supp. at 623.

61. *Id.* The parties apparently agreed that COSCO's United States activities were limited at the time, though other PRC activities may have been more widespread. *Id.* at n.4. It is odd that COSCO is sufficiently linked to the PRC to be viewed as an agency or instrumentality of the PRC, but that the court does not consider the contacts to be interchangeable. For further discussion on this point see 481 F. Supp. at 1056.

62. 493 F. Supp. at 624. The Federal Water Pollution Control Act of 1948, § 311¶, 33 U.S.C. § 1321¶, *as amended by* the Clean Water Act of 1977, Pub. L. No. 95-217, §§ 57, 58(a)-(g), (i), (k)-(m), 91 Stat. 1593-96 (1977), and the imple-

bill of lading with a New York choice-of-forum clause.[63] Since it viewed COSCO as an agency or instrumentality of a foreign state that was not subject to either the commercial or waiver exception to the Act, the court denied plaintiffs' motion for a default judgment.[64]

IV. COMMENT

The instant case is the first case dealing with the application of the Act to the shipping activities of a PRC-owned agency. The sudden transformation of Sino-American relationships mandates that the precedential value of this decision be carefully scrutinized because recent events imply that China may soon interact with the United States in myriad international ventures.[65] Any encouragement or understanding of such interactions depends on a recognition of China's long-standing fear of Western interference[66] and the strong sense of sovereignty reflected in all epochs

---

menting Federal Maritime Commission regulations, 46 C.F.R. § 542.15(a) (1980), require this selection.

63. *See* note 2 *supra* and accompanying text. The court, however, explained that the choice of forum clause would have constituted a waiver of immunity in a Sea Queen/COSCO controversy. At the time of the instant litigation, Sea Queen had already defaulted. 493 F. Supp. at 624.

64. The court's reasoning here is unclear. The court refers to COSCO's "technical" default without full explanation of the ramifications of this reference. *Id.* at 624.

65. The United States relations with the PRC have come a long way from the point in December, 1969 when Mao Tse Tung told Edgar Snow that Richard Nixon was welcome to visit the PRC. The "Shanghai Communique" of February 28, 1972, a joint Sino-American statement, indicated that the United States would eventually withdraw its military forces from Taiwan. In 1973 the United States and the PRC established liaison offices in each nation. On December 15, 1978, President Carter and Chairman Hua Kuo-feng announced that the United States and the PRC would establish full diplomatic relations on January 1, 1979. KAPLAN, ENCYCLOPEDIA OF CHINA TODAY 61-66 (1979). China has recently received most-favoured nation status. 126 CONG. REC. 5348-51 (daily ed. Jan. 24, 1980). The Law of the PRC on Joint Ventures Using Chinese and Foreign Investment is viewed as a harbinger of greatly expanded trade with the PRC. Law of July 8, 1979, adopted by the 5th National People's Congress, 2d Sess., July 1, 1979 effective July 8, 1979, as discussed in Note, *Joint Ventures and the PRC*, 14 J. INT'L L. & ECON. 133 (1979).

66. Many sources indicate that China's fear of Western interference with its trading activities stems from the "Unequal Treaties," which opened five Chinese ports to British vessels in 1842. *See also* note 73 *infra*.

of Chinese history.[67] Indeed, COSCO's claim of immunity in the

67. China's veritable isolation has bred a strange type of sovereignty, nurtured both by a feeling that the Chinese civilization was the parent of all other civilizations and by a fear of the foreign invasions that caused so many dynastic downfalls: the invasions of the Khitans, the Jurchen, the Mongols, and the Manchus, which occurred between the tenth and seventeenth centuries. J. FAIRBANK, E.O. REISCHAUER & A. CRAIG, EAST ASIA (1973). Before the fifth century, the northern Chinese states began erecting walls that were later joined to form the Great Wall of China. *Id.* at 38. The Great Wall was designed to be a permanent barrier separating the agricultural Chinese from the nomadic barbarians. *Id.* at 57. This feeling of superiority was well justified. As one source explained, "From any point of view, it is plain that China under the T'ang and Sung and right down to Marco Polo's day was a far greater civilization in both size and accomplishment than its contemporary, medieval Europe," because of the great Chinese inventions and the fact that ideas tended to flow from China to Europe. *Id.* at 243. As a result, during the Ming dynasty (1368-1662), China began to view its foreign relations in terms of a "suzerain-vassal" relationship. The Chinese often required that foreign traders perform the kowtow as an indication of their inferiority in the face of their Chinese hosts. *Id.* at 252-53. One of the aims of the Nationalist Revolution was to eliminate foreign privileges and influence that had developed under the "Unequal Treaties" that the British had forced the Chinese to sign. *Id.* at 774. Sovereignty received much attention when the Agreement between China and India on Trade and Intercourse between the Tibetan Region of China and India was announced recently. 57 U.N.T.S. 299 (1958). This agreement discussed the "Five Principles": (1) mutual respect for each other's territorial integrity and sovereignty; (2) mutual non-agression; (3) mutual non-interference in international affairs; (4) equality and mutual benefit; (5) peaceful coexistence. One Chinese source has referred to sovereignty as "one of the most important principles in international relations and in the whole system of international law." CONCEPT AND PRACTICE OF INTERNATIONAL LAW IN CHINA: A HANDBOOK 393, 399-400 n.24 (Yuan-li Wu ed. 1973), *citing to* Yang Itsin and Ch'en Chien, *Expose and Censure the Imperialist's Fallacy Concerning the Question of State Sovereignty, reprinted from* 4 STUD. IN POL'Y SCI. & L. 6 (1964). One of the few Chinese references indicating the manner in which the Chinese might view the instant case suggests that the Chinese could take nearly any position on the question of COSCO's immunity:

> As to maritime matters and the bill of lading, we do not recognize the rules, so legally we are not bound by the rules. China Ocean Shipping Company has its own bill of lading. But the terms and conditions laid down in that bill of lading refer to those applicable in international matters. As to the conference which adopted the rules, we did not participate, but politically we support that conference. Whether to adhere to it is under study.

Speech by Jen Tsien-Hsin, Director of the Legal Department of the China Council for Promotion of International Trade and Secretary-General of the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission, *reprinted in* 65 A.B.A.J. 1063-64 (1979).

instant case is consistent with the PRC's practice of automatically claiming immunity in foreign suits.[68] The increase in the number and power of foreign state owned trading organizations[69] suggests that the issues raised in this suit, because of defendant's status as a state-owned shipping organization, may reappear frequently in future cases. By departing from the two basic approaches to the treatment of entities organized within socialist state structures, provided by the leading cases[70] in the area, the court increased the potential import of this decision. While the instant court's decision is justifiable under case law, and acceptable in light of the argument or lack thereof presented by the parties, the court's reasoning is blurred and simplistic[71] when compared to the sophisticated, detailed social and economic analysis of the agency/instrumentality dichotomy employed by the *Yessenin* and *Edlow* courts. This is particularly distressing because the Act does not define the terms "agency" and "instrumentality" or the criteria by which to distinguish them. The court's treatment of the contacts issue is also disturbing. Instead of giving full consideration to the question of whether the parties had sufficient contacts with the United States to cause a "direct effect" within the country, the court simply explained that since the plaintiffs did not point to any direct effects, the court would not find such effects.[72] At least one court has emphasized that the defendant's previous contacts with the United States provide the requisite contacts for due process.[73] The contacts issue in the instant case might have

---

68. The Soviet Union and the PRC traditionally claim immunity for their trading activities. Triggs, *Restrictive Sovereign Immunity: The State as International Trader*, 53 AUSTL. L. J. 244 (1979). Whether the Chinese will attempt to claim immunity for shipping organizations such as COSCO is not certain, but there is reason to believe that they will make efforts to receive grants of immunity whenever possible.

69. Even the United States uses state trading agencies, such as the General Service Administration, the Commercial Credit Co. of the Department of Agriculture, and the United States military posts abroad. Timberg, *supra* note 18, at 110-11.

70. *See* notes 50-51 *supra* and accompanying text.

71. *See* notes 50-60 *supra* and accompanying text.

72. Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A., 493 F. Supp. at 623. Apparently, plaintiffs made some general arguments about the extent of defendant's contacts with the jurisdiction but the court, without explaining the nature of the plaintiffs' arguments, dismissed the arguments on the basis of Harris v. V.A.O. Intourist, 481 F. Supp. 1056 (E.D.N.Y. 1979).

73. E. Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 388

been analyzed by the same method as was the decision in *Harris v. V.A.O. Intourist*,[74] in which that court found that contractual or tortious actions arising from the "commercial" activities of a foreign state-owned entity may be reached using the long-arm "direct effect" provision in section 1605. The contact element of the instant claim is also significant because the growing interdependence of the world's economies indicates that most international transactions will have some type of direct effect in the United States.[75] The instant decision does nothing to further define the degree of contact required before a foreign state-owned entity's actions will fall within section 1605's direct effect provisions. Because the commercial activities exception may be defined both in terms of the direct effect provisions of section 1605 and in terms of the jurisdiction provisions[76] of section 1330, the precedential value of this case is uncertain. This opinion may have been shaped by the paucity of arguments presented by the various parties.[77] Certainly, the court cannot be faulted for abstaining from producing dicta on arguments unaddressed by the parties. Perhaps the court simply refused to extend the long-arm provisions of the Act to cover a case in which neither party was a United States citizen and the jurisdiction-giving powers of a New York choice of forum clause were obviated by confusion over which defendant possessed which bill of lading at which time. The ambiguities surrounding the true basis for the instant decision suggest that future decisions involving potential agencies or instrumentalities of the PRC may be based on the ownership analysis in *Yessenin*, the control analysis in *Edlow*, the structural analysis in *Harris*, the traditional governmental function analysis in *Gittler*, or some totally new type of analysis.

Shari D. Olenick

(S.D.N.Y. 1979).

74. Harris v. V.A.O. Intourist, 480 F. Supp. 1056, 1064 (E.D.N.Y. 1979). In *Harris*, a United States citizen was killed as a result of a hotel fire in Moscow. The court discussed the manner in which the Russian travel company involved in the booking, the Russian hotel, the Russian government, and the United States booking agent representative of the Russian government interacted.

75. Kahale & Vega, *supra* note 35, at 247.

76. *See* note 29 *supra*.

77. *See generally* Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A., 493 F. Supp. 621 (S.D.N.Y. 1980).

STATE CORPORATE INCOME TAX—FOREIGN SOURCE DIVIDENDS INCLUDED IN STATE TAXATION BASE UNDER UNITARY BUSINESS ENTERPRISE TEST

I. FACTS AND HOLDING

Appellant Mobil Oil Company (Mobil), a New York corporation[1] authorized to do business in Vermont, sought a reversal of the decision of the Vermont Commissioner of Taxes to include foreign source dividends in Mobil's preapportionment tax base. Vermont imposes an annual net income tax on corporations doing business in the state and employs an apportionment scheme[2] under which the corporation's aggregate net income for the year is multiplied by the arithmetic average of the ratio of the corporation's in-state sales, payroll, and in-state property holdings as compared to those figures for the corporation as a whole. Appellant's net income for the years in question included substantial dividends from its foreign subsidiaries and affiliates,[3] but Mobil considered these foreign source dividends nonapportionable and did not include them as income on its Vermont tax returns. The Vermont Department of Taxes recalculated Mobil's taxes after adding the foreign source dividends to Mobil's preapportionment tax base and assessed deficiencies plus interest. Appellant challenged the deficiencies before the Commissioner of Taxes, alleging violations of the due process clause of the fourteenth amendment and the interstate and foreign commerce clause. The Commissioner rejected Mobil's arguments.[4] The Superior Court of Wash-

---

1. Mobil is engaged internationally in all phases of the petroleum industry, from initial exploration to final production and sale, as well as in related chemical and mining enterprises. Mobil's sole activities in Vermont, however, are confined to the wholesale and retail marketing of petroleum and related products.

2. VT. STAT. ANN. tit. 32, § 5833(a) (1970 & Supp. 1978) sets out the apportionment scheme.

3. Mobil conducts much of its international business through wholly and partially owned subsidiaries and other affiliates. Many are foreign corporations though some are incorporated domestically. None, however, either are incorporated in or do any business in Vermont.

4. The Commissioner relied on F.W. Woolworth Co. v. Comm'r of Taxes, 130 Vt. 544, 298 A.2d 839 (1972), and Gulf Oil Corp. v. Morrison, 120 Vt. 324, 141 A.2d 671 (1958). *See* Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 428, 433 n.9 (1980).

ington County reversed on appeal and held that the inclusion of foreign source dividend income in appellant's preapportionment tax base presaged potential multiple taxation[5] and thus was unconstitutional. The Commissioner appealed to the Supreme Court of Vermont, which reversed the Superior Court, holding that Mobil had not established that multiple taxation would actually ensue[6] and that there was a sufficient "nexus" between Mobil and Vermont to allow Vermont to levy an apportioned tax on the corporation's investment income as well as on its operating income.[7] On appeal to the United States Supreme Court, *affirmed. Held:* When a corporation receives foreign source dividend income and the business activities of the payor are part of the unitary business enterprise of the recipient in the taxing state, such dividend income is subject to state taxation. *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425 (1980).

II. LEGAL BACKGROUND

A. *State Taxation and the Commerce Clause*

The United States Supreme Court faced the question of whether a state could levy a tax on profits of a foreign corporation earned in interstate commerce as early as 1918. In *United States Glue Co. v. Town of Oak Creek,*[8] the Court held that although the commerce clause prohibits a state from burdening interstate commerce with direct taxation, a tax on the net income or profits from such commerce was not prohibited.[9] The Supreme Court extended this analysis in *Underwood Typewriter Co. v. Chamberlain*[10] by holding that an apportionment system set up to tax a foreign corporation's net income from interstate activities, even if

5. The Superior Court reasoned that New York, as Mobil's state of domicile, could tax the corporation without apportionment and that therefore any inclusion of foreign source dividend by the Commissioner would subject Mobil to multiple taxation even under the apportionment scheme. *See* 445 U.S. at 433.

6. New York had not taxed the foreign source dividend income for the years in question. The Supreme Court questioned whether a state could legally tax foreign source dividend income without apportionment.

7. 136 Vt. 545, 394 A.2d 1147 (1978).

8. 246 U.S. 321 (1918).

9. *Id.* at 326. The Court differentiated between a tax on gross receipts regardless of profit and a tax on net income. The former was viewed as prohibiting interstate commerce, while the latter was viewed as being merely incidental to actual profit. *Id.* at 328-29.

10. 254 U.S. 113 (1920).

not exact, would not be found in violation of the commerce clause if rationally intended to reach those profits resulting from activities occurring within the taxing state.[11] The Court extended the reach of the state taxing power in *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*[12] by concluding that a New York tax on the profits of a British corporation that manufactured ale in Great Britain and made sales through branch offices in the United States did not constitute a violation of the commerce clause.[13] The Court's reasoning was based on its characterization of the corporation as a unitary business of manufacturing and sales that yielded unitary profits inseparable from its business activities in the United States.[14] The taxation of unitary business enterprises was further developed by the Supreme Court in *Butler Brothers v. McColgan.*[15] Butler Brothers was a clothing chain with autonomous branches in seven states linked by a central purchasing division and central corporate headquarters. The Court noted that the key elements of a unitary business were unity of ownership, unity of use, and unity of management and held that in view of the centralized nature of Butler Brothers' activities the taxing state could levy an apportioned tax on the total net income of the unitary enterprise.[16] The limits of the state taxing power under the commerce clause were later delineated by the Court in *Norton Co. v. Department of Revenue,*[17] in which it held that a foreign corporation doing business within the taxing state could escape an apportioned tax only if it could prove that the particular transactions were wholly interstate in nature

11. *Id.* at 121. *See also* Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942).

12. 266 U.S. 271 (1924).

13. *Id.* at 280.

14. *Id.* at 280-83. New York's tax was denoted an "apportioned franchise tax," *i.e.,* a tax on the privilege of doing business rather than on the income from the business, but this distinction does not alter the real import of the decision since the Court specifically cited *Underwood Typewriter* as controlling. *Id.*

15. 315 U.S. 501 (1942). One of the branches was located in California, the taxing state.

16. *Id.* at 705. The corporation argued that its accounting records showed the California branch operating at a loss and that the California tax would be entirely on profits earned out of state. The Court reasoned, however, that the California branch obviously contributed some funds to the unitary enterprise and that an apportioned state tax was the only fair way to tax those contributions. *Id.* at 704-05.

17. 340 U.S. 534 (1951).

and had no association with the local business.[18] The Court further intimated that the only such exempt transactions were mail orders sent directly from the customer to the out-of-state corporation in situations where the order was filled out of state and sent directly back to the customer.[19]

B. *State Taxation and the Due Process Clause*

The due process clause of the fourteenth amendment places on the state taxing power the fundamental requirement that "the taxing power exerted by the state bears fiscal relation to protection, opportunities, and benefits given by the state. The simple and controlling question is whether the state has given anything for which it can ask return."[20] The United States Supreme Court further refined the theory that a state could apportionately tax profits in return for the services it provided by holding in *Portland Cement Co. v. Minnesota*[21] that the due process clause requires a "sufficient nexus" of local activities within the state to support the tax.[22] The Court reasoned that such an apportioned tax was a constitutionally valid way of making interstate commerce pay its own way.[23] The Court eventually broadened its definition so that by 1977 the mere presence of transport trucks crossing state lines to deliver automobiles to dealerships within the taxing state was a "sufficient nexus" to allow taxation of the foreign transport corporation.[24]

III. THE INSTANT OPINION

In the instant case, the Court first recognized the established rule that corporate income generated in interstate commerce is

---

18. *Id.* at 537.

19. *Id.* at 539. The Court looked to Norton Co.'s marketing methods. If Norton Co. had sent in solicitors, the Court stated, it would have been immune from taxation. Instead Norton Co. undertook the burden of proving that the local branches were not the decisive factors in the sales. Norton Co. failed to meet this burden. *Id.* at 538.

20. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

21. 358 U.S. 450 (1959).

22. *Id.* at 464. This seems to be a minimal test for the Court since Northwestern's only contact with the taxing state was the leasing of a small office for its salesmen. The Court found such contact sufficient to meet the test.

23. *Id.* at 464.

24. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

subject to fairly apportioned state taxation.[25] The Court noted that the due process clause of the fourteenth amendment required some "nexus" between the business activities taxed and the taxing state, but explained that the "nexus" requirement is satisfied if the entity merely conducts business within the state.[26] The Court further noted that the nexus was not destroyed simply because the events taxed occurred outside the taxing state.[27] In response to appellant's due process argument that its foreign source dividend income lacked the requisite connection to its business activities in Vermont, the Court held that neither the source nor the form of the dividend income would exempt it from apportioned state taxation.[28] The Court held that the functionally integrated nature of the business entity was the controlling factor in a decision to assess state income tax;[29] if the activity generating the income in question was part of a functionally integrated, unitary business enterprise, it was subject to apportioned state taxation.[30] The Court stated that appellant would have to show that the income was completely unrelated to its business activities in Vermont in order to escape taxation.[31]

The Court next answered Mobil's argument that Vermont's tax on its foreign source dividends was a burden on interstate and foreign commerce because it presented a substantial risk of multiple taxation. In response to appellant's argument that any apportioned tax on its dividend income would burden interstate commerce since New York could, theoretically, tax the income without apportionment, the Court noted that New York did not presently tax such income.[32] In view of the absence of a duplica-

---

25. Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 437 (1980).
26. *Id.*
27. *Id.*
28. *Id.* at 440-41.
29. *Id.*
30. *Id.*
31. *Id.* at 440. The Court stated:

> We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business.

Id. at 441-42.

32. *Id.* at 444. To support its argument that New York could tax the dividends without apportionment, Mobil cited several cases holding that intangible

tive tax, the Court felt that, instead of seeking relief from a present burden of multiple taxation, appellant was asking the Court to rule that the commerce clause requires dividend income to be allocated to the state of commercial domicile rather than apportioned among the states.[33] Although the Court recognized the appropriateness of allocating the situs of intangible property to a single state for purposes of ownership, it saw no justification for such fictionalized allocation when taxing the income from such property.[34] The Court felt that no state should have the exclusive power to tax dividend income which in fact reflected income from a unitary business operating in several states.[35] The Court reasoned that since the income resulted from the benefits and privileges conferred by different states, each of the states should be able to tax a proportionate share of the dividends.[36] Appellant countered by arguing that dividends from foreign subsidiaries and affiliates should be allocated to the state of commercial domicile even if dividends from domestic subsidiaries and affiliates are not, since the burden of multiple taxation at home resulting from the inaccuracies and duplication inherent to apportionment would be compounded by taxation abroad.[37] The Court rejected this because the logical extension of the argument would cover all income rather than just dividend income;[38] the Court felt that any dangers of unjust taxation were mitigated by the fact that it could always alleviate excessive tax burdens on a case-by-case basis.[39]

Justice Stevens' dissent criticized the majority for misdefining "unitary business" to include both operating and investment income, or if the Court's definition of "unitary business" was cor-

---

property was to be taxed either by the state of commercial domicile or by the "business situs" state of the property. *Id.*

33. *Id.*

34. *Id.* at 445. The Court supported its decision by citing cases allowing apportionment in situations involving property and franchise taxes and distinguishing allocation to a situs state for ownership purposes from taxation of income from the property. *Id.*

35. *Id.* at 446.

36. *Id.*

37. *Id.*

38. 445 U.S. at 447. The Court noted that a similar argument could be made about any arguably foreign income and that the burden on state taxing authorities to discern what income actually had a foreign source would be too great. *Id.*

39. *Id.*

rect, for allowing Vermont to apply its apportionment scheme in an arbitrary manner.[40] Justice Stevens suggested that "unitary business" could be defined to include only operating income; operating income plus investment income regardless of the type of business of the dividend payor or the extent of Mobil's interest therein; or operating income plus investment income from those entities engaged in a business similar to Mobil's.[41] Justice Stevens found the first definition wholly acceptable.[42] He also found the second definition, as encompassed in Vermont's taxation scheme, acceptable if the amount of the investment income was moderate. He stated, however, that

> [c]learly, it is improper simply to lump huge quantities of investment income that have no special connection with the taxpayer's operations in the taxing state into the tax base and to apportion it on the basis of factors that are used to allocate operating income.[43]

Although he found the third definition, relied upon by the majority, theoretically acceptable, Justice Stevens criticized its *application* to Mobil's situation on three grounds. First, many of Mobil's affiliates were neither engaged in the petroleum business nor had any connection with Mobil.[44] Second, even though the Court was assuming that the affiliates were mere operating divisions of Mobil organized in a legally distinguishable form, the Court did not attempt to support the theory with a correlation between the earnings of the affiliates and the dividends they paid.[45] Finally, Justice Stevens argued that the third definition was arbitrarily applied since Vermont added only the income and not the respective sales, payroll, and property values into its apportionment computations, thus overstating Vermont's share of Mobil's income tenfold.[46] Justice Stevens concluded that Vermont must either accept the first definition of "unitary business" or apply the third definition fairly by constructing a consolidated income statement of Mobil's entire business activities showing consolidated earnings and taking into account the dividend payor's sales

---

40. *Id.* at 450.
41. *Id.* at 455-56.
42. *Id.* at 457.
43. *Id.* at 459.
44. *Id.* at 460.
45. *Id.*
46. *Id.* at 460-61. Justice Stevens supplied figures showing that such a methodology artificially increased Vermont's share tenfold. *Id.*

payroll, and property values.[47]

IV. COMMENT

The substantive holding of the instant case was narrowly restricted by design, and at first blush seems to be of little import. A close reading of the case, however, reveals that the Supreme Court may have expanded the states' power to tax the net income of foreign corporations. The logical result which flows from the Court's reasoning is that the operating income of a unitary business enterprise includes income from pure investments. The instant case provided the Court with the opportunity to further delineate and reinforce the sufficient nexus requirement of the due process clause. Instead, the majority rendered a decision that may remove the sufficient nexus test from foreign source dividend income cases. The core reasoning behind state taxation of a foreign corporation is that the state should be able to exact a tax on corporate income produced under protections and privileges provided by the state. If taxable income is defined as income from operations, and if the foreign corporation has sufficient contacts with the state, such reasoning remains sound. By defining operating income to include pure investment income, however, the Court has shifted its inquiries to the nexus of the recipient corporation with the taxing state instead of the nexus relationship of the income producer. As the dissent points out, many of the foreign affiliates here involved in *Mobil* had no nexus whatsoever with Vermont,[48] and yet the Court allows a tax to be levied upon the portion of the foreign affiliate's income paid to Mobil as an investment dividend. None of the income was produced under any protection or privilege provided by Vermont nor could any of Mobil's investment income be said to have been produced under such protections or privileges. The Court fails to indicate how a state can tax the proceeds of a business, *i.e.*, the foreign source, when it provides no benefits to the production of that revenue. The Court holds that a state's ability to tax depends upon whether the activity in question is part of a unitary business, but the only such activities involved in the instant case were the foreign affiliate's activities producing the income and Mobil's activities making the investment and receiving the proceeds. Clearly,

47. *Id.* at 461.
48. *Id. But see id.* at 442 n.16.

none of these activities had any connection with Vermont or, more importantly, with the protections or privileges provided by that state. In characterizing investment income as income from operations, the majority overlooks the very basis of the sufficient nexus requirement: that the taxing state made available some benefit or privilege which facilitated production of the income to be taxed. Justice Stevens underlines these problems in his dissent when he notes that the Court missed the opportunity to redefine a unitary business enterprise in such a way as to avoid these problems and maintain the integrity of the due process clause requirement.[49] The Court's decision reduces the sufficient nexus requirement to the point that a recipient corporation of foreign source investment income will have that income subjected to apportioned state taxation if the recipient has even the most minimal connection with the taxing state, regardless of its form or nature.[50]

Stephen B. Hatcher

49. *Id.* at 454-61.

50. The only way to avoid this result is to fall back upon the Court's assertion that Mobil simply failed to meet the burden of proving the lack of any unitary enterprise. Yet, since the majority failed to provide any standards for that burden, the option of meeting it rings hollow in the face of the Court's decision on the facts here involved. *But see* note 31 *supra.*

TRADE REGULATION—USE OF REGISTERED MAIL BY FEDERAL TRADE COMMISSION TO SUBPOENA FOREIGN CITIZENS ABROAD VIOLATES INTERNATIONAL LAW

I. FACTS AND HOLDING

Plaintiff, Federal Trade Commission (FTC),[1] sought to force defendant foreign holding company[2] to comply with an FTC subpoena[3] served on defendant's Paris headquarters by registered mail. The FTC petitioned the district court for an enforcement order pursuant to section 9 of the Federal Trade Commission Act[4] (FTCA) when defendant refused to comply with four sub-

---

1. Congress created the Federal Trade Commission (FTC) in 1914 and charged it with the responsibility of insuring that the market place is not distorted by anti-competitive practices or by practices that are unfair or deceptive. Federal Trade Commission Act of 1914, ch. 331, 38 Stat. 717 (1914) (codified in U.S.C. §§ 41-77 (1976) [hereinafter cited as FTCA]. Section 45(a)(2) provides: "The Commission is empowered and directed to prevent persons, partnerships, or corporations, . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in commerce."

2. The defendant, Compagnie de Saint-Gobain-Pont-a-Mousson (SGPM), is a French holding company headquartered in Paris. SGPM has a general delegate based in New York City. Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1304 (D.C. Cir. 1980).

3. In 1977 the FTC began a nonpublic antitrust investigation of the United States fiberglass insulation industry to determine whether fiberglass manufacturers and distributers had engaged in acts or practices in violation of the FTCA. The FTC served the subpoena at issue during this investigation. Specifically, the FTC has sought

> [t]o determine whether Owens-Corning Fiberglass Corporation, Certainteed Corporation [SGPM's United States subsidiary], Johns-Manville Corporation, Compagnie de Saint-Gobain-Pont-a-Mousson, or others engaged directly or indirectly in the manufacture, distribution or sale of insulation are engaging or have engaged in acts or practices which may have restricted competition in the manufacture, distribution or sale of insulation . . . .

636 F.2d at 1304 n.5.

4. 15 U.S.C. § 49 (1976). Section 9 of the FTCA authorizes the Commission:

> to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation. . . . [T]he production of such documentary evidence, may be required *from any place in the United States,* at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring . . . the production of documentary evidence.

poenas duces tecum issued by the FTC.[5] Defendant asserted that it should be excused from compliance because of the unauthorized[6] methods of service used by the FTC. The district court rejected this argument and issued an enforcement order. On appeal, the District of Columbia Circuit ruled that three of the service techniques were improper[7] and remanded[8] the case to the district court for a determination of the propriety of service abroad by registered mail. Despite the French government's protestation that service of a subpoena in this manner infringed on French sovereignty,[9] the district court issued a second order after it con-

---

(Emphasis added.)

5. The subpoenas were identical, but were served in different ways: (1) by registered mail to SGPM's Paris headquarters; (2) hand delivered to the New York office of SGPM's general United States delegate; (3) delivered to the New York City residence of the daughter of SGPM's general delegate; and (4) served upon the Washington, D.C. attorney representing SGPM in a related proceeding. 636 F.2d at 1304-05.

6. For reasons that remain unclear, the defendant conceded the FTC's power to issue an investigatory subpoena directed at obtaining the particular documents sought in this investigation and acknowledged sufficient contacts with the United States to subject it to the agency's personal jurisdiction. SGPM insisted, however, that service of any subpoena directed at documents abroad could lawfully be made only in the United States. *Id.* at 1321 n.119; *see* note 28 *infra.*

7. The court questioned the validity of service by registered mail to SGPM's Paris headquarters, but found that the three latter methods of service were invalid. *See* note 5 *supra*; Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, No. 78-2160, at 2 n.2 (D.C. Cir. Nov. 26, 1979) (per curiam).

8. The circuit court instructed the district court to carefully examine the validity *vel non* of the subpoena service via registered mail to defendant's Paris headquarters, "to construe the relevant authorizing statutes to determine the underlying congressional intent," and to make certain that its construction of the relevant statutes conformed to the principles of jurisdiction in international law. Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, No. 78-2160, at 2 (D.C. Cir. Nov. 26, 1979) (per curiam).

9. Following argument on remand, the French Embassy sent a note to the State Department. The relevant text of the French note reads as follows:

> The Embassy of France informs the Department of State that the transmittal by the FTC of a subpoena directly by mail to a French company (in this case Saint-Gobain-Pont-a-Mousson) is inconsistent with the general principles of international law and constitutes a failure to recognize French soverignty [sic]. Moreover, the French Government has expressed formal reservations regarding the application in France of the principle of pre-trial discovery of documents characteristic of common law countries.
>
> Furthermore, the response of the requests from the FTC could subject the directors of Saint-Gobain-Pont-a-Mousson to civil and criminal liability and therefore expose them to judicial proceedings in France.

cluded that neither the Constitution nor the FTCA prohibited service by mail on a foreign corporation suspected of FTCA violations. On appeal to the United States Court of Appeals for the District of Columbia Circuit, *vacated. Held*: The FTC's statutory power to investigate foreign corporations' activities affecting the price of competitive goods in United States commerce does not implicitly authorize the FTC to employ registered mail, in violation of international law, for service of an investigatory subpoena on a foreign subject abroad. *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-a-Mousson,* 636 F.2d 1300 (D.C. Cir. 1980).

II. LEGAL BACKGROUND

Analysis of the validity of FTC methods of subpoena service requires consideration of two distinctions concerning the nature of the served document and the type of jurisdiction invoked by the United States.[10] The Federal Rules of Civil Procedure (FRCP) illustrate the first distinction by authorizing distinct methods of notification for serving process[11] and serving subpoenas.[12] Although a respondent served with a summons and com-

---

> Consequently, the Embassy of France would be grateful if the Department of State would make this position known to the various American authorities concerned by informing them that the French Government wishes such steps both in this matter and in any others which may subsequently arise, to be taken solely through diplomatic channels.

Note to the U.S. State Department from the French Embassy Regarding the FTC Investigation of SGPM, 10 January 1980. 636 F.2d at 1306 n.18.

10. *Id.* at 1310.

11. FED. R. CIV. P. 4(i)(1) provides five techniques for service of process abroad:

> (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court.

FED. R. CIV. P. 45 narrows the wide range of alternative methods of service authorized by FED. R. CIV. P. 4 as the purpose of service changes and the consequences of noncompliance become more severe. *See* note 12 *infra.*

12. FED. R. CIV. P. 45(c) provides the following method for service:

> A subpoena may be served by the marshal, by his deputy, or by any other

plaint has the option of taking one of several actions,[13] a third party in receipt of a subpoena is compelled to produce the documents and noncompliance allows an agency or court to exert full enforcement power.[14] The FRCP's distinction between the proper methods of service abroad for each document highlights this difference in consequences. Because of its informal nature, service of process abroad is considered a benign act.[15] Authorities agree, however, that service of compulsory process abroad is an exercise

---

person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

Id.

13. According to 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1063 (1969 & Supp. 1980):

> The primary function of Rule 4 is to provide the mechanism for bringing *notice of the commencement of an action* to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. The general attitude of the federal courts is that the provisions of Rule 4 should be liberally construed in the interest of doing substantial justice and that the propriety of service in each case should turn on its own facts within the limits of the flexibility provided by the rule itself. This is consistent with the modern conception of service of process as primarily a notice-giving device.

Id. § 1083 (emphasis added).

Once a respondent in an FTC proceeding is served with a copy of the complaint and the proposed order, he may meet with the FTC's counsel to negotiate a consent order or proceed to litigation. He may appeal the result of litigation before any cease and desist order may be issued. The court may not bring its coercive power to bear upon the respondent until the cease and desist order becomes final through affirmance by an appeals court or the Supreme Court (if presented to the Court by certiorari). *See* 15 U.S.C. § 21 (1976).

14. The FTCA authorizes a fine of $1,000 to $5,000 or a year's imprisonment, or both, upon conviction by a court of competent jurisdiction for any person who refuses to produce documentary evidence "in obedience to the subpoena or lawful requirement of the commission." 15 U.S.C. § 50 (1976). In addition, the FTC's Rules of Practice and Procedure provide a range of penalties for noncompliance with compulsory processes. 16 C.F.R. § 2.13 (1980). Under section 2.13, the Commission may seek a judicial order directing compliance or a finding that the respondent is in contempt of court. In the event of continued noncompliance, a district court could enforce its order by seizing the noncomplying respondent's assets, by holding the corporation's officers and agents in contempt, or by otherwise exercising its discretion to punish recalcitrance.

15. *See* notes 11 & 13 *supra*.

of sovereignty within the territory of another sovereign that violates international principles of territorial jurisdiction.[16]

The validity of subpoena service technique is also distinguished under principles of domestic and international law according to the type of jurisdiction exercised: prescriptive jurisidiction or enforcement jurisdiction. Under traditional principles of absolute territoriality, a state had the right to enact laws regulating the conduct and relations of persons within its territory,[17] but had no right to control another state's regulation within that state's territory.[18] American courts developed exceptions[19] to these rigid principles. Today, the *Restatement (Second) of Foreign Relations Law of the United States*[20] distinguishes regulation or prescrip-

---

16. "[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State." The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 9 at 18; *see* notes 17 and 18 *infra* and accompanying text. *See also* 1 L. OPPENHEIM, INTERNATIONAL LAW § 144a (8th ed. Lauterpacht 1955) ("[S]tates must not perform acts of sovereignty within the territory of other States").

17. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute").

18. The Appollon, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.) ("[the laws of a nation] can have no force to control the sovereignty or rights of any other nation within its own jurisdiction.").

19. The principle of territorial jurisdiction was acceptable in international law because it required a state to demonstrate the closest connection possible with facts or persons before asserting a right to regulate them. The complications of modern commercial practices have led to attempts to find a substitute for the situs of the injury test for the assertion of jurisdiction. In United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand's often cited opinion held that agreements made abroad between foreigners may violate the Sherman Antitrust Act if those agreements were "intended to affect imports and [if they] did affect them." *Id.* at 444. The great potentialities of the Alcoa "effects doctrine" were demonstrated in United States v. The Watchmakers of Switzerland Information Centre, Inc., 5 TRADE REG. REP. (CCH) § 70600 (S.D.N.Y. 1962). In that case the court held, in effect, that Swiss arrangements concerning the regulation of the manufacture and sale of watches, watch parts, and watch making machinery, made with the assistance and approval of the Swiss government, were illegal under the Sherman Act because they were intended to, and did, 'affect' the United States.

20. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 6-7 (1965) [hereinafter cited as RESTATEMENT]. According to RESTATEMENT § 6, Comment a:

> Jurisdiction to "prescribe" refers to the capacity of a state under international law to make a rule of law, whether this capacity be exercised by the

tive jurisdiction from enforcement jurisdiction. The *Restatement* applies a substantial effects test[21] to determine whether a state has prescriptive jurisdiction, but applies the traditional territorial test to determine the extent of a state's enforcement jurisdiction.[22] Two conferences of the International Law Association have discussed this dichotomy and concluded that when a state exercises its enforcement power to compel production of documents from abroad in advance of finding prescriptive jurisdiction, it violates international law.[23] When the issue is a state's jurisdiction to

---

legislative branch or by some other branch of government. Jurisdiction to "enforce" refers to the capacity of a state under international law to enforce a rule of law, whether this capacity be exercised by the judicial or the executive branch, as is normally the case in the United States, or by some other branch of government, as may be the case in states with differing forms of government.

Examples of the exercise of jurisdiction to prescribe are the enactment of a criminal or commercial code, the issuance of administrative tax regulations, and the issuance of a decree regulating currency transactions. Examples of the exercise of jurisdiction to enforce are arrest, a criminal or civil trial, the entry of a judgment by a court, and the confiscation of contraband by customs officers.

The action taken by a branch of the government of a state may be an exercise of both jurisdiction to prescribe and jurisdiction to enforce, rather than the exercise of only one of them.

21. RESTATEMENT, *supra* note 20, § 18; *see* note 19 *supra*.

22. RESTATEMENT, *supra* note 20, § 20. The *Restatement* illustrates this disjunction as follows:

X is a national of state *A* residing in state *B*. *A* had jurisdiction to prescribe a rule subjecting *X* to punishment if he fails to return to *A* for military service. *X* does not return. *A* has no jurisdiction to enforce its rule by action against *X* in the territory of *B*.

Id. § 7, comment a, illustration 1.

One commentator has criticized the *Restatement*'s liberal construction of a state's prescriptive enforcement right and suggested that it should be as conservatively construed as the state's enforcement right because one state's regulations may cause foreign states or subjects to react by adjusting their course of action. According to F. A. Mann:

This is even clearer in cases where the legislation concerns trading relationships. People all over the world would have to take account of and obey such legislation merely because they or their property may become subject to it. Yet no State is entitled to impose its legislation upon other States. Here, then, is a source of serious conflict which the doctrine of jurisdiction must overcome.

MANN, *The Doctrine of Jurisdiction in International Law*, in STUDIES IN INTERNATIONAL LAW 7 (1973) [hereinafter cited as MANN].

23. The Fifty-First Conference of the International Law Society concluded:

adjudicate, as distinguished from its jurisdiction to prescribe or enforce, principles of domestic law apply. A federal court may adjudicate a controversy if it has personal[24] and subject matter jurisdiction.[25] The assertion of personal jurisdiction is circumscribed by the due process[26] requirement that a defendant have "minimum contacts" with the forum conducting a suit against him[27] and that a defendant receive adequate notice and opportu-

---

It is difficult to find any authority under international law for the issuance of orders compelling the production of documents from abroad. The documents are admittedly located in the territory of another State. To assume jurisdiction over documents located abroad in advance of a finding of effect upon commerce raises the greatest doubts among non-Americans as to the validity of such orders.

REPORT OF THE FIFTY-FIRST CONFERENCE, INTERNATIONAL LAW ASSOCIATION 403, 407 (Tokyo 1964).

The Fifty-Second Conference of the International Law Society continued:

(1) Where a State requires a local branch [of a foreign company] to produce documents relating to its own affairs, the demand cannot be resisted merely because the documents are not within the jurisdiction or that they belong to a non-resident alien. A case may arise when the discovery is prohibited by his *lax situs* [the law of the residence of the alien and the documents]. In such case, each State is acting within its jurisdiction, the one in requiring production and the other in forbidding it, and a conflict arises . . . .

(4) Where, however, a State proceeds against a local branch to enforce the production of documents situated abroad and moreover relating to the affairs or to activities outside the jurisdiction of the head-office of the non-resident alien, the requirement is only lawful if the enforcing State has, in fact, substantive jurisdiction to enquire into those affairs and activities. A State abuses its powers if it uses the process of its courts to reach further than its legislative jurisdiction properly extends.

REPORT OF THE FIFTY-SECOND CONFERENCE, INTERNATIONAL LAW ASSOCIATION 109-112 (Helsinki 1966) (brackets in original).

24. Pennoyer v. Neff, 95 U.S. 714 (1877).

25. Louisville & Nashville R. R. v. Mottley, 211 U.S. 149 (1908). The federal courts' subject matter jurisdiction depends upon congressional implementation of a constitutional grant of this jurisdiction. *See also* Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

26. Pennoyer v. Neff, 95 U.S. 714 (1877).

27. In Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945), the Court held that an assertion of jurisdiction requires a finding that the defendant has "certain minimum contacts with it such that the maintenance of a suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316. Because a court may not exert its adjudicative power over a defendant lacking "minimum contacts" with the forum, the FTC's assertion of personal jurisdiction may also be

nity to be heard.[28] Even when adjudicative jurisdiction exists, a court's power to order compliance with an agency's demand depends on whether that demand was a proper exercise of the agency's investigatory authority. The FTC is empowered to investigate trade conditions in and with foreign countries to prevent the use of unfair methods of competition in interstate and international commerce.[29] In 1977[30] the Commission had unlimited authority to serve a subpoena by registered mail on anyone in any location.[31] Because the courts customarily defer to an agency's de-

---

limited, thus preventing it from exerting investigative authority over a foreigner lacking sufficient contacts with the United States. 636 F.2d at 1321 n.119.

28. Fuentes v. Shevin, 407 U.S. 67 (1972); Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306 (1950). In the instant case, the personal jurisdiction of both the district court and the FTC is not at issue. The court has obtained personal jurisdiction over the respondent by proper service of process, and the respondent has conceded that the documents in question are subject to the personal jurisdiction of the FTC. *See* note 6 *supra.*

29. *See* note 3 *supra.* The FTCA continues to define commerce to include both interstate and international commerce. 15 U.S.C. § 44 (1976). Additionally, Congress empowered the FTC to gather and compile information and "[t]o investigate, from time to time conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants or traders, or other conditions, may affect the foreign trade of the United States. . . ." 15 U.S.C. § 46(h) (1976).

30. 1977 was the year in which the FTC subpoenaed SPGM's documents. 636 F.2d at 1304-05.

31. 15 U.S.C. § 46(g) (1976) provides the Commission with regulatory jurisdiction: "The Commission shall also have power— . . . (g) From time to time to . . . make rules and regulations for the purpose of carrying out the provisions of [sections 41 to 46 and 47 to 48 of this title]." When the subpoena at issue was served, section 4.4(a)(1) of the FTC's RULES OF PRACTICE & PROCEDURE governed:

> Service of subpoenas . . . may be effected as follows:
>
> (1) By registered or certified mail—A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his, her or its residence or principal office or place of business, registered or certified, and mailed . . . .

Following the service of the instant subpoena and the district court's decision, the Commission amended rule 4.4(a) to provide:

> (1) Service of complaints, initial decisions, final orders, and other processes of the Commission under 15 U.S.C. 45 may be effected as follows:
>
> (i) *By registered or certified mail*—A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his, her or its residence or principal office or place of business, registered or certified, and mailed; or . . .

termination of the scope of its investigatory jurisdiction,[32] they have enforced FTC subpoenas that were issued prior to a complaint and served outside their districts, but within the United States.[33] When judicial enforcement of ambiguous legislation threatens to have extraterritorial impact, however, courts applying canons of statutory construction have limited the scope of their statutory enforcement power.[34] Recognizing that states often

---

(2) All other orders and notices, *including subpoenas,* orders, requiring access, orders to file annual and special reports, and notices of default, *may be served by any method reasonably certain to inform the affected person, partnership, corporation, or unincorporated association including any method specified in paragraph (a)(1) of this section.*

32. Section 9 of the FTCA, 15 U.S.C. § 49 (1976), and interpretations of similarly worded statutes provided information about the permitted geographic range of service, but failed to describe proper modes of service; *see, e.g.,* Okla. Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); *see* note 4 *supra.* Section 9 of the FTCA derives its language from the Interstate Commerce Act, § 12, 49 U.S.C. § 12(2) (1976), and incorporates phrases identical to provisions conferring subpoena authority on other agencies, including the Civil Aeronautics Board, 49 U.S.C. § 1484(c) (1976), the Federal Maritime Commission, 46 U.S.C. § 826(a) (1976), and the Securities and Exchange Commission, 15 U.S.C. § 775(b) (1976). In Fed. Maritime Comm'n v. DeSmedt, 366 F.2d 464 (2d Cir.), *cert. denied,* 385 U.S. 974 (1966), Judge Friendly derived the meaning of the phrase, "from any place in the United States," from the context of the ICC Act. He found that an agency had the power to compel a witness' appearance by subpoena inside the United States, though outside the boundaries of the judicial district in which the witness resided. Moreover, an agency had the power to compel a subpoenaed witness residing in the United States to produce documents located abroad. In a dissenting opinion, Judge Moore remarked, "If Congress had intended to enact legislation authorizing such production 'from any place in the world,' it is . . . presumed that it had available sufficiently skilled draftsmen who could have used 'world' instead of 'United States'—a not altogether too difficult bit of draftsmanship." *Id.* at 474. Despite Judge Moore's observation, Judge Friendly's broad interpretation was adopted without analysis in Civil Aeronautics Bd. v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951 (D.C. Cir. 1979) (per curiam) (discussing the Civil Aeronautics Board's subpoena authority conferred by 49 U.S.C. § 1484(c) (1976)). This decision held that the language in question "was not intended as a limitation on agency subpoena authority, but rather . . . to free the agency of the geographic limitations imposed on subpoenas issued by the district courts." 591 F.2d at 953.

33. *See, e.g.,* Fed. Trade Comm'n v. Browning, 435 F.2d 96, 99-100 (D.C. Cir. 1970); Hunt Foods & Indus., Inc. v. Fed. Trade Comm'n 286 F.2d 803 (9th Cir. 1960), *cert. denied,* 365 U.S. 877 (1961).

34. Chief Justice Story established the rule in Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) that courts are bound to

need evidence located abroad in order to enforce trade regulations within their own territory, international conventions have adopted procedures allowing a state to serve documents in the territory of another state.[35] Proper service, however, may not insure actual production of documents because of foreign nondisclosure laws.[36] Recent FTCA amendments[37] provide some informa-

---

strictly construe federal statutes to avoid conflicts with contrary principles of international law. In Foley Bros. v. Filardo, 336 U.S. 281 (1949), a case involving application of the Fair Labor Act to work performed in the Near East, the Supreme Court suggested that conflict between a federal statute and the principle of international jurisdiction could be avoided if congressional legislation is interpreted to apply "only within the territorial jurisdiction of the United States." *Id.* at 285. The requirement that each state's right to enforce its regulations be measured against the principle of jurisdiction in public international law *is* the concept of the "comity of nations." MANN, *supra* note 22, at 7-8. *See also* RESTATEMENT, *supra* note 20, § 38.

35. Direct service of United States subpoenas abroad does not violate international law if a state gives general consent in an international convention to service of compulsory process upon its citizens by another state's government agencies. *See, e.g.*, Multilateral Convention on the Service Abroad of Judicial and Extrajudicial Documents, *signed* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. [hereinafter cited as Hague Convention]. The Hague Convention specifically recognizes, however, a signatory's right to refuse to honor another government's request for service of judicial documents "if it deems that compliance would infringe its sovereignty or security." *Id.* art. XIII. In addition, the United States and France have participated in a recent effort to facilitate the process of obtaining evidence abroad—The Multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (of which the Hague Convention is revised chapter 1).

36. By 1979, six foreign states and two Canadian provinces had enacted nondisclosure laws designed to protect their citizens against official investigations by authorities of other states. For a listing and categorization of these laws, see Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L. J. 612 (1979). These defensive laws were prompted by the zeal with which United States litigators have pursued antitrust discovery abroad and the ease with which United States courts have ordered production of foreign documents. See, *e.g.*, the response of the British House of Lords to United States Government support of Westinghouse's attempts to obtain the testimony of British witnesses to an alleged uranium price fixing conspiracy. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 2 W.L.R. 81 (House of Lords). For a discussion of the controversy stimulated by the ongoing Westinghouse litigation, In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977), see generally Megrige, *The Westinghouse Uranium Case: Problems Encountered in Seeking Foreign Discovery and Evidence*, 13 INT'L LAW 19 (1979).

The case law fails to provide an adequate means for resolving the policy con-

tion about the propriety of using registered mail in 1977 for service of an investigatory subpoena on a foreign subject abroad. Prior to the instant decision, however, no court had considered the question of whether the FTC's statutory power authorized the FTC to serve subpoenas abroad in contravention of international law.

---

flict between domestically issued discovery orders and foreign nondisclosure laws. The *Restatement,* however, provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT, *supra* note 20, § 40.

37. Amendments to the FTCA provide: "Any such demand or any enforcement petition filed under this section may be served upon any person who is not found within the territorial jurisdiction of any court of the United States, *in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation.*" Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 13, 94 Stat. 381 (1980) (to be codified at 15 U.S.C. § 20(c)(6)(B)) (emphasis added); *see* notes 11 & 12 *supra.* The instant court stated:

> These amendments replace the FTC's subpoena authority in certain Commission consumer protection investigation cases with C.I.D. [civil investigative demand] authority virtually identical to that conferred upon the Justice Department by the Antitrust Civil Process Act, 15 U.S.C. 1312(d)(2) (1976). Ironically, these amendments to the FTC Act were viewed by the Senate as *limiting* rather than expanding the FTC's authority to conduct its investigations. *See* S. Rep. No. 96-500, 96th Cong., 1st Sess. 23-26 (1979). Since these amendments obviously apply only prospectively, they do not affect our analysis of the invalidity of the mode of service employed in this case. If anything, the passage of these amendments buttresses the argument already made, for it indicates that when Congress intends to authorize extraterritorial service of investigative subpoenas, it will express that intent explicitly.

636 F.2d at 1325 n.140 (parentheses added).

III. The Instant Opinion

The District of Columbia Circuit Court noted that congressional intent regarding the proper methods of serving investigatory subpoenas abroad in 1977 could not be determined from either the FTCA or the legislative history of the Act and similar statutes.[38] The court also found that a determination of the propriety of serving such subpoenas by registered mail could not be made until two distinctions of critical importance in international law were drawn: the type of document being served and the type of jurisdiction being asserted.[39] The court suggested that the appropriate interpretation of the legislature's intent could be ascertained by applying canons of statutory construction;[40] the FTC was authorized to employ all "customary and legitimate" techniques used by United States tribunals[41] for service of subpoenas within the territorial jurisdiction of the United States. This interpretation requires that the FTC's initial resort be through established diplomatic channels or procedures authorized by international conventions[42] and that the FTC serve a subpoena personally on a foreign subject abroad.[43] Therefore, the court concluded that the service of a subpoena via registered mail on defendant's Paris headquarters was invalid.[44]

---

38. *See* notes 31 & 32 *supra* and accompanying text. Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1309 (D.C. Cir. 1980).

39. 636 F.2d at 1310.

40. *Id. See also* note 34 *supra* and accompanying text.

41. The court noted the great expansion of the FTC's investigatory and regulatory jurisdiction since 1914. In light of the international interests at stake, however, the court assumed that legislation enacted during periods of limited government regulation was less pervasive and thus unlikely to reflect congressional intent to extend investigatory and regulatory jurisdiction beyond the United States. *Id.* at 1323 n.134.

42. *See* notes 9 & 35 *supra* and accompanying text.

43. This service is required by Fed. R. Civ. P. 45(c). *See* note 12 *supra.*

44. In a concurring opinion, Judge McGowan stated that service of a subpoena on a foreign citizen abroad is a significant act requiring congressional attention and that the Department of Justice is authorized to use registered mail to serve such subpoenas. Because similar legislation concerning FTC investigations was in force, Judge McGowan concluded that Congress had not intended the Commission to use that method of compulsory process at that time. 636 F.2d at 1327-28.

IV. COMMENT

The instant case is the first case in which a court has confronted the question of whether Congress expressly or impliedly authorized the FTC to serve an investigatory subpoena directly upon foreign citizens overseas via registered mail. The instant court notified the FTC that even when Congress has expressly authorized that agency to use particular methods of subpoena service extraterritorially, the FTC must comply with jurisdiction requirements established in international law before serving an investigatory subpoena or invoking the enforcement power of the courts. No court has confronted a similar issue in a case decided after the implementation of the May 1980 amendments to the FTCA.[45] While the instant court reached an acceptable result, its rationale, which emphasized principles of international jurisdiction, indicates that jurisdictional considerations may be allowed to override a court's obligation to give effect to an unambiguous expression of congressional intent. The majority's analysis requires the FTC to assess the validity of subpoena service on a case-by-case basis. The court indicates that when a subpoenaed foreign witness both refuses to concede the agency's personal jurisdiction and lacks sufficient contacts with the United States, the court will not enforce compliance with a subpoena served abroad by mail. Though the FTCA amendments were interpreted as an expression of congressional intent to restrict the FTC's power,[46] the court suggested that the extraterritorial service of FTC subpoenas by mail may be proper when due process and basic principles of international law are satisfied. In balancing the FTC's interests in fulfilling its investigatory function against the principle of international comity, the court's approach is in accord with the *Restatement*'s "balancing of interests" test.[47] Use of this balancing approach is appropriate when a case does not involve a civil demand for investigation covered by the 1980 amendments.[48] By sensitizing the FTC to restraints on its enforcement jurisdiction and by emphasizing the agency's responsibility to explore alternative methods of service, this approach allows the FTC to determine the propriety of a service technique before adopting it.

---

45. *See* note 37 *supra*.
46. *Id.*
47. *See* note 36 *supra*.
48. *See* note 37 *supra*.

Since this approach minimizes confrontation with foreign governments and maximizes consultative procedures, it is more likely to effectuate discovery. The balancing approach also maintains the separation of powers: the court avoids interfering with the Executive's role in foreign affairs; the court gives effect to the legislature's intent when it is expressed ambiguously; and the court conserves its own limited resources for adjudication.

Ann M. Bell