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Recent Decisions

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RECENT DECISIONS

ADMIRALTY—TIME CHARTER—SHIPOWNER'S CONTRACTUAL RIGHT TO WITHDRAW SERVICES OF VESSEL UPON CHARTERER'S FAILURE TO PROVIDE PUNCTUAL PAYMENT IS NOT EXTINGUISHED BY LATE TENDER OF PAYMENT

I. FACTS AND HOLDING

In January 1970, Mardorf Peach and Co. hired *The Laconia,* a vessel owned by Attica Sea Carriers Corp., on a time charter.[1] The terms of the agreement were set forth in a standard New York Produce Exchange (NYPE) form.[2] The last semimonthly advance payment fell due on a Sunday, and the charterers tendered payment the following day.[3] The shipowners refused acceptance of the payment as tardy[4] and informed the charterers that they were withdrawing their services from the time charter.[5] The charterers

1. The agreement was entered into on January 8, 1970. The duration of the time charter was three months, fifteen days more or less at the option of the charterers. Payment was to be made by the charterers into the owners' account with the First National City Bank of New York, branch 34, Moorgate, London, at a contract rate per calendar month of $3.10 per ton.

2. The NYPE is one of several available standardized forms for use in time charters. The text of the New York Produce Exchange Government Form 1946 is reproduced in its entirety in G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY at 1003-10 (2d ed. 1975) [hereinafter cited as G. GILMORE]. Both the NYPE and the Uniform Time Charter 1939 (Baltime) are standardized forms best suited for use with dry cargoes. The Baltime form is utilized to a greater extent in England and Europe than in the United States. Time charter forms frequently used for tanker hire include the Mobil Tanker Time Charter Party (Mobiletime) (4-67), the Texaco Tanker Time Charter Party (Texacotime 2) (December 1971), and Tanker Time Charter Party (STB Time). *See* Thowbridge, *The History, Development, and Characteristics of the Charter Concept,* 49 TUL. L. REV. 743, 750-51 (1975).

3. The charterers had remitted payment for six of the seven installment obligations in complete satisfaction of the terms of the time charter.

4. A tardy payment would be in breach of clause five of the NYPE, the relevant portions of which are as follows:

> Payment of said hire to be made . . . semi-monthly in advance . . . otherwise failing the punctual and regular payment of the hire . . . the Owners shall be at liberty to withdraw the vessel from the service of the Charterers . . . .

G. GILMORE, *supra* note 2, at 1005.

5. The seventh installment fell due on Sunday, April 12, 1970. London banks are not open for business on Sundays or Saturdays. On Monday morning, the shipowners' agents telephoned the charterers and informed them that they were contemplating withdrawal of the vessel's services for breach of payment. The

submitted to a new agreement for the duration of the original charter[6] but simultaneously demanded that the matter be submitted to arbitration.[7] The arbitrators found that the charterers were in immediate default by failing to make payment on the business day immediately preceding the Sunday due date (*i.e.*, Friday), and that the shipowners were entitled to withdraw their vessel on Monday.[8] On appeal of an award in the form of a special case, the judge affirmed the shipowners' right of withdrawal as a matter of law.[9] The Court of Appeal subsequently reversed and granted leave to the shipowners to appeal, holding that the charterers had remedied the breach of contract through payment.[10] The English House of Lords *reversed. Held:* In a time charter set forth in a NYPE form, failure of the charterer to perform by punctual payment accords the shipowner an immediate right to elect withdrawal of his services which cannot be extinguished by a late tender of payment by the charterer. *Mardorf Peach & Co. v. Attica Sea Carriers Corp.*, [1977] A.C. 850.

II. LEGAL BACKGROUND

The mutual obligations between a charterer and shipowner of a

shipowners then asked their bank to inform them when and if payment was received from the charterers. The charterers instructed their London bank and had delivered a "payment order" in the full amount of the installment to the shipowners' bank at approximately 15:00 hours. The payment order was in accordance with the method of the London Currency Settlement Scheme operated by member banks, and a payment order was regarded by the member banks as equivalent to cash. Upon receipt of the payment order, the shipowners' bank began dealing with the payment order in the usual manner and subsequently informed the shipowners of its receipt by the bank. The shipowners immediately instructed their bank to refuse and return the payment order. The bank complied by issuing a return payment order, in favor of the charterer's bank, which it delivered the following morning. At 18:55 hours on Monday, April 13, the shipowners informed the charterers that services of *The Laconia* were withdrawn.

6. As of April 13, 1970, the market rate had risen to $5.59 per ton. At the time of withdrawal, *The Laconia* was outside Halifax waiting to load cargo for transport to Glasgow. To complete their voyage, the charterers agreed to a rate charge of $8.00 per ton.

7. An arbitration clause is a standard term in time charters and is included as paragraph seventeen of the NYPE. *See* G. GILMORE, *supra* note 2, at 1007.

8. The text of the arbitration award, in the form of a special case to determine whether as a matter of law the shipowners were entitled to withdraw *The Laconia* from the charter, is reprinted in Mardorf Peach & Co. v. Attica Sea Carriers Corp. (The Laconia) [1975] 1 Lloyd's List L.R. 634, 635-37 (Q.B.).

9. [1975] 1 Lloyd's List L.R. 634.

10. Mardorf Peach & Co. v. Attica Sea Carriers Corp. (The Laconia) [1976] 1 Q.B. 835; [1976] 2 W.L.R. 668; [1976] 2 All E.R. 249.

vessel for hire are generally set forth in a contractual document termed a "charter party" or "charter." The historical development of the oceanic shipping industry has resulted in the standardization of types of charter parties, one of which is the time charter.[11] The legal force of the time charter is in its establishment of substantive contractual rights. In every time charter, the shipowner retains a right to elect a withdrawal of the services of his vessel (*i.e.*, rescission of the contract) upon default of payment by the charterer.[12] The rule with regard to when and under what conditions the right to withdraw inures to a shipowner, however, has been a subject of judicial uncertainty. In *The Petrofina*,[13] the House of Lords clarified the controlling English rule as to when the right to choose to withdraw a vessel's services accrues to a shipowner. The court held that where a due date for payment is stipulated within the time charter,[14] the right to elect a withdrawal accrues immediately to the shipowner upon obtaining knowledge of a charterer's failure to pay.[15] *The Petrofina* specifically noted that payment a few days late is not timely enough,[16] and that the

11. In general, there are three main types of charter parties: time charter, voyage charter, and demise (bareboat) charter. Each form of time charter is adapted to a specific purpose of the charterer, and custom and usage has standardized the nature of the agreement in each case. *See generally* G. GILMORE, *supra* note 2, at 193-243; W. PAYNE, CARRIAGE OF GOODS BY SEA 9-54 (10th ed. E. Ivamy 1976).

12. *See* T. SCRUTTON, CHARTERPARTIES AND BILLS OF LADING 360-61 (18th ed. A. Mocatta, M. Mustill & S. Boyd eds. 1974). The substance of a time charter is that of a contract for the provision of services. The charterer holds the right to have his cargo carried by a particular vessel. The shipowners, however, maintain the rights of possession and control of the vessel by retaining master and crew as employees throughout the duration of the charter. The shipowner must sustain the daily costs of operation. In leasing his vessel, the shipowner will release profitability of the vessel to the objectives of the charter. To reduce this risk, shipowners in time charters have traditionally received payment in advance for the use of their vessel.

13. Tankexpress A/S v. Compagnie Financière Belge des Petroles S.A. (The Petrofina) [1949] A.C. 76.

14. The relevant portions of the time charter in *The Petrofina* were as follows: "By cl. 11: 'Payment of the said hire is to be as follows: In cash, monthly, in advance, in London. In default of such payment the owners shall have the faculty of withdrawing the said vessel from the service of the charterers . . . .'" *Id.* at 77.

15. *Id.* at 76.

16. The House of Lords expressly disapproved of dictum in the early English case of Nova Scotia Steel Co. v. Sutherland Steam Shipping Co., [1899] 6 Com. Cas. 106, 109 to the effect that where a charter party required regular and punc-

shipowner's right to elect a withdrawal could be based solely on a failure to receive due payment, for "neither deliberate non-performance nor negligence in performing the contract [by the charterer] is necessary."[17] This absolute right of a shipowner to elect a withdrawal was severely restricted by the English Court of Appeal in *The Georgios C.*[18] The Baltime charter form employed in *The Georgios C* was substantially the same as that used in *The Petrofina.*[19] The appellate court agreed that under the contract the shipowners had the right to exercise withdrawal immediately upon passage of the due date for payment. However, the court also held that the charterers could thereafter extinguish that right by tender of payment.[20] The charterers were therefore allowed to make a late payment in satisfaction of the requirement of performance, up until the time that the shipowners notified them of the election of the right to withdraw. As Lord Denning, M.R., stated, "I think in this clause the words 'in default of payment' mean 'in default of payment and so long as default continues.' "[21] The impact of Lord Denning's interpretation of the rule was to modify the right of withdrawal of a shipowner. No longer considered absolute, the right was conditioned upon a charterer's failure to tender payment during the period of default prior to withdrawal.[22] This extended construction of the default clause was contrary to the literal analysis of the time charter form employed by the House of Lords in *The Petrofina,* and it was not followed in a subsequent case presenting

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tual payment, tender of hire two days after due date was permissible. *Id.* at 91 *passim.*

17. *Id.* In the House of Lords, Lord Porter found that a default of payment had occurred in the charterers' failure to pay the required installment on the due date. Liability was not assessed, however, as special circumstances (the outbreak of World War II) delayed receipt of the charterer's dispatched payment.

18. Empresa Cubana de Fletes v. Lagonisi Shipping Co. (The Georgios C) [1971] 1 Q.B. 488.

19. The relevant portions of the Baltime time charter in *The Georgios C* were as follows:

> *In default of payment* the owners to have the right of withdrawing the vessel from the service of the charterers, without noting any protest and without interference by any court or any other formality whatsoever . . . .

Id. at 491 (emphasis added).

20. *Id.* at 504 *passim.*

21. *Id.*

22. "It seems that the owners have the option—so long as the charterers are in default—to withdraw the vessel. But, once the charterers remedy their default, by paying the installment or tendering it, the owners have no right to withdraw." *Id.*

a similar factual situation. In *The Brimnes,*[23] the charter under a NYPE contract failed to meet the payment due date but subsequently made a later payment. The English Court of Appeal allowed the shipowners to rescind the contract.[24] *The Brimnes* returned the English rule to that of *The Petrofina* and added that the shipowner's absolute right of withdrawal was not affected by a late tender of payment prior to the election of withdrawal.[25] Although the appellate court in *The Brimnes* could not overrule *The Georgios C* holding, it distinguished the results on the basis of wording differences in the two time charter forms.[26] The issue with respect to when a shipowner acquires the right to withdrawal upon a failure of payment by a charterer has also been considered in American tribunals. Even though the standard time charter forms, such as Baltime and NYPE, are used worldwide, American decisions interpreting the withdrawal clauses in these forms have at times differed from the English formulations discussed above. The American interpretations differ on two important points: first, when payment is required if the due date falls on a nonbusiness day; and second, whether a charterer's late tender of payment acts to extinguish the shipowner's right of withdrawal. In a time charter, installment payments in full are required in advance. When that payment date falls on a Saturday, Sunday, or holiday, the English and American rules are contrary. The English rule requires that payment be made on the immediately preceding business day.[27] The American rule, established in New York arbi-

23. Tenax Steamship Co. v. Brimnes (Owners) (The Brimnes) [1975] Q.B. 929.

24. *Id.* at 956.

25. *Id.* at 953.

26. The distinction was between *The Georgios C* words "in default of payment" and *The Brimnes* (NYPE) words "failing the punctual and regular payment." *Id.* The instant court found the semantic distinction to be unconvincing and superfluous. [1977] A.C. at 882, 877.

27. *See* 37 HALSBURY'S LAWS OF ENGLAND § 172, at 97 (3d ed. 1962), which provides in part:

> Period expiring on Sunday or holiday. The fact that the last day of a prescribed period is a Sunday or other non-juridical day does not as a general rule give the person who is called upon to act an extra day; it is no excuse for his omission to do the act on some prior day.

The rule, however, is subject to exceptions. For example, where scheduled performance of an action in an English court falls upon a Sunday, performance may be made the following Monday. Pritam Kaur v. S. Russell & Sons, Ltd. [1973] Q.B. 335. No exception has been judicially declared as to banks, and the point that bank payment due on a Sunday must be tendered on the preceding Friday

tration in *The Maria G. Culucundis,*[28] is in accord with state business law,[29] allowing payment to be made on the following business day. Concerning a charterer's late tender of an installment payment, the American rule appears less stringent that that provided in the English case of *The Brimnes.* While the right to withdraw immediately accrues to the shipowner (in accord with *The Petrofina*), that right may be extinguished by the charterer's subsequent offer of payment. In *The U.S. 219,*[30] the United States District Court held that an acceptance by the shipowner of a late payment extinguished the right of withdrawal. This principle was followed in an arbitration case, *The San Juan Venturer,*[31] where acceptance of a late payment, even for past and non-advance hire services, was held to negate a subsequent withdrawal notice by the shipowners. It is not entirely certain whether withdrawal would be valid where the shipowner rejects a late tender of payment. In an early Second Circuit Court of Appeals case, *Luckenbach v. Pierson,*[32] such a rejection followed by withdrawal by the shipowner was sanctioned by the court. *Luckenbach* was followed in the later case of *The Gloria,*[33] where the shipowner's right to withdraw was not extinguished by the charterer's late tender of payment. Forceful dictum, however, emphasized that because of the war-time circumstances involved in *The Gloria,* it might not be controlling in normal times.[34] It has not since been cited as authority in any reported decision.

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is generally conceded by counsel. *See, e.g.,* Empresa Cubana de Fletes v. Lagonigi Shipping Co., [1971] 1 Q.B. 488 (where charterer's claim for continuation of default was allowed notwithstanding concession of tardiness).

28. China Trading & Indus. Dev. Corp. v. Culucundis, 1954 A.M.C. 325 (Arb. 1952) (Barton, Colesworthy & Dunaif, Arbs.).

29. N.Y. GEN. CONSTR. LAW § 25(1) (McKinney Supp. 1977) provides in relevant part:

> Where a contract by its terms authorizes or requires the payment of money or the performance of a condition on a Saturday, Sunday or a public holiday . . . , unless the contract expressly or impliedly indicates a different intent, such payment may be made or condition performed on the next succeeding business day . . . , with the same force and effect as if made or performed in accordance with the terms of the contract.

30. 21 F. Supp. 466, 470 (E.D. Pa. 1937).

31. Marcona Carriers, Ltd. v. Japan Line, Ltd., 1974 A.M.C. 1053 (Arb. 1974) (Caldera, Healey & Freehill, Arbs.).

32. 229 F. 130, 132 (2d Cir. 1915).

33. Confederation of Switzerland v. Compania de Vapores Arauco Panamena, 40 F. Supp. 330, 332 (E.D.N.Y. 1941).

34. The rationale of the court went to an interpretation of the parties' intent to strictly comply with the terms of the time charter. The court emphasized that

III. The Instant Opinion

In the instant case, each Lord considered the appellate decision in *The Brimnes* as controlling.[35] The court noted that the same NYPE form was used in both cases, and that the import of the withdrawal clause was to provide the shipowner with an immediate right of withdrawal upon failure of payment. The NYPE form requires "punctual" payment by the charterers.[36] The court, per Lord Fraser, ruled that the word "punctual" "must have the effect that the owners will not be deprived of the right of withdrawal by a tender of unpunctual payment."[37] Lord Fraser expressly relied upon and endorsed the statement of Davis, L.J., in *The Brimnes* that "the right to withdraw having undoubtedly arisen, it was exercisable by the owners notwithstanding a preceding, but belated, payment of the . . . hire by the charterers."[38] The court reasoned that the words in the NYPE withdrawal clause were neither difficult nor ambiguous, and that "punctual" was to be applied in its literal sense.[39] The court, per Lord Salmon, noted that under the English rule, where payment falls due on a nonbusiness day, punctual payment can only be accomplished on the preceding business day.[40] The court refused to follow *The Georgios C* by allowing a successful tender of a late payment, reasoning that such a payment would simply not be punctual with respect to the NYPE requirement. The court went further, however, and expressly overruled the holding of the appellate court in *The Georgios C*.[41] It found that the Baltime form therein employed could not be easily distinguished from the NYPE form in its wording,[42] and it

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the increased war-time risk of ship capture, damage, or loss demanded exact adherence to the advance payment term of the contract. The court noted, however,

> In an ordinary case, in ordinary times, I have no doubt but that a court might find that the strict compliance with the time of payment required in this case of libellant would require some further evidence of intention and a more liberal construction would be given in the light of such ordinary circumstances.

Id. at 334.

35. [1977] A.C. at 868, 876, 882, 887.
36. *See* note 4 *supra*.
37. [1977] A.C. at 883.
38. [1975] Q.B. at 953.
39. [1977] A.C. at 867.
40. *Id.* at 875.
41. *Id.* at 868-69.
42. *See* note 26 *supra*.

expressly upheld the result in *The Petrofina,* where essentially the same form as that in *The Georgios C* was used.[43] The basis for the court's holding was that the time charter form contemplates payment for services in advance, and unpunctual payment does not meet an advance payment requirement. The Lords considered the hardship their decision might cause to charterers failing to make payment by the due date, but considered the need for certainty in commercial dealings and strict contractual interpretation paramount concerns.[44] The court noted that charterers and shipowners are free to choose from a range of available time charter forms during their negotiations, and that many of these forms provide less stringent withdrawal conditions.[45] Additionally, as was suggested by Lord Fraser, the charterers could have insisted upon a stipulation for notice before withdrawal.[46] By overruling *The Georgios C,* the court sought to reestablish the absolute right of a shipowner to withdraw his services, under either the Baltime or NYPE forms, as was provided by the decisions in *The Petrofina* and *The Brimnes.*

IV. COMMENT

The broad significance of the instant decision in overruling *The Georgios C* is to provide a concrete rule with respect to withdrawal clauses in standardized time charter forms. The rule is relevant to

43. [1977] A.C. at 876-77.

44. The court implicitly noted that it was *The Georgios C* (1971) appellate result which interrupted the certain rule of a shipowner's immediate right to withdrawal. In urging its overruling, Lord Salmon suggested, "My Lords, I hope that the doubts which have troubled the waters since 1971 will now be finally dispelled by this decision of your Lordships' House." *Id.* at 878.

45. In particular, default clauses in other suggested forms included the Barecon "A" ("in default of payment beyond a period of seven running days"), Essotime 1969 ("default of punctual and regular payment as herein specified," allowing a ten day grace period for charterer payment), and Beepeetime 2 (allowing a seven day grace period). *Id.* at 869.

46. *Id.* at 883. *See* Oceanic Freighters Corp. v. M.V. Libyaville Reederei und Schiffarhrts G.m.b.H. (The Libyaville) [1975] 1 Lloyd's List L.R. 537. The time charter was drawn on a NYPE form and included the standard default clause in paragraph five. *See* note 4 *supra.* The agreement was amended, however, by certain "anti-technicality" clauses, the second of which read in part: " 'Where there is any failure to make "punctual and regular payment" . . . , Charterers shall be given by Owners two banking working days' written notice to rectify the failure . . . .' " [1975] 1 Lloyd's List L.R. at 550. The owners attempted to withdraw their vessel's services without complying with the notice provision, and the court held for the charterers. *Id.* at 555.

potential English arbitration and litigation, and it forewarns charterers that any failure to make a due date payment will immediately place them in default. The default is incurable, and the charterer will thereafter be subject to the whim of the shipowner. Upon default, the shipowner may either exercise his right of withdrawal within a reasonable time period or accept a late tender of payment in continuation of the contract. This option of the shipowner is obviously advantageous. In times of rising market rates, an alert shipowner could monitor the charterer's payment behavior and immediately withdraw his vessel's services upon a failure of payment. The shipowner could subsequently enter into a new time charter at a more profitable market rate.[47] The rule will also work to the shipowner's advantage in a time of falling market rates. Given such a condition, the charterer is forced to continue payments at the relatively higher stipulated contract rate or deliberately breach the contract through nonpayment, thus subjecting himself to an inevitable damages claim. The question therefore arises as to whether the English rule is well suited to periods of fluctuating market rates. The instant court was motivated by the need to instill certainty in time charters executed in England.[48] In particular, the court stressed the fact that the rule in *The Georgios C* served only to disrupt the state of commercial affairs in admiralty, to the disadvantage of all participants.[49] Standardized time charter forms can easily be amended to provide notice provisions prior to withdrawal, grace periods for payment, or sliding rate adjustments geared to an objective market rate. Such amended terms would not be inconsistent with the scope and effect of the English rule, and the court demonstrated foresight in mentioning them.[50] The small burden in planning and drafting placed upon the parties using such amended terms greatly reduces the undesirable

47. This point was presented by counsel for the charterers in *The Laconia.* [1977] A.C. at 857-59. It was not considered in the decision of any Lord, however, suggesting that its relative merit in formulating the rule of law was not significant.

48. The court in *The Laconia* was undoubtedly influenced in part by the call for reform by contemporary commentators. *See, e.g.,* Wilson, *British Aspects of Chartering Problems: Some Recent Developments,* 49 TUL. L. REV. 1063, 1070-72 (1975).

49. "The decision [*The Georgios C*] seems to have had the unfortunate effect of causing confusion and uncertainty by introducing verbal distinctions which are 'quite inappropriate to commercial relationship (*sic*).' " *The Laconia,* [1977] 1 A.C. at 882.

50. *See* notes 45 & 46 *supra.*

incentive to change behavior during the course of the time charter in response to market conditions.[51] The instant decision may be of some significance in the interpretation of standardized time charter forms drawn in the United States. American admiralty courts sometimes look to English precedent in determining difficult points of law.[52] Litigation relevant to the issue considered in *The Laconia* has been rare in American tribunals. The instant decision serves as an example of a strict contractual interpretation of withdrawal clauses and could provide limited authority for American courts in analyzing similar issues in time charters.

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51. The possibility exists that a charterer might circumvent the strict application of the law established in the instant decision by attempting to analyze a withdrawal as a forfeiture, thereby invoking equitable relief. A discussion of the role of equity principles, however, was dismissed in the instant case upon a procedural point. Counsel for the charterers failed to prepare an argument relying upon equitable grounds until oral presentation before the House of Lords. The introduction of an argument seeking to equate a withdrawal with a forefeiture was disallowed by the high court. [1977] A.C. at 873. Such an approach has been previously alluded to in similar factual circumstances, but has never been framed as a major issue. The success of an equity argument is uncertain. Under an established rule of law, the relationship of the parties will not be influenced by external factors not creating a situation of frustration, such as market rate variations. *See, e.g.*, Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia) [1964] 2 Q.B. 226, providing an extended interpretation by the English Court of Appeal of the nature and meaning of frustration in time charters. *See also* W. PAYNE, *supra* note 11, at 47-54. Intervention by equity would probably serve only to modify the impact of a withdrawal upon the charterer and would not negate the shipowner's right to withdraw.

52. *See, e.g.*, Confederation of Switzerland v. Compania de Vapores Arauco Panamena, 40 F. Supp. 330, 333, where the United States District Court did not hesitate to cite nineteenth century English case law.

ANTITRUST—TREBLE DAMAGES—A FOREIGN SOVEREIGN IS A "PERSON" ENTITLED TO SUE UNDER SECTION 4 OF THE CLAYTON ACT

I. FACTS AND HOLDING

Plaintiffs, sovereigns of several foreign countries,[1] sued Pfizer, Inc. (Pfizer) and other pharmaceutical manufacturers,[2] alleging a conspiracy to restrain and monopolize interstate and foreign trade in the manufacture, distribution and sale of broad spectrum antibiotics in violation of sections 1 and 2 of the Sherman Act.[3] Among the violations alleged were price fixing, market division, and fraud upon the United States Patent Office. Pfizer moved to dismiss the claims on the ground that the foreign sovereigns were not "persons" entitled to sue for treble damages under section 4 of the Clayton Act.[4] The district court held that a foreign sovereign has a cause of action under section 4 and certified the question for interlocutory appeal.[5] The court of appeals, adopting the reasoning of *Georgia v. Evans*,[6] affirmed.[7] On appeal to the United States

1. The Government of India, the Imperial Government of Iran, and the Republic of the Philippines were respondents in the appeal to the Supreme Court. The complaint of the Republic of Vietnam had been dismissed on the ground that the United States no longer recognized that nation's government. Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977). Claims by the foreign governments as *parens patriae* had been dismissed in Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975). Other suits by Spain, South Korea, West Germany, Colombia, and Kuwait had been settled or were held pending.

2. Pfizer, Inc., American Cyanamid Co., Bristol-Myers Co., Squibb Corp., Olin Corp., and The Upjohn Co., petitioners, were defendants in the district court.

3. Act of July 2, 1890, ch. 647, §§ 1, 2, 26 Stat. 209; (current version at 15 U.S.C. §§ 1, 2 (1976)).

4. Act of Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731 (codified at 15 U.S.C. § 15 (1976)). Section 4 provides that:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . , and shall recover threefold the damages by him sustained . . . .

Section 1 of the Clayton Act provides that

> [t]he word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Id., § 1, 38 Stat. 730 (codified at 15 U.S.C. § 12 (1976)). *Cf.* Securities Act of 1933, § 2(2), 15 U.S.C. § 77b(2) (1976) ("person" includes "a government or political subdivision thereof").

5. *See* Pfizer, Inc. v. India, 550 F.2d 396 (8th Cir. 1976).

6. 316 U.S. 159. For a consideration of *Evans*, see notes 19-22 and accompanying text *infra*.

7. Pfizer, Inc. v. India, 550 F.2d 396, *adopted on rehearing en banc*, 550 F.2d 400.

Supreme Court, *affirmed. Held:* A foreign sovereign otherwise entitled to sue in this country is a "person" entitled to sue for treble damages under section 4 of the Clayton Act. *Pfizer, Inc. v. India,* 434 U.S. 308, 98 S. Ct. 584, 54 L.Ed.2d 563 (1978), *rehearing denied,* ____ U.S. ____, 98 S. Ct. 1462, 55 L.Ed.2d 502 (1978).

II. LEGAL BACKGROUND

The right of the domestic sovereign to sue in an action at common law is settled, on the ground that it is capable of owning property and should be able to protect it.[8] Whether the sovereign is, however, the subject of a statute creating a right or obligation for a "person" or "persons," depends upon an interpretation of the particular statute to determine the intent of the legislature.[9] The Supreme Court first considered the use of the word "person" in sections 7 and 8 of the Sherman Act[10] in *United States v. Cooper Corporation.*[11] The Court adopted a rule of exclusion for the antitrust laws, holding that rights and remedies were available only to those upon whom they were conferred by the Sherman Act.[12] While noting that the word "person" generally does not include the sover-

8. Cotton v. United States, 52 U.S. (11 How.) 228 (1850) (trespass); Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818) (bill of exchange); *see* United States v. Gear, 44 U.S. (3 How.) 120 (1845) (trespass).

The sovereign may likewise sue in a common law action when a right is granted to it by statute. United States v. Chamberlin, 219 U.S. 250 (1911) (action in debt for a stamp tax due under a War Revenues Act); Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227 (1873) (action in debt for an internal revenue tax).

9. For cases dealing with this question in other areas, see California v. United States, 320 U.S. 577, 585-86 (1944) (federal shipping statute applied to state as owner of wharf); Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 91-92 (1934) (taxation of bond issued by United States); Ohio v. Helvering, 292 U.S. 360, 370 (1934) (federal taxation of a state's commercial activities); Davis v. Pringle, 268 U.S. 315, 318 (1925) (United States as creditor in bankruptcy); Stanley v. Schwalby, 147 U.S. 508, 517 (1893); Dollar Savings Bank v. United States, 86 U.S. at 240.

10. Act of July 2, 1890, ch. 647, §§ 7, 8, 26 Stat. 210. The provisions were reenacted as §§ 4 and 1, respectively, of the Clayton Act. *See* United States v. Cooper Corp., 312 U.S. 600, 610 (1941); note 4 *supra.* In 1955, § 7 of the Sherman Act was repealed as redundant. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283; *see* S. REP. No. 619, 84th Cong., 1st Sess. 2 (1955).

11. 312 U.S. 600. "Person" in the Sherman Act as expressly defined to include a municipal corporation was considered in Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906).

12. 312 U.S. at 604. The Court specifically stated: "It is not our function to engraft on a statute additions which we think the legislature logically might or should have made." *Id.* at 605 (citations omitted). *See id.* at 606.

eign, the Court held that this was not conclusive,[13] and gave controlling weight to the intent of Congress, as indicated by "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute."[14] The policy of the antitrust laws to provide a remedy to victims of antitrust violations, the Court said, was only one of the aids to construction.[15] Considering the Sherman Act, its legislative history, and related legislation,[16] the Court found that the word "person" was not used to refer to the United States, but to parties whose characteristics were those of "natural and artificial persons."[17] Finally, the Court noted as significant the failure of the United States to bring an action for treble damages in fifty years.[18] The Supreme Court next construed the word "person" in the antitrust laws in *Georgia v. Evans,*[19] where a state sued for treble damages under section 7. The Court appeared to invert the presumption in *Cooper,* that a sovereign will not have a cause of action unless one is conferred by the

13. 312 U.S. at 604-05 (citing United States v. Fox, 94 U.S. 315, 321 (1876)).

14. 312 U.S. at 605.

15. *Id.*

16. The Court in *Cooper* did not consider § 1 of the Revised Statutes (1874) (current version at 1 U.S.C. § 1 (1976)) (definition of "person" last amended in 1948), which supplemented the definition of "person" in § 8 of the Sherman Act and § 1 of the Clayton Act. In 1871 Congress had enacted this general definitional statute which provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . ." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. The reference to "bodies politic" was deleted when the Revised Statutes were enacted into positive law to require specific reference in any particular statute in order to include a state, territory, or foreign government. I REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 18 (1872) (Revisers' Note); *see* UNITED STATES REVISION OF THE LAWS 1 (Report of T.J. Durant, 1873).

It was not clear when the antitrust laws were enacted that the corporation in § 1 of the Revised Statutes included foreign corporations. *See* United States v. Fox, 94 U.S. at 321; G. ENDLICH, INTERPRETATION OF STATUTES 118-19 (1888). Congress expanded the definition to "preclude any narrow interpretation," United States v. Cooper Corp., 312 U.S. at 607, and to ensure that foreign corporations competed on an equal basis with domestic corporations. *See* 21 CONG. REC. 4472 (1890); 19 CONG. REC. 4409 (1888).

17. 312 U.S. at 606-13. The Court noted that "person" was used in the same sentence to refer to defendants as well as plaintiffs, and in other sections of the Sherman Act to refer to one liable to criminal prosecution. Further, the Court found that the "scheme and structure" of the Sherman Act was to create two classes of actions: public remedies of injunction, seizure, and criminal prosecution, and a private remedy of treble damages. *Id.* at 607-08.

18. *Id.* at 613-14.

19. 316 U.S. 159 (1942).

antitrust laws.[20] The Court noted that although a state could not prosecute antitrust violations, it was otherwise like other purchasers injured by such violations.[21] Observing that to hold otherwise would be to leave a state without any redress for anticompetitive activity, the Court held that a state could sue for treble damages.[22] Although a foreign sovereign may bring an action in the United States courts,[23] its right to do so is not absolute, but is based on comity.[24] The only antitrust suits by foreign sovereigns of record prior to 1969 were in the early 1960's.[25] Foreign commerce is clearly a subject of the antitrust laws; the acts extend expressly to "trade or commerce . . . with foreign nations."[26] Foreign corporations may by definition sue and be sued as "persons" under the antitrust

20. *See* 312 U.S. at 604; note 12 & accompanying text *supra.*

21. 316 U.S. at 162-63. The Court noted the holding in *Cooper* that the Sherman Act created one class of action for the federal government and one class for "other victims" of violations. 316 U.S. at 161-62; *see* 312 U.S. at 607-10; note 17 *supra.* Appellant Georgia had argued, "If the word 'person' as used in the statute excludes the sovereign, the State may yet maintain an action, [because it] has effectively divested itself of its sovereignty with reference to . . . interstate commerce . . . and is relegated to the status of a private individual." Brief for Appellant at 37, Georgia v. Evans, 316 U.S. 159.

22. 316 U.S. at 162. Mr. Justice Roberts, who wrote the majority opinion in *Cooper,* dissented, arguing that the Court was amending the act on policy grounds when Congress had not indicated its intent. 316 U.S. at 164.

23. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-09 (1964) (conversion); The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870) (libel); *see* U.S. CONST. art. III, § 2, cl. 1.

At the time of the enactment of the Sherman Act, foreign sovereigns brought actions for unfair competition in the United States courts. *See, e.g.,* French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 (1903) (France suing for use and benefit of its citizen-lessee); La Republique Francaise v. Schultz, 94 F. 500 (S.D.N.Y. 1899).

24. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 408-09. This right may be denied if the foreign sovereign is at war with the United States, but is otherwise accorded. *Id.* at 408-12; Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938). It is circumscribed by other rules of law. *See, e.g.,* Monaco v. Mississippi, 292 U.S. 313, 321-28 (1934) (a state may not be sued without its consent).

25. *See* Velvel, *Antitrust Suits by Foreign Nations,* 25 CATH. U.L. REV. 1 & n.3, 2 n.5 (1975). These cases were settled; preliminary motions to dismiss for lack of standing were denied. *Id.* at 1 n.3.

26. 15 U.S.C. §§ 1, 2, 12 (1976); *see* United States v. Hamburg-Amerikanische P.F.A. Gesellschaft, 200 F. 806 (S.D.N.Y. 1911), 216 F. 971 (S.D.N.Y. 1914), *rev'd on grounds of mootness,* 239 U.S. 466 (1916). The original draft of the Sherman Act covered only imports. *See* 21 CONG. REC. 2598 (1890). The statute as enacted has been held to apply to exports as well. *See, e.g.,* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 961 (D. Mass. 1950).

laws.[27] Beyond this, the intent of Congress to protect foreign consumers, particularly foreign sovereigns,[28] is not clear.[29] The legislative history contains no indication that Congress considered the inclusion of foreign sovereigns as plaintiffs.[30] The antitrust laws, moreover, use the word "person" to refer to both plaintiffs and defendants;[31] therefore, under the *Cooper* rationale, a plaintiff must be able to be a defendant.[32] Since at the time of the enactment of the antitrust laws foreign sovereigns were immune from suit,[33] it would follow that they cannot be plaintiffs. Finally, an effect within the United States is required for recovery under the

27. 15 U.S.C. § 12 (1976).

28. Congress, as evidenced by its general definitional statute, *see* note 16 *supra,* did not understand the word "person" to include a sovereign. This statute has been most recently addressed in United States v. U.M.W., 330 U.S. 258 (1947), where the Court said,

> The [Norris-LaGuardia] Act does not define "persons." In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so [citing United States v. Cooper Corp., 312 U.S. at 604; United States v. Fox, 94 U.S. at 321]. Congress made express provisions R.S. § 1, 1 U.S.C. § 1, for the term to extend to partnerships and corporations . . . . The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.

330 U.S. at 275.

29. Several cases hold that neither the remedial nor the deterrent aspect of treble damages will result in an expansion of the remedy beyond the bounds intended by Congress. *See, e.g.,* Illinois Brick Co. v. Illinois, ___ U.S. ___, 97 S. Ct. 2061, 42 L.Ed.2d 707, *rehearing denied,* ___ U.S. ___, 98 S. Ct. 243, 54 L.Ed.2d 164 (1977) (disallowing the offensive use of the passing-on doctrine); Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972); United States v. Cooper, 312 U.S. at 604; Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973), *cert. denied,* 411 U.S. 938 (1973). The Court noted the primacy of the remedial nature of treble damages in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977) ("the treble damage provision . . . is designed primarily as a remedy").

30. Pfizer, Inc. v. India, 550 F.2d at 399 (concurring opinion), *on rehearing en banc* at 400 (dissent). Congress, on the other hand, expressly intended to include American citizens. *See, e.g.,* 51 CONG. REC. 13898 (1914) (remedy available to "any citizen of the United States or citizen of the country . . . ."); 21 CONG. REC. 1767-68, 1771, 2564, 2569, 2727 (1890); 20 CONG. REC. 1457 (1889); 19 CONG. REC. 192, 4401 (1888). The Court noted this view in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 486 n.10 (citing 21 CONG. REC. 1767 (1890)).

31. *See* 15 U.S.C. §§ 1, 2, 15 (1976).

32. *See* 312 U.S. at 606.

33. *See Ex parte* Peru, 318 U.S. 578, 586-89 (1943); The Exchange, 11 U.S. (7 Cranch) 116, 135-36 (1812).

antitrust laws.[34] The legislative history of the Webb-Pomerene Act,[35] which created an exception to the antitrust laws for joint export associations whose actions have no effect in the United States,[36] indicates that Congress was not concerned with monopolies affecting only foreign consumers,[37] but desired to affirm that the antitrust laws did not regulate such activity.[38]

III. THE INSTANT OPINION

The instant Court began its opinion by noting that Congress had not considered the question of standing for foreign sovereigns at the time the Sherman and Clayton Acts were enacted. It found, moreover, that Congress had intended the phrase "any person" to have "its naturally broad and inclusive meaning," and that the expansive remedial purpose of the antitrust laws precluded a "technical or semantic approach" to the definition, citing the *Cooper* formula for statutory interpretation.[39] The Court thus framed the issue as whether a foreign sovereign possessed any characteristics that might exclude it from the protection of the antitrust laws. The majority found first that being foreign did not itself exclude a plaintiff, noting the extension of the antitrust acts to trade with foreign nations, and the inclusion of foreign corporations as persons under the acts.[40] Conceding that the primary purpose of the antitrust laws was to protect the American consumer, the Court further noted that the remedy accorded foreign plaintiffs

34. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909); United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945) (court of appeals sitting as court of last resort). *See generally* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 29-74 (2d ed. 1973).

35. Act of April 10, 1918, ch. 50, §§ 1-5, 40 Stat. 516 (codified at 15 U.S.C. §§ 61-65 (1976)).

36. *See* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 207-08 (1968).

37. *See id.;* 1 FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE 9 (1916); *Hearings on H.R. 16707 before the House Committee on the Judiciary,* 64th Cong., 1st Sess. 7 (1916).

38. There was some question whether acts which had no effect in the United States were violations of the antitrust laws. *See* H.R. REP. No. 50, 65th Cong., 1st Sess. 3 (1917); K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 105-06 (1958).

39. *See* text at note 14 *supra.*

40. Describing the Webb-Pomerene Act as "a narrow and carefully limited exception to the antitrust laws for certain export activity", the Court concluded that a rule excluding all foreign plaintiffs would be inconsistent with Congress' intent that the antitrust laws be generally applied to foreign commerce.

would contribute to the protection of Americans.[41] The Court similarly determined that a sovereign was not excluded from antitrust protection by reason of its sovereignty. Distinguishing *United States v. Fox* as a construction of New York law, the Court found that Congress had not understood the definition of "person" as clearly excluding sovereign governments.[42] The majority further explained that cases decided at the time the Sherman Act was enacted generally held that the sovereign was entitled to the benefit of a statute extending a right to persons, and that cases construing federal statutes of that era did not invariably imply an intent to exclude the sovereign.[43] The Court noted that *United States v. Cooper* had rejected a hard and fast rule of exclusion of governments as persons, considering "all other available aids to construction" of the antitrust laws.[44] The Court emphasized that the holding in *Cooper* was based upon Congress' affirmative intent to exclude the United States as plaintiff. The Court next applied the holding in *Georgia v. Evans* to foreign sovereigns, reasoning that, just as a state or individual, a foreign sovereign can be injured by anticompetitive practices and is without alternative remedies such as those provided to the United States.[45] The majority concluded that permitting a foreign sovereign to sue under the antitrust laws was merely an application of the "long-settled general rule" that a foreign sovereign is entitled to prosecute its claims upon the same basis as a domestic individual or corporation,[46] and noted that its

41. The Court emphasized that, without actions by foreign plaintiffs, the deterrent effect of the treble damages remedy would be reduced, thereby encouraging companies to violate the law, having the expectation of "illegal profits" abroad offsetting liability for domestic violations. Thus, domestic consumers would be benefitted by the maximum deterrent effect of the assessment of the full costs of antitrust violations.

42. ___ U.S. at ___ n.15, 98 S. Ct. at 589 n.15, 54 L.Ed.2d at 563 n.15. The Court did not consider Congress' general definitional statute, *see* note 16 *supra*, though Pfizer argued to the Court the effect of this statute and its treatment in United States v. U.M.W., *see* note 28 *supra*. Brief for Petitioner at 19-20, 21, Pfizer, Inc. v. India, ___ U.S. ___, 98 S. Ct. 584, 54 L.Ed.2d 502.

43. ___ U.S. at ___ n.15, 98 S. Ct. at 589 n.15, 54 L.Ed.2d at 563 n.15.

44. The Court likewise noted that in *Chattanooga Foundry & Pipe Works*, a city was held to be a "person" "without extended discussion." *See* note 11 *supra*.

45. The Court argued that a foreign sovereign's ability to participate in a cartel or boycott to counter anticompetitive practices, as was suggested by the dissent, was a remedy "hardly available to a foreign nation faced with monopolistic control of the supply of medicines needed for the health and safety of its people."

46. For the general rule of comity the Court cited Banco Nacional de Cuba v.

holding that a foreign sovereign can sue for treble damages in no way involved the Court in foreign policy, affirming "complete judicial deference" to the policy of the executive branch. The dissent, written by Chief Justice Burger,[47] observed that the language of the statute did not support the majority's result, finding that the discrimination between foreign corporations and sovereigns was based on the immunity from suit of foreign sovereigns when the acts were passed, that Congress' concern with foreign commerce did not entail a desire to protect foreign sovereigns, and that the legislative history of the Webb-Pomerene Act demonstrated Congress' desire to protect American consumers even at the expense of foreign consumers. The dissent stated that the absence of legislative history on the question was the best argument for leaving the decision to Congress.[48] It next challenged the majority's interpretation of *Georgia v. Evans,* noting that the states act on behalf of American citizens when they bring antitrust claims, and that they had given up their right to regulate antitrust violations under the commerce and supremacy clauses. The dissent claimed that to apply the *Evans* reasoning to such a different situation was to substitute a "hard and fast rule of inclusion," eschewed in both *Evans* and *Cooper,* noting that foreign sovereigns in bringing antitrust suits contribute at best indirectly to the protection of American consumers, and remain free to enact their own antitrust laws. Foreign sovereigns, moreover, often hold economic ideologies and interests in conflict with those of the United States, and can employ political and commercial weapons against American business. Finally, it was noted that the primary purpose of the act is remedial, and that to permit suits by foreign sovereigns on the basis of a maximum deterrent effect is to reverse the priority of purposes of the antitrust laws on the basis of uninformed speculation. The dissent said that in areas of less political delicacy, the Court had been unwilling to go so far.[49]

Sabbatino, 376 U.S. at 408-09; Monaco v. Mississippi, 292 U.S. at 323 n.2; The Sapphire, 78 U.S. at 167; and U.S. CONST. art. III, § 2, cl. 1. The Court noted that, at the time of the enactment of the Sherman and Clayton Acts, a foreign sovereign could bring actions for unfair competition, "similar in general nature to antitrust claims," citing French Republic v. Saratoga Vichy Spring Co., 191 U.S. 472; and La Republique Francaise v. Schultz, 94 F. 500.

47. Justices Powell and Rehnquist joined in the Chief Justice's dissent.

48. Mr. Justice Powell, dissenting in a separate opinion, said that the question was one of "general policy" upon which the Court had not been given direction by Congress, and that Congress alone had the ability to decide the questions of foreign policy and economic welfare.

49. The dissent cited Hawaii v. Standard Oil Co., 405 U.S. at 264-65, which

IV. COMMENT

The conflicting inferences which may be drawn from the policy considerations advanced by the Court in the instant case indicate that the decision to grant standing to foreign sovereigns should be left to Congress.[50] On the other hand, the economic effect of the decision is consistent with the purpose of the antitrust laws to maintain free competition. In the instant case, Pfizer's anticompetitive activity had an effect both in the United States and abroad; the Court was thus able to find that suit by a foreign sovereign would deter antitrust violations to the benefit of American consumers. Where there is no effect in the United States, however, such a suit would have only a detrimental effect on the economy as a whole, resulting in a flow of money out of the economy, without detering anticompetitive activity which injures Americans. Permitting suit by foreign sovereigns supports the posture of the United States as a proponent of free enterprise, and contributes to a healthy world economy which will provide access for American companies to markets and to raw materials.[51] On the other hand, while it may be equitable to extend standing to many foreign sovereigns, it is unfair to American interests to permit suit by other more powerful sovereigns who may be involved in their own anticompetitive activity.[52] The effects of this activity would be felt

held that a state may not bring an action as *parens patriae*. *Cf.* note 29 *supra* (expansion based on nature of remedy).

50. On February 6, 1978, Senators DeConcini, Thurmond and Allen (Ala.) introduced a bill, the Antitrust Reciprocity Act, which would limit the standing of a foreign sovereign to sue under the antitrust laws. *See* S. 2486, 95th Cong., 2d Sess., § 2, 124 CONG. REC. 1189, 1190-91 (1978) (to Judiciary). The bill provides for actual damages to foreign sovereigns, subject to two criteria:

> (b) No foreign sovereign may bring an action in any court of the United States under the authority of this section unless the Attorney General of the United States certifies to the relevant court that—
>
> (1) the United States is entitled to sue in its own name and on its own behalf on a civil claim in the courts of such foreign sovereign; and
>
> (2) such foreign sovereign by its laws prohibits restrictive trade practices.

Id., § 2(b), 124 CONG. REC. at 1191. Senator DeConcini remarked that the bill would permit suit only by countries which have "demonstrated a commitment to the concepts embodied" in the United States antitrust laws. 124 CONG. REC. at 1190.

51. For a collection of essays on the relationship of the antitrust laws and foreign commerce, see J. BURNS, A STUDY OF THE ANTITRUST LAWS 161-251 (1958).

52. The proposed Antitrust Reciprocity Act does not address the case of a foreign sovereign which is itself involved in an international cartel, while having on its books a statute prohibiting such activity by resident corporations.

both by the domestic economy and by American companies abroad.[53] The Court has heretofore been unwilling to extend antitrust protection beyond the bounds intended by Congress.[54] While stating that it had no legislative guidance, the Court ignored Congress' general definitional statute and the treatment of that statute in *United States v. United Mine Workers,*[55] and relied on the most general indicia of legislative intent. If any class of foreign sovereigns is not to be accorded standing under the proposed Antitrust Reciprocity Act, its characteristics should be clearly set out in the statute and its legislative history.

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53. The most notable example of anticompetitive activity by foreign nations is the cartel of the oil-producing countries.

54. *See* note 29 *supra.*

55. *See* notes 16 & 28 *supra.*

CUSTOMS SEARCH OF INTERNATIONAL MAIL—A CUSTOMS SEARCH OF INTERNATIONAL MAIL IS AUTHORIZED BY 19 C.F.R. § 145.2 AND INCORPORATES THE REASONABLE CAUSE TO SUSPECT REQUIREMENT OF 19 U.S.C. § 482

I. FACTS AND HOLDING

Appellants, two naturalized American citizens, petitioned the district court for a declaration that customs officials had unlawfully searched letters sent to them from Holland and for an injunction to prevent a repetition of similar acts.[1] The complaint alleged that three first class letters, addressed to appellants in California, were opened by customs officials without appellants' prior knowledge or consent, without any cause to suspect that the letters contained contraband or dutiable merchandise, and without probable cause or a warrant.[2] The appellants argued that the search violated both 19 U.S.C. § 482,[3] which requires customs officials to have reasonable cause to suspect that the letter contains contraband or dutiable merchandise, and their rights guaranteed by the First and Fourth Amendments.[4] The government moved to dismiss the complaint on the grounds that no claim for relief had been or could be stated on the alleged facts.[5] The district court granted the motion, holding that any constitutional requirement of reasonable suspi-

1. DeVries v. Acree, 565 F.2d 577, 578 (9th Cir. 1977).
2. *Id.*
3. 19 U.S.C. § 482 (1976).

§ 482. Search of vehicles and persons.

Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle beast or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. § 3061.

4. DeVries v. Acree, 565 F.2d 577, 578 (9th Cir. 1977).
5. *Id.* The facts were accepted as true for purposes of the motion. Brief for Appellee, at 1.

cion is automatically supplied by the mere entry of a letter into the United States.[6] The district court also accepted the government's contention that the customs officers' search was authorized by 19 U.S.C. § 1582[7] and its implementing regulation, 19 C.F.R. § 145.2,[8] which did not require customs officials to have reasonable cause to suspect that the letter contained contraband or dutiable merchandise.[9] On appeal to the Ninth Circuit Court of Appeals, *held,* reversed. The inspection of international mail by customs officials is governed by 19 C.F.R. § 145.2. It is a regulation implementing 19 U.S.C. § 482 and it therefore incorporates the "reasonable cause to suspect" test contained in that statute.[10] *DeVries v. Acree,* 565 F.2d 577 (1977).

II. LEGAL BACKGROUND

The Fourth Amendment prohibits both warrantless and unreasonable searches and seizures.[11] Border searches have been recognized as an exception to the warrant requirement since the enactment of the first customs statute in 1789.[12] Numerous factors have been offered to justify this exception, including its longstanding

6. DeVries v. Acree, 565 F.2d, 577, 578 (9th Cir. 1977).

7. *Id.* 19 U.S.C. § 1582 (1976).

§ 1582. Search of persons and baggage; regulations.

The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

8. 19 C.F.R. § 145.2 (1977).

§ 145.2 Mail subject to Customs examination.

All mail originating outside the Customs territory of the United States, whether sealed or unsealed, is subject to Customs examination, except . . . . [Various diplomatic and official exemptions are cited].

9. DeVries v. Acree, 565 F.2d 577, 578-79 (9th Cir. 1977).

10. *Id.*

11. U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

12. Act of July 31, 1789, ch. 5, 1 Stat. 29, 43. This statute was enacted by the same Congress which proposed the Bill of Rights. This fact has been cited to help justify the border exception. U.S. v. Ramsey, 97 S. Ct. 1972, 1979 (1977).

history,[13] the expectation of border searches,[14] the governmental interest in controlling contraband,[15] and the impracticality of obtaining large numbers of warrants efficiently.[16] The governmental interests served by the exception include the interception of contraband,[17] the collection of customs duties[18] and the exclusion of illegal aliens.[19] Courts reviewing border searches of international mail have relied on either 19 U.S.C. § 482[20] or § 1582[21] as authorizing warrantless searches. The regulations generally recognized as implementing this statutory authority[22] are 19 C.F.R. § 145.2 and 39 C.F.R. § 61.1.[23] If § 482 is found to be the authorizing statute, its "reasonable cause to suspect" contraband or dutiable merchandise requirement is incorporated in its implementing regulations.[24] If § 1582 is held to be the authorizing legislation, no such statutory requirement is imposed.[25] All border searches are subject to the Fourth Amendment prohibition of unreasonableness regardless of any additional statutory limitations.[26] In *United States v. Doe*,[27] the court reviewed the search of a package from Columbia that was

13. U.S. v. Ramsey, 97 S. Ct. 1972, 1981 (1977).

14. U.S. v. Doe, 472 F.2d 982, 984 (2d Cir. 1973); U.S. v. Sohnen, 298 F. Supp. 51, 55 (E.D.N.Y. 1969).

15. U.S. v. Sohnen, 298 F. Supp. 51, 54 (E.D.N.Y. 1969).

16. U.S. v. King, 517 F.2d 350, 353 (5th Cir. 1975).

17. U.S. v. 12 200-ft. Reels of Film. 413 U.S. 123, 125 (1973).

18. U.S. v. Ramsey, 97 S. Ct. 1972, 1981 (1977).

19. Almeida—Sanchez v. U.S., 413 U.S. 266, 272 (1973).

20. U.S. v. Ramsey, 97 S. Ct. 1972 (1977).

21. U.S. v. Odland, 502 F.2d 148, 150 (7th Cir. 1974), *cert. denied*, 419 U.S. 1088 (1974).

22. U.S. v. Ramsey, 97 S. Ct. 1972, 1976-78 (1977).

23. For text of 19 C.F.R. § 145.2, see note 8 *supra.*

Postal Service Publication 42 has replaced Parts 11-74 of 39 C.F.R. Chapter I. These parts, including the former 39 C.F.R. § 61.1, have been incorporated by reference to C.F.R. by a document published at 41 Fed. Reg. 35,682 (1976). 39 C.F.R. §§ 10.1-3 provide information on the availability of Postal Service Publication 42.

39 C.F.R. § 61.1 provided:

§ 61.1 What is subject to examination.

All mail originating outside the Customs territory of the United States is subject to customs examination, except [various diplomatic and official government exceptions are listed].

24. *Id.*

25. U.S. v. Odland, 502 F.2d 148, 150-51 (7th Cir. 1974), *cert. denied*, 419 U.S. 1088 (7th Cir. 1974).

26. U.S. v. Ramsey, 97 S. Ct. 1972, 1979 (1977); Carroll v. U.S., 267 U.S. 132, 146-47 (1924).

27. 472 F.2d 982 (2nd Cir. 1973).

found to contain cocaine. The *Doe* court stated that "mere suspicion" was sufficient to satisfy the Fourth Amendment's standard of reasonableness.[28] The *Doe* court than applied § 482 and held that the "reasonable cause to suspect" standard was to be construed as providing no greater constraint on customs officials than the Fourth Amendment.[29] According to the *Doe* court, any other construction would preclude effective enforcement of the customs laws and would do violence to congressional intent.[30] In *United States v. Odland*,[31] the Seventh Circuit held that § 1582 and its implementing regulation 19 C.F.R. § 61.1 authorized the search of a greeting card from Colombia.[32] Under § 61.1, the envelope was "subject to search at the border merely because it was entering the United States from abroad; no other fact, and no suspicion particular to this envelope, is necessary . . . ."[33] The court also found that the same mere entry standard satisfied the Fourth Amendment.[34] In *United States v. Ramsey*[35] the Supreme Court found that specific language of § 482[36] was applicable to a border search of international mail and that § 145.2 and § 61.1[37] were its implementing regulations. Justice Rehnquist expressly declined to decide whether § 1582 or other language of § 482 provided additional authority.[38] The "reasonable cause to suspect" test of § 482 was found to be "a practical test which imposes a less stringent requirement than that of 'probable cause' imposed by the Fourth Amend-

28. *Id.* at 984.

29. *Id.* at 984-85. The court's holding was based on the unintrusive nature of mail search, the expectation of search and the governmental interest in enforcing customs laws. Applying this standard, a satisfaction of the Fourth Amendment automatically complies with § 482.

30. *Id.* at 985.

31. 502 F.2d 148 (7th Cir. 1974), *cert. denied*, 419 U.S. 1088.

32. *Id.* at 150.

33. *Id.* at 150-51.

34. *Id.* at 151.

35. 97 S. Ct. 1972 (1977).

36. *Id.* at 1976. "Any of the officers or persons authorized to board or search vessels may . . . search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law . . . ."

37. *Id.* at 1976-77.

38. *Id.* at 1978 n.10. The Court's limited holding prevented *Odland* and similar § 1582 cases from being overruled.

39. *Id.* at 1977-78. "Probable cause" is the Fourth Amendment standard required for search warrants. It is a stricter standard than "reasonable cause to suspect."

ment . . . ."[39] Addressing itself to the Fourth Amendment challenge to the search, the Court stated "that searches made at the border, are reasonable simply by virtue of the fact that they occur at the border . . . ."[40] The Court rejected the argument that a combination of First and Fourth Amendment rights requires that a warrant be obtained before first class letters are searched at the border.[41] Since the customs official was found to have probable cause[42] for the search, the Court did not have to articulate the requirements of the "reasonable cause to suspect" test or the interaction of this test with the Fourth Amendment.[43] *Ramsey* has provided some guidance, but it has not answered all questions.

III. THE INSTANT DECISION

In the instant case the Ninth Circuit held that 19 C.F.R. § 145.2 implements 19 U.S.C. § 482 and necessarily incorporates the statute's "reasonable cause to suspect" test.[44] According to the instant court, 19 U.S.C. § 1582 is inapplicable to the search of international mail or envelopes and nothing in its history or language suggests otherwise.[45] The court noted that the district court may have been misled by *United States v. Barclift*[46] when it relied on § 1582 as authorizing § 145.2.[47] The court distinguished *Barclift* as being limited to the issue of the constitutionality of § 145.2.[48] The court, basing its holding on a violation of § 482, found it unnecessary to discuss possible violations of the First or Fourth Amendments.[49] In a dissenting opinion, Judge Kilkenny asserted that § 1581, rather than § 482, authorizes § 145.2.[50] After examining the parent statute of §§ 1581, 1582 and 482 and its subsequent history, the dissenting Judge concluded that only §§ 1581 and

40. *Id.* at 1979.
41. *Id.* at 1982-83.
42. *Id.* at 1978 n.9. A finding of "probable cause" means that a "reasonable cause to suspect" is necessarily present.
43. *Id.* at 1978-79.
44. DeVries v. Acree, 565 F.2d 577, 578 (9th Cir. 1977).
45. *Id.* at 579.
46. U.S. v. Barclift, 514 F.2d 1073 (9th Cir. 1975), *cert. denied*, 423 U.S. 842. *Barclift*, also decided by the Ninth Circuit, concerned a constitutional challenge to § 145.2. The court never specified which statute authorized § 145.2, although its opinion was interpreted by the district court as supporting § 1582.
47. DeVries v. Acree, 565 F.2d 577, 579 (9th Cir. 1977).
48. *Id.*
49. *Id.*
50. *Id.* (Kilkenny, J., dissenting) at 579-82.

1582 are applicable to border searches.[51] Since § 482 is limited to the search of items which have already been introduced into the United States, it has nothing to do with searches at the border.[52] Judge Kilkenny noted that § 145.1(c) defines the word "package" which is found in § 1581 but not in § 482.[53] These considerations, combined with the pressing need to prevent drug smuggling, lead Judge Kilkenny to conclude that §§ 1581 and 1582 are the authorizing statutes of §§ 145.1 and 145.2 and therefore a "reasonable cause to suspect" is not a statutory requirement for a search of international mail at the border.[54] Relying on *Ramsey*, the Judge disposed of the First and Fourth Amendment challenges.[55] Judge Kilkenny stated that mere entry into this country makes a search reasonable, and that First Amendment rights are adequately protected by 19 C.F.R. § 145.3,[56] which prohibits the reading of mail without a search warrant.[57] Therefore, Judge Kilkenny concluded that the majority was wrong in holding that § 145.2 implements § 482 and incorporates its "reasonable cause to suspect" requirement for searches of international mail at the border.[58]

IV. COMMENT

The instant case is one of the few situations in which it has been necessary for a court to define carefully the statutory standard for a border search of international mail. Earlier decisions have failed to provide a generally acceptable outline of the appropriate standard. A resolution is provided by an examination of the purposes of the statutes and the conflicting private interests. Customs officials must be provided with adequate authority to intercept con-

51. *Id.* at 581. The judge notes that § 1581 is a more general border search statute while § 482 is specifically designed to apprehend smugglers after they have successfully crossed the border. The fact that the contraband is already in the country justifies the higher standard of § 482.

52. *Id.*

53. *Id.* at 582.

54. *Id.*

55. *Id.* at 582-83.

56. *Id.* at 583. 19 C.F.R. § 145.3 (1977).

§ 145.3 Reading of correspondence prohibited.

No customs officer or employee shall read or authorize or allow any other person to read any correspondence contained in sealed letter mail of foreign origin unless a search warrant has been obtained in advance from appropriate judge or U.S. magistrate which authorizes such action.

57. *Id.*

58. *Id.* at 579.

traband and collect duties. Procedures for searching mail should not be needlessly complicated or time consuming. On the other hand, individuals have a legitimate concern that their mail be free from arbitrary or groundless searches. The preference of both the *Ramsey* and *DeVries* courts for § 482 and its "reasonable cause to suspect" test would seem to provide a rational balancing of the conflicting interests. Government officials should not be authorized to search mail when there is no indication that the mail violates any law. This type of search would be wasteful and would have no rational expectation of furthering any governmental interest. It has been suggested the border search exception should not be construed more broadly than necessary to accomplish legitimate goals.[59] As Justice Powell stated in the *Ramsey* concurrence, the § 482 "reasonable cause to suspect" standard adequately protects constitutional rights.[60] An amendment to 19 C.F.R. § 145.3,[61] proposed by the Treasury in response to the *Ramsey* decision, reaffirms the reliance on § 482 and the assertion that the "reasonable cause to suspect" requirement is not unduly burdensome.[62] The proposal would require officials to obtain a search warrant before any letter which appears to contain only correspondence could be searched.[63] If a letter "appears to contain matter in addition to, or other than, correspondence, . . . reasonable cause to suspect"[64] dutiable merchandise or contraband is neces-

59. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975).

60. U.S. v. Ramsey, 97 S. Ct. 1972, 1983 (1977) (Powell, J., concurring).

61. 42 Fed. Reg. 38,393 (1977).

§ 145.3 Opening of Sealed Letter Mail; Reading of Correspondence Prohibited.

(a) No Customs officer or employee shall open sealed letter mail which appears to contain only correspondence unless a search warrant has been obtained in advance of the opening from an appropriate judge or U.S. magistrate authorizing that action.

(b) Customs officers or employees may open and examine sealed letter mail arriving from outside the Customs territory of the United States (or from outside the Virgin Islands in the case of examinations within the Virgin Islands) which appears to contain matter in addition to, or other than, correspondence, provided they have reasonable cause to suspect the presence of merchandise or contraband.

(c) No Customs officer or employee shall read or authorize or allow any other person to read any correspondence contained in sealed letter mail unless a search warrant has been obtained in advance from an appropriate judge or U.S. magistrate authorizing that action.

62. *Id.*

63. *Id.*

64. *Id.*

sary to justify a search. In the accompanying proposed policy statement, the Treasury provides criteria that can establish a "reasonable cause to suspect."[65] The proposal is consistent with the *DeVries* decision and suggests the Treasury is content with the application of § 482 and the "reasonable cause to suspect" standard.[66] Promulgation of this amendment would provide the needed clarification of the requirement for a customs search of international mail. This standard provides a reasonable balancing of the competing interests of all concerned and should, if accepted, avoid conflicts similar to the instant case.

Daniel R. Wofsey

65. *Id.* at 38,394. In the appendix Section B, the following factors are illustrative of factors that can provide reasonable cause to suspect:

(1) A detector dog has alerted officials.
(2) X-ray or spectroscopic examination.
(3) The weight, shape or feel of a letter.
(4) A tip from a dependable outside source.
(5) The letter is insured.
(6) The mail or article is a box, carton or wrapper.
(7) The sender is a known mailer of merchandise or contraband.

The following factors are not sufficient to constitute reasonable cause to suspect:

(1) The mail article is registered.
(2) The letter appears to contain one or a limited number of photographs.
(3) The letter is part of a mass mailing.
(4) The mail article is from a known source country of contraband.

66. Application of the proposed amendment to the facts of the instant case suggests that a search should not have been conducted without a warrant. Section 145.2(a) would prohibit the opening of "sealed letter mail which appears to contain only correspondence unless a search warrant has been obtained." Even though one of the letters contained photographs, absent any other suspicious characteristics, a warrant would be required. Appendix Sec. B at 38,494.

JURISDICTION AND PROCEDURE—DISCOVERY—PARTY UNABLE TO COMPLY WITH DISCOVERY ORDER WHICH CONTRAVENES FOREIGN NONDISCLOSURE LAW IS NOT IN CONTEMPT OF COURT

I. FACTS AND HOLDING

Rio Algom, a Delaware corporation maintaining corporate offices in Canada,[1] appealed an order adjudging it and its president[2] to be in willful and inexcusable civil contempt of court for failure to comply with a discovery order issued on behalf of Westinghouse Electric Corporation as defendant in a separate action.[3] Although Rio Algom complied with the subpoena duces tecum in numerous particulars, it objected to Westinghouse's request for production of business documents located in its Toronto offices, and to producing its president for deposition concerning those records. The basis for objection was the company's belief that if it produced the business records located in Canada, and if it allowed its president to be deposed concerning those records, it would subject itself to criminal prosecution for violation of the Canadian Uranium Securities Regulations.[4] In an attempt to fully comply with the discovery order without violating the Regulations, Rio Algom had requested the consent of Canadian officials to release the controversial records.[5] That request was denied, as had been letters rogatory[6]

1. Rio Algom Corporation operates a uranium mine in Utah. It is a wholly owned subsidiary of Rio Algom, Ltd., a Canadian corporation having its principal place of business in Toronto. Rio Algom, Ltd. is in turn a subsidiary of Rio Tinte Corporation, Ltd., head of a worldwide mining conglomerate headquartered in London.

2. The president of Rio Algom Corporation is George Albino, a resident of Canada whose citizenship as either American or Canadian is contested by the parties.

3. Westinghouse Electric Corporation was the defendant in a civil action for breach of contract to deliver uranium to several utility companies who brought suit in the United States District Court for the Eastern District of Virginia. Westinghouse's defense of "commercial impracticability" under the Uniform Commercial Code turned on the issue of whether an 800% increase in the price of uranium was caused by secret price-fixing. The instant case arose when Westinghouse sought to buttress its allegation of price-fixing through discovery procedures aimed at Rio Algom and other foreign and domestic uranium producers.

4. The Uranium Information Security Regulations, S.O.R. 76-644 (Sept. 21, 1976), 110 Can. Gaz. Part II at 2747 (1976), were promulgated under the authority of Canada's Atomic Energy Control Act, § 9, CAN. REV. STAT. Cn. A-19 (1970).

5. In a letter to the Honourable Alistair Gillespie, Minister of the Department of Energy, Mines and Resources, June 23, 1977, Rio Algom's counsel explained its dilemma and requested formal waiver of the nondisclosure provisions of the Uranium Security Regulations. 563 F.2d at 999.

issued by Westinghouse to the Supreme Court of Ontario seeking judicial aid in obtaining the records and deposition of Rio Algom's president.[7] The district court then ordered Rio Algom to show cause why it should not be held in contempt of court for failure to comply with an order to satisfy the subpoena.[8] Based on the finding that Rio Algom had not acted in good faith, the district court entered a written order of contempt.[9] On appeal to the court of appeals, *order vacated. Held:* Where a party subject to discovery order asserts inability to comply as a consequence of nondisclosure laws of the country in which documents are located, a reviewing court must consider the party's good faith efforts at compliance, the legal obstacles to compliance, and the relative interests of both parties and nations involved in deciding whether and how to fashion sanctions for noncompliance. *In re Westinghouse Electric Corporation Uranium Contracts Ligitation,* 563 F.2d 992 (10th Cir. 1977).

II. LEGAL BACKGROUND

The Federal Rules of Civil Procedure grant courts broad discretion in formulating and imposing sanctions for failure to comply with discovery requests.[10] When discovery orders from federal courts compel behavior which conflicts with foreign law, the policy

6. A letter rogatory is the method by which one country, speaking through one of its courts, requests another country, acting through its courts by the methods of court procedure peculiar to it and within its control, to assist the administration of justice in the former country. The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941) (citing BLACK'S LAW DICTIONARY, 1050 (4th ed. rev. 1975)).

7. The Supreme Court of Ontario declined to enforce Westinghouse's letters rogatory on the ground that release of the business records sought would violate the Uranium Information Security Regulations, which were promulgated in 1976 under the authority of Canada's Atomic Energy Control Act. The Ontario court also felt that enforcement of the letters would tend to impinge on Canada's sovereignty. *In re* Westinghouse Electric Corp., 16 Ont.2d 273 (1977).

8. Hearings were held before the United States District Court for the District of Utah, Central Division, on June 21 and July 29, 1977, reviewing a discovery order issued May 2, 1977.

9. The contempt order directed Rio Algom to pay $10,000 per day until it had complied fully with the subpoena and subjected corporate property in Utah to seizure in the event that the fine was not paid.

10. Rule 37(a) lists possible sanctions for failure to comply with an order, and grants courts the power to "make such orders in regard to the failure as are just . . . ." Suggested sanctions include issuance of contempt of court orders, rendering a default judgment against the disobedient party, and drawing negative inferences of fact against the party failing to disclose probative information.

supporting effective discovery procedures and the principle of "law of the forum"[11] compete with considerations of international comity[12] and fairness to the individual.[13] The authoritative blueprint for resolving this tension is *Societé Internationale Pour Participations Industrielles et Commerciales v. Rogers.*[14] The plaintiff in that case, a Swiss holding company seeking return of property seized during World War II under the Trading With the Enemy Act, claimed inability to comply with a discovery order for banking records on the ground that to do so would violate Swiss penal law.[15] In reviewing the lower court's dismissal of the case for plaintiff's failure to comply, the Supreme Court distinguished between two issues affecting enforcement of discovery requests where compliance would violate foreign law: (1) whether a person had "control" over the information sought within the meaning of Federal Rule of Civil Procedure 34, so as to render a compliance order appropriate;

11. The principle that matters of procedure and remedy are determined by the law of the forum. Pritchard v. Norton, 106 U.S. 124, 129 (1882); Societé Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435 (D.D.C. 1953), *modified and aff'd sub nom*, Societé Internationale pour Participations Industrielles et Commerciales, S.A. v. Brownell, 224 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

The district court in *Societé* said:

> Procedures of the law of the forum customarily govern law suits. . . . It seems obvious that foreign law cannot be permitted to obstruct the investigation and discovery of facts in a case, under rules established as conducive to the proper and orderly administration of justice in a court of the United States.

111 F. Supp. at 444.

12. "International comity" is the principle that one nation will respect the laws of another in recognition of its sovereignty. For a discussion of various definitions of the principle, see Note, *Ordering Production of Documents from Abroad in Violation of Foreign Law,* 31 U. CHI. L. REV. 791, 794-95 (1964).

13. In an opinion written one year before the decision in the instant case, the Tenth Circuit Court of Appeals wrote: "The dilemma is the accommodation of the principles of the law of the forum with concepts of due process and international comity." Arthur Anderson & Co. v. Finesilver, 546 F.2d 338, 341 (10th Cir. 1976). The *Societé* court raised, but did not resolve, the possibility of denial of due process when a party is punished for good faith inability to comply. 111 F. Supp. at 446, 447.

14. 357 U.S. 197 (1958).

15. The United States government moved under Rule 34 for an order requiring the plaintiff to produce certain banking records. The plaintiff conceded the relevance of the documents, but petitioned for relief from the production order on the ground that disclosure would violate Swiss law. Before a final answer to these petitions was issued, the Swiss Federal Attorney confiscated the records. 357 U.S. at 200.

and (2) whether and how to fashion judicial sanctions for failure to produce.[16] The Court stressed that each consideration was distinct and to be decided on a case-by-case basis, thus limiting the holding of the case to the particular facts under consideration.[17] It held for plaintiff, characterizing its failure to produce as an "inability fostered neither by its own conduct nor by circumstances within its control."[18] The Court based its decision on findings that: (1) the plaintiff's fear of Swiss prosecution was valid, and hence a reasonable excuse for nonproduction;[19] (2) the plaintiff had made all the good faith efforts which could be expected of a reasonable person under the circumstances;[20] and (3) that there was no evidence indicating collusion between the plaintiff and the Swiss government.[21] The opinion cautioned that the question of good faith bore no relation to the fact of noncompliance or to the propriety of an order to produce, and was relevant only to the decision regarding appropriate sanctions.[22] Subsequent decisions interpreting *Societé* have clouded the Court's distinction between the question of judicial power to order compliance, and the question of how to determine appropriate sanctions for noncompliance.[23] Courts

16. 357 U.S. at 205, 206.

17. *Id.* at 205.

18. *Id.* at 211. In holding the records to be within the plaintiff's control within the meaning of Rule 34, the Court noted the "vital influence" which the records might have on the litigation and the fact that the Swiss plaintiff would be in an "advantageous position to plead with its own sovereign" for waiver of the penal laws inhibiting disclosure. *Id.* at 205.

19. *Id.* at 211.

20. The plaintiff had made extensive efforts at compliance with the order, producing over 190,000 documents with the consent of the Swiss government, and had drafted a compromise plan for further compliance which the Swiss government approved but the United States District Court and Court of Appeals refused to entertain. *Id.* at 203.

21. The Court found no evidence in support of the United States government's contention that the plaintiff had played a conspiratorial role in the seizure of the documents by the Swiss government. *Id.* at 208, 209.

22. *Id.* at 208. The Court also noted that curtailment of a party's rights for inability to comply with a discovery order, despite good faith efforts, raised the question of whether such action deprived the party of fifth amendment due process. The opinion did not attempt to resolve the constitutional issue.

23. In Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960), the court refused to enforce a subpoena duces tecum requesting Canadian banking records, on the ground that the American defendant had met "the exception of illegality under foreign law . . .", merely by showing that production would violate Canadian law. In First Nat'l City Bank of New York v. IRS, 271 F.2d 616, 619 (2d Cir. 1969), a case concerning production of branch bank records located in Panama, the court

have often reduced the subtle balancing of variables prescribed under the *Societé* case-by-case approach to oversimplified formulas.[24] Deference to vague principles of international comity have superseded considerations of competing national policies and the interests of particular parties.[25] In response to this misinterpretation of precedent, the 1965 *Restatement (Second) of Foreign Relations Law of the United States* reiterated the underlying assumption of *Societé*—the fact that a discovery order might require an individual to violate the laws of a foreign country did not in itself preclude courts from issuing production orders.[26] In accord with the *Societé* approach to the discovery dilemma,[27] the *Restatement* urged states to mitigate individual hardship resulting from imposition of noncompliance sanctions when certain factors indicate a valid excuse for nonproduction, such as evidence of a party's compliance with portions of a discovery request not subject to nondisclosure regulations, or of a party's attempt to obtain waivers consenting to release of affected records.[28] Publication of

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noted that had Panama's nondisclosure laws applied to the defendant American bank so as to subject it to penalty for disclosure, "production of the Panama records should not be ordered." *See also In re* Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production,* 14 VA. J. INT'L L. 747, 753 (1974).

24. Note, *supra* note 23, at 750.

25. *See* 271 F.2d at 619.

26. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 39 (1965) [hereinafter cited as RESTATEMENT]:

> Inconsistent Requirements Do Not Affect Jurisdiction
>
> (1) A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct.

27. *See* Arthur Anderson & Co. v. Finesilver, 546 F.2d at 341.

28. RESTATEMENT, *supra* note 26, § 40:

> Limitations on Exercise of Enforcement Jurisdiction
>
> 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 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

the *Restatement* was followed by indications that the bias against issuing discovery orders offensive to foreign law was diminishing in the face of increased legislative and judicial support of broad and effective discovery techniques. The 1970 amendment to Rule 37 of the Federal Rules of Civil Procedure eliminated proof of willfulness as a prerequisite to punishing failures to comply with discovery orders,[29] rendering sheer inability to produce no barrier to invocation of Rule 37 noncompliance remedies. Recent decisions have emphasized facts encouraging stringent enforcement of discovery orders, such as materiality of information sought,[30] and the degree to which a corporation enjoyed the privileges and protections of United States law.[31] In antitrust cases in particular, courts have tended toward strict enforcement of discovery orders, and the law of the forum concept has emerged as the dominant approach to jurisdictional conflicts.[32]

III. THE INSTANT OPINION

The instant decision termed the district court's finding of contempt and its imposition of sanction for Rio Algom's failure to fully comply with the Westinghouse discovery request an abuse of discretion, and reversed both orders. The court labeled "clearly erroneous"[33] the lower court's findings that neither Rio Algom nor its president had made a diligent effort at compliance, and that no justification existed to excuse the failure. It further charged the district court with failure to weigh competing national interests as prescribed under the *Societé* case-by-case approach.[34] Expressly recognizing the distinction drawn in *Societé* between the issuance of compliance orders and the imposition of proper sanctions for

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance by that state.

29. The 1970 amendment of Rule 37 eliminated the distinction between "refusal" and "failure" to comply, classifying all noncompliance as simple failure to produce. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2281, at 755 n.18 (1970).

30. *See* Trade Development Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972).

31. *See* Note, *supra* note 23, at 763 n.66.

32. *See id.* at 755. *See also* United States v. First Nat'l City Bank, 396 F.2d 897, 903 (2d Cir. 1968); American Indus. Contracting, Inc. v. Johns-Mansville Corp., 326 F. Supp. 879, 880 (W.D. Pa. 1971).

33. 563 F.2d at 998.

34. The court charged that "the district court's reasoning was that the law of the forum would prevail, regardless of the particular facts of the case." *Id.* at 999.

failure to comply, the court first examined Rio Algom's behavior according to the criteria relied upon by the Court in that case. On the question of good faith, the court characterized Rio Algom's efforts at compliance as both diligent and timely.[35] The court noted that the company had made all efforts to produce those records not subject to nondisclosure regulations, placing the emphasis on Rio Algom's request to the Canadian government for a waiver authorizing release of restricted documents.[36] The court took notice of the strong criminal sanctions[37] which the company would suffer for release of restricted information, and dismissed as unsupported allegations of collusion between Rio Algom and the Canadian government.[38] The court then cited sections 39 and 40 of the *Restatement (Second) of Foreign Relations Law of the United States* as a source of guidance in balancing the interests of the two nations whose laws the controversy involved.[39] Noting the physical location of the records stored at Rio Algom's Toronto offices, the court deemed legitimate the national security concerns expressed in the Supreme Court of Ontario's denial of Westinghouse's letters rogatory.[40] The court concluded that the United States' obvious interest in affording litigants adequate discovery did not in this case outweigh Canada's need to control matters affecting national security.[41] It noted, moreover, that Westinghouse's defense did not depend on enforcement of the discovery order directed at Rio Algom, as its claim of price-fixing was based on cumulative evidence obtained from a variety of uranium concerns. Finally, Rio Algom's enjoyment of the privileges of incorporation under domestic law was not regarded as adequate cause to hold it to an absolute duty of disclosure in view of more significant factors under consid-

35. The district court had found Rio Algom's request for waiver tardy, although it had been made prior to the contempt hearing. *Id.* at 998.

36. *See* note 5 *supra.*

37. Canadian law provided for imposition of a $5-10,000 fine, two to five years imprisonment or both for violation of the Uranium Security Regulations. *See* 563 F.2d at 996.

38. In his dissenting opinion, Judge Doyle echoed Westinghouse's suggestion that Rio Algom had acted in collusion with the Canadian government in effecting promulgation of the nondisclosure regulations. *Id.* at 1001 (dissent).

39. *Id.* at 997.

40. *See* note 7 *supra.*

41. The court implied, however, that under other circumstances, competing national interests in a discovery dispute might weigh out differently, noting that the case at hand involved neither a grand jury investigation nor direct enforcement of antitrust laws. 563 F.2d at 999.

eration. The court decided that in view of Rio Algom's good faith efforts at compliance with the discovery order, the unyielding defense of the Uranium Security Regulations by Canadian courts and administrative authorities, and Westinghouse's access to alternative evidence compensating for Rio Algom's inability to produce, no sanctions for noncompliance should be imposed.

IV. COMMENT

As prosecution of multinational corporations for antitrust violations becomes more frequent,[42] refinement of criteria for resolving discovery stalemates is essential, both to successful enforcement and to the maintenance of friendly diplomatic relations. The instant opinion combines a valuable clarification of the case-by-case approach outlined in *Societé* with a responsible expansion of that precedent through integration of the balancing factors in sections 39 and 40 of the *Restatement,* thus providing needed guidance for the resolution of international discovery disputes. However, the court's explicit recognition that the instant case did not involve direct enforcement of United States antitrust laws suggests an awareness of the limitations of the *Societé* doctrine.[43] Whenever possible, courts are apt to resolve discovery controversies on narrow factual or procedural grounds, rather than appraise the competing national interests which often lie at the heart of these disputes.[44] Neither judicial precedent nor the *Restatement* can equip courts to perform the essentially diplomatic function of accommodating national interests drawn into conflict by requests for disclosure. Attempts by American courts to force compliance with discovery orders which controvert nondisclosure laws protecting sensitive prerogatives of foreign states run the risk of appearing to be conscious impingements on national sovereignty.[45] Moreover, differing national views of the proper role of discovery raise questions of policy which fall more appropriately within the purview of the State Department than that of courts.[46] Particularly difficult chal-

42. *See* Hollmann, *Problems of Obtaining Evidence in Antitrust Litigation: Comparative Approaches to the Multinational Corporation,* 11 TEX. J. INT'L L. 461 (1976).

43. *See* Note, *supra* note 23, at 755.

44. *Id.*

45. *See* note 7 *supra.*

46. In Radio Corp. of America v. Rauland [1956] 1 All E.R. 549, 554, Lord Goddard, C.J., commented on the United States procedural rule allowing discovery requests reasonably calculated to produce admissible evidence: "That is what we should call a fishing proceeding, which is never allowed in the English courts."

lenges to courts would be cases in which meritorious allegations of bad faith were raised regarding a foreign state's promulgation or application of nondisclosure laws.[47] Courts would then be torn between the unsavory prospect of punishing individuals for good faith inability to comply, and the political necessity of imposing such noncompliance sanctions in support of a strong enforcement policy. In addition to the possibility that certain discovery controversies are fundamentally nonjusticiable, considerations of expense and timely adjudication counsel against allowing discovery disputes to stymie international antitrust litigation. Arbitration of international discovery disputes through the appointment of neutral masters assigned to examine restricted documents for legitimate protectionism might be an alternative to complete denial of disclosure. However, nations may balk at the alternative of binding arbitration since discovery controversies often implicate prerogatives of sovereignty which national authorities are loathe to relinquish. Any effective reconciliation of the conflict between liberal American discovery procedures and the reluctance of foreign governments to concede such broad disclosure must come in the form of specific international agreements squarely addressing the problem.[48] Courts have in the past circumvented the fundamentally political dilemma of accommodating competing national policies by drafting narrow decisions based on factual or procedural grounds peculiar to a given case. International procedural disputes are essentially political in nature, and the discovery dilemma requires diplomatic, not judicial, resolution.

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47. Findings of collusion on the part of the party claiming inability to comply pose no difficulty for courts, since evidence of bad faith dissolves any reason to withold compliance orders or to mitigate noncompliance sanctions.

48. For a discussion of prior attempts to develop international civil procedure, see Note, *supra* note 23, at 770-74.

TREATIES—DRUGS AND NARCOTICS—SINGLE CONVENTION ON NARCOTIC DRUGS PERMITS THE UNITED STATES TO PLACE FEWER RESTRICTIONS ON SEPARATED MARIJUANA LEAVES

I. FACTS AND HOLDING

The National Organization for Reform of Marijuana Laws (NORML)[1] petitioned[2] the Director of the Bureau of Narcotics and Dangerous Drugs (BNDD)[3] to decontrol marijuana under the Controlled Substances Act (CSA),[4] or alternatively, to transfer the substance from Schedule I to Schedule V[5] under the CSA. The Director refused to accept the petition for filing,[6] stating that control of marijuana was required pursuant to the Single Convention on Narcotic Drugs (Single Convention).[7] The Director claimed that section 201(d) of the CSA[8] gave him sole authority for the scheduling of controlled substances governed by the treaty. NORML appealed, contending that section 201(d) required that scheduling under the CSA be in conformity with the minimal requirements of the Single Convention. NORML asserted that the treaty does not impose severe restrictions upon the *separated leaves* of the canna-

1. Joining NORML in this petition were the Institute for the Study of Health and Society, and the American Public Health Association.

2. The petition was dated May 18, 1972.

3. Pursuant to the Controlled Substances Act, § 501(a), 21 U.S.C. § 871(a) (1976), the Attorney General delegated his functions under the act to the BNDD, a bureau within the Department of Justice.

4. The CSA is Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1235, and is codified in pertinent part, *as amended,* in 21 U.S.C. § 801-904 (1976).

5. Schedule I drugs are defined as drugs with no currently accepted medical use in treatment and having a high potential for abuse. Schedule V drugs have a currently accepted medical use in treatment and have a low potential for abuse relative to drugs in Schedules I, II, III or IV. 21 U.S.C. § 812 (1976).

6. 37 Fed. Reg. 18097 (1972).

7. Single Convention on Narcotic Drugs, *opened for signature* March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 (effective for the United States June 24, 1967) [hereinafter cited as Single Convention].

8. Section 201(d) of the CSA provides:

> If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 202(b) and without regard to the procedures prescribed by subsections (a) and (b) of this section.

21 U.S.C. § 811(d) (1976).

bis plant, but regulates only the flowering or fruited tops and the resin of the plant.[9] NORML would require that the question of removing the leaves from CSA controls be referred to the Secretary of Health, Education and Welfare for a scientific and medical evaluation of the substance, pursuant to the referral procedure found in section 201(a)-(c) of the CSA. The District of Columbia Circuit Court of Appeals[10] reversed and remanded the case for further proceedings. The court expressed dissatisfaction with the Director's position that even though the treaty might require no more control than Schedule V, he could insist on Schedule I without adhering to the referral mechanisms of the CSA.[11] The Department of Justice was required to conduct hearings[12] regarding the amount of latitude permitted consistent with United States treaty obligations in scheduling marijuana and separate marijuana leaves.[13] A second phase of the hearing was required to determine the operation of the referral mechanism of section 201.[14] The hearing before an Administrative Law Judge[15] determined that, consistent with the Single Convention, "cannabis" and "cannabis resin"—as defined by the treaty—could be rescheduled to CSA Schedule II, cannabis leaves could be rescheduled to CSA Schedule V, and cannabis seeds could be decontrolled. The Judge rejected the government's interpretation of section 201(d) of the CSA, holding that the agency should follow the referral and hearing procedures of section 201(a)-(c). DEA's Acting Administrator,[16] however, denied NORML's petition,[17] stating that regardless of the interpretation of the Single Convention, marijuana could not be removed from Schedule I[18] since the acting Assistant Secretary of

9. *See* Single Convention, *supra* note 7, art. 1(b), (c).

10. NORML v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974). A reorganization within the Department of Justice occurred while this case was pending, causing the action to be continued against the Director of the Drug Enforcement Administration (DEA).

11. *Id.* at 660-61.

12. The court indicated that a rejection of plaintiffs' petition would only be proper after a hearing on the merits, and that the premature rejection after the filing of the petition was improper. *Id.* at 659.

13. *Id.* at 660.

14. *Id.* at 661 n.17.

15. Ad. L.J. Lewis F. Parker.

16. The functions vested in the Attorney General by the CSA have been delegated to DEA's Acting Administrator pursuant to 28 C.F.R. §§ 0.100, 0.132(d) (1976).

17. 40 Fed. Reg. 44164, 44168 (1975).

18. *See* note 5 *supra.*

Health had indicated in a letter that there was no accepted medical use of marijuana in the United States.[19] The Acting Administrator determined that this letter satisfied the referral procedures of section 201(a)-(c) of the CSA.[20] On appeal to the United States Court of Appeals District of Columbia Circuit, reversed and remanded for further proceedings. *Held:* Since United States treaty obligations under the Single Convention would permit separated marijuana leaves to be rescheduled in CSA Schedule V, the Acting Administrator must request a medical and scientific evaluation from the Secretary of Health, Education and Welfare in order to place marijuana leaves in a more restrictive schedule. *National Organization for Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration,* 559 F.2d 735 (D.C. Cir. 1977).

II. Legal Background

The Single Convention, completed by the United Nations in 1961, replaced all previous multilateral treaties[21] designed to control the use and traffic of specified drugs.[22] The Single Convention was an endeavor to obligate signatory states to pass legislative and administrative measures necessary to limit the production, manufacture, import, export, distribution of, trade in, use and possession of drugs.[23] The amount of control required with respect to various drugs depends on their placement in one or more schedules, numbered I-IV,[24] reflecting a decreasing degree of harmfulness and control restrictions. In its definitional section, the Single Convention defines "cannabis"[25] as "the flowering or fruited tops

19. Letter from Dr. Theodore Cooper, Acting Ass't Sec'y of Health, to the Drug Enforcement Administration, *reprinted in* 40 Fed. Reg. 44,165 (1975). Ad. L.J. Parker had refused to weigh the impact of Dr. Cooper's letter and requested a specific opinion from the Secretary of Health, Education and Welfare.

20. *Id.* at 44,165.

21. Single Convention, *supra* note 7, art. 44.

22. The first international effort was made by the Shanghai Opium Commission of 1909. The first international narcotics convention, the International Opium Convention, *signed* January 23, 1912, 38 Stat. 1912 (1912), T.S. No. 612, 8 L.N.T.S. 187, was completed at the Hague in 1912. For synposes of these and subsequent efforts, see Bassiouni, *The International Narcotics Control System: A Proposal,* 46 St. John's L. Rev. 713 (1972); Waddell, *International Narcotics Control,* 64 Am. J. Int'l L. 310 (1970).

23. Single Convention, *supra* note 7, art. 4.

24. Schedule I drugs are subject to all measures of control available under the Single Convention. *Id.* art. 2, ¶ 1.

25. *Cannabis sativa* is the species description of marijuana.

of the cannabis plant *(excluding the seeds and leaves when not accompanied by the tops)*."[26] "Cannabis resin" is defined as "the separated resin . . . obtained from the cannabis plant."[27] Thus, the Single Convention excludes separated leaves from the definition of cannabis and cannabis resin. Cannabis and cannabis resin are placed in Schedule I by the Single Convention.[28] Article 2, paragraph 7 recognizes this distinction between cannabis and separated leaves when it provides that cannabis leaves are subject to the control measures of article 28. Article 28 requires that "[t]he Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."[29] The Single Convention was a major influence on the United States Congress[30] when the Comprehensive Drug Abuse Prevention and Control Act of 1970[31] was passed. This Act attempted to incorporate a series of prior regulatory and enforcement statutes which dealt with drug control.[32] Title II of the Act, dealing exclusively with control and regulation of drugs, is cited as the Controlled Substances Act.[33] The CSA parallels the organization of the Single Convention in several instances. In the CSA, five schedules of controlled substances[34] are established,[35] reflecting decreasing degrees of control and regulation of drugs. The CSA placed various drugs into these schedules,[36] but provided the mech-

26. Single Convention, *supra* note 7, art. 1, ¶ 1(b) (emphasis added).

27. *Id.* art. 1, ¶ 1(d).

28. *See id.* Schedule 1.

29. *Id.* art. 28, ¶ 3. The leaves were placed in this category because of the belief that they do not contain as much of the "narcotic substance" as the flowers and resin of the cannabis plant. Conference for Adoption of a Single Convention on Narcotic Drugs, U.N. ESCOR, Vol. II, U.N. Doc. E/CONF. 34/24/add. 1, at 174-75 (1961).

30. Section 107(7) of the CSA declares: "The United States is a party to the Single Convention on Narcotic Drugs, 1961 . . . designed to establish effective control over international and domestic traffic in controlled substances." 21 U.S.C. § 801(7) (1976).

Other sections of the CSA which refer to the Single Convention are §§ 201(d), 202(b), and 303(a) (codified in 21 U.S.C. §§ 811(d), 912(b), 823(a) (1976)).

31. Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. §§ 801-966 (1976)).

32. Sections 1, 2, 3, 701, 1101, and 1102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 repeal or amend at least a dozen previous federal statutes and portions of the Internal Revenue Code.

33. Pub. L. No. 91-513, § 100, 84 Stat. 1236 (1970).

34. Section 102(6) of the CSA defines "controlled substance" as a "drug or other substance" included in one of the schedules. 21 U.S.C. § 802(6) (1976).

35. 21 U.S.C. § 812(a) (1976).

36. *Id.* at § 812(c).

anism whereby substances could be added to, or transferred between, the schedules.[37] This mechanism is found in section 201 of the CSA, and its interpretation is the major conflict between NORML and DEA. Section 201(a) empowers the Attorney General to add to or transfer[38] between schedules any drug upon which he finds to have a potential for abuse and is eligible for inclusion in one of the schedules.[39] Before the Attorney General follows the rules and hearing requirements of section 201(a), he must request a scientific and medical evaluation from the Secretary of Health, Education and Welfare, as provided for in section 201(b). The Secretary's recommendations are binding upon the Attorney General as to factors within the Secretary's expertise.[40] The key provision is section 201(d).[41] The BNDD and DEA interpret section 201(d) as not requiring a report from the Secretary of Health, Education and Welfare whenever control of a substance is required by international obligations, and further, as allowing the Attorney General to place a substance in the schedule he considers appropriate.[42] NORML maintains that international obligations impose a

37. *Id.* at § 811. Marijuana as defined by § 102(15) of the CSA is placed in Schedule I [hallucinogenic substances] by the CSA. *Id.* § 812, Schedule I(c)(10). This schedule was updated and republished in 21 C.F.R. § 1308.11(d) (1977).

38. The Attorney General may remove a substance from a schedule if he finds that the substance does not meet the requirements for inclusion in any schedule. 21 U.S.C. § 811(a)(2) (1976).

39. The schedules reflect the amount of control placed on a substance according to (a) the potential for abuse, (b) whether or not the substance has a currently accepted medical use in treatment in the United States, and (c) the extent of psychological or physical dependence which may accompany the use of the substance. *See id.* § 812(b). This is very similar to the Single Convention method of classification. *See* Lessem, *Toward An International System of Drug Control,* 8 MICH. J.L. REF. 103, 134 (1974).

40. 21 U.S.C. § 811(b) (1976). Section 201(c) outlines the various factors to be considered in the placement of the substance. *Id.* § 811(c).

41. *See* note 8 *supra.*

42. DEA cites as supportive of this position statements made in a report of the Committee on Interstate and Foreign Commerce analyzing what was then the proposed CSA. These statements read:

> Under subsection (d), where control of a drug or other substance by the United States is required by reason of its obligations under an international treaty, convention, or protocol . . . , the bill does not require that the Attorney General seek an evaluation and recommendation by the Secretary of Health, Education, and Welfare, or pursue the procedures for control prescribed by the bill but he may include the drug or other substance under any of the five schedules of the bill which he considers most appropriate to carry out the obligations of the United States under the international in-

floor on the amount of control required, and asserts that section 201(d) recognizes the necessity of the referral mechanism of section 201(b).[43]

III. The Instant Opinion

In the instant case, the court of appeals agreed that the Single Convention permits a significant degree of latitude with respect to the scheduling of the various parts of the marijuana plant under the CSA. The court first adopted NORML's position that section 201(d) of the CSA requires the Attorney General to seek the recommendations of the Secretary of Health, Education and Welfare even as to drugs controlled by international obligations. First, the court emphasized the congressional scheme which limited the Attorney General's authority to make scheduling decisions under the CSA and enabled HEW to preserve its input. Second, the court pointed out that DEA's reading of section 201(d)—that is, if any amount of control was required with respect to a particular substance under the Single Convention, then the Attorney General can forego the referral procedures—would be an absurd reading of that section insofar as the list of drugs included in the Single Convention nearly parallels those found in the CSA, and thus the referral mechanisms would become meaningless. The court found that such a reading would destroy the balance of power created by Congress in this matter. The proper procedure, said the court, would be for the Attorney General to make a legal judgment as to the minimum level of control required by international obligations, and to request a report from the Secretary of Health, Education and Welfare. The Secretary, after making medical and scientific

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strument, and he may do so without making the specific findings otherwise required for inclusion of a drug or other substance in that schedule.

H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 36 (1970).

43. The Senate recognized that the Justice Department may not have the expertise to reschedule drugs "since such decisions require special medical knowledge and training." S. Rep. No. 91-613, 91st Cong., 1st Sess. 5 (1969). The Senate thus provided in its original version of the CSA, S. 1895, that the Attorney General seek advice from the Secretary of Health, Education and Welfare on all scheduling matters. Quoting from the same House Report as DEA, *see* note 42 *supra*, NORML argued that Congress intended a balance of decision-making in the process, allowing the Attorney General to consider law enforcement criteria, while the Secretary of Health, Education and Welfare would make decisions concerning scientific and medical data, those decisions to be binding on the Attorney General. *See* H. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 22-23 (1970).

findings,[44] could recommend placement of the substance. The instant court stated that the Acting Assistant Secretary of Health's letter would not satisfy the requirement of an elaborate fact-finding medical inquiry by the Secretary of HEW. The court remarked that Dr. Cooper's conclusory statements about the lack of a medical use for marijuana may run counter to other HEW reports[45] and consequently, a formal referral and hearing by HEW is required. On the issue of how much control was required by the Single Convention, the court interpreted the treaty, concluding that "cannabis" and "cannabis resin" could be placed in a minimum CSA Schedule II, while cannabis leaves and seeds could be contained in a minimum CSA Schedule V. The parties agreed and the Acting Administrator had held that "cannabis" and "cannabis resin" as defined by the Single Convention could be rescheduled to CSA Schedule II consistent with the Single Convention, thereby preventing the limiting of these substances for research only. The court then spoke of the sufficiency of CSA Schedule V with respect to the separated leaves. The Single Convention does not require that the leaves be dispensed only by prescription. Article 28, paragraph 3 of the Single Convention merely requires that certain measures be taken to prevent the misuse and illicit traffic in, the leaves of the cannabis plant. Thus, the court found that the Single Convention would allow the United States to place separated leaves in CSA Schedule V. The court concluded that the Acting Administrator of DEA must refer NORML's petition to the Secretary of Health, Education and Welfare for his evaluations and recommendations as to the placement of cannabis and cannabis leaves, and that these recommendations will be binding to the extent that they meet the minimum requirements of the Single Convention.

IV. COMMENT

The instant case is a study in the interpretation of a scheme of administrative procedure. The problem was in reconciling existing law under a multilateral treaty with a congressional statute. Clearly, scheduling decisions under the CSA are meant to consider various factors such as medical evidence and law enforcement.

44. Both DEA and HEW have interpreted section 201(b) of the CSA to bar DEA from exceeding the level of control recommended by HEW. *See* 559 F.2d at 738 n.11.

45. 559 F.2d at 749 (citing U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, FIFTH ANNUAL REPORT TO THE U.S. CONGRESS, MARIJUANA AND HEALTH (1975)).

Congress recognized that certain factors depended on expert analysis from government departments, and it is with this view that the Attorney General is required to seek binding recommendations from the Secretary of Health, Education and Welfare on the scientific and medical aspects of a substance. This balance of power approach seems crucial to a workable understanding of the CSA. Additionally, the CSA recognizes the obligations imposed on the United States by treaties and other conventions. The most coherent interpretation of section 201 of the CSA is that adopted by the instant court—that is, that the Single Convention places minimum obligations on signatory states who may pass more stringent legislation as they see fit. In the United States, this would indicate that the Attorney General must first determine what minimum obligations are imposed by the Single Convention. He must then refer the petition for rescheduling to the Secretary of Health, Education and Welfare who may determine that more control is necessary than specified in the Single Convention. Because so many drugs appearing in the CSA are already listed in the Single Convention, a contrary reading of section 201 would allow the Attorney General to bypass the referral mechanism in almost every case. Presently, the Acting Administrator of DEA is awaiting the recommendations of the Secretary of Health, Education and Welfare before ruling on NORML's Petition.[46] Placement of cannabis leaves in Schedule I by the Secretary would, of course, foreclose the issue. In the event the Secretary places the leaves in a less restrictive schedule, DEA will probably appeal the instant court's decision. Eventually, there is likely to be a partial decontrol and decriminalization of marijuana,[47] but this is a slow process, and may require congressional action. This is so because DEA appears intent on preventing the rescheduling of marijuana. A *re-control* of marijuana may be the most logical solution to this dispute. A system whereby marijuana is decriminalized and at the same time taxed and regulated would be a realistic approach. Marijuana is constantly smuggled into the United States with law enforcement attempts having little effect on the flow. Presently, the public's appetite for marijuana is satisfied by those who face the risk of

46. *See* Controlled Substances Advisory Committee Meetings transcripts.

47. Because the Single Convention requires at least some control over separated cannabis leaves, *legalization* of marijuana is inconsistent with United States' obligations under the Convention. *See* Leinwand, *The International Law of Treaties and United States Legalization of Marijuana,* 10 COLUM. J. TRANSNAT'L L. 413, 416 (1971).

criminal sanctions. Government regulation would obviate the necessity for this source of supply and at the same time, would insure against the introduction of harmful additives to marijuana, such as paraquat, a type of herbicide used in Mexico. The alcohol industry presents the closest analogy to this proposed solution. Licensed companies processing separated cannabis leaves would permit the United States to impose penalties on the use or distribution of flowering tops outside of regulated channels, and thus comply with the Single Convention. In addition, marijuana would be cleared for any of its probable medical uses. The instant case cleared the way for this approach by recognizing the latitude permitted by treaty obligations.

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