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Recent Decisions

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RECENT DECISIONS

ACT OF STATE DOCTRINE—ACT OF STATE DOCTRINE PRECLUDES JUDICIAL INQUIRY INTO THE MOTIVATION UNDERLYING THE ACTS OF A FOREIGN STATE IN A PRIVATE ANTITRUST SUIT

I. FACTS AND HOLDING

Nelson Bunker Hunt, an independent oil producer operating in Libya, brought suit[1] against seven major oil companies operating Libyan and Persian Gulf oil fields[2] for three antitrust violations[3] and breach of contract.[4] The seven major producers had initiated an agreement[5] whereby each agreed to share proportionally any loss caused by the production cutback of any other producer who was a party to the agreement. Plaintiff joined in the agreement[6]

1. Nelson Bunker Hunt filed the complaint on March 3, 1975. On January 9, 1976, the complaint was amended to include W. Herbert Hunt and Lamar Hunt. The plaintiffs, hereinafter referred to as "Hunt," had obtained an oil concession in Libya's Sarir Field in 1957. Between 1961 and 1971, production in the Sarir Field was shared equally by Hunt and British Petroleum Company.

2. Defendants, Mobile Oil Corp., Texaco, Inc., Standard Oil Co. of California, British Petroleum Co., Exxon Corp., Gulf Oil Corp., Occidental Petroleum Corp., and Grace Petroleum Corp., derived approximately 90% of their oil production from the Persian Gulf fields.

3. Two statutes were allegedly violated. Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975) states in relevant part: "Every . . . combination . . . or conspiracy, in restraint of trade or commerce . . ., is declared to be illegal." Section 73 of the Wilson Tariff Act, 15 U.S.C. § 8 (1970) states in relevant part: "Every . . . agreement . . . is . . . illegal . . . when the same is made by or between two or more persons or corporations . . . engaged in importing any article from any foreign country into the United States, and when such combination . . . is intended to operate in restraint of lawful trade or commerce."

4. The defendants moved to dismiss the contract claims, the grounds for which are not relevant to this appeal.

5. The Libyan Producers Agreement of January 15, 1971 was designed to reduce the effect of an increasingly belligerent Libyan policy towards American oil interests. The agreement provided that if "there was insufficient Libyan oil to meet contractual obligations to existing European or Western Hemisphere customers due to restrictions or a government shutdown, the Persian Gulf producers would supply the Libyan producers with Persian Gulf oil at cost . . . ." Hunt v. Mobil Oil Corp., 550 F.2d 68, 71 (2d Cir. 1977).

6. Anticipating the antitrust implications, defendants had obtained a letter from the Department of Justice indicating the Department would not bring an antitrust action if independent Libyan producers were included in any proposed joint action. Upon invitation of the defendants, Hunt participated in the meetings that eventually gave rise to the agreement.

and in reliance thereon subsequently refused a demand to market expropriated oil for Libya.[7] In the third of the antitrust claims,[8] plaintiff contended that the defendants combined and conspired to establish a competitive advantage of Persian Gulf oil over Libyan oil through the agreement which precluded plaintiff from negotiating with Libya to the defendants' disadvantage. Plaintiff further alleged that defendants' manipulations of plaintiff's dealings with Libya led to the nationalization of plaintiff's Libyan oil assets. Defendants moved to dismiss the three antitrust claims for lack of subject matter jurisdiction and for failure to state claims upon which relief could be granted. The United States District Court for the Southern District of New York denied defendants' motion to dismiss the first two antitrust claims but granted the motion with respect to the third. On appeal of the third claim to the Court of Appeals for the Second Circuit, *held,* affirmed. The act of state doctrine precludes judicial inquiry into the actions and the motivation underlying the acts of a foreign state in a private antitrust action. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. denied*, ___ U.S. ___, 46 U.S.L.W. 3366 (U.S. Dec. 6, 1977) (No. 76-1403).

II. LEGAL BACKGROUND

The act of state doctrine, which renders a claim non-justiciable,[9]

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7. On October 7, 1971, Libya nationalized British Petroleum's interests and demanded that Hunt market the oil for Libya. Hunt refused, and in early 1972 Libya evicted Hunt personnel and cut back Hunt's permitted oil production by fifty percent. Hunt's right to produce and export Libyan crude oil was terminated on May 24, 1973. Nationalization of Hunt's assets followed on June 11, 1973, pursuant to Libya's Law 42 of June 11, 1973.

8. The third claim states in relevant part:

> [T]he seven majors . . . have engaged in a combination and/or conspiracy in unreasonable restraint of . . . foreign trade . . . [and] have combined and conspired among themselves to preserve the competitive advantage of Persian Gulf crude oil relative to that of Libyan crude oil, and to diminish competition from Libyan crude oil. . . . In furtherance of this unlawful combination and conspiracy, the seven majors entered into written agreements with Hunt and other Libyan producers, manipulated the course of Libyan negotiations so as to advance their own interests in the Persian Gulf, and followed a course of action that led to Hunt's nationalization and elimination from the production of Libyan crude oil.

550 F.2d at 72.

9. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773-74 (1972) (Powell, J., concurring). One writer has compared justiciability in act of state cases with the political question doctrine. *See* Lowenfeld, *Act of State*

is a principle of federal common law.[10] The doctrine was formally articulated in *Underhill v. Hernandez*[11] wherein the Court stated, "Every sovereign is bound to respect the independence of every other State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[12] Since *Underhill* two competing theories concerning the doctrine's purpose have evolved, and although they are not mutually exclusive, the conflict between them has made consistent application of the doctrine difficult. One theory maintains that the doctrine's underlying concern is to preserve international comity.[13] The second theory bases the doctrine on sustaining the separation of powers.[14] Whichever theory is adopted, it is clear that the doctrine as applied by American courts is not mandated as a rule of international law.[15] American courts have sought to apply the act of state barrier to various situations including: claims of private party responsibility for activity committed in conjunction with a foreign state;[16] actions demanding either restitution from private parties[17] or restoration of property confiscated by a foreign government;[18] and suits applying antitrust laws to alleged monopoliza-

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and Department of State: First National City Bank v. Banco Nacional de Cuba, 66 AM. J. INT'L L. 795, 811 (1972).

10. Williams, *The Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba,* 9 VAND. J. TRANSNAT'L L. 735, 736 (1976).

11. 168 U.S. 250 (1897).

12. For an earlier pronouncement of the doctrine by a state court, see Hatch v. Baez, 7 Hun 596 (Sup. Ct. N.Y. 1876).

13. In *Oetjen v. Central Leather Co.,* 246 U.S. 297, 303-04 (1918), the Supreme Court held that the act of state doctrine prevented American courts from reexamining a seizure by Mexican military authorities of hides owned by a Mexican citizen, stating that the doctrine "rests at last upon the highest considerations of international comity and expediency." The Court did not, however, discount the importance of the political question underpinning. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762-63, 765 (1972).

14. According to the Supreme Court in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964), the act of state doctrine is not required by the constitution but arises "out of the basic relationships between branches of government in a system of separation of powers."

15. 376 U.S. at 421; L. OPPENHEIM, INTERNATIONAL LAW 267 (8th ed. 1955). France, Germany, and the Netherlands use a conflict of laws approach in applying the act of state doctrine. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, at 136 (1965).

16. *See, e.g.,* United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

17. *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

18. These categories were briefly referred to in an illustrative study distinguishing the act of state doctrine from jurisdictional immunities, see Van Pan-

tions that involve activity by a foreign government. Application of the doctrine to a case in the last category emerged in *American Banana Co. v. United Fruit Co.*[19] The Court there found that the Sherman Antitrust Act did not have extraterritorial reach since characterizing the lawfulness of an act could not be accomplished without reference to the law of the country where the act was completed.[20] The Court's alternative rationale in applying the act of state doctrine, was that a United States court should not determine whether the acts of a private party, aimed at persuading a foreign state's government to "bring about a result that it declares by its conduct to be desirable and proper"[21] are unlawful. Departing from *American Banana's* limitation on extraterritorial antitrust laws, *United States v. Sisal Sales Corp.*[22] held that an antitrust action alleging a conspiracy to control sisal imports initiated in the United States, and aided by foreign legislation that was prompted by the defendants, was not barred by the act of state doctrine because the acts leading to the conspiracy and its effects occurred within the United States. In *Banco Nacional de Cuba v. Sabbatino,*[23] the doctrine prevented the assertion of an American claim against a bank representing Cuba for recovery of the proceeds from property expropriated by the Cuban government. *Sabbatino* emphasized that American courts were precluded from inquiring into the *validity* of a foreign state's public acts;[24] moreover, it used a flexible approach that balanced the consensus concerning the particular area of international law in dispute against the United States foreign policy.[25] One year before *Sabbatino,* the Court had held in *Continental Ore Co. v. Union Carbide & Carbon Corp.*[26] that the act of state doctrine did not bar an antitrust action based on an alleged conspiracy to control the production of ferrovanadium. In concluding that no foreign act of state was involved,

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huys, *In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities,* 13 INT'L & COMP. L.Q. 1193, 1211-12 (1964).

19. 213 U.S. 347 (1909).

20. *Id.* at 357.

21. *Id.* at 358.

22. 274 U.S. 268 (1927).

23. 376 U.S. 398 (1964).

24. 376 U.S. at 401. The court replaced the *Underhill* prohibition against sitting in judgment of foreign acts with a prohibition against questioning the validity of the acts. In practice there is little difference between the two concepts since both decline to inquire into the legality of foreign acts.

25. *Id.* at 428.

26. 370 U.S. 690 (1962).

the Court preliminarily examined the foreign actor and determined that its acts could be distinguished from those of the foreign state.[27] Recent cases illustrate a noticeable trend toward similar examinations before applying the act of state doctrine. In *Timberlane Lumber Co. v. Bank of America,*[28] the Court of Appeals for the Ninth Circuit indicated that summary procedures should be used sparingly in complex antitrust litigation, stating that the act of state doctrine does not offer blanket immunity to all conduct that involves a foreign government.[29] The court there declined to apply the doctrine where the defendants had allegedly combined and conspired to prevent plaintiff from milling and exporting Honduran lumber, aided by the Honduran government's enforcement of certain security interests. In *Bernstein v. N.V. Nederlandsche-Amerikaansche*[30] the Court of Appeals for the Second Circuit held that when the executive branch represented to the court that judicial restraint would not further American foreign policy interests the court could proceed with the case. The Supreme Court, however, has recently shifted emphasis from the *Bernstein* exception to other reasons for limiting use of the act of state doctrine. Justice Douglas' concurring opinion in *First National City Bank v. Banco Nacional de Cuba*[31] suggested that it was voluntary submission by a foreign claimant to an American court's jurisdiction, rather than the *Bernstein* exception, that permitted assertion of a setoff against a claim asserted by a foreign state.[32] The Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*[33] did not apply the act of state doctrine where sums had been mistakenly paid to Cubans operating nationalized cigar plants since the operators had only commercial as opposed

27. In *Continental Ore* the plaintiff questioned the allegedly anti-competitive marketing practices of a company appointed as Canada's exclusive wartime vanadium agent. The Court found that it was permissible to examine the relationship between the acts of the defendant corporation and the foreign government before the Court decided whether to apply the act of state doctrine.

28. 549 F.2d 597 (9th Cir. 1976).

29. 549 F.2d at 605-06. *See also* Rupali Bank v. Provident National Bank, 403 F. Supp. 1285 (E.D. Pa. 1975).

30. 210 F.2d 375 (2d Cir. 1954).

31. 406 U.S. 759 (1972). The case involved a counterclaim by an American bank against a Cuban bank for expropriation of property. The Court permitted assertion of the counterclaim since Cuba had originally brought the action as a claim for excess collateral which it had pledged to secure a loan.

32. 406 U.S. at 772-73.

33. 425 U.S. 682 (1976).

to governmental authority.[34] The judicial trend towards limiting the application of the doctrine has been supported by the legislative branch. Congress attempted to reverse the presumption of *Sabbatino* and *Bernstein*—that the act of state doctrine applied to foreign acts unless the executive branch issued a directive to the contrary—by passing the Hickenlooper amendment.[35] The amendment prevents United States courts from basing a refusal to adjudicate property claims on the act of state doctrine unless the foreign state has not acted contrary to international law or the executive branch determines that the act of state doctrine is applicable. This amendment, however, has been interpreted narrowly in practice,[36] leaving the scope of the doctrine's application to further definition by the courts.

III. THE INSTANT OPINION

The instant court determined that under the Sherman Act there was subject matter jurisdiction over the third antitrust claim,[37] then proceeded to adopt the lower court's analytical framework regarding the act of state doctrine.[38] The instant court first separated the jurisdictional holding of *American Banana,* that the Sherman Act does not apply extraterritorially, from the holding that the act of state doctrine applied where defendants had persuaded a foreign government to bring about a certain result. The instant court found that although the former was unpersuasive, the latter was controlling.[39] The court then remarked that *Dunhill* left the *Sabbatino* approach intact[40] and noted that since the sovereign acts of Libya did not fall within the commercial limitation of *Dunhill,* they were within the ambit of the act of state doctrine.[41]

34. 425 U.S. at 691-94.

35. 22 U.S.C. § 2370(e)(2)(1970).

36. Williams, *supra* note 10, at 737.

37. The instant court carefully stated that "[T]he Sherman Act is applicable to the cause pleaded in the third claim. However, the fact that the court has jurisdiction does not make the issue justiciable . . . . Were the Sherman Act not applicable here we would never reach the act of state doctrine . . . ." 550 F.2d at 74.

38. The court stated that for Hunt to prevail he must establish that "*but for* the conspiracy Libya would not have committed" the aggressive acts. To establish this would "require judicial inquiry into 'acts and conduct of Libyan officials, Libyan affairs and Libyan policies . . . and the underlying reasons for the Libyan Government's actions.' " *Id.* at 72.

39. *Id.* at 75.

40. *Id.* at 72-73.

41. *Id.* at 73.

Thus the court found the claim to be non-justiciable since the inquiry into the pleadings would inevitably require judging the acts of a foreign state.[42] In so finding, the instant court rejected plaintiff's contention that the act of state doctrine should not be applied because Libya was not named as a defendant or suggested as a co-conspirator but rather was characterized as a *victim* of the conspiracy.[43] While the court acknowledged that these factors served to distinguish plaintiff's argument from a similar unsuccessful approach in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[44] the instant court insisted that plaintiff's mere characterization of Libya's act as lawful did not prevent application of the act of state doctrine.[45] The court stated that although Libya was not designated a defendant or co-conspirator, its acts remained elements in the chain of causation.[46] First, the court determined that plaintiff's argument that the action by Libya was lawful contradicted the State Department's characterization of the expropriation as retaliatory in motivation and a violation of international law.[47] The court concluded that additional inquiry into the Libyan acts or motivation would be embarrassing to the Executive's conduct of foreign affairs.[48] According to the instant court, the claim could not be established unless the court examined the nexus between Libya's motivation for the acts and the acts themselves.[49] The court, however, found that Libya's motivation and the legality of the seizure were logically inseparable, and reasoned that examination of the motivation required assessment of the validity of the act.[50] Second, the court felt that its inability to undertake any comprehensive fact finding in the area of foreign relations limited its inquiry into Libya's acts. The instant court stated that applica-

42. *Id.*

43. *Id.* at 75-76.

44. 331 F. Supp. 92 (C.D. Cal. 1971). In *Occidental,* plaintiff's private antitrust suit alleged that two Trucial States, Great Britian, and Iran were conspirators. The case was dismissed under the act of state doctrine.

45. 550 F.2d at 76.

46. The court mentioned that the plaintiff did not deny that a private plaintiff bringing an antitrust action "must allege and establish that his business or property was injured as a direct result of the Sherman Act violation." *Id.* at 76.

47. A note from the American Embassy in Tripoli in response to the Libyan nationalization of Hunt's assets labelled the acts a political reprisal directed against the United States. A. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 335.

48. 550 F.2d at 77.

49. *Id.*

50. *Id.* at 77-78.

tion of the act of state doctrine would have to be re-defined to permit examination of the motivation[51] of the foreign sovereign, and declined the task of distinguishing motivation from the act itself out of fear that the act of state doctrine would be weakened.[52] Thus, the instant court held that the act of state doctrine precludes judicial inquiry into the motivation for, as well as the validity of, the acts of a foreign state committed within its territory.

Judge Van Graafiland, in dissent, argued that the act of state doctrine does not prohibit, but rather requires, judicial examination of the nexus between the conduct complained of and the foreign sovereign.[53] He noted three cases[54] in which a court entertained evidence concerning the role played by American citizens in motivating acts of foreign officials.[55] The dissent also disagreed with the majority's position that plaintiff must establish Libya's motivation for the act of seizure and thereby call into question the validity of the Libyan acts.[56] The dissent suggested that *Cantor v. Detroit Edison Co.*,[57] in which the Supreme Court declared that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity,"[58] applied in foreign as well as in domestic "states."[59] The dissent then concluded that the instant court's reliance upon *American Banana* was misplaced and that where the validity of a foreign state's acts are not called into question the foreign state's "participation in the wrongdoing of individual defendants should not be permitted to screen the defendants" from liability.[60]

IV. COMMENT

The instant decision runs contrary to the current trend toward limiting application of the act of state doctrine. The court summa-

51. The instant court notably did not admit that the chain of events prompting Libya's acts could conceivably be differentiated from the motivation.

52. 550 F.2d at 77-78.

53. *Id.* at 79.

54. United States v. Lira, 515 F.2d 68 (2d Cir. 1975); United States v. Cotton, 471 F.2d 744 (9th Cir. 1973); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968).

55. 550 F.2d at 80.

56. The dissent stated that plaintiff's burden of proof required only proof of a causal relationship between defendant's conduct and the injury. *Id.* at 80 n.2.

57. 428 U.S. 579 (1976).

58. 550 F.2d at 80.

59. *Id.*

60. *Id.* at 81 n.2.

rily rejected the argument that an analysis of the motivations behind an act of a foreign state need not question the validity of the act itself although this very distinction has been drawn in other act of state cases. The Ninth Circuit found it possible to investigate the nature of a foreign nation's interest without challenging the motivation and by implication the validity of its acts.[61] *Timberlane* stated that activities by a private actor would not be protected by the act of state doctrine even if a foreign government's acts were procured as part of defendant's overall scheme.[62] Significantly, *Timberlane's* approach is parallel to the instant dissent in that under each analysis the act of state doctrine would not preclude initial inquiry into the nature of the foreign nation's involvement. The dissent, however, further suggests that even if the foreign nation sanctions the alleged private anticompetitive acts, the act of state doctrine should not be invoked automatically. As the dissent reads *Cantor,* a foreign state's " 'authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity' upon the wrongdoer."[63] Since *Cantor* involved only domestic states, the dissent's application of the holding to a situation involving a foreign state is questionable.[64] Nevertheless, the rationale does lend further support to the argument in *Timberlane* that a foreign government's participation in a series of acts does not axiomatically necessitate immunity from antitrust law under the act of state doctrine. Furthermore, United States courts ought not refuse, as did the instant court, to inquire into an alleged anticompetitive scheme by private parties simply because of possible complications in its investigation of the acts of a foreign government allegedly involved in the private scheme. Although in some cases difficulties may arise from the reaction of a foreign state to the exercise of jurisdiction in the United States, from a foreign state's refusal to supply pertinent evidence,[65] or from the inability of American courts to obtain sensitive information, alternative solutions are available. The Court in *Zenith Radio Corp. v.*

61. 549 F.2d at 607.

62. *Id.* at 608.

63. 550 F.2d at 80.

64. The dissent at least addresses this important issue, whereas the majority avoids the question completely by assuming that Libya could not be characterized as a participant in any wrongdoing since it was named as a victim of the conspiracy in plaintiff's complaint.

65. This possibility is suggested in 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 156-57 (1968).

Hazeltine Research Inc.,[66] for example, held that inferences drawn from circumstantial evidence may establish the causal connection between the antitrust violation and the injury.[67] Thus, the Second Circuit's refusal to inquire not only into the motivations behind the acts of a foreign government but also into its involvement in the defendant's alleged scheme leads to an entirely different treatment of the act of state doctrine than that in the Ninth Circuit. Two important considerations result from the instant case's holding. First, inconsistent application of the act of state doctrine by the circuit courts will not further American foreign policy interests. Second, contrary to the recent trend to avoid blanket use of the act of state doctrine, the instant decision extends the application of the act of state doctrine from a proscription against questioning the validity of foreign acts to a proscription against examining even those factors which prompt foreign acts.

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66. 395 U.S. 100 (1969).

67. The dissent also cited *Zenith* for the proposition that an antitrust plaintiff need only show that the illegality complained of was a material cause of the injury. 550 F.2d at 80 n.2. *See* 395 U.S. at 114 n.9.

PREEMPTION—STATE STATUTE PROHIBITING NONRESIDENTS OR ALIENS FROM FISHING IN ITS WATERS IS PREEMPTED BY FEDERAL LAW

I. FACTS AND HOLDING

A foreign owned commercial fishing corporation and its subsidiaries,[1] licensees under the Federal Enrollment and Licensing Act,[2] brought suit in United States district court[3] to enjoin the Virginia Commissioner of Marine Resources from enforcing state statutes prohibiting ships owned by foreign nationals from fishing anywhere in the Commonwealth[4] and barring nonresidents[5] from fish-

1. Seacoast Products, Inc., the principal plaintiff (appellee) is a Delaware corporation, qualified to do business in Virginia. The two subsidiaries are The New Smith Meal Co., Inc. and Sound Oceanic Corp. In 1973 the business was sold to Hanson Trust Ltd., a United Kingdom company owned almost entirely by alien stockholders. Seacoast continued its operations unchanged after the sale.

2. 46 U.S.C. §§ 251-336 (1970 & Supp. V 1975). Section 251 provides:

> Vessels of twenty tons and upward, enrolled in pursuance . . . of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force . . . , and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries.

Section 262 states that "[n]o licensed vessel shall be employed in any trade whereby the revenue laws of the states shall be defrauded." Section 263 provides that "[t]he form of a license for carrying on the coasting trade or fisheries shall be as follows: 'License for carrying on the (here insert "coasting trade," "whale fishery," "mackerel fishery," or "cod fishery," as the case may be.)' " The above three categories of fisheries were the only ones prevalent at the time. These categories have remained unchanged in the statute. Thus, appellees' license for the "mackerel fishery" entitled them to fish for menhaden as well. Douglas v. Seacoast Products, Inc., 97 S. Ct. 1740, 1746 n.8 (1977). At the time of its sale, Seacoast's vessels were enrolled and licensed United States flagships. Under 46 U.S.C. §§ 808, 835, the transfer of these vessels to a foreign-controlled corporation required approval of the Department of Commerce. Following this approval the vessels were reenrolled and relicensed pursuant to 46 U.S.C. §§ 251, 252, 263.

3. Seacoast Products, Inc. v. Douglas, 432 F. Supp. 1 (E.D. Va. 1975).

4. VA. CODE § 28.1-81.1(b) provides in part:

> Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five percentum of the interest therein shall be owned by citizens of the United States . . . and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

5. VA. CODE § 28.1-60 states in part:

> License for taking menhaden fish—A nonresident . . . firm or corporation may take or catch fish known as "menhaden" within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles lighthouse to Cape Henry lighthouse . . . , provided such person,

ing for menhaden[6] in Chesapeake Bay. The plaintiffs argued that the Virginia statutes violated the equal protection clause of the fourteenth amendment and specifically that § 28.1-81.1 of the Virginia Code was preempted by the Bartlett Act.[7] Virginia claimed that the statutes were essential to protect its fishing waters from foreign encroachment.[8] The district court found § 28.1-60 unconstitutional under the equal protection clause[9] and held that § 28.1-81.1 was preempted by the Bartlett Act.[10] The United States Supreme Court noted probable jurisdiction,[11] and on appeal *held,* affirmed. State statutes subjecting federally-licensed fishing vessels owned by aliens or nonresidents to restrictions not applicable to residents are preempted by the Federal Enrollment and Licensing Act and are, therefore, invalid. *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740 (1977).

II. LEGAL BACKGROUND

Authority for the doctrine of preemption originates in the article

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firm or corporation has applied for and obtained a license to take and catch such fish within the above-defined area . . . .

The area thus defined excludes Chesapeake Bay. Section 28.1-60 enables nonresidents who meet the citizenship requirements of § 28.1-81.1 to fish for menhaden in the three-mile wide belt off the coastline, but not within the Chesapeake under any circumstances. In the past, Seacoast had had processing plants in Virginia and was entitled to fish in the Chesapeake as a resident, and more recently, as a nonresident in the area defined by § 28.1-60. Seacoast became an alien corporation in 1973, and with the passage of § 28.1-81.1 in 1975, it was unable to meet the citizenship requirement, and was therefore excluded completely from Virginia's menhaden fishery. 97 S. Ct. at 1744.

6. Seacoast is one of three companies that dominate the menhaden industry, the largest fishing industry in the United States.

7. 16 U.S.C. §§ 1081-1086 (1970 & Supp. V 1975). On appeal appellees also argued that the statutes violated the commerce clause, due process clause, and the foreign affairs power. 97 S. Ct. at 1745 n.5.

8. 432 F. Supp. at 4.

9. *Id.*

10. The Act provides in relevant part that "[i]t is unlawful for any vessel, except a vessel of the United States . . . to engage in the fisheries within the territorial waters of the United States, ..." The Supreme Court did not consider preemption under the Bartlett Act.

11. 425 U.S. 949 (1976). The Supreme Court affirmed the trial court's finding that the doctrine of abstention should not apply in this case. The doctrine of abstention requires forebearance of federal judicial action where the underlying state statute is susceptible to an interpretation which would avoid constitutional adjudication. Since plaintiffs' claims are based on the supremacy clause and federal preemption, abstention was found to be inappropriate. 97 S. Ct. at 1744 n.4.

VI supremacy clause.[12] The circumstances under which a state statute will be preempted by the enactment of federal law has received considerable attention from the Supreme Court.[13] Preemption cases may be divided into three main groups: (1) where Congress has expressly preempted state legislation; (2) where Congress has impliedly preempted state regulation; (3) where Congress has neither expressly nor impliedly prohibited state legislation, but where the state law is nevertheless in conflict with federal regulation of the area. In cases where Congress has expressly precluded states from legislating in a field, the state law is automatically invalidated under the supremacy clause.[14] The validity of state legislation is more difficult to determine, however, in cases where federal legislation does not expressly prohibit state regulation, but where the nature of the subject matter being regulated[15] or the breadth and complexity of the federal legislative scheme[16] manifests an implied congressional purpose to occupy the field. In the leading case of *Rice v. Santa Fe Elevator Corp.*,[17] the Court stated that such an implied purpose is evidenced where the scheme of federal regulation is so "pervasive" or the field is one in which a federal interest is so "predominant" that state laws are presumed to be excluded.[18] *Rice* creates a presumption in favor of the validity of state law, however, when Congress has legislated in a field traditionally occupied by the states, unless preemption of state police power is "the clear and manifest purpose of Con-

12. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

13. *See, e.g.*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

14. *E.g.*, Jones v. Rath Packing Co., 97 S. Ct. 1305, 1311 (1977) (the Wholesome Meat Act, 21 U.S.C. §§ 601-695, which on its face prohibited " 'marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' the Act," held to preempt a California statute with "different requirements").

15. *E.g.*, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 143-44 (1963); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

16. City of Burbank v. Lockheed, 411 U.S. 624 (1973) (In light of the pervasive nature of the scheme of federal regulation of aircraft noise, reaffirmed by the Noise Control Act of 1972, the Federal Aviation Administration, now in conjunction with the Environmental Protection Agency, has full control over aircraft noise, preempting state and local control).

17. 331 U.S. 218 (1947).

18. *Id.* at 230.

gress."[19] This point is further supported by *Florida Lime & Avocado Growers v. Paul,*[20] in which the Supreme Court upheld a California statute prohibiting transportation or sale in California of avocados even though Congress had acted in the field. The Court stated that preemption would not occur "in the absence of persuasive reasons—either that the nature of the subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[21] Generally, complete proscription of the state from legislating on an aspect of commerce is rare, leaving the states with some freedom to act.[22] Once validity of state regulation in an area has been established, either because Congress has expressly provided for it or the area has been traditionally occupied by the states, the question remains whether the state law is so inconsistent[23] or in such conflict with federal law,[24] that the offensive state law must be invalidated. The Court has fashioned myriad tests for determining if such conflicts or inconsistencies exist. In *Hines v. Davidowitz,*[25] a case involving conflict between the Federal Alien Registration Act and a more stringent Pennsylvania alien registration law, the Court questioned whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress."[26] A more restrictive viewpoint developed in earlier decisions and given renewed vitality in *Florida Avocado Growers,* is that preemption should occur only where there is actual conflict between federal and state regulations.[27] The most recent synthesis of preemption doctrine guidelines appears in *Jones v. Rath Pack-*

19. *Id.*

20. 373 U.S. 132 (1963).

21. *Id.* at 142.

22. G. GUNTHER, CONSTITUTIONAL LAW 357 (9th ed. 1975), *citing* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953).

23. Florida Lime & Avocado Growers v. Paul, 373 U.S. at 141; Savage v. Jones, 225 U.S. 501, 533 (1912).

24. Skiriotes v. Florida, 313 U.S. 69, 73 (1941); Kelly v. Washington, 302 U.S. 1 (1937) (holding that enforcement of a state law requiring safety inspections of tugs was not barred by enactment of the Federal Motor Boat Act of 1910).

25. 312 U.S. 52 (1940).

26. *Id.* at 67.

27. "[W]hether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations may be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." 373 U.S. at 142. "[T]he exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot fairly be reconciled or consistently stand together." Kelly v. Washington, 302 U.S. at 10.

ing Co.,[28] a successful suit to enjoin enforcement of a California statute and regulation pertaining to labeling of packaged foods by weight, wherein the Supreme Court endorsed the application of the "clear and manifest purpose" standard of *Rice*, as well as the "unmistakably so ordained" criterion established in *Florida Avocado Growers* and the conflict test of *Hines*.[29] On the other hand, state law has been upheld where there was only minimal conflict between federal and state law, and where the state was acting in an area traditionally occupied by the states, as long as its laws are used to effectuate a "legitimate local public interest."[30] The regulation of fisheries has traditionally been left to the states.[31] Even-handed, legitimate conservation measures, even those impinging upon the rights of federally-licensed fishermen, have consistently been upheld by the Court.[32] In *Smith v. Maryland*,[33] a Maryland statute limiting the use of certain implements in oyster fishing was held valid because "the purpose of the law [was] to protect growth of oysters in the waters of the state."[34] The states' interest in protecting fish and wildlife has traditionally been accorded substantial weight by the courts.[35] Although some early courts equated this interest with a right of "ownership,"[36] the more modern view

28. 97 S. Ct. 1305 (1977).

29. *Id.* at 1309.

30. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), (where the purpose of a city smoke abatement ordinance was to promote the health and welfare of the city's inhabitants, enforcement against federally licensed and inspected vessels was a valid exercise of the state police power).

31. Alaska v. Arctic Maid, 366 U.S. 199, 203 (1961); Skiriotes v. Florida, 313 U.S. 69, 74-75 (1941); Manchester v. Massachusetts, 139 U.S. 240, 266 (1891); McCready v. Virginia, 94 U.S. 391, 394-95 (1876); Smith v. Maryland, 59 U.S. 71 (1855).

32. Skiriotes v. Florida, 313 U.S. 69 (prohibiting use of diving equipment in taking sponges); Manchester v. Massachusetts, 139 U.S. 240 (preventing use of drag nets in fishing for menhaden); Smith v. Maryland (prohibiting use of certain implements in oyster fishing). *But see* Toomer v. Witsell, 334 U.S. 385, 397 (1948) (South Carolina law that charged residents $25 for a shrimp fishing license, but nonresidents $2500, was struck down as obviously discriminatory and without a bona fide conservation purpose).

33. 59 U.S. 71 (1855).

34. *Id.* at 73.

35. "The State holds the propriety of this soil for the conservation of the public rights of fishery thereon . . . . [I]t may forbid all such acts as would render the public right less valuable, or destroy it altogether." *Id.* at 75. *See also* cases cited in *supra* note 32.

36. State power over fisheries "is, in fact, a property right, and not a mere privilege or immunity of citizenship." McCready v. Virginia, 94 U.S. at 395. "The common ownership imports the right to keep the property, if the sovereign so

has termed this ownership a mere "fiction expressive . . . of the importance to its people that a state have power to preserve and regulate the exploitation of a vital resource."[37] However, Congress has also passed fishing laws, including the federal licensing statute. The scope of the federal licensing statute was first set forth in *Gibbons v. Ogden,*[38] where a New York law granting a steamboat monopoly was struck down because it conflicted with the federal act. Justice Marshall concluded that the purpose of the licensing act was to grant "an authority to carry on the coasting trade" and not merely to confer a badge of nationality on the vessel.[39] Subsequent decisions emphasized that the conferral of a federal coasting license does not exempt a vessel from all state regulation in the area.[40] Similarly, the Enrollment and Licensing Act has not completely preempted state regulation of fisheries, but rather has left to the states the power to regulate certain aspects of that industry. Thus, the question that arises in cases where a state has enacted laws regulating its fisheries is whether under the *Hines* or *Florida Avocado Growers* standards the statute fatally conflicts with concurrent federal legislation.

III. THE INSTANT OPINION

In the instant opinion, the Court first declined to decide the case on the same constitutional grounds as did the district court.[41] Rely-

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chooses, always within its jurisdiction for every purpose." Geer v. Connecticut, 161 U.S. 519, 530 (1896). In the instant case the state argues that both the case law and the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1970), recognize an ownership interest of a state in the fish swimming in its territorial waters. The Act gives the states "title," "ownership," and "the right and power to manage, administer, lease, develop and use" the lands beneath the oceans and natural resources within their jurisdiction. The Court emphasized, however, that within this grant of power there are retained "all constitutional powers of regulation and control" over these lands and waters "for purposes of commerce, navigation, national defense, and international affairs." 97 S. Ct. at 1751, *quoting* 43 U.S.C. § 1314(a) (1970).

37. Toomer v. Witsell, 334 U.S. at 402; Missouri v. Holland, 252 U.S. 416, 434 (1920).

38. 22 U.S. 1 (1824).

39. *Id.* at 212-13.

40. Huron Portland Cement Co. v. Detroit, 362 U.S. at 446; Kelly v. Washington, 302 U.S. 1 (1937); Packet Co. v. Catlettsburg, 105 U.S. 599 (1881).

41. The appellees had argued that the statutes violated the equal protection clause and the commerce clause and that they interfered with conduct of foreign affairs. *See* note 7 *supra.* Cases involving protective fishing laws have frequently been prosecuted on the former two grounds, as well as under the due process

ing instead largely upon its synthesis of preemption doctrine in *Jones v. Rath Packing,* with particular emphasis on the *Rice* test, the Court determined that the instant case dealt with "federal legislation arguably superseding state law in a field 'traditionally occupied by the states,' "[42] and, therefore, that preemption would be found only if exclusion of state regulation were "the clear and manifest purpose of Congress."[43] Accordingly, the Court began its analysis by inquiring into the congressional intent and purpose in enacting the enrollment and licensing laws. Noting the lack of legislative history, the Court relied almost exclusively upon the interpretation given the federal statute in *Gibbons v. Ogden.* The Court cited with approval the portion of Chief Justice Marshall's opinion which held that conferral of a federal license gives a vessel "authority to carry on the coasting trade," and is not intended merely to establish the nationality of the vessel. Conceding that Marshall's interpretation of the Act's intent had been criticized by some commentators, the Court nevertheless bolstered its reliance on *Gibbons* with the assertion that continued reenactment of the Act in approximately the same form conclusively indicated Congress' endorsement of that interpretation.[44] The Court recognized also the "negative implications" of *Gibbons,* that the states retain power to enact "reasonable, nondiscriminatory conservation and environmental protection measures."[45] The Court then equated the "coasting license" conferred in *Gibbons* with the "mackerel fishing license" granted appellees in the instant case, and reasoned that just as the "coasting license" confers the authority to carry on the coasting trade, so the "fishing license" confers the right to "fish in Virginia waters on the same terms as Virginia residents."[46] Admitting that Congress had not traditionally had the power to regulate fisheries in state waters, the Court concluded that under modern commerce clause doctrine such power exists where, as in the instant case, there is some effect on interstate commerce. Having decided that the Act validly confers a federally-licensed right to

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clause and the privileges and immunities clause. *See, e.g.,* Alaska v. Arctic Maid, 366 U.S. 199 (commerce clause); Takashi v. Fish & Game Comm'r, 334 U.S. 410 (1948) (equal protection and due process); Toomer v. Witsell, 334 U.S. 385 (1948) (privileges and immunities clause).

42. 97 S. Ct. at 1745.

43. *Id.*

44. *Id.* at 1749. *See generally* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 (1975).

45. 97 S. Ct. at 1749-50.

46. *Id.* at 1751.

fish, the Court concluded that the Virginia statutes were invalid since they conflicted with appellee's exercise of that right.[47] Moreover, the Court rejected appellants' arguments that an "ownership" interest in the fish carried with it the right to exclude some federally-licensed fishermen.[48] Finally, the Court listed policy considerations in support of its decision—value of federalism and the threat of Balkanization of the fishing industry that might result from a proliferation of discriminatory state fishing laws.[49] In upholding the district court's decision, the Court held that even-handed and reasonable state regulation in this area would have been valid, but that § 28.1-60 and § 28.1-81.1 were preempted by the Federal Enrollment and Licensing Act insofar as they subjected federally-licensed vesssels owned by aliens and nonresidents to restrictions not applicable to similarly licensed American citizens and Virginia residents.

IV. COMMENT

The instant opinion is important in determining the extent to which the preemption doctrine may be used in the future to strike down discriminatory state fishing laws. In deciding the case on preemption grounds, rather than on equal protection, due process, or commerce clause rationale, the Court has indicated that preemption is the most effective means of invalidating protective fishing laws.[50] Since the courts have considerable leeway in finding an implied congressional exclusion or determining that the state laws are in sufficient conflict with federal regulation, preemption is a more flexible basis for deciding a case. This enables the courts to consider protective fishing statutes individually, striking down those whose impact is discriminatory, while upholding even-

47. *Id.* at 1752, *citing* Florida Avocado Growers v. Paul, 373 U.S. at 142 ("no State may completely exclude federally licensed commerce").

48. *See* note 37 *supra.*

49. New York, Massachusetts, Maryland, Maine, and Delaware, for example, have similar protective fishing laws.

50. One author suggests that in the closely related field of endangered species protection, preemption is a more effective basis for invalidating state legislation than are either due process or commerce clause rationales. Increased concern for environmental problems has made due process invalidation less likely, while the use of commerce clause reasoning has been weakened by decisions holding state conservation laws valid where there is only an incidental effect on interstate commerce. Note, *Federal Preemption: A New Method for Invalidating State Laws to Protect Endangered Species,* 47 COLO. L. REV. 261, 263 (1973).

handed and reasonable conservation measures.[51] Unfortunately, the instant decision appears to expand the courts' discretion even beyond this point. In applying the test recently set forth in *Jones*, the Court erroneously places primary reliance on the incorporated standard of *Rice v. Santa Fe Elevator*. Moreover, the Court unnecessarily appends policy considerations not wholly applicable to the case before it.[52] The *Rice* standard, where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,"[53] should be applied to strike down state laws where, regardless of any conflict between state and federal regulation, the "clear and manifest purpose" of Congress is to supersede state regulation. The field itself will have been preempted. This is not the situation in the instant case, as is clear from the Court's qualifying statement that reasonable and evenhanded conservation measures are unaffected by its decision.[54] Control of fisheries has uniformly been held to be a local matter, amenable to local regulation.[55] The Court in the instant case alters the standard that should be applied to the area of state fishing and conservation law, allowing future courts to expand the scope of preemption simply by finding that the federal interest in this area is so dominant as to preclude state regulation. The Court's policy statement similarly distorts the intended scope of the instant holding. By expounding federalism and warning of the dangers of "Balkanization" of the commercial fishing industry, the Court encourages the erroneous assumption that the case is one in which the interest in the area of regulation is so inherently national that only federal regulation should be allowed. It is clear, however, that the Court felt the Virginia statutes were offensive only to the extent that they were discriminatory, not because they were enacted in a field preempted by federal scheme. This case is better characterized as one where, as in *Huron Portland Cement Co. v. Detroit* or *Hines v. Davidowitz*, the Court found that the state could act as long as it did so impartially and in pursuit of a legitimate local

51. The Court is able to avoid or postpone constitutional decisions by relying instead upon statutory construction, thus assuring the continued sanctity of the Constitution while at the same time providing Congress with an opportunity to reconsider and revise its enactments. *See* Note, *Preemption as a Preferential Ground*, 12 STAN. L. REV. 208, 224-25 (1959).

52. 97 S. Ct. at 1752.

53. 331 U.S. at 230.

54. 97 S. Ct. at 1753.

55. *See* note 31 *supra*.

public interest. If subsequent decisions attach more weight to the standards applied in reaching the instant decision and the Court's inaccurate policy statements than to the actual holding, then the concededly significant state interest in protecting its fisheries may be greatly jeopardized.

Douglas Berry

WARSAW CONVENTION—PROVISION FOR LIMITING LIABILITY—RECOVERIES IN PERSONAL INJURY ACTIONS AGAINST AIR CARRIER EMPLOYEES, AS WELL AS AGAINST THE AIR CARRIER ITSELF, ARE TO BE LIMITED BY THE WARSAW CONVENTION

I. FACTS AND HOLDING

Personal representatives, heirs, and next of kin of nine airline passengers killed on a Trans World Airlines (TWA) flight from Tel Aviv to New York,[1] in an attempt to circumvent the liability limitation provisions of the Warsaw Convention,[2] brought suit not

1. On September 8, 1974, Trans World Airlines flight 841 from Tel Aviv to New York crashed into the high seas some 50 nautical miles west of Cephalonia, Greece, killing all 79 passengers and 9 crew members on board.

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature,* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 875, 137 L.N.T.S. 11 (adherence of United States proclaimed Oct. 29, 1934) [hereinafter cited as Warsaw Convention]. The relevant provisions of the Convention relating to liability limitations are as follows (with official French version reproduced where relevant to the text):

Article 17

French (Official):

> *Le transporteur* est responsable due dommage survenu *en cas de* mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutés operations d'embarquement et de debarquement.

[emphasis added.]

English (Unofficial):

> *The carrier* shall be liable for damage sustained *in the event* of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[emphasis added.]

Article 22

English (Unofficial):

> In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [In 1934, about $8,300] . . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Article 24

French (Official):

> (1) Dans *les cas* prévus aux articles 18 et 19 toute action en responsabilite, a quelque titre que ce soit, ne peut etrê exercée que dans les conditions et limites prévues par la presenté Convention.

against the carrier (TWA) itself but against the President of the carrier and its Vice-President for Audit and Security. Plaintiffs alleged that the defendants negligently failed to prevent the placing of a bomb, which is alleged to have exploded and caused the disaster, on board the aircraft. Defendants denied the allegations and, in the alternative, pleaded the liability limits of the Convention as modified by the Montreal Agreement.[3] Defendants argued that under the Convention a carrier[4] can be held liable for the death or injury of passengers, but that its liability is limited in amount to $75,000 per passenger unless plaintiff(s) can show willful misconduct.[5] The United States District Court for the Southern District of New York concluded that the Convention's liability limitations should not be extended to carrier employees,[6] dismissed defendants' defense, and certified the question to the Court of Appeals for the Second Circuit.[7] The Court of Appeals, *held,* reversed and remanded. Under the limits prescribed by the Warsaw Convention, plaintiffs may not recover from an air carrier's employees, or from the carrier and its employees together, a sum greater than that recoverable in a suit against the carrier itself. *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), *petition for cert. denied*, 46 U.S.L.W. 3293 (U.S. Oct. 31, 1977) (No. 77-339).

II. LEGAL BACKGROUND

The Warsaw Convention was created to promote uniform rules

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(2) Dans *les cas* prévus a l'article 17, s'appliquent egalement les dispositions de l'alinea precedent.

[emphasis added.]

English (Unofficial):

(1) In the *cases* covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the *cases* covered by article 17 the provisions of the preceding paragraph shall also apply.

[emphasis added.]

3. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. 18,900, Civil Aeronautics Board Order Approving Agreement, May 13, 1966, 31 Fed. Reg. 7302 (1966). The Montreal Agreement provided for absolute carrier liability up to $75,000 on all flights into or out of the United States.

4. The term "carrier" is not defined in the original Convention.

5. *See* Warsaw Convention, *supra* note 2, article 25, 49 Stat. 3000 at 3006, 3020.

6. Reed v. Wiser, 414 F. Supp. 863, 864 (S.D.N.Y. 1976).

7. *See* 28 U.S.C. § 1292(b) (1970).

relating to the international transportation of persons, baggage, or goods performed by aircraft for hire.[8] The United States became a party to the Convention on June 27, 1934.[9] The Convention establishes the liability of carriers for damage to passengers,[10] sets a maximum liability per passenger at $8,291.87,[11] and prescribes certain defenses available to the carrier. Since the Convention's enactment, the limitation of liability provisions have been the center of considerable debate.[12] Citing the low liability limitation, the United States gave a formal six month notice of denunciation of the Convention on November 15, 1965.[13] As a result, a conference was convened in Montreal and an interim arrangement known as the Montreal Agreement was formulated.[14] Under the Agreement, the majority of international air carriers[15] scheduling flights involving the United States[16] agreed to increase their liability limit to $75,000 per passenger, inclusive of legal fees,[17] and to waive any

8. Landry, *Swift, Sure and Equitable Recovery—A Developing Concept in International Air Law,* 47 N.Y. ST. B.J. 372, 373 (1975).

9. *See,* Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules,* S. EXEC. DOC. No. 6, 73d Cong., 2d Sess. 3-4 (1934).

10. *See* note 2 *supra.*

11. This was the equivalent in 1934 of 125,000 Poincaré francs, the amount specified in the Warsaw Convention. The standard of fineness was fixed in gold.

12. For detailed discussion of the history of the Convention, amendments thereto, and debate surrounding the limitation provision, see H. DRION, THE LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW (1954); L. KREINDLER, 1 AVIATION ACCIDENT LAW § 11.01-11.09 (rev. ed. 1974); 1 C. SHAWCROSS & K. BEAUMONT, AIR LAW (3d ed. 1966); Calkins, *The Cause of Action Under the Warsaw Convention,* 26 J. AIR L. & COM. 217 (1959); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 (1967); Sands, *Air Carrier's Limitations of Liability & Air Passengers Accident Compensation Under the Warsaw Convention,* 28 J. AIR L. & COM. 260 (1961-62); *The Warsaw Convention—Recent Developments in the Withdrawal of the U.S. Denunciation,* 32 J. AIR L. & COM. 243 (1966).

13. The notice was in the form of a diplomatic note delivered by the American Embassy in Warsaw to the Government of the People's Polish Republic. 50 DEP'T STATE BULL. 923 (1965). *See also,* Lowenfeld & Mendelsohn, *supra* note 12, at 551.

14. Agreement C.A.B. 18,900, Civil Aeronautics Board Order Approving Agreement, May 13, 1966, 31 Fed. Reg. 7302 (1966).

15. For a listing of air carriers that had signed the Agreement as of April 1970, see L. KREINDLER, *supra* note 12, § 12A.03.

16. In promulgating the Montreal Agreement, a quasi-legal and largely experimental system of liability of a contractual nature was imposed upon international aviation. Broadly stated, the system provides for absolute liability and a limitation of damages. *See id.* § 12A.01.

17. Liability limits had previously been increased by the Hague Protocol in September, 1955. The Protocol incorporated amendments to the Convention (in-

defense under subdivision (1) of article 20[18] of the Convention.[19] There is some question whether the liability of agents of the carrier is limited[20] since the Convention speaks only of the carrier itself.[21] To the extent that such ambiguities exist, they must be resolved by the interpretation of the agreement.[22] Where the official text of a treaty is in only one language, that language is controlling.[23] While the Agreement was officially translated into several languages, the Convention's only official language is French.[24] In *Bacardi Corp. v. Domenech*,[25] the United States Supreme Court reasoned that where a treaty admits of two constructions, one restricting and the other enlarging, the more liberal interpretation is to be preferred.[26] The Court noted that construing a treaty in this manner tends to give effect to the purpose which animates it.[27] In *Block v. Compagnie Nationale Air France*,[28] the Fifth Circuit applied similar reasoning in finding the Warsaw Convention applicable to charter flights.[29] In *Eck v. United Arab Airlines, Inc.*,[30] the

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cluding article 25A) which increased the maximum limit of passenger liability to $16,584 and specifically extended to agents of the carrier the liability limitation available to the carrier itself. *See* L. KREINDLER, *supra* note 12, § 12.02[1]. The United States neither ratified nor adhered to the Hague Protocol. *See id.* § 12.01. The text of the Protocol may be found at 2 AV. L. REV. (CCH) ¶ 27.

18. Article 20(1) provides:

English (Unofficial):

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

19. Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

20. L. KREINDLER, *supra* note 12, § 11.05[6].

21. *See* Warsaw Convention, *supra* note 2, articles 17 & 22.

22. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 146 (1965).

23. Todok v. Union State Bank, 281 U.S. 449, 454 (1930), *cited in* Rosman v. Trans World Airlines, Inc., 314 N.E.2d at 852.

24. Article 36 provides:

English (Unofficial):

This Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry of Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

25. 311 U.S. 150 (1940).

26. 311 U.S. at 163, *citing* Factor v. Laubenheimer, 290 U.S. 276, 293-4 (1933) and Jordan v. Tashiro, 278 U.S. 123, 127 (1928).

27. 311 U.S. at 163.

28. 386 F.2d 323 (5th Cir. 1967).

29. *Id.* at 330.

30. 15 N.Y.2d 53, 203 N.E.2d 640 (1964).

New York Court of Appeals concluded that the proper procedure is to examine the treaty as a whole and to study problems which it was intended to solve.[31] In its interpretation of the Convention, the court stated that "he who considers merely the letter of an instrument goes but skin deep into its meaning, and all statutes are to be construed according to their meaning, not according to the letter."[32] While the majority of victims of international air disasters have limited themselves to seeking redress from the airline company owning or operating the airplane involved, or from the manufacturer of the airplane, a pilot may ordinarily be held liable for damages caused by his operation of the airplane.[33] Such liability arises either under the common law doctrine of *res ipsa loquitur*[34] or the civil law doctrine that the person controlling the vehicle is absolutely liable for injuries resulting from an accident, regardless of the absence of fault or negligence.[35] United States trial court decisions on the issue have been few in number and inconsistent in result. In *Wanderer v. Sabena,* the Supreme Court of New York County held, without explanation and without express reference to an agency relationship, that agents of the carrier were protected by the limits of the Convention.[36] In *Chutter v. KLM Royal Dutch Airlines,*[37] plaintiff brought suit against the carrier and its agent,[38] alleging that the negligence of both contributed to her injuries. The court held that the conditions and limitations of the Convention inured to the benefit of the defendant agent since the defendant airline was fulfilling a part of its obliga-

31. 203 N.E.2d at 642. *See also,* Maximov v. United States, 373 U.S. 49, 54 (1963); Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 10 (1936).

32. 203 N.E.2d at 643, *quoting* River Brand Rice Mills v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E.2d 545 (1953). *See also,* United States v. A.L. Burbank & Co., 525 F.2d 9, 12-14 (2d Cir. 1975); Bd. of County Comm'rs v. Aerolineas Peruanasa, S.A.,307 F.2d 802, 806-07 (5th Cir. 1962).

33. 555 F.2d at 1082.

34. *See,* Smith v. O'Donnell, 215 Cal. 714, 12 P.2d 933 (1932); Seaman v. Curtiss Flying Service, Inc., 231 App. Div. 867, 247 N.Y.S. 251 (1930); A. LOWENFELD, AVIATION LAW § 4.32 (1972), *cited in* 555 F.2d at 1082 n.3.

35. Judgment of April 7, 1956, Cour d'appel, Paris, [1956] J.C.P. II 9453; Judgment of Oct. 11, 1954, Cour d'appel, Bordeaux, [1955] D. Jur. 32; Judgment of Nov. 12, 1952, Cour d'appel, Paris, [1953] J.C.P. II 7650; C. CIV. art. 1384, para. 1 (Fr.); *all cited in* 555 F.2d at 1082 n.4.

36. 1949 U.S. Aviation Rep. 25; *see also* H. DRION, *supra* note 12, at 157.

37. 132 F. Supp. 611 (S.D.N.Y. 1955).

38. Allied Aviation Service International Corporation, which pursuant to a cargo and line agreement with defendant KLM placed and removed the passenger loading stairs used for entry and exit from the aircraft.

tion under the contract of transportation through its agent.[39] In *Pierre v. Eastern Airlines,* the court held that the liability of the pilot of an Eastern Airlines airplane was not limited by the Convention.[40] Because the Warsaw Convention restricts the force of statutory and common law rights to recover death and personal injury damages, the question of whether its provisions should be strictly or broadly construed is of considerable importance.

III. THE INSTANT OPINION

In the instant case, the court of appeals held that at no time has the United States abandoned the principle that air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters except in the event of proof of "willful misconduct."[41] Addressing the merits of the case, the court found that articles 17, 22, and 24[42] presented two questions of interpretation: first, whether in the absence of any definition of the term *transporteur* (carrier) used in the Convention, that term is limited to the corporate entity or is intended to embrace persons actually performing the corporate entity's function;[43] and second, whether the use of the word *cas* in article 24(1) and (2) should be translated as "cases,"[44] as appellees contended, or "events."[45] Citing *Block v. Compagnie Nationale Air*

39. 132 F. Supp. at 615.

40. 152 F. Supp. 486 (D.N.J. 1957). The court's rationale is worth noting:

> The Warsaw Convention at the time of the accident (1953) applied to the carrier only. Various efforts had been made to amend the terms of the Convention to include the servants and agents of the carrier . . ., but to no avail. Not until 1955 was the limitation so extended in article 25A of the Convention.

152 F. Supp. at 489. This reasoning implies that had suit been brought against the pilot after the incorporation of article 25A of the Hague Protocol, the pilot could have invoked the limitation provision. But since the United States neither ratified nor adhered to the Protocol, this reasoning is questionable.

41. 555 F.2d 1079, 1087 n.11. The court noted that with the possible exception of *Pierre v. Eastern Airlines,* 152 F. Supp. 486, there has never been a Warsaw case in any country in which a plaintiff has obtained, by suing the carrier's employees instead of the carrier itself, more than the sum for which the carrier itself would be liable under the Convention.

42. *See* note 2 *supra.*

43. 555 F.2d at 1083.

44. The amended phrase would read, "In the cases covered by article 17 . . . ."

45. In article 17 (unofficial English version) *cas* is so translated. Appellees argued that *transporteur,* as used in article 17, should be restricted to the corporate entity only, and that *cas,* as used in article 24(1)-(2), should be translated

France,[46] the court found that while under common law the liability of the wrongdoing agent is a separate and clear source of redress, distinct from and logically prior to that of the principal, the Convention was intended to act as an international uniform law that must be read in the context of the national legal systems of all its members.[47] Drawing on the remarks of delegates to conventions on international air law subsequent to the enactment of the Warsaw Convention, the court ruled that a purely common law reading of the language of the Convention would be inappropriate.[48] In holding that the language of the official French version of article 24 implied that the conditions and limits set out in the Convention applied to the instant case, the court interpreted *cas* to mean "event" or "case" in a nonjuridical sense. The court further noted that the authors of the Convention intended article 24 to bar circumvention of the article 22 liability limitations.[49] Turning to the question of the overall purposes of the Convention, the court adopted the positions of the Supreme Court in *Bacardi Corp. v. Domenech*[50] and the New York Court of Appeals in *Eck v. United Arab Airlines, Inc.*[51] Holding that the Convention should be construed to effectuate its evident purposes, the court isolated two principles underlying the Convention's enactment. First, the purpose of the liability limitation "was to fix at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover such damages."[52] Second, it was the desire of the signatories to the Convention to establish a uniform body of rules on liability governing international aviation.[53] Citing the history of the Convention, the court held that to permit a suit against

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as "cases." Such a translation would render the Convention inapplicable to the instant case under article 24(2) since the corporate entity was not a party defendant here.

46. 386 F.2d 323.

47. 555 F.2d at 1083.

48. *Id.* at 1084.

49. *Id.* The court relied on *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F. Supp. 1238, 1245 (S.D.N.Y. 1975) and H. DRION, *supra* note 12, at 158. The district court had accorded considerable weight to the United States' refusal to ratify the Hague Protocol of 1955. The court of appeals considered this reliance to be misplaced, noting that the only reason for the refusal was the United States' dissatisfaction with the low level of the carrier's liability limitations, not with the other provisions of the Protocol.

50. 311 U.S. 150. *See* text at note 25 *supra.*

51. 15 N.Y.2d 53. *See* text at note 30 *supra.*

52. 555 F.2d at 1089.

53. *Id.* at 1090.

a carrier's employees for an unlimited amount of damages for personal injuries would undermine the purpose behind article 22.[54] Further, the court distinguished the decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*,[55] holding that § 4(5) of the Carriage of Goods By Sea Act (COGSA),[56] which limits the liability of an ocean carrier, does not limit the liability of an independent stevedoring company. Unlike the Convention, not only does COGSA specifically exclude the stevedoring company from its definition of "carrier,"[57] but COGSA also must be read against the common law.[58] The court held that a construction of the language of articles 22(1) and 24 which extends the Convention's liability limitation to passenger claims against employees not only reflects the plain meaning and purpose of the French text of these articles, but accomplishes all of the Convention's objectives.[59]

IV. COMMENT

The instant case is one of first impression at the federal appellate level on the question of whether an airline employee sued for damages for personal injuries suffered in an international airplane accident may invoke the Warsaw Convention's liability limitations. In applying liberal principles to obtain an arguably conservative result, the Second Circuit has judicially extended the limits of the Warsaw Convention. It appears that the court's reasoning was predicated on the assumption that unless the limitation provisions protect employees of the carrier as well, their purpose would be defeated. If employees are unprotected, most carriers would be forced to include indemnification provisions in contracts of employment. Further, the carrier would be burdened with unlimited claims, and, as a result, would have to insure against such risk. Consequently, litigation would increase, costs of operation and insurance rates would rise, and the added expense would be passed on to the passenger.[60] Arguably, this process would culminate in an

54. *Id.* at 1089.
55. 359 U.S. 297 (1959).
56. 46 U.S.C. § 1304(5) (1970).
57. 46 U.S.C. § 1301(a) (1970).
58. 555 F.2d at 1093.
59. *Id.* at 1093. Earlier in the opinion, the court had noted that affirmance of the district court's decision would force future tribunals to assume the task of determining what domestic law applies and whether under that law recovery might be had for an amount greater than that recoverable against the airline. *Id.* at 1089.
60. *See,* Comment, *Carriage By Air Act, 1952—Limitation of Air Carrier's*

effect contrary to that anticipated by Secretary of State Cordell Hull[61] and other proponents of limitation of liability in favor of the carrier.[62] The court apparently overlooked the fact that current employment contracts negotiated with air carriers commonly contain indemnification provisions and, correspondingly, the carrier is usually compelled to insure itself against the added risks undertaken as a consequence of such provisions. While attempts have been made to find a strictly legal basis for the proposition espoused by the court in the instant decision,[63] most authorities contend that such a basis does not exist.[64] The foundation for the argument rejected by the court rests on the fact that no attempt was made at Warsaw to cover the liability of employees for their individual tortious acts.[65] Nothing in the history or preamble of the Convention indicates otherwise. Furthermore, articles 17, 18, 19, and 22 speak only of the carrier, whereas in articles 20 and 25, the carrier's agents are mentioned.[66] While it is arguable whether the weight of judicial authority conclusively supports one side or the other, there is a persuasive argument for a result contrary to that reached in the instant case. In this regard, American jurisprudence recognizes two noteworthy principles: first, a culpable tortfeasor should be required to fully compensate his innocent victim for actual damages sustained, and second, anyone who does not cause damage to another should be exculpated from liability.[67] If liability limitations in general are not to be viewed as alien to these principles, they must at least reflect the full capacity of the airline industry to secure insurance coverage for the risks of commercial flight.[68] As for those who would argue for uniformity of rules, H. Drion, one of the foremost proponents of the limitations, has conceded that "[i]f there is any field in which unification of the law on a worldwide basis would be inappropriate, it is the field of the amount of

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Liability—Whether Servants of Carrier Also Protected, 41 CAN. B. REV. 124 (1963).

61. *Id.* at 126.

62. For an extensive discussion of the rationales of limitations of liability, see H. DRION, *supra* note 12, at 12-44 nn.14-42.

63. Comment, *supra* note 60, at 126.

64. *Id.* at 128.

65. *Id. See also* note 12.

66. *See* Comment, *supra* note 60, at 128.

67. *See* Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents,* 52 A.B.A.J. 1122, 1125 (1966).

68. Cabranes, *Limitations of Liability in International Air Law,* 15 INT'L & COMP. L.Q. 660, 683 (1966).

damages to be paid in case of death or injuries . . . ."[69] Limits of liability set by international agreement, embodied in treaty form and adjustable only by subsequent international agreement, are simply incapable of being kept up-to-date.[70] In view of the scarcity of prior United States trial court rulings on the issue and the vigor with which the Second Circuit attacked the questions involved, this decision will likely have significant ramifications for aviation accident law.

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69. H. DRION, *supra* note 12, at 42.
70. Cabranes, *supra* note 68, at 683.