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Recent Decisions

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Recent Decisions

ACT OF STATE—ACT OF STATE DOCTRINE NOT A BAR TO ADJUDICATION OF A COUNTERCLAIM

The following bracketed discussion is quoted from the comment on the Second Circuit's decision that appeared in 5 VAND. J. TRANSNAT'L L. 503-12 (1972) (footnotes renumbered):

[Plaintiff, Banco Nacional de Cuba (hereinafter Banco),[1] brought suit in the District Court for the Southern District of New York to recover the excess realized on the sale of collateral that secured a one year renegotiated loan[2] for ten million dollars[3] made in 1960 by defendant, First National City Bank of New York (hereinafter Citibank). Shortly after the renegotiation, the Cuban Government nationalized defendant's eleven Cuban branch offices.[4] Citibank sold the collateral for an estimated twelve million dollars, and retained the entire amount on the grounds that the excess over the amount of the loan could be retained as partial compensation for the expropriated properties. Ruling that the holding announced in *Banco Nacional de Cuba v. Sabbatino*[5] was, in effect, overruled by the Hickenlooper

1. Banco was the financial agent of the Cuban Government: "There is no serious question that the Government of Cuba and Banco Nacional are one and the same. . . ." Banco Nacional de Cuba v. First National City Bank of New York, 270 F. Supp. 1004, 1006 (S.D.N.Y. 1967).

2. The original loan was made by First National City to Banco de Desarrollo Economicoy Social (Bandes), a corporate agency of the Government of the Republic of Cuba, for fifteen million dollars. After the Castro Government seized control of the Republic of Cuba, the loan was renewed for another year commencing on July 8, 1959. Cuban Law No. 730, February 16, 1960 and Law No. 847, June 30, 1960, dissolved Bandes and declared Banco successor to the rights and obligations thereof, including the obligation to repay the loan. 270 F. Supp. at 1005.

3. When the loan was renegotiated on July 7, 1960, Banco repaid five million dollars and Citibank released approximately one-third of the collateral. Banco Nacional de Cuba v. First National City Bank of New York, 431 F.2d 394, 395 (2d Cir. 1970).

4. Executive Power Resolution No. 2, issued September 17, 1960, left no doubt that the confiscations were permanent. Text reprinted in 270 F. Supp. at 1009 n.6.

5. 376 U.S. 398 (1964).

amendment[6] and that the amendment was applicable, the district court granted summary judgment for Citibank.[7] On appeal, the Second Circuit Court of Appeals reversed.[8] Citibank petitioned the

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6. 22 U.S.C. § 2370(e)(2) (1970): "(2)Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such a state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

7. "The *Sabbatino* amendment is inapplicable 'in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.' 22 U.S.C. § 2370(e)(2). However, since the Executive Branch has maintained silence for the six years that this action has been pending, it is clear that it has not determined that foreign policy interests of the United States require application of the act of state doctrine here." 270 F. Supp. at 1010 n.8. The nationalization was determined to be in violation of international law. "The totality of circumstances presented by this case—a patent failure to provide adequate compensation, a retaliatory confiscation by a foreign government, and discrimination against the United States nationals—compel a finding that the Cuban decree directing confiscation of First National City's property was in direct contravention of the principles of international law." 270 F. Supp. at 1010. Plaintiff did not dispute Citibank's right to the ten million dollars derived from the sale: Banco only contested the retention of the excess.

8. 431 F.2d 394 (2d Cir. 1970). The court held that the Hickenlooper amendment was not applicable in this instance, by indulging in a strained interpretation of congressional intent. "If one fact is clear from the legislative history [of the Hickenlooper amendment], it is that this language was designed to be invoked by American firms in order to afford them 'a day in court'—and presumably a monetary recovery—when some other entity attempted to market the American firm's expropriated property . . . ." 431 U.S. at 402. Since Banco was not attempting to market the expropriated property, the Court found that the Hickenlooper amendment did not apply to the instant case. Professor Lillich

Supreme Court for a writ of certiorari on October 13, 1970.[9] On November 17, 1970, the Legal Adviser to the State Department sent a letter to the Supreme Court, expressing the opinion of the executive branch that the act of state doctrine should not be applied in this

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suggests that the interpretation of the legislative history came from Banco's brief. Lillich, *1970 Survey of New York Law: International Law,* 22 SYRACUSE L. REV. 263, 269-80 (1971). The court added that failure to apply the act of state doctrine would run counter to what Congress had intended to be the statutory method of recovery. International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-43 (1970). Pertinent sections of this act are set out below.

§ 1623(h): "The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied... shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim.... The action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

§ 1643: "It is the purpose of this subchapter to provide for the determination of the amount and validity of claims against the Government of Cuba... [arising] out of nationalization, expropriation, intervention, or other takings of, or special measures directed against, property of nationals of the United States... arising out of violations of international law by the Government of Cuba... in order to obtain information concerning the total amount of such claims against the Government of Cuba... on behalf of nationals of the United States. This subchapter shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims."

§ 1643(b)(a): "The Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba... arising since January 1, 1959, in the case of claims against the Government of Cuba... for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States."

§ 1643(e): "In determining the amount of any claim, the Commission shall deduct all amounts the claimant has received from any source on account of the same loss or losses."

According to the court, it would seem that Congress wanted this type of claim to be submitted to the Foreign Claims Settlement Commission. 431 F.2d at 403. For a hypothetical example of the settlement of a claim through the Foreign Claims Settlement Commission see 431 F.2d at 404 n.18.

9. *Petition for cert. filed,* 39 U.S.L.W. 3230 (U.S. Nov. 24, 1970) (No. 846).

case.[10] The Supreme Court granted certiorari, vacated the decision of the Second Circuit, and remanded the case for further consideration.[11] On remand, Citibank contended that the Second Circuit should reverse its prior decision because the executive branch had submitted a "Bernstein letter"[12] which made application of the act of state doctrine unnecessary.] The Second Circuit, affirming its prior decision,[13] held that the "Bernstein exception" to the act of state doctrine should be limited to the facts of the *Bernstein* case, a holding that resulted in the court's applying the act of state doctrine.[14] On writ of certiorari, the United States Supreme Court, *held*, reversed. The act of state doctrine does not necessarily bar adjudication of a counterclaim against a foreign sovereign. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

[In *Underhill v. Hernandez*,[15] the Supreme Court first enunciated the act of state doctrine. The Court said that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of

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10. Letter from John R. Stevenson to the clerk of the United States Supreme Court, the Honorable E. Robert Seaver, Nov. 17, 1970. 442 F.2d at 536-38. The letter stated in part: "Recent events, in our view, make appropriate a determination by the Department of State that the act of state need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.... The Department of State belives that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or setoff against the Government of Cuba in this or like cases."

11. The Solicitor General suggested to the Supreme Court that it remand the case to the court of appeals for the court's further consideration in light of the State Department's views. *See* First National City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971). In remanding the case, the Supreme Court noted that it was "expressing no views on the merits of the case." 400 U.S. at 1019.

12. For an explanation of the Bernstein letter, see Bernstein v. N.V. Nederlandsche-Amerikaanche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

13. 431 F.2d 394 (2d Cir. 1970).

14. 442 F.2d 530 (2d Cir. 1971).

15. 168 U.S. 250 (1897). The earliest pronouncement of this doctrine was in Hatch v. Baez, 7 Hun. 596 (N.Y. Sup. Ct. 1876). *See* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 64-138 (1964). *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 41-43 (1965).

the government of another done within its own territory."[16] The first direct executive intervention in the application of the act of state doctrine occurred in an attempt to recover property seized by the Nazi Government.[17] Judge Learned Hand, in *Bernstein v. Van Heyghen Frères Société Anonyme*,[18] applied the act of state doctrine and refused to consider the validity of the Nazi confiscation.[19] In a subsequent case[20] involving the same seizure, however, the Court reached the validity of the acts of the Nazi officials and held that the State Department's letter to the court had expressly released it from the restraint of the act of state doctrine,[21] thus giving birth to the so-called "Bernstein exception." Squarely facing the problem of the application of the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court applied the doctrine and held that United States courts were prevented from examining the validity of the acts of the Cuban Government "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles . . . ."[22]

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16. 168 U.S. at 252. In Oetjen v. Central Leather Co., 246 U.S. 297 (1917), the Court said: "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency." 246 U.S. at 303.

17. *See* Cheatham & Maier, *Private International Law and Its Sources,* 22 VAND. L. REV. 27, 90 (1968).

18. 163 F.2d 246 (2d Cir. 1947).

19. The court reaffirmed its decision in the first *Bernstein* case, holding that the act of state doctrine prevented judicial determination of the confiscatory acts of the Nazi Government because of the lack of definite expression of executive policy. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949).

20. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

21. "3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Letter from Jack B. Tate, Acting Legal Adviser, to Bennett, House & Couts, April 13, 1949, *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers,* 20 DEP'T STATE BULL. 592, 593 (May 8, 1949).

22. 376 U.S. at 428. The Court reasoned: "[The act of state doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense

The Court avoided passing upon the validity of the "Bernstein exception" since all doubt concerning executive policy was removed by the amicus briefs of the executive branch in favor of applying the act of state doctrine.[23] Subsequently, Congress passed the Hickenlooper amendment.[24] The effect of the amendment was a reversal of presumptions. Under the *Sabbatino* decision, courts assume that any adjudication on the merits of the act of the foreign state would embarrass the executive in the conduct of foreign policy unless the executive expresses a contrary view. Under the amendment, the courts assume that they may proceed with an adjudication of the validity of the foreign act, unless the President expresses the view that such an adjudication would impede the conduct of foreign policy.[25] Nevertheless, there was a difference of opinion among the proponents of the legislation on the scope of the amendment.[26] On remand of

of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." 376 U.S. at 423.

23. "[R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of the suit... even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428.

24. 22 U.S.C. § 2370(e)(2) (1970). The amendment was reenacted on Sept. 6, 1965, and contained a slight variation from the first Hickenlooper amendment. The only change was the substitution of "other right to property" for "other right" in two instances, and the deletion of Proviso 3, which had made the amendment inapplicalbe to any proceeding commenced prior to January 1, 1966. "The words 'to property' have been inserted to make it clear that the law does not prevent banks, insurance companies, and other financial institutions from using the act of state doctrine as a defense to multiple liability upon any contract or deposit or insurance policy in any case where such liability has been taken over or expropriated by a foreign state." S. REP. No. 170, 89th Cong., 1st Sess. 19 (1965). For a discussion of the changes in the amended version of the Hickenlooper amendment see Banco Nacional de Cuba v. Farr, 383 F.2d 166, 171-72 (2d Cir. 1967).

25. S. REP. No. 1188, 88th Cong., 1st Sess. (1964).

26. One author of the amendment took a broad view of its scope: "... its [the amendment's] purpose is not merely to facilitate the occasional recovery of specific goods or their money equivalent, but rather to restore and confirm a model in principle and procedure...." *Hearings on the Foreign Assistance Act of 1965 Before the House Comm. on Foreign Affairs,* 89th Cong., 1st Sess., at 1035 (1965) (hereinafter cited as *Hearings*). Before the House Committee on Foreign

Sabbatino, the Second Circuit, in *Banco Nacional de Cuba v. Farr*,[27] upheld the constitutionality of the Hickenlooper amendment and applied it to the case.[28] The court, having previously determined that the Cuban law in question was in violation of international law, reached the merits of the claim by Banco and rendered judgment for plaintiff. Furthermore, the court reasoned that because the executive branch had not suggested application of the act of state doctrine, it should not be applied to the case.[29]] Another case relevant to the

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Affairs, Attorney General Katzenbach expressed a more limited view: "We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back into the United States." *Id.* at 1235. Senator Hickenlooper himself made contradictory statements regarding the purpose of the amendment. *Compare* 110 CONG. REC. 19546 (1964) (letter of Senator Hickenlooper to the Washington Post, July 27, 1964) *and id.* at 24076 *with id.* at 19548. In a letter from Professor Cecil J. Olmstead to Donald M. Fraser, March 29, 1965, Mr. Olmstead posed a hypothetical, qualifying his remarks made at the hearings. "Thus, if Castro sues a U.S. bank whose branch he has seized in Havana for return of certain Cuban Government accounts or collateral held by the U.S. bank, the present U.S. rule (established in the Supreme Court decision in *National City Bank v. Republic of China*, 348 U.S. 356 (1955)) is that by bringing suit Castro has waived sovereign immunity and that the U.S. bank is permitted to make a counterclaim or setoff for the value of its seized Havana branch." *Hearings, supra* at 1306.

27. 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, *rehearing denied*, 390 U.S. 1037 (1968). Farr Whitlock received notice on August 23, 1960 that Peter L. F. Sabbatino on August 16 had been appointed temporary receiver for the assets pursuant to N.Y. CIV. PRAC. ACT § 977-b (1963). Sabbatino was eliminated when the parties agreed that the Lehman Brothers would hold a sum of money in escrow to satisfy the final judgment in this case and Sabbatino transferred $225,000 to Lehman Brothers for that purpose. 383 F.2d at 170-71.

28. "[W]e hold that the application of the Hickenlooper Amendment to this case does not deprive appellant [Banco] of its property without due process of law under the Fifth Amendment." 383 F.2d at 179. "Thus we find that the adoption of the Hickenlooper Amendment was not legislative interference with judicial power violative of the Federal Constitution; to the contrary, we find good reason for judicial acceptance of this legislative modification of the act of state doctrine." 383 F.2d at 182. The court also rejected the idea that Congress had interfered with the executive power. 383 F.2d at 182. "The existing law [the Hickenlooper amendment] applies to cases pending at the time of its enactment. . . ." S. REP. No. 170, 89th Cong., 1st Sess. 19 (1965).

29. The district court had waited 60 days before entering final judgment to allow the President to exercise his right under the amendment; the court was informed by a letter from the U.S. Attorney for the Southern District of New York on September 25, 1965, that the executive branch had made no determination that the act of state doctrine should be applied. 383 F.2d at 172 n.7.

question whether the validity of a foreign governmental act is a justiciable issue in a United States court is *National City Bank of New York v. Republic of China.* [30] In that case the Supreme Court held that when a foreign sovereign sues in the courts of the United States, the defense of sovereign immunity is not a bar to a counterclaim. The Court determined that considerations of "fair play" require allowance of counterclaims against the claim of a foreign sovereign.

In the instant case, Mr. Justice Rehnquist [31] observed that the act of state doctrine is flexible. [32] He distinguished *Banco Nacional de Cuba v. Sabbatino* on the grounds that the State Department had not expressed an opinion in that case on whether the Court should apply the act of state doctrine. In the instant case, however, the State Department had sent a letter advising the Court not to apply the doctrine because of the exception carved out in the *Bernstein* decision. After considering *Sabbatino*, Justice Rehnquist concluded that the "Bernstein exception" was determinative of the instant case in light of the State Department's letter. Justice Rehnquist premised his reasoning on the theory that the act of state doctrine is based on judicial concern that an adjudication by United States courts of the legality of the acts of a foreign sovereign would hinder the policital branches of government in their management of the foreign relations power. [33] Since the executive branch had expressly advised the Court that the act of state doctrine need not be applied in this case, Justice Rehnquist determined that the management of foreign relations would not be impeded by adjudicating the counterclaim. Mr. Justice Douglas, although concurring in the result that the doctrine should not be applied, determined that *National City Bank v. Republic of China* and not the "Bernstein exception" should govern the instant case, reasoning that the "fair play" standard established by that decision required adjudication of the counterclaim to the extent of a set-off. Justice Douglas made it clear that he would not permit an adjudication of that part of the counterclaim that exceeded a set-off and,

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30. 348 U.S. 356. The Republic of China sued an American bank for $200,000 deposited in the bank. The bank counterclaimed for $1,634,432 on defaulted treasury notes of the Republic.

31. The Chief Justice and Mr. Justice White joined in the opinion.

32. *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In the *Sabbatino* case the Court said: "[I]ts [the act of state doctrine] continuing validity depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U.S. at 427-28.

33. 406 U.S. at 767-68.

thus, specifically disapproved of the "Bernstein exception."[34] Mr. Justice Powell, concurring in the result, also rejected the applicability of the "Bernstein exception." He contended that the holding in *Sabbatino* was not compelled by the underlying principles of the act of state doctrine,[35] arguing that when the validity of the act of a foreign sovereign is at issue, the judiciary should adjudicate the merits of that act under international law unless to do so would interfere with delicate foreign relations. Because there would be no interference with foreign affairs in the instant case, Justice Powell concluded that the act of state doctrine should not be applied.

Mr. Justice Brennan, dissenting,[36] criticized Mr. Justice Rehnquist's conclusion that an expression by the executive branch to the effect that an adjudication of the merits would not embarrass the Government makes application of the act of state doctrine unnecessary. Justice Brennan noted that the Court had previously decided that a judicial determination of the merits of a foreign governmental act may conflict with the interests of the executive branch,[37] since a finding that a foreign state had violated international law could insult the foreign state involved and hinder any negotiations between the Executive and the offending country. The dissent admitted that when the political branch is indifferent to whatever result the court may reach, adjudication on the merits would not impair the foreign relations power of the political branches. Justice Brennan argued that since the United States had already protested the taking of property by Cuba as violative of international law,[38] the political branch was not indifferent in the instant case, and that consequently by agreeing to hear the claim the Court was engaging in an adjudication that, in fact, could have only one politically predetermined result—a finding

34. In the *Republic of China* case, the Court stated: "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." 348 U.S. at 361-62. The Court then ruled that a sovereign's claim may be reduced by a setoff or counterclaim. 348 U.S. at 364.

35. Justice Powell agreed with the underlying principles of the act of state doctrine as expressed by Justice Harlan in *Sabbatino.* He disagreed, however, with the broad application of these principles. 406 U.S. at 774.

36. Justices Stewart, Marshall and Blackmun joined in the dissent.

37. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 433 (1964). Justice Harlan in *Sabbatino* concluded that the Executive can better protect the interests of United States citizens than can an occasional judicial determination. 376 U.S. at 431.

38. 406 U.S. at 783.

that the Cuban taking was in violation of international law—since any other holding would seriously embarrass the Executive in its conduct of foreign relations. Furthermore, Justice Brennan contended, a judgment for Banco would seriously compromise efforts by the Government to secure compensation for property expropriated in other countries. The main emphasis of the dissent, however, was that there must be a "proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[39] The dissent argued, therefore, that to determine whether there is such a "proper distribution of functions" considerations other than the mere possibility of Executive embarrassment must be examined.[40] Justice Brennan reasoned that examination of these additional considerations leads to the conclusion that the subject matter of the instant case constitutes a political question not cognizable in the courts.[41]

In the instant case, six Justices rejected the "Bernstein exception," but three Justices applied it; two Justices formulated additional possible exceptions for certain circumstances. The Court failed not only to accept the opportunity to clarify the status of the act of state doctrine but also to enunciate a test that could be used by lower courts in determining whether the doctrine applies. Six Justices, however, mentioned the use of a "political question test" to decide whether the act of state doctrine is applicable, and it is suggested that courts in the future use such a test. This test would implement both the political question doctrine of the dissent and the "Bernstein exception" of the plurality. The test, moreover, would involve an examination of only two basic considerations whereas the opinions in the instant case formulate three. First, the court should consider whether there is a consensus among nations on what international rules govern the outcome of the substantive issue involved. If such a consensus exists, the court should not apply the act of state doctrine: in such a case, the court would not be making foreign policy, but would be serving the proper judicial function of interpreting applica-

39. Justice Brennan was quoting from *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 427-28 (1964).

40. These other considerations included the absence of concensus on the applicable international rules, the unavailability of traditional standards from treaties or other agreements, the existence and international recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been injured. 406 U.S. at 788.

41. *Cf.* Baker v. Carr, 369 U.S. 186, 211-12 (1962).

ble international law.[42] If a consensus on the applicable international rules does not exist, then the second consideration of the "political question test" must be examined. The court would consider whether the executive branch had stated explicitly in a "Bernstein letter" that no decision rendered by the court would hinder the management of United States foreign relations. If a "Bernstein letter" is sent and, upon examination of the letter, the court determines either that adjudication of the merits could hinder or embarrass foreign relations or that the letter does not state that *any* decision reached would not hinder Executive regulation of foreign relations, the act of state doctrine would be applied. If, on the other hand, no "Bernstein letter" were sent, then the act of state doctrine also would preclude the court from reaching the merits of the suit. Applying this "political question test" to the instant case, one must consider whether there is a consensus on the international rules applicable to the substantive issue before the court—that is, whether the expropriation by Cuba of defendants' properties violated international law. *Sabbatino* noted the absence of a consensus on international rules concerning expropriation,[43] and that the lack of concensus is especially true when the expropriating country is economically underdeveloped.[44] Since Cuba is regarded as an economically underdeveloped country,[45] a consensus on this issue does not exist in the present case and the "Bernstein letter" must be examined. The letter states in part:

42. In *Sabbatino* the Court concluded: "It should be apparent that the greater the degree of codification or concensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact . . . ." 376 U.S. at 428.

43. "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." 376 U.S. at 428.

44. "The conflict of attitudes and doctrines, resulting from the clash of interests between economically developed and economically underdeveloped countries, corresponding to that between capital exporting and capital importing countries, has expressed itself in a number of international legal controversies.

"The most widely debated of these controversies is that between the so-called 'minimum standard' and the standard of 'equality of treatment' (with nationals) in the cases of expropriation of foreign property interests." W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 318 (1964).

45. "Cuba is not only typical; in many cases it provides us with caricatures of some of the major problems in under-developed areas." Blansten, *Castroism in Latin America,* 70 COM. L. J. 263, 264 (1965).

> The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institutions' counterclaims for their assets expropriated in the foreign country.[46]

The letter indicates that the executive branch believes that a corporation is entitled to redress against the expropriating country. However, the letter certainly does not indicate executive indifference to whatever result the Court should reach concerning the legality of the expropriation. Using this "political question test," therefore, the Court should have determined that the act of state doctrine applied and precluded judicial examination of the counterclaim. As the foregoing analysis suggests, the use of this "political question test" would clarify a confusing area of the law by providing the lower courts with a guide for determining whether the act of state doctrine applies in a particular factual context.

Robert M. Erickson

46. Letter from John R. Stevenson to the Clerk of the United States Supreme Court, The Honorable E. Robert Seaver, Nov. 17, 1970, quoted in 442 F.2d at 536-38.

ADMIRALTY—SHIP MORTGAGE ACT OF 1920—DEFICIENCY JUDGMENT AGAINST MORTGAGOR IN PERSONAM NOT PRECLUDED BY STATE LAW WHEN VESSELS WERE SOLD AT PUBLIC FORECLOSURE AUCTION WITHOUT PRIOR APPRAISAL

Plaintiff, a shipbuilder[1] and the holder of preferred ship mortgages that secured a note[2] for the purchase price of vessels it had constructed for defendant,[3] brought a mortgage foreclosure action in the federal district court[4] against the vessels in rem and against the defendant in personam under the Ship Mortgage Act of 1920.[5] The defendant had refused to pay the note, alleging that the vessels were unseaworthy. Subsequently, the plaintiff had the vessels seized and

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1. J. Ray McDermott & Co. [hereinafter referred to as McDermott], owner of a shipyard in Morgan City, Louisiana, builds and repairs ships.

2. The promissary note and preferred ship mortgages were duly registered at the Customs House in New Orleans, Louisiana, pursuant to 46 U.S.C. § 921 (1970), which provides that a ship's mortgage is to be recorded at the collector of customs office in the vessel's port of documentation.

3. Texas Menhaden Company, although aware that McDermott had never built menhaden fishing vessels, contracted with plaintiff to build 8 ships for a total cost of $2,574,152. The contract to build the vessels had been signed by Mr. Harvey W. Smith. Mr. Smith was the president of two family-owned corporations—the Texas Menhaden Co. and The Fish Meal Co. The note for the ships was executed by The Fish Meal Co., with Mr. Smith guaranteeing the loan as surety in a personal capacity. The in personam action was brought against both The Fish Meal Co. and Mr. Smith, who are hereinafter collectively referred to as defendant.

4. The mortgage foreclosure action was consolidated with defendant's suit brought in the eastern district of Louisiana against the plaintiff for breach of contract and for a declaration of nonliability under the notes. The contract provided, *inter alia,* that the ships would have a hold capacity of 700 short tons of fish, an empty ship draft of 6 feet, 6 inches, and a loaded draft of 9 feet, 6 inches. According to the testimony, however, the boats drew 14½ feet of water with only 500 tons of fish in the hold, which impaired their ability to operate in shallow waters. Because of this and similar evidence introduced at the district court trial, defendant, with McDermott's consent, attempted to sell the alleged unseaworthy vessels. When these efforts failed, the vessels were moved to a fresh water bayou in Texas to prevent deterioration. McDermott libelled the vessels and brought the foreclosure action in the eastern district of Texas. The parties stipulated to both the transfer of the breach of contract action to the Texas district court and the judicial sale of the vessels under the direction of the court.

5. Merchant Marine Act § 30, 41 Stat. 1000 (1920), *as amended,* 46 U.S.C. §§ 911-84 (1970).

sold at public auction[6] and although no prior appraisal had been made, the district court confirmed the sale. Because the proceeds of the sale were insufficient to satisfy defendant's obligation under the note,[7] plaintiff initiated a separate proceeding seeking a deficiency judgment for the outstanding balance due on the note. The defendant contended that because the federal statutes regulating judicial sales do not contain specific authorization for deficiency judgments where a public sale without appraisal has occurred, a gap in the federal procedure exists. The defendant further contended that state law[8] fills this gap and that Louisiana law bars deficiency judgments when the foreclosure sale was made without prior appraisal. The district court held that state law was inapplicable to a mortgage foreclosure proceeding under federal maritime law, and granted the deficiency judgment.[9] On appeal, the Fifth Circuit reversed and vacated the deficiency judgment.[10] On rehearing en banc, the United States Court of Appeals for the Fifth Circuit, *held*, vacated and remanded.[11] When

6. McDermott submitted the highest bid ($689,000) at the court-supervised public auction and took possession of the 8 vessels including the engines and other property installed by the defendant at a cost of approximately $1,000,000. McDermott posted bond for the net proceeds from the sale, awaiting final determination of the controversy.

7. The note secured by the preferred ship mortgages was for $3,233,891.36. The net proceeds from the public sale amounted to $666,747.25, leaving an outstanding balance of $2,567,144.11.

8. LA. REV. STAT. ANN. § 13:4106 (1968) provides: "If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency. . . ."

9. The deficiency judgment granted by the district court was $3,233,891.36, with 6% interest per annum plus attorney fees and court costs, reduced by $666,747.25—the net proceeds of the foreclosure sale of the 8 vessels.

10. J. Ray McDermott v. The Morning Star, 431 F.2d 714 (5th Cir. 1970). The judgment on the breach of contract suit was reversed and remanded for a new trial. The court held that the jury instructions were erroneous under the law and the facts of the case.

11. Although the court of appeals vacated the deficiency judgment granted by the district court, it did so on the grounds that state rather than federal law applied. On rehearing *en banc*, the instant court reversed the prior holding, which had applied state law on the grounds that the opinion was based upon an error of law. The instant court, however, agreed that the deficiency judgment must be

vessels have been sold at a public foreclosure auction without prior appraisal, state law may not proscribe a deficiency judgment action against the mortgagor in personam under the Ship Mortgage Act of 1920. *J. Ray McDermott & Co. v. The Morning Star*, 457 F.2d 815 (5th Cir. 1972) (en banc).

The doctrine of uniformity in maritime law has generally required the invalidation of state laws that prejudice admiralty law.[12] The doctrine can be traced back to *Southern Pacific Co. v. Jensen*,[13] in which the Supreme Court, noting the need for uniformity in the maritime law, refused to allow a cause of action based on a state workmen's compensation law. In *Garrett v. Moore-McCormack Co.*,[14] a case involving a burden of proof question, the Supreme Court again looked to general maritime law rather than state law. Prior to the enactment of the Ship Mortgage Act of 1920, however, the Supreme Court had held ship mortgages to be nonmaritime and not within admiralty jurisdiction.[15] Foreclosure proceedings against the ship were available to a mortgagee in nonmaritime courts,[16] but maritime liens were held to be senior to ship mortgages.[17] Although a

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vacated, since the issue of liability under the contract had been remanded to the district court for a new trial, and that application for a deficiency judgment must await the outcome of the breach of contract action.

12. Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 256 (1950). *See generally* Note, *The General Maritime Law v. State Law in Maritime Cases: Which, When, and Why?* 50 NW. U. L. REV. 677 (1955). For a discussion of the doctrine of uniformity in maritime cases containing an international element see Cheatham & Maier, *Private International Law and its Sources*, 22 VAND. L. REV. 27, 65-66 (1968).

13. 244 U.S. 205, 217 (1917). The majority in *Jensen* invalidated the award of damages under the New York Workmen's Compensation Act to the widow of a stevedore. The majority reasoned that since the stevedore was killed while unloading a ship in navigable waters, the action was within admiralty jurisdiction.

14. 317 U.S. 239 (1942).

15. *See* Bogart v. The S.S. John Jay, 58 U.S. (17 How.) 399 (1854) (federal courts held to be without jurisdiction over a ship mortgage); Canfield, *The Ship Mortgage Act of 1920*, 22 MICH. L. REV. 10 (1923).

16. The mortgagee could foreclose the mortgage in state courts, but such an action could not be entertained in federal district courts unless diversity requirements were satisfied.

17. The value of the mortgagee's security was reduced, however, because the purchaser at a foreclosure sale took the vessel subject to the maritime liens. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 9-47 (1957). A vessel mortgage is not preferred over a subsequent lien for supplies even where the materialman knew of the mortgage. The J.E. Rumbell, 148 U.S. 1 (1893); The Lottawanna, 88 U.S. (21 Wall) 558 (1874). *See* note 21 *infra.*

mortgagee was allowed to intervene in an in rem proceeding brought by a maritime lienholder in admiralty, the mortgagee's interest could be satisfied only if a surplus remained after all maritime claimants had been paid.[18] Consequently, the practical effect of subordinating the mortgagee's interests was that ship mortgages were not attractive investments. Recognizing this problem, Congress passed the Ship Mortgage Act of 1920 in an attempt to encourage investment in the shipping industry.[19] The Act provided security for lendors by bringing ship mortgages within maritime jurisdiction[20] and by according to them a preferred status over all liens except preferred maritime liens.[21] When the statute is not specific,[22] courts have applied either state or federal law. In a recent preferred ship mortgage case, *Bergren v. Davis*,[23] the district court reasoned that because the

18. Gyory, *Security at Sea: A Review of the Preferred Ship Mortgage*, 31 FORDHAM L. REV. 231, 232 (1962).

19. At the end of the First World War, the United States Government had a wartime fleet that Congress wanted to dismantle. The Ship Mortgage Act of 1920 was passed to facilitate this objective by encouraging private investment in the shipping industry and to provide protection for the Government when it extended credit to sell the ships. G. GILMORE & C. BLACK, *supra* note 17, at § 9-48.

20. Merchants & Marine Bank v. The T.E. Welles, 289 F.2d 188, 193-94 (5th Cir. 1961) (superior lien of initial mortgage not extinguished by subsequent mortgage executed in satisfaction of initial mortgage).

21. 46 U.S.C. § 953 (1970). Preferred maritime liens that are senior to preferred ship mortgages include: liens prior in time to the recording of the mortgage; liens for legal costs; tonnage and light dues; taxes; wages of the crew and master; wages of stevedores employed by the shipmaster; and liens arising out of liability for collisions. 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY § 11 (6th ed. 1940, Supp. 1971).

22. While the statute contains detailed provisions concerning preferred ship mortgages in specific areas, it is not comprehensive but is rather a generalized outline. The statute sets out in specific details three principal areas of ship mortgages. First, to be a preferred ship mortgage, a mortgage must be valid and include the whole of a vessel of the United States. In order to maintain a preferred status the requirements of 46 U.S.C. § 922 (1970) must be fulfilled. G. GILMORE & C. BLACK, *supra* note 17, at § 9-52. Secondly, in 46 U.S.C. § 921 (1970) the requirements for public notice through recordation and indorsement are provided. G. GILMORE & C. BLACK, *supra* note 17, at § 9-53. Thirdly, the statute establishes the priorities among the preferred ship mortgage and other maritime liens. *See* note 21 *supra*. The act also contains sketchy provisions on foreclosure, providing for an in rem action to enforce the mortgage and an in personam action by the mortgagee against the mortgagor for any deficiency. G. GILMORE & C. BLACK, *supra* note 17, at § 9-57.

23. 287 F. Supp. 52 (D. Conn. 1968). In this foreclosure action, the

ship mortgage is a chattel mortgage that has maritime status, and since there is no federal law of mortgages except as specifically provided by statutes such as the Ship Mortgage Act of 1920, state law governed the interstices of federal statutory mortgage law. One year later, however, the Third Circuit in *Mastan Co. v. Steinberg*[24] refused to apply state law to determine the elements of the good faith requirements in the Ship Mortgage Act of 1920 on the grounds that admiralty is a federal concern[25] and Congress has provided standards for the enforcement of admiralty suits; the court reasoned that to engraft the nuances of the various state laws onto the Ship Mortgage Act of 1920 would abrogate the uniform interpretation of federal statutes.[26]

In the instant case, the majority noted that federal statutes[27] provide procedures for federal judicial sales and grant federal district courts original jurisdiction in ship mortgage foreclosure actions.[28] The court rejected the defendant's contention that a void in the statutory scheme exists and concluded that reference to state law is not necessary to determine the validity of the deficiency judgment in the instant case. The court read the Ship Mortgage Act of 1920 together with the federal statutes delineating judicial sales procedures and concluded that these statutes furnish a comprehensive scheme for foreclosure of the mortgage, the sale of the vessel,[29] and a deficiency judgment against the mortgagor.[30] The court found that, while the federal statute concerning judicial sales[31] requires appraisal prior to a

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defendant alleged failure of consideration. The law of Maine allowed failure of consideration as a defense, since the court found no federal law of mortgages. *Accord,* Southland Financial Corp. v. Oil Screw Mary Evelyn, 248 F. Supp. 520 (E.D. La. 1965).

24. 418 F.2d 177 (3d Cir. 1969), *cert. denied,* 397 U.S. 1009 (1970). As required by 46 U.S.C. § 922 (1970), an affidavit was filed that the ship mortgage was made in good faith. A creditor of the ship, contesting the ship mortgage priority, contended that a New York statute, which provided that a per se lack of good faith existed when the mortgagor was insolvent, should apply. The court, noting the need for uniformity in admiralty, refused to apply state law.

25. Panama R.R. v. Johnson, 264 U.S. 375 (1924).

26. 418 F.2d at 179.

27. 28 U.S.C. §§ 2001-07 (1970).

28. 46 U.S.C. § 951 (1970) provides in part: "A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

29. Sales may be held prior to the completion of foreclosure proceedings. FED. R. CIV. P. E(9)(b).

private sale, it does not specify an appraisal requirement for public sales.[32] Since Congress had explicitly provided an appraisal requirement for private sales but had not done so for public sales, the court reasoned[33] that an appraisal prior to a public sale was not compulsory. The court concluded that since the sale in the instant case was public, prior appraisal as specified under state law was not required. In support of this conclusion, the court cited the importance of national uniformity to achieve the purpose[34] of the Ship Mortgage Act of 1920, and held that additional requirements borrowed from state law could not be imposed on a public foreclosure sale.

The instant decision effectuates the purpose of the Ship Mortgage Act of 1920. By finding that there is no void in the statutory scheme of foreclosure proceedings concerning the need for appraisal prior to a public sale of the mortgaged vessel, and thereby avoiding engrafting state law to the federal statute, the court made the foreclosure proceeding less onerous for the investor. Ideally, the application of federal law reduces investor uncertainty without adversely affecting the state's interest in protecting its citizens by insuring fairness to the mortgagor in the foreclosure sale proceeding. By resolving the vertical choice of law problem in favor of federal law, the court, in this case of

30. 46 U.S.C. § 954(a) (1970) provides: "Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof."

31. 28 U.S.C. § 2004 (1970) provides that personalty sold under court order shall be sold in compliance with 28 U.S.C. § 2001 (1970). 28 U.S.C. § 2001(b) (1970) provides in part: "Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property. . . ."

32. 28 U.S.C. § 2001(a) (1970) provides: "Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs."

33. *See, e.g.,* Federal Trade Comm'n v. Sun Oil Co., 371 U.S. 505, 514-15 (1963) (when Congress expressly expanded concept of competition in one section, the Court concluded that if broad concept had been intended in another section, Congress would have explicitly provided the language); Pena-Cabanillas v. United States, 394 F.2d 785, 789-90 (9th Cir. 1968) (court refused to conclude that Congress had inadvertently left out the word "intent" in one section when it was included in several other sections).

34. *See* G. GILMORE & C. BLACK, *supra* note 17, § 9-47.

first impression, eliminated investor uncertainty created by differences in the laws of the various states.[35] Since state law does not apply, variations in the appraisal requirements in the several states do not affect public ship mortgage foreclosure sales. Had the court accepted the alternative of applying state law, in addition to horizontal choice of law questions a vertical conflicts problem would be presented if the United States were a party to the mortgage. It is now clear that federal law applies when the United States Government is a party to the mortgage.[36] If state law were applied to private mortgages and federal law to government mortgages, the identity of the mortgage holder would determine the rights of the mortgagee.[37] Even though, as the dissent points out, no federal common law of mortgages exists at present,[38] cases involving the United States as a party to the mortgage will provide case law in the future. The decision not to apply the state law requirement for appraisal in a public sale, however, does present one area of concern. The burden is on the district court to examine carefully the foreclosure sale proceeding and insure that the proceeds of the sale are not grossly inadequate.[39] Even though the sale is public, the district court must determine the fairness of even uncontested foreclosure sales in order to provide adequate protection for the mortgagor.[40]

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35. *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW § 66 (1968). Judge Friendly discussed the difficulty courts have in Nolan v. Transocean Air Lines, 290 F.2d 904 (2d Cir. 1961).

36. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); United States v. Oil Screw Ken, 275 F. Supp. 792 (E.D. La. 1967) (court applied federal law where United States was mortgagee and sought distribution of proceeds from sale of vessels).

37. G. GILMORE & C. BLACK, *supra* note 17, at 592.

38. The dissent found that there was no federal law of mortgages, citing *Bergren v. Davis.* Since under Louisiana law no deficiency arises from a public sale without prior appraisal, the dissent concluded that there was no deficiency upon which the mortgagee could sue. The dissent, citing Dantoni v. Board of Levee Comm'rs, 227 La. 575, 80 So.2d 81 (1955), noted that Louisiana law is incorporated into contracts made in Louisiana. The dissent reasoned that since the Ship Mortgage Act of 1920 does not deny the parties the right to define their liabilities by contract, an admiralty court cannot find a deficiency when the contract says there is not one.

39. *See, e.g.,* United States v. Wells, 403 F.2d 596, 598 (5th Cir. 1968); Ghezzi v. Foss Launch & Tug Co., 321 F.2d 421, 425 (9th Cir. 1963).

40. The dissent was appalled by the inequities in the instant case. The confirmation of the foreclosure sale was not contested by the defendant. The plaintiff has the vessels and approximately $1,000,000 worth of equipment in addition to the deficiency judgment. *See* note 7 *supra.*

ALIENS—IMMIGRATION AND NATURALIZATION—RESTRICTION OF COMMUTER ALIENS' ACCESS TO DOMESTIC EMPLOYMENT BY ATTORNEY GENERAL IS ABUSE OF DISCRETION

Appellant, an American employer[1] of alien workers who commuted daily from Mexico, brought this action against the United States Attorney General to enjoin enforcement of Immigration and Naturalization Regulation 211.1(b)(1),[2] which in the event of a labor dispute suspends the informal documentation procedures used by these employees for entering the country,[3] and for a declaratory judgment that the regulation was invalid. The Secretary of Labor had certified that a labor dispute was in progress at appellant's place of business, and Border Patrol officers informed appellant's alien workers that their border crossing documents would be revoked if they continued to work in appellant's fields.[4] Appellant contended that commuter aliens[5] had been granted permanent resident alien status,[6]

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1. Appellant is a partnership engaged in truck farming in California, and 95% of its work force consisted of Mexicans.

2. 8 C.F.R. § 211.1(b)(1) (1972). The Attorney General promulgated this regulation pursuant to the authority vested in him by 8 U.S.C. § 1103(a) (1970).

3. 8 C.F.R. § 211.1(b)(1) (1972) states in part: "When the Secretary of Labor determines and announces that a labor dispute involving a work stoppage or lay-off of employees is in progress at a named place of employment, Form I-151 shall be invalid when presented in lieu of an immigrant visa or reentry permit by an alien who has departed for and seeks reentry from any foreign place and who, prior to his departure or during his temporary absence abroad has in any manner entered into an arrangement to return to the United States for the primary purpose, or seeks reentry with the intention, of accepting employment at the place where the Secretary of Labor has determined that a labor dispute exists, or of continuing employment which commenced at such place subsequent to the date of the Secretary of Labor's determination." Pursuant to the provisions of this regulation, Form I-151 (known as a "green card") is customarily used by commuters in place of normal border crossing documents.

4. As a result of the Attorney General's enforcement of this regulation, appellant was forced to employ less experienced and more costly domestic labor to work in his fields.

5. Commuter aliens are aliens who have been lawfully admitted for permanent residence, but who continue to retain their place of residence in foreign contiguous territory while commuting to their place of employment in the United States. *See* F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 67 (1961). Commuters were given the status of permanent resident aliens by administrative action in order to comply with the requirements of the Immigration Act of 1924.

6. A permanent resident alien is an alien lawfully admitted for permanent residence. 8 U.S.C. § 1101(a)(20) (1970) provides, in part, that the term

were entitled to admission as special immigrants,[7] and could not be differentiated rationally from permanent resident aliens in any manner consistent with the goals of the immigration law. The Attorney General argued that a rational basis existed for distinguishing commuter aliens from permanent resident aliens because commuter aliens did not maintain their residence in the United States. In making this distinction, the Attorney General relied upon his discretionary power[8] and the immigrant screening provisions[9] of the Immigration and Naturalization Act.[10] The district court upheld the regulation, finding that the commuter aliens' lack of actual residence in the United States was the determinative factor upon which the Attorney

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"lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

7. 8 U.S.C. § 1101(a)(27)(B) (1970) defines a "special immigrant" as "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." Because they have been previously admitted to lawful residence in this country, special immigrants are relieved of many of the reentry documentation requirements demanded of other immigrants pursuant to 8 U.S.C. § 1181(b) (1970), which states in part: "returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigration visa, reentry permit or other documentation." 8 C.F.R. § 211.1(b)(1) (1972) executes this section of the code by providing for the use of Form I-151 ("green cards") in lieu of passports or other documents.

8. 8 U.S.C. § 1103(a) (1970) provides in part: "The Attorney General shall be charged with the administration and enforcement of . . . all . . . laws relating to the immigration and naturalization of aliens. . . . He shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1181(b) (1970) gives the Attorney General the power to admit special immigrants at his discretion under informal documentation procedures.

9. 8 U.S.C. § 1182(a)(14) (1970). Originally, this provision gave the Attorney General the right to exclude any alien certified by the Secretary of Labor as adversely affecting the wages and working conditions of domestic workers similarly employed. *See* 8 U.S.C. § 1182(a)(14) (1964). In 1965, however, the emphasis was reversed and no immigrant could be admitted until it had been certified that he would not adversely affect domestic labor conditions. Permanent resident aliens are not subject to this regulation. *See* note 17 *infra* and accompanying text.

10. Domestic labor unions have been concerned with alien labor control, particularly the control of Mexican labor, as evidenced by their constant attacks upon the commuter alien system in litigation preceeding this case. *See, e.g.,*

General could rely in more stringently controlling commuter aliens. On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, reversed. Residence outside the United States does not alter commuter aliens' status as permanent resident aliens or special immigrants and cannot be utilized as a means of restricting access to the domestic labor market. *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972).

The protection of American labor [11] was one of the primary purposes of the Immigration Act of 1924. [12] Consequently, the commuter alien was designated an immigrant under the Act. [13] In 1927, the Immigration and Naturalization Service, conscious of the inhibitory effect [14] that this designation had on the commuter alien, adopted a regulation that gave such aliens permanent resident alien status. [15] In accordance with this administrative action, a commuter alien was required to qualify under the immigration laws only on his first entrance into the country; thereafter he would be considered a

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Cermeno-Cerna v. Farrell, 291 F. Supp. 521 (C.D. Cal. 1968); Amalgamated Meat Cutters v. Rogers, 186 F. Supp. 114 (D.D.C. 1960). Curiously, however, labor did not seek to intervene in the instant case. The Government has responded to labor's position by monitoring the economic impact of foreign labor along the border areas of the Southwest. *See generally* Dellon, *Foreign Agricultural Workers and the Prevention of Adverse Effect,* 17 LABOR L.J. 739 (1966). Equally noteworthy has been the Attorney General's position on commuter alien status. In *Gooch v. Clark,* 433 F.2d 74 (9th Cir. 1970), *cert. denied,* 402 U.S. 995 (1971), the Attorney General argued successfully that commuter aliens were special immigrants and as such were exempt from the labor certification requirements of the Act. This not only contradicted the thrust of Regulation 211.1(b)(1), then in force, but was diametrically opposed to the Attorney General's contention in the instant case.

11. *See* Karnuth v. United States *ex rel.* Albro, 279 U.S. 231, 243 (1929) (in view of Congress' labor protection policy, commuter aliens cannot be admitted under the "temporarily for business" category—an exempt classification—but must be considered immigrants subject to all restrictions). Creating an administrative category for commuters, therefore, would seem to be in accord with congressional intent.

12. Act of May 26, 1924, ch. 190, 43 Stat. 153.

13. The Act of 1924 defined an "immigrant" as "any alien departing from any place outside the United States destined for the United States." Act of May 26, 1924, ch. 190, § 3, 43 Stat. 153.

14. As immigrants, commuters were subject, among other things, to quota restrictions and would have to requalify each time they entered the United States. This effectively prevented daily commuting.

15. Immigration and Naturalization Service General Order 86 (April 1, 1927), reprinted in 1 FOREIGN RELATIONS OF THE UNITED STATES 490 (1942).

permanent resident alien making a temporary visit abroad. This artificial administrative status was an exception to the protectionist policies of immigration legislation and was predicated upon a desire to preserve friendly relations with Canada and Mexico.[16] Subsequent legislation[17] significantly strengthened the safeguards of American labor,[18] but left the 1927 regulation unaltered. The commuter alien's status as a permanent resident alien was upheld in *In re H—O—*,[19] in which the Board of Immigration Appeals decided that lack of actual residence in the United States did not change the commuter alien's status as a permanent resident alien. Consequently, they were entitled to readmission to this country under the informal documentation procedures applicable to special immigrants. This determination, however, was overturned in *Amalgamated Meat Cutters v. Rogers*,[20] in which a federal district court concluded that a commuter alien could not be considered a permanent resident alien. The court based its decision upon the definition of "residence" in the Act.[21] The Board of Immigration Appeals subsequently followed this decision,[22] but expressly limited its rulings to the facts in *Amalgamated.*

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16. *In re* M—D—S— & L—G— & W—D—C—, 8 ADMINISTRATIVE DECISIONS UNDER IMMIGRATION & NATIONALITY LAWS OF THE UNITED STATES 209 (1958) (commuter status is predicated upon maintaining friendly relations with Canada and Mexico) [hereinafter cited as I. & N. DEC.]

17. Immigration and Nationality Act, ch. 477, § 212(a)(14), 66 Stat. 183 (1952), *as amended,* 8 U.S.C. § 1182 (a)(14) (1965). The 1965 amendment places the burden on the immigrant to show that he will not adversely affect local labor conditions as an entry requirement.

18. *Hearings on the Review of the Operation of the Immigration and Nationality Act as Amended by the Act of October 3, 1965, Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 90th Cong., 2d Sess., at 2, 101 (1968). It was the opinion of the Committee and the Department of Labor that the 1965 amendment more stringently controlled alien labor flow.

19. *In re* H—O—, 5 I. & N. DEC. 716 (1954).

20. 186 F. Supp. 114 (D.D.C. 1960). The court agreed that 8 U.S.C. § 1182(a)(14), dealing with exclusions based upon certification of adverse effect by the Secretary of Labor, did not apply to permanent resident aliens, but it found that commuters were not within that class. 186 F. Supp. at 119-20. A more ominous implication of the decision was that if commuter aliens were not permanent resident aliens, then by definition they could not be special immigrants entitled to informal documentation procedures. The entire commuter system was therefore jeopardized by the *Amalgamated* decision.

21. 8 U.S.C. § 1101(a)(33) (1970) provides in part: "[T]he place of general abode . . . means his principal, actual dwelling place in fact without regard to intent."

22. *In re* J—P—, 9 I. & N. DEC. 591 (1962).

Thereafter, the Attorney General could exclude commuter aliens upon a showing that they would adversely affect the wages and working conditions of domestic workers similarly employed. Because of the rising concern over the impact of foreign labor on the domestic job market, especially in the border areas of the Southwest,[23] the Immigration and Naturalization Service promulgated Regulation 211.1(b)(1) in 1967. In *Cermeno-Cerna v. Farrell*,[24] the first judicial test of the new regulation, the Government argued that § 212(a)(14) of the Act empowered the Attorney General to regulate commuter aliens after they had been lawfully admitted to the United States. The district court, although rejecting the Government's contention, upheld the regulation. In *Cermeno-Cerna*, the court refined the *Amalgamated* distinction between commuters and permanent resident aliens by finding that commuter aliens had neither statutory nor constitutional status and entered the country at the sufferance of the Attorney General.[25] *Amalgamated* was repudiated in *Gooch v. Clark*,[26] in which the Ninth Circuit concluded that commuter aliens had the same status as permanent resident aliens and were unaffected by residence across the border.[27] The *Gooch* court interpreted "special immigrant" to mean a person lawfully admitted for permanent residence, and determined that the definition referred not to the actuality of one's residence, but to one's status under the immigration laws.[28] As a

23. *See, e.g.*, Note, *Alien Commuters in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws,* 21 STAN. L. REV. 1750, 1759 (1969).

24. 291 F. Supp. 521 (C.D. Cal. 1968).

25. 291 F. Supp. at 529.

26. 433 F.2d 74 (9th Cir. 1970), *cert. denied,* 402 U.S. 995 (1971).

27. The *Gooch* court recognized that the practical effect of *Amalgamated* was the denial of informal documentation procedures to commuter aliens. Thus the central issue, according to the majority, was whether the United States borders should be closed to approximately 40,000 commuter aliens. In ruling that commuter aliens should not be denied informal documentation privileges, however, the *Gooch* court did not rule upon Regulation 211.1(b)(1) or consider the policy arguments in support of the regulation. Rather, the court dealt with the validity of the commuter system itself in the wake of *Amalgamated.*

28. In a vigorous dissent Judge Wright pointed out that the state of the law in 1965, with commuter aliens regarded as special immigrants, was embodied in the *Amalgamated* decision. Therefore, he concluded that inaction by Congress should be construed as support for *Amalgamated.* Judge Wright also called attention to the inconsistent positions assumed by the Service over the years concerning commuter status. 433 F.2d at 82. Nonetheless, Judge Wright joined in invalidating Regulation 211.1(b)(1) in the instant decision.

result, it was unimportant whether the commuter alien lived in the United States if he had been lawfully accorded the privilege of residing permanently in the United States.[29]

The court in the instant case sought a rational relationship between the regulation and its parent statute. The court noted that the regulation created both a distinction between commuter aliens who worked for an employer involved in a labor dispute and those who did not and a distinction between the commuter and the permanent resident alien; however, the court found neither distinction rationally related to the administration of the Immigration and Naturalization Act.[30] Applying the rationale of *Gooch*,[31] the court determined that commuters were special immigrants and therefore exempt from the labor certification provisions of § 212(a)(14) of the Act. In concluding that neither the Act nor its legislative history implied that the informal admission procedures available to special immigrants could be used by the Attorney General to intervene in domestic labor disputes,[32] the court rejected the Attorney General's contention that his discretionary power allowed him to differentiate between commuters and permanent resident aliens[33] and held that commuter alien status was unaffected by lack of residence in the United States.[34]

In the instant case the Ninth Circuit was presented with a split of judicial opinion regarding the legitimacy of the commuter alien's administrative status as a permanent resident alien. This split had created uncertainty about the inclusion of commuter aliens within the class of special immigrants who were exempt from most immigration requirements. A forthright declaration by the instant court was needed to resolve prior judicial disagreement and to secure the commuter alien's rights in a period of rising opposition.[35] Unfortunately, the court chose instead to limit its opinion to a rebuttal of the

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29. The policy of protecting alien rights evidenced in *Gooch* was subsequently reinforced by the Supreme Court in *Graham v. Richardson,* 403 U.S. 365 (1971) (a state statute that denies welfare benefits to resident aliens or denies benefits to aliens who have not resided in the United States for a specified number of years violates the equal protection clause).

30. *See* Fook Hong Mak v. Immigration and Naturalization Service, 435 F.2d 728 (2d Cir. 1970) (regulation must be upheld if it is founded on considerations rationally related to the statute being administered).

31. *See* note 27 *supra* and accompanying text.

32. 457 F.2d at 748.

33. 457 F.2d at 749.

34. 457 F.2d at 749.

35. *See* note 10 *supra* and accompanying text.

Government's case;[36] the decision was merely a logical extension of its opinion in *Gooch.*[37] Rather than expand the commuter alien's rights, the Ninth Circuit solidified existing rights that had an uncertain base and that had been compromised by previous court decisions.[38] The instant decision might serve as a basis for future expansion of commuter alien rights,[39] but it is not certain that this decision will halt efforts to restrict the flow of alien workers. The intensity of future opposition to commuter labor will depend primarily upon the level of unemployment in those areas affected by commuter aliens and by the success of unionization efforts in the industries affected by commuter aliens. It is unlikely that the Immigration Service will be able to respond effectively to this opposition because its ability to act in the commuter alien field has been severely circumscribed by the court in the instant case. It will be difficult for the Service to direct any future action toward commuter aliens because the instant decision has made commuter aliens equivalent to permanent resident aliens who actually reside in the United States. Consequently, future attempts to control commuters will have to apply to resident aliens as well.[40] The instant decision might result in a greater emphasis on the screening provisions of § 212(a)(14) of the Act,[41] causing in turn more rigorous screening of other immigrants in order to accommodate domestic opposition to foreign labor. The absence of labor intervention in the instant case may reflect gains made in unionizing farm workers and a concomitant decline in opposition to foreign labor, but it more likely indicates that the fight will be taken to another

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36. Several arguments were available to the court. The constitutional rights of permanent resident aliens had been widened by such cases as *Graham v. Richardson.* In considering whether the commuter was to share in these expanded rights, the court could have pointed to the fact that the commuter was first given permanent resident alien status in order to comply with the 1924 Act, that this scheme was noted by Congress in the 1952 reenactment, that Congress has consistently refused to alter the commuter system despite its efforts to restrict foreign labor competition, and that the commuter's status was of long standing.

37. The court in *Gooch* upheld the use of Form I-151 and further held that commuter aliens were special immigrants and thus exempt from the labor certification provisions of 8 U.S.C. § 1182(a)(14) (1970).

38. *See* notes 20 & 24 *supra.*

39. *See* note 29 *supra.*

40. The remedies available to the Attorney General are thus diminished because permanent resident aliens are exempt from most restrictions contained in the Act.

41. This section was relied upon by Congress as the primary vehicle for controlling immigration flow. *See* note 18 *supra.*

forum—the Congress. Because of *Amalgamated*, labor probably felt little need for a congressional declaration concerning commuter aliens when the revisions to the Immigration Act were enacted in 1965. *Gooch* and the instant decision may now cause labor unions to reexamine the need for congressional action. Nevertheless, Congress may continue its reluctance to legislate in this area because such action would affect directly our relations with Canada and Mexico.[42] Because foreign relations is within the power of the Executive, Congress is unlikely to act in the absence of Executive leadership. Thus while the immediate future for commuter aliens appears secure, the quest for a congressional declaration on commuter alien status probably will be intensified. In the long run, this may be the only satisfactory way to secure permanently the commuter alien's position in American society.

Alan Marchisotto

42. Although no aspect of immigration law can be divorced from foreign policy, the commuter problem, more than any other, has a direct link to our relations with foreign states. The commuter system was created in order to maintain friendly relations with Canada and Mexico. *See* note 16 *supra*.

EXTRADITION—PRINCIPLE OF SPECIALTY—SPECIALTY DOES NOT PRECLUDE PROSECUTION FOR SIMILAR OFFENSE WHEN ASYLUM NATION WOULD NOT CONSIDER IT A BREACH OF FAITH

Appellants,[1] citizens of France, were extradited to the United States in October of 1971 as an act of comity by the Italian Government.[2] The extradition was based on an indictment issued by a federal grand jury in the District of Massachusetts,[3] which charged appellants with conspiring to import heroin into the United States from September of 1968 through April of 1969.[4] After their arrival in Massachusetts, appellants were released on bail, but shortly thereafter were indicted by a federal grand jury in the Southern District of New York for conspiring to violate the narcotics laws between January of

1. Charles Laurent Fiocconi and Jean Claude Kella.

2. The United States Embassy in Rome requested extradition in September of 1970 after Interpol discovered appellants in an Italian town. Appellants could not be extradited by operation of treaty since narcotics crimes are not among the offenses listed in the extradition convention with Italy. *See* Convention with the King of Italy for the Surrender of Criminals, March 23, 1868, 15 Stat. 629 (1868), T.S. No. 174. In requesting extradition as an act of comity, the Embassy emphasized that the offense for which extradition was requested was also a crime under Italian law and that drug traffic was strongly condemned by public opinion. Fiocconi v. Attorney General of the United States, 339 F. Supp. 1242, 1244 (S.D.N.Y. 1972). Extradition procedure is prescribed by treaty, and there is little uniformity. The usual procedure, however, is initiated by the filing of a requisition for extradition by the requesting nation and includes a hearing in the asylum nation to determine if there are sufficient grounds for a trial of the accused. *See generally* HARVARD RESEARCH IN INTERNATIONAL LAW, *Extradition,* 29 AM. J. INT'L L. 158-213 (Supp. 1935) [hereinafter cited as HARVARD RESEARCH]. In the United States, extradition is a federal prerogative which cannot be granted unless provided by treaty. Factor v. Laubenheimer, 290 U.S. 276, 287 (1933). The United States, therefore, seldom requests extradition not under treaty, since it cannot reciprocate. Wise, *Some Problems of Extradition,* 15 WAYNE L. REV. 709, 714 (1969). For United States extradition procedure see 18 U.S.C. §§ 3181-95 (1970).

3. The indictment and arrest warrants issued by the District Court of Massachusetts were among the papers presented to the Italian Government. The extradition order issued by a Florence court directed appellants' surrender "so that they can be subjected to judgment according to the writ of indictment against them formulated by the Grand Jury of the District Court of Appeals of Massachusetts [sic] dated the 20th of November, 1969 . . . ." 462 F.2d at 477.

4. Importation of heroin was a violation of 21 U.S.C. § 174 (1964). Although § 174 was repealed effective May 1, 1971, the repealer contained a saving provision for violations committed prior to May 1, 1971. Pub. L. No. 91-513, § 1103(a) (Oct. 27, 1970).

1970 and January of 1972, and for receiving, concealing and selling heroin.[5] Following their detention on the New York charges, appellants petitioned for a writ of habeas corpus on the grounds that their prosecution would be in violation of the principle of specialty[6] constituting a breach of faith with Italy. The district court denied the petition, holding that unless extradition is under treaty,[7] such a breach of faith is not judicially cognizable, but is a matter for the executive.[8] On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed on separate grounds. Violations of the principle of specialty in extraditions not under treaty are judicially cognizable, but the principle does not preclude prosecution where the asylum nation would not consider it a breach of faith. *Fiocconi v.*

5. The grand jury in the Southern District of New York originally indicted appellants for only the substantive crimes of receiving, concealing and selling heroin. While appellants' petition for a writ of habeas corpus was pending with the district court, a superseding indictment was issued that added the conspiracy charges. 462 F.2d at 477.

6. The principle of specialty provides that an extraditee cannot be prosecuted for an offense other than that for which he was surrendered until he has had a reasonable time to leave the prosecuting country. HARVARD RESEARCH, *supra* note 2, at 213-17. Although the principle is generally recognized, it has been suggested that the right of the asylum nation to waive the principle indicates that it is not a rule of international law, but merely a rule of comity. *See* 2 D. O'CONNELL, INTERNATIONAL LAW 732-33 (2d ed. 1970). Specialty is related to the principle that political crimes are not extraditable: specialty prevents a requesting nation from prosecuting an extraditee for his opposition to the government after obtaining his extradition for another offense. *See* Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula,* 15 WAYNE L. REV. 733, 749 (1969).

7. "Extradition under treaty" denotes extradition demanded of the asylum nation on the authority of a treaty between the requesting and asylum nations. "Extradition under comity" denotes extradition requested of the asylum nation on the basis of international comity.

8. Fiocconi v. Attorney General of the United States, 339 F. Supp. 1242 (S.D.N.Y. 1972). The district court declared that the obligation to refrain from prosecution of extraditees for an offense other than that for which they were extradited is an obligation imposed only by treaty. According to the court, an extraditee unprotected by treaty is to be treated like a defendant brought before the court in violation of international law, who may be prosecuted in spite of that violation. *See* United States v. Sobell, 142 F. Supp. 515, 523 (S.D.N.Y. 1956), *aff'd,* 244 F.2d 520 (2d Cir.), *cert. denied,* 355 U.S. 873 (1957). Consequently, the court allowed an extraditee surrendered by a nation as an act of comity no immunity from prosecution for any crime for which he has been properly indicted. 339 F. Supp. at 1246-47.

Attorney General of the United States, 462 F.2d 475 (2d Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3114 (U.S. Aug. 26, 1972) (No. 332).

In accordance with the concept of territorial sovereignty,[9] modern international law recognizes no duty to extradite.[10] Since extradition is therefore a voluntary act of good faith,[11] nations have long recognized the principle of specialty—a duty to refrain from prosecuting an extraditee for an offense other than that for which he was surrendered by the asylum nation.[12] In *United States v. Rauscher*,[13] the Supreme Court provided the extraditee with a judicial remedy for

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9. A nation has unrestricted authority over the property and persons within its borders; it cannot legally be forced to surrender a person to whom it has chosen to provide asylum, unless it has agreed to do so by treaty. *See generally* 1 L. OPPENHEIM, INTERNATIONAL LAW §§ 123, 124 (H. Lauterpacht 8th ed. 1955).

10. Grotius and other early writers stated that a nation has the duty either to punish the offender or to deliver him to the requesting nation for punishment. United States *ex rel.* Donnelly v. Mulligan, 74 F.2d 220, 221 (2d Cir. 1934); Bassiouni, *supra* note 6, at 734. Modern international law, however, recognizes no such duty. OPPENHEIM, *supra* note 9, at § 327. Although the surrender of criminals by one nation to another was practiced even in the ancient world, these transfers were effected as a matter of comity. Extradition agreements, however, have become common within the last two centuries. The first United States extradition treaty of consequence was the Webster-Ashburton Treaty with Great Britain, August 9, 1842, art. X, 8 Stat. 572, T.S. No. 119. *See generally* HARVARD RESEARCH, *supra* note 2, at 32-51.

11. Extradition, whether under treaty or comity, is a voluntary act since a nation is under no duty either to enter into an extradition agreement or to surrender an extraditee as an act of comity. *See* United States *ex rel.* Donnelly v. Mulligan, 74 F.2d 220, 222 (2d Cir. 1934); OPPENHEIM, *supra* note 9, at § 327.

12. *See, e.g.*, HARVARD RESEARCH, *supra* note 2, at 213.

13. 119 U.S. 407 (1886). In *Rauscher*, petitioner was extradited to the United States under treaty with Great Britain, on charges of murder on the high seas. Upon extradition, he was tried and convicted on the lesser charge of inflicting cruel and unusual punishment. On appeal, the Supreme Court held that although the treaty with Great Britain did not contain a "specialty clause" the principle must nonetheless be upheld. The Court expressed the classic justification for the principle of specialty: "[I]t can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offense of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of

the breach of international good faith by depriving United States courts of jurisdiction to prosecute in violation of specialty,[14] even though the applicable treaty did not express the principle. The traditional test applied in order to determine if specialty has been accorded is whether the unlawful act represented to the asylum nation is the act for which the accused is ultimately prosecuted.[15] This test was altered, however, in *United States v. Paroutian*,[16] in which the Second Circuit ruled that the test should be whether the asylum nation would consider the offense supporting prosecution as "sepa-

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the party." 119 U.S. at 419. *Rauscher* settled a long dispute in this country over the principle of specialty and its application to the Webster-Ashburton Treaty with Great Britain. *Compare* United States v. Lawrence, 26 F. Cas. 879 (No. 15,573) (C.C.S.D. N.Y. 1876) (held that the Webster-Ashburton Treaty does not require that prosecution of extraditees under that treaty comply with the principle of specialty) *with* Commonwealth v. Hawes, 76 Ky. (13 Bush) 697 (1878) (held that the weight of authority and a fair construction of the treaty preclude prosecution in violation of specialty). For an exhaustive discussion of the specialty issue in the *Lawrence* case see Lawrence, *The Extradition Treaty*, 14 ALBANY L. J. 85 (1876), 15 ALBANY L. J. 224 (1877) and 16 ALBANY L. J. 361 (1878). The *Rauscher* decision actually conflicted with the view taken at one time by the United States Department of State. In 1876, Great Britain proposed as a condition to the surrender of one Winslow a stipulation that the United States would prosecute him only for the offense presented to British authorities. The State Department refused to so stipulate and threatened to regard the Anglo-American treaty as abrogated if the British persisted. 2 F. WHARTON, DIGEST OF INTERNATIONAL LAW 760, 769 (2d ed. 1887); *see* 15 OP. ATT'Y GEN. 514 (1875).

14. Chief Justice Waite, dissenting, argued not against the principle of specialty, but merely against the provision of a judicial remedy for its violation. 119 U.S. at 434.

15. "In deciding whether the indictment charges the same offense for which the defendants were extradited, the acts of the defendants alleged in the two proceedings must be considered. It is not a question of names." Greene v. United States, 154 F. 401, 406 (5th Cir. 1907) (specialty not violated by indictment for "conspiracy with an agent to defraud" after extradition for "participation in fraud by an agent or trustee"); *cf.* Bryant v. United States, 167 U.S. 104, 108 (1897) ("So long as the prisoner is tried upon the facts which appeared in evidence before the [extradition] commissioner, and upon . . . one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny or embezzlement"). *See also* Collins v. Loisel, 259 U.S. 309, 312 (1922) ("cheating" held not different offense from "obtaining property under false pretenses").

16. 299 F.2d 486 (2d Cir. 1962). Paroutian was extradited from Lebanon on the basis of an indictment issued in the Southern District of New York charging conspiracy to violate 21 U.S.C. § 174 (1964) (importation of heroin). He was

rate." The judicial remedy available to extraditees under treaty is an exception to the general rule of criminal jurisdiction that a court may try a defendant properly indicted for any crime committed within the court's jurisdiction.[17] Normally, violations of international law attending criminal prosecution confer no immunity from prosecution upon the defendant, but are matters handled by the executive upon protest of the offended sovereign.[18] Moreover, the mere existence of a treaty confers no right to asylum on the defendant; rights accrue to his benefit only when the treaty is called into effect.[19] The general rule was applied to the extreme in *Ker v. Illinois*,[20] in which the Supreme Court refused to disturb the conviction of a defendant

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convicted, however, on an indictment in the Eastern District of New York that added counts for receipt and concealment of heroin to the conspiracy charge. The court concluded that Lebanon would not consider that Paroutian had been convicted for an offense other than the extradition offense, but reversed the conviction on other grounds.

17. United States v. Sobell, 142 F. Supp. 515, 524 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957). Sobell, convicted for conspiracy to commit espionage as a co-defendant of Julius and Ethel Rosenberg, argued that the court was without jurisdiction to try him since he was seized in Mexico by Mexican police, forcibly removed to the United States border, and turned over to United States agents. In rejecting Sobell's claim, the court distinguished the *Rauscher* remedy as an exception to the general criminal rule.

18. *See* Ker v. Illinois, 119 U.S. 436 (1886); United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957). *See also* United States v. Unverzagt, 299 F. 1015, 1016-17 (W.D. Wash. 1924), *aff'd sub. nom.* Unverzagt v. Benn, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925) (abduction of accused from British Columbia by purported American agents does not deprive United States court of jurisdiction to try accused).

19. Ker v. Illinois, 119 U.S. 436, 442 (1886). Petitioner in *Ker* argued that the existence of an extradition treaty with Peru prevented the United States from removing him by any method other than extradition under treaty. In dismissing petitioner's argument, Justice Miller said that the existence of the treaty conferred no right of asylum in Peru.

20. 119 U.S. 436 (1886). Mr. Justice Miller delivered the opinions in *Ker* and *Rauscher*, decided on the same day. In *Ker*, a warrant requesting extradition of petitioner from Peru was issued by the President to one Julian, who took the necessary papers to Lima. After his arrival in Lima, however, Julian apparently never presented the warrant to Peruvian authorities but simply kidnapped petitioner and forcibly removed him to Illinois. *See* note 19 *supra*. A unanimous Court reaffirmed *Ker* in *Frisbie v. Collins*, 342 U.S. 519 (1952), commenting: "This Court has never departed from the rule announced in *Ker v. Illinois* . . . . No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in

kidnapped from Lima, Peru by American agents and forcibly returned to Illinois for trial.

In the instant case a unanimous court found that the denial of jurisdiction decreed in *Rauscher* does not depend upon a governing treaty, but is a rule of United States foreign relations law that provides a remedy both to extraditees surrendered as an act of comity and to those demanded under treaty.[21] The court adopted the rationale of the *Paroutian* case, which determined that the purpose of the *Rauscher* remedy is to prevent United States violations of international obligations. The court then formulated its own test: specialty will be satisfied if the asylum nation would not regard prosecution of the extraditee as a breach of faith.[22] The court conceded that its application of this test required a step beyond *Paroutian*, since the indictment supporting prosecution in the instant case alleged a conspiracy one to three years subsequent to the conspiracy alleged in the extradition request.[23] Nevertheless, the court opined that Italy would not deem prosecution for the subsequent offense to be a breach of faith, since the extradition offense was of the same character as that supporting prosecution.[24]

The part of the decision that extends the *Rauscher* remedy to extraditees surrendered as a matter of comity is sound for at least two

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court is convicted of a crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." 342 U.S. at 522 (Black, J.).

21. The court reasoned that Rauscher's conviction could not have violated the extradition treaty with Great Britain since the treaty did not refer to the principle of specialty. *See* note 13 *supra*. Rauscher's conviction, the court said, violated United States foreign relations law "devised by the courts to implement the treaty." It is therefore not necessary, the court felt, that the extradition be under treaty for the judicial remedy created in *Rauscher* to apply. 462 F.2d at 479-80; *cf.* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3, Comment (h) (1965) ("The domestic law of a state may provide a remedy in its courts to a person who has been injured by a violation of a rule of international law.").

22. 462 F.2d at 480.

23. *See* note 31 *infra*.

24. Judge Friendly, writing for the court, characterized the transfer from Massachusetts to New York as a "problem of venue, a 'technical refinement of local law' with which Italy is scarcely concerned." The court also found support in that the extradition treaty with Italy does not prohibit prosecution of an extraditee for any offense committed before his extradition, as do some treaties, but prohibits only prosecution for crimes committed before that for which

reasons. First, the *Ker v. Illinois* rationale utilized by the district court[25] has been applied only in those cases in which a violation of territorial sovereignty had occurred.[26] Application of *Ker* in extradition cases would discourage extradition since a protest by the asylum nation would not necessarily prevent a United States court from prosecuting the extraditee.[27] In addition, the principle of specialty could be completely abrogated if political considerations prevented the asylum nation's protest.[28] Secondly, the reasons for providing a judicial remedy for extraditees under treaty apply equally well to those surrendered under comity. If, as the court in the instant case indicates, the remedy is only to prevent the United States from injuring international relations, it makes no difference that a treaty was not effectuated. A breach of comity would injure foreign relations no less than the breach of a treaty obligation; neither breach would be conducive to the granting of future extraditions by the asylum nation. If, in addition to the avoidance of United States violations of international obligations, the remedy provided in *Rauscher* is to protect the extraditee from indiscriminate prosecution,[29] that protec-

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extradition is requested. The court inferred that the treaty thus allows prosecution for a crime committed before extradition, so long as the offense was not antecedent to the offense for which the extraditee was returned, and said that this more liberal provision was an indication of Italy's attitude toward prosecution of extraditees.

25. *See* note 8 *supra.*

26. *See, e.g.,* The Richmond, 13 U.S. (9 Cranch) 102 (1815) (United States court held not deprived of jurisdiction over vessel by its seizure in violation of international law); Ker v. Illinois, 119 U.S. 436 (1886).

27. In a case involving a crime such as treason or espionage, the executive might well assign greater importance to the prosecution of the accused than to the maintenance of the good will of the asylum nation. *Cf.* United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd,* 244 F.2d 520 (2d Cir.), *cert. denied,* 355 U.S. 873 (1957).

28. "Given the complexity and delicacy of present-day international relations, and the often overwhelming multiple preoccupations of state departments, foreign offices and the other governmental agencies concerned, states must be left a measure of discretion as to whether and to what extent to pursue the interests of nationals who may have suffered injury abroad. There may well be situations where a government may feel disinclined to endanger relations with another state, which may be of strategic or political significance, in order to protect a national. . . ." W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 238 (1964).

29. The instant court recognized that the principle of specialty reflects the international belief that extraditees should not be indiscriminately prosecuted, especially for political crimes. 462 F.2d at 481.

tion is needed whether the extradition occurs by treaty or under comity. After extending the remedy provided by *Rauscher*, however, the instant court adopted a test of whether specialty has been satisfied that is in derogation of both specialty and the *Rauscher* remedy. Unless the asylum nation affirmatively protests,[30] the new test effectively allows an extraditee to be prosecuted for an offense clearly different from that for which he was extradited.[31] The result in the instant case, however, is subject to a more fundamental criticism. In addition to preventing violations of international obligations by the executive, the *Rauscher* remedy afforded extraditees basic Constitutional guarantees—notice of the charges on which they were to be prosecuted.[32] The instant decision, which sanctions the prosecution of extraditees for offenses not specified to the asylum nation, denies the accused notice of the charge against which he must ultimately defend. The possible result is the very thing that the principle of specialty was designed to prevent—indiscriminate prosecution by the

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30. As noted earlier, a nation may be prevented from protesting by political considerations. *See* note 28 *supra* and accompanying text.

31. It is not clear whether the instant court felt that the prosecution of appellants for the subsequent conspiracy and substantive crimes would have met the traditional test requiring that the accused be prosecuted for the same act for which he was extradited. *See* note 15 *supra*. While quoting *Paroutian* to the effect that the test should not depend upon "some technical refinement of local law," the court admitted that it was going beyond *Paroutian* by finding specialty satisfied. There is little authority on whether prosecution for a substantive crime following extradition on a charge of conspiracy to commit that crime violates specialty. *Greene v. United States*, 154 F. 401 (5th Cir. 1907), held that specialty was not violated by an indictment for "conspiracy with an agent to defraud" following extradition for "participation in fraud by an agent or trustee." 154 F. at 406. The instant case also demonstrates the difficulty of applying the "same act" standard to conspiracy. A conspiracy allegedly existed in the instant case from 1968 until 1972. The entire conspiracy related to the importation of heroin; the "same act" standard, therefore, might be met. Nevertheless, it may be unreasonable to conclude that a 1968 conspiracy is the same act as one occurring in 1971.

32. U.S. CONST., amend. V. Due process includes notice of the specific charge against the accused and an opportunity to contest the charges against him. *See, e.g.,* Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge . . . [is] among the constitutional rights of every accused"); *cf.* Galpin v. Page, 85 U.S. (18 Wall.) 350, 368-69 (1873) ("[N]o one shall be personally bound until he has had his day in court . . . and has been afforded an opportunity to be heard."). *But cf.* Frisbie v. Collins, 342 U.S. 519 (1952). *See* note 20 *supra*.

requesting nation.[33] Although the individual traditionally has not been considered the subject of international law,[34] the belief that international law should concern itself with the individual is growing, and some writers have argued for a revised international law that would apply directly to individuals.[35] This court's view that compliance with specialty depends upon the reaction of the asylum nation to the prosecution is in accordance with traditional international law, but it is clearly contrary to modern concern for individual rights. This decision affords little protection to the individual, for the extraditee must depend upon the willingness and ability of the asylum nation to oppose his prosecution in violation of specialty. If the extraditee is not a national of the asylum nation, protest by that state to the prosecuting nation is especially unlikely.[36] An argument against the direct application of international law to individuals is that major

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33. Without notice of the charge on which he is eventually to be prosecuted, the accused naturally cannot defend against his extradition on that charge. After his extradition to the United States, the accused has no protection against prosecution on a separate charge under the holding of the instant case. Even if the asylum nation protests and prosecution is halted, the extraditee has already been subjected to the manifest inconvenience of removal and detention.

34. "[T]he Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as an alien or an ambassador, for example, is not directly a subject of International Law. Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not, as a rule, international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the State concerned by International Law." OPPENHEIM, *supra* note 9, at 19. Wolfgang Friedmann wrote that "[U]ntil recently, during by far the greater part of the development of modern international law, the individual, the 'common man' was essentially a pawn of international policy and diplomacy." FRIEDMANN, *supra* note 28, at 40.

35. One manifestation of this increased international concern for individual rights is the drafting of covenants of human rights like the 1948 United Nations Declaration of Human Rights. *See,* FRIEDMANN, *supra* note 28, at 40. Among the advocates of an individual international law is Judge Philip Jessup, who made the direct application of international law to the individual one of two "keystones of a revised international legal order." P. JESSUP, A MODERN LAW OF NATIONS 2 (1950). For a complete discussion of the status of the individual in international law see Lauterpacht, *The Subjects of the Law of Nations,* 63 L.Q. REV. 438 (1947) and 64 L.Q. REV. 97 (1948). Lauterpacht concludes that recognition of the individual as the true subject of the law of nations is not contrary to the "true purpose" of international law. 64 L.Q. REV. at 119.

structural and legal changes would be necessary to effect that application.[37] In the instant case, however, no change in structure or law was necessary to effect protection of the individual from indiscriminate extradition and prosecution. *Rauscher* provided adequate protection by denying United States courts jurisdiction to prosecute extraditees for offenses other than that for which they were surrendered. By undermining the *Rauscher* remedy, the *Fiocconi* court has missed an opportunity to promote the protection of international individual rights.

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36. The instant case is a good example. Appellants were not Italian nationals and were carrying false passports when arrested in Italy. It seems highly unlikely that extraditees like appellants would receive much protection from the asylum nation. It is likely that the extraditee will not be a national of the asylum nation since many countries refuse to extradite their own citizens. *See* HARVARD RESEARCH, *supra* note 2, at 123-37.

37. For a discussion of several possible structural changes, including a world parliament, see JESSUP, *supra* note 35, at 16-18. *See also* FRIEDMANN, *supra* note 28, at 234-42.

JURISDICTION—FORUM SELECTION CLAUSES—UNITED STATES COURTS WILL ENFORCE FORUM SELECTION CLAUSES IN INTERNATIONAL TOWAGE CONTRACTS ABSENT EXCEPTIONAL CIRCUMSTANCES

Petitioner,[1] a German corporation, entered into an international towage contract with respondent,[2] an American corporation, to tow a seagoing oil drilling rig[3] from Louisiana to Italy. The provisions of the contract included a forum selection clause,[4] which stipulated that all litigation concerning the contract would be resolved before the High Court of Justice in London, and two clauses[5] that purported to release petitioner from liability for damages to the tow. A severe storm during the voyage caused extensive damage to the rig and respondent instructed petitioner's tug[6] to tow the rig to the nearest port, Tampa, Florida. Ignoring the forum selection clause, respondent commenced a suit in admiralty in the federal district court at Tampa against petitioner in personam and the tug in rem seeking damages for negligent towage and breach of contract. Petitioner moved to dismiss the action for lack of jurisdiction and on grounds of *forum non conveniens*; the court took these motions under advisement.[7] Due to statutory time limits, however, petitioner was compelled to file a limitation proceeding[8] in the same court. Respondent filed its claim in

1. Unterweser Reederei, G.m.b.H.

2. Zapata Off-Shore Company, a Delaware corporation with its principal place of business in Houston.

3. The *Chaparral.*

4. "Any dispute arising must be treated before the London Court of Justice." Presumably the parties meant the High Court of Justice located in London.

5. "1. . . . [Unterweser and its] masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

"2. . . . (b) Damages suffered by the towed object are in any case for account of its Owners." The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 3 n.2 (1972).

6. The *M/S Bremen.*

7. Oral argument to dismiss was heard on April 29, 1968, but no ruling was given until July 29, 1968—after Unterweser had filed its limitation proceeding for which the statute of limitations would have run July 8, 1968.

8. Limitation of Vessel Owner's Liability, 46 U.S.C. § 185 (1970) provides: "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of a claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter.... Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

the limitation proceeding and petitioner sought a stay of litigation in order to allow the English court, which was concurrently hearing the controversy, to resolve the dispute.[9] The district court[10] found the equitable considerations presented by petitioner to be unpersuasive and denied the stay.[11] The Court of Appeals for the Fifth Circuit, relying on *Carbon Black Export, Inc. v. The Monrosa*[12] for the proposition that an agreement attempting to oust the court of jurisdiction is violative of public policy and unenforceable,[13] affirmed, both in a three judge panel[14] and upon rehearing en banc.[15] The court of appeals concluded also that the district court had not abused its discretion in denying the stay on the basis of *forum non conveniens.*[16] On writ of certiorari, the United States Supreme Court,

9. After respondent had initiated the admiralty action in the district court at Tampa, petitioner brought an action on the contract in the High Court of Justice in London, England. *Ex parte* leave was granted to serve notice of the English writ in the United States and respondent's motion to set aside service was rejected. After Unterweser filed its limitation proceeding in the federal district court, the English Court of Appeals affirmed the prima facie policy of the English courts to hold parties to their bargains, absent the showing of strong reason to the contrary. UnterweserReederei G.m.b.H. v. Zapata Off-Shore Co. ("The Chaparral"), [1968] 2 Lloyd's Rep. 158.

10. The court relied in part on A/S J. Ludwig Mowickles Rederi, 268 F. Supp. 682 (S.D.N.Y. 1967) (refusal to grant injunction against shipowner's attempt to amend limitation petition in which owner of second ship in collision was inadvertently omitted based on facts of case and not lack of power to enjoin).

11. 296 F. Supp. 733 (M.D. Fla. 1969).

12. 254 F.2d 297 (5th Cir. 1958), *cert. dismissed as improvidently granted,* 359 U.S. 180 (1959).

13. The court also noted that the exculpatory clause, apparently unenforceable in United States courts as violative of public policy, would probably be enforced in England according to the uncontroverted opinion of English maritime expert F.D. Bateson. 428 F.2d at 895.

14. *In re* Unterweser Reederei, G.m.b.H., 428 F.2d 888 (5th Cir. 1970).

15. 446 F.2d 907 (5th Cir. 1971).

16. The general rule concerning the doctrine of *forum non conveniens* requires the party seeking a transfer to justify its application. The district court incorrectly applied this rule by considering the forum clause one of the considerations in determining the balance of convenience and by relying on a case not involving a selection clause: "[U]nless the balance is strongly in favor of defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1946). Judge Wisdom's dissent, noting this error, cited the RESTATEMENT (SECOND) CONFLICTS OF LAW § 80, comment (Tent. Draft No. 4, 1957): "[w]hen a forum clause is involved our standard should be not to disturb the *contractual* choice of forum unless 'the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action.' " 428

held, judgment vacated and case remanded. United States courts will enforce forum selection clauses in international towage contracts in the absence of unforseeable and extreme hardships that would effectively deprive the resisting party of his day in court. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

Traditionally, United States courts have treated forum selection clauses[17]—attempts by the parties to confer jurisdiction on a particular court—with hostility. Comparatively, the civil law systems divide forum selection clauses into two categories—prorogation clauses, in which a particular court is selected by the parties to hear any disputes that arise, and derogation clauses, in which the parties seek to exclude a particular court. Both have become acceptable internationally; Austria, Belgium, France and Switzerland are among the countries that

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F.2d at 910. As petitioner argued, *forum non conveniens* is a doctrine applied after the fact—when a dispute has developed and litigation is in process; therefore it cannot logically be applied to test the reasonableness of a forum contracted for in advance. Nonetheless, the appellate court determined the clause in question unreasonable, curiously citing *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966) (forum clauses prima facie valid not to be tested by application of *forum non conveniens*). The factors the courts have considered in determining the validity of a forum selection clause are: (a) Whether the rights of the resisting party will be substantially diminished if compelled to litigate in the foreign forum. *See* Chemical Carriers, Inc. v. L. Smit's & Co.'s Internationale, 154 F. Supp. 886 (S.D.N.Y. 1957) (towage contract retained because plaintiff deprived of remedy in foreign forum); Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955) (rights not significantly affected, case declined); (b) Relative availability of testimony and evidence between forums. Hawaii Credit Card Corp. v. Continental Credit Card Corp., 290 F. Supp. 848 (D. Hawaii 1968) (most evidence in noncontract forum, jurisdiction retained); (c) The citizenship of the parties and the nationality of the parties involved. Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684 (1950) (suit by citizen against foreigner invokes different considerations than suit between foreigners); (d) Relative degree of contacts with the subject matter of the litigation. Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951); (e) Whether or not the contract is executory. Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955); (f) Whether or not the contract was procured through fraud or overreaching; and (g) Whether the foreign forum would accept the case and decide the dispute.

17. "The common law has no term of art to label an exclusive forum agreement. The civilians have two serviceable terms. Considered from the point of view of the state in which the parties have agreed to bring their litigation, it is called a prorogation agreement. From the view of the states in which the parties have agreed not to litigate, it is a derogation agreement." Perillo, *Selected Forum Agreements in Western Europe*, 13 AM. J. COMP. L. 162 (1964).

recognize the forum selected by the parties, subject to varying notions of public policy. Such clauses in civil or commercial contracts generally have been upheld, although suits concerning domestic relations and immovable objects within a state's boundaries normally are exceptions.[18] In early state and federal cases in the United States, however, agreements of both types were characterized as either unjustifiable attempts by the contracting parties to oust the courts of jurisdiction or unenforceable efforts to circumvent public policy.[19] Despite considerable continued acceptance of this attitude, contrary decisions upholding the validity of reasonable forum selection clauses have increased in frequency since 1900.[20] By 1949 the hostility toward choice of forum clauses had been eroded to the extent that Judge Hand stated he knew of no

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18. Perillo, *supra* note 17. *See generally* Lenhoff, *The Parties' Choice of Forum: Prorogation Agreements,* 15 RUTGERS L. REV. 414 (1961). A recent English case, *The Eleftheria,* recognized the selected forum despite the fact that a preponderance of the evidence was situated in England, primarily due to the substantive difference in Greek law upon which the parties had undoubtedly relied in arriving at their bargain. [1969] 1 Lloyd's Rep. 237 (in rem action by cargo owners relegated to Greek courts). *Contra,* The Fehmarn, [1958] 1 W.L.R. 159 (C.A.) (jurisdiction assumed despite contractual agreement to litigate in a foreign court, primarily due to location of evidence).

19. *See, e.g.,* Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174 (1856) (early state rejection of selection clauses couched in historical terms); *accord,* Nashua River Paper Co. v. Hammermill Paper Co., 233 Mass. 8, 111 N.E. 678 (1916). The federal courts have evidenced similar antipathy. *See, e.g.,* Doyle v. Continental Ins. Co., 94 U.S. 535 (1877) (reaffirming prior decision that agreements precluding recourse to the courts of the United States were void as against public policy). For an excellent discussion of these and other cases see Hay, *International Versus Interstate Conflicts Law in the United States,* 35 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 430 (1971).

20. A 1903 state decision enforced a contractually selected forum between two aliens. Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903). More recently several federal cases have reached the same conclusion. *See, e.g.,* Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2d Cir. 1951) (Peruvian bill of lading selecting Norwegian courts honored by dismissal of United States proceedings). Those instances in which forum selection clauses have been rejected involved either adhesion contracts attempting to avoid a particular forum, *see, e.g.,* Standard Pipe Line Co. v. Burnett, 188 Ark. 491, 66 S.W.2d 637 (1933); Parker v. Krauss Co., 157 Misc. 667, 284 N.Y.S. 478 (Sup. Ct. 1935) (derogation by Louisiana department store of Louisiana courts in conflict arising from standardized sales contract), or contracts in which the American citizenship of the parties made the selection of a foreign forum suspect, *see* Kuhnhold v. Compagnie Générale Transatlantique, 251 F. 387 (S.D.N.Y. 1918).

"absolute taboo" against "reasonable"[21] forum selection provisions.[22] The Supreme Court's increasing willingness to honor choice of forum and its recognition of the power of individuals to consent, in advance, to litigate in a specific forum were most recently evidenced in *National Equipment Rental, Ltd. v. Szukhent.*[23] In admiralty, the erosion of hostility to forum selection clauses followed a similar path. Early cases considered that the relegation of United States citizens to foreign forums was contrary to public policy, especially in cases involving adhesion contracts.[24] Frequently associated with adhesion contracts were the equally disfavored exculpatory clauses, which were held to be against public policy and void in towage contracts in *Bisso v. Inland Waterways Corp.*[25] Eventually, however, Judge Hand's "reasonableness" test was applied to an admiralty case in *Wm. H. Muller & Co. v. Swedish American Lines Ltd.*,[26] in which the Second Circuit concluded that, unless unreasonable, a forum clause in an international contract should be enforced. Subsequently, in *Indussa Corp. v. S.S. Ranborg,* [27] the Second Circuit overruled *Muller* in part and held forum selection clauses unenforceable when the Carriage of Goods by Sea Act,[28] which prohibited such clauses, was applicable. Prior to *Indussa,* the Fifth Circuit had recognized a prorogation agreement in *Carbon Black Export, Inc. v. The Monrosa,*[29] and reversed a district court that had followed *Muller.* Apparently, the

21. Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 209 A.2d 810 (1965).

22. Krenger v. Pennsylvania R.R., 174 F.2d 556, 561 (2d Cir. 1949).

23. 375 U.S. 311 (1964). The impact of this holding is restricted because the issue was whether the state court had jurisdiction, not whether other courts with concurrent jurisdiction should decline to exercise jurisdiction.

24. Insurance cases are typical. *See generally* Annot., 107 A.L.R. 1060 (1937).

25. 349 U.S. 85 (1955).

26. 224 F.2d 806 (2d Cir. 1955) (Swedish courts and law selected in bill of lading). A number of cases followed *Muller* in treating the choice of forum clause as prima facie enforceable. *See, e.g.,* Pakhuismeesteren S.A. v. S.S. Goettingen, 225 F. Supp. 888 (S.D.N.Y. 1963) (exclusive jurisdiction of German courts honored); Takemura & Co. v. S.S. Tsuneshima Maru, 197 F. Supp. 909 (S.D.N.Y. 1961) (exclusive jurisdiction of Japanese courts honored).

27. 377 F.2d 200 (2d Cir. 1967).

28. 46 U.S.C. §§ 1300-15 (1970) [hereinafter COGSA].

29. 254 F.2d 297 (5th Cir. 1958). It is interesting to note that the court made little reference to the fact that COGSA was applicable to the contract. "The bills of lading [in an international shipping contract] provided for exclusive jurisdiction in the courts of Genoa. The libellants brought actions in rem against the

Fifth Circuit equated the "reasonableness" standard of *Muller* with "convenience" and held that *forum non conveniens* balancing standards should govern in rem proceedings.

The Court in the instant case determined that the lower courts had given insufficient consideration to the forum selection clause in the towage contract. After tracing the judicial history of forum selection clauses in the United States, the Court cited extensive international recognition of the desirability of enforcing agreements freely made by contracting parties and dismissed the "ouster" and "public policy" arguments as vestigial legal fiction.[30] The Court acknowledged that the forum selection clause was negotiated at arm's length by highly sophisticated, knowledgeable businessmen and concluded that the clause was a vital part of the agreement on which the parties had undoubtedly relied in allocating insurance costs. The Court emphasized that international development and continued commercial expansion would be hampered by American insistance on litigating all disputes concerning her citizens in domestic courts. Turning to the Fifth Circuit's improper application of the *forum non conveniens* burden of proof, the Court held that the burden of showing the forum selected in the contract to be unreasonable or invalid for such reasons as fraud or overreaching was on the party resisting enforcement of the clause. *Bisso* was distinguished on the grounds that the appropriate considerations in contracts for towage in American waters are not the same as those in international waters. Finally, the Court rejected respondent's contention that petitioner had availed itself of the United States courts by filing the limitation proceeding and therefore was precluded from challenging the propriety of the district court's hearing the other charges.[31] Justice Douglas, dissenting, argued that the forum selection clause was an integral part of an unenforceable exculpatory clause and, therefore, should not be given effect.[32]

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vessel and in personam against the shipowner for damage to and non-delivery of the cargo. The Court of Appeal (Fifth Circuit) distinguished Muller as an action in rem and, without espousing or rejecting Muller as to actions in personam, refused to give effect to the choice of forum clause." Denning, *Choice of Forum Clauses in Bills of Lading,* 2 J. MARITIME L. & COMMERCE 17, 29-30 (1970) (footnotes omitted).

30. 407 U.S. at 9-10. The Court adopted the argument of Judge Wisdom's dissenting opinions in the circuit court. *See* 428 F.2d 888, 896 (5th Cir. 1971); 446 F.2d 907, 908 (5th Cir. 1971).

31. Respondent's attempt to characterize the clause in question as ambiguous was dismissed by the Court as "specious."

32. 407 U.S. at 23.

The instant decision, in honoring contractually conferred jurisdiction, is a commendable attempt to bring domestic law more into harmony with international custom and comparative practice. Moreover, the decision furthers predictability in world commerce; by giving effect to the just expectations of parties having contracted from positions of equality, the Court attempted to synthesize and liberalize prior inconsistent and parochial decisions. In seeking to achieve this end the Court used broad language that invites extension of this decision to international contracts generally. Unfortunately, numerous realities may thwart in practice what appears in theory to be an effective vehicle for change. For example, the developing countries of the Third World may challenge the existence of the international custom that the instant decision assumes.[33] In addition, it is unfortunate that the Court did not clearly endorse the prorogation-derogation distinction as an aid in analyzing forum selection cases[34] and thereby make these analytical tools available to common law attorneys, since much of the confusion that exists in the earlier American decisions is the result of a failure to distinguish between decisions of prorogated and derogated courts in their determinations of whether a forum selection clause should be enforced. The primary advantage of utilizing the civil law classification is that it would better

33. Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961). Among the questions that must be addressed is whether failure to confer exclusive jurisdiction permits the interpretation that the forum selected is but one of many acceptable forums. *See* Wescott v. Alsco Products of Canada Ltd., 45 Mar. Prov. 394, 26 D.L.R.2d 281 (Newf. 1961) (by selecting a particular court the parties had not excluded courts with concurrent jurisdiction). The court should insure that the parties do, in fact, have their dispute heard in the selected forum by dismissing subject to the commencement of proceedings in the selected forum. *See* Olympic Corp. v. Societé Générale, 462 F.2d 376 (2d Cir. 1972) (defendant's crossclaim for indemnification dismissed contingent upon filing the action in the French courts).

34. Numerous scholars have noted the inconsistency and confusion that surround choice of forum clauses. *See, e.g.,* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 729 (1968); Collins, *Forum Selection and an Anglo-American Conflict–The Sad Case of The Chaparral,* 20 INT'L & COMP. L.Q. 550, 553 (1971). Two excellent sources that synthesize the mechanics, advantages and disadvantages of the civilian method of analysis are available. *See* Lenhoff, *supra* note 18 (survey of various civil law countries' utilization of this method, with emphasis on European nations); *The Validity of Forum Selection Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association,* 13 AM. J. COMP. L. 157 (1964) (collection of six papers).

accomplish the Court's objective of furthering predictability in world commerce by providing a method of analysis less vulnerable to restrictive interpretation than that provided in the instant decision.[35] Notwithstanding the possibility of future restrictive interpretation because of the Court's failure to adopt the civil law classifications, the instant decision should be applauded by all who seek the development of uniformity in transnational law.

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35. In *Indussa,* for example, an excluded (derogated) court overruled the decision made by a selected (prorogated) court in *Muller.* This is only one example of the unnecessarily inconsistent decisions that result because of the imprecision of the analytical tools available. The full adoption of these principles can still be achieved, however, either by a comprehensive advisory judgment by the Court or through private parties' incorporating the principles by reference.

TAXATION—FOREIGN TAX CREDIT—FOREIGN INCOME TAX CREDIT UNDER SECTION 901 ALLOWABLE ONLY FOR TAXES IMPOSED ON NET GAIN OR PROFIT

Plaintiff, a national banking association,[1] brought suit[2] for refund of federal income taxes, challenging the Internal Revenue Service's determination that certain taxes paid to foreign governments[3] were not creditable against its United States tax liability. Plaintiff contended that the foreign taxes levied on its general banking business[4] were income taxes within the meaning of § 901(b)(1) of the Internal Revenue Code of 1954[5] and, therefore, creditable under § 901(a).[6] The United States alleged that the taxes were not income taxes within

1. Plaintiff's principal office is located in San Francisco, California. In addition, it has branch offices in Bangkok, Manila and Buenos Aires.

2. These were consolidated cases, the first of which involved the taxable years 1959 and 1960. As a result of a Philippine tax credit carry-over from 1958 to 1959, 1958 was also involved in the first case. The second case was based on the taxable year 1961.

3. The Internal Revenue Service ruled that the following taxes were not creditable: Kingdom of Thailand, Business Tax, Type 1 and Type 2, Municipal Tax and Receipts Tax; Republic of the Philippines, Tax on Banks; Republic of Argentina, Tax in Substitution of Surcharge on Free Transfer of Property, City of Buenos Aires Tax on Profit-Making Activities and Contribution to the Bankers' Institute for Social Services. The Service did allow credits for the Thailand Companies Income Tax and Profit Remittance Tax, the Philippines Tax on Foreign Corporations and the Argentina Corporation Income Tax and Excess Profits Tax.

4. The business conducted at these branch offices included the making of commercial, real estate and personal installment loans, the rendering of trust department and property management services, foreign exchange transactions, the issuance of letters of credit, guarantees, travelers' checks and cashiers' checks, and the acceptance of trade paper.

5. The relevant portions of § 901 are:

"(a) *Allowance of Credit.*—If the taxpayer chooses to have the benefit of this subpart, the tax imposed by this chapter shall, subject to the applicable limitation of section 904, be credited with the amounts provided in the applicable paragraphs of subsection (b) . . . .

(b) *Amount Allowed.*—Subject to the applicable limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) *Citizens and domestic corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; . . . ."

Section 904 provides a per-country limitation, which is the amount of the United States tax on income from sources in that foreign country. The taxpayer may elect an overall limitation under § 904 (2). The amount of the overall limitation is

the meaning of § 901 because they were imposed on gross, rather than net, income. The Trial Commissioner[7] allowed credits for the four gross income taxes involved.[8] On review by the Court of Claims, *held*, reversed. The controlling factor in determining whether a foreign tax is creditable under § 901 is whether it is directed at net gain or profit, not whether it is characterized as an income or excise tax. *Bank of America Trust and Savings Ass'n v. United States*, 459 F.2d 513 (Ct. Cl. 1972), *cert. denied*, 41 U.S.L.W. 3229 (U.S. Oct. 24, 1972).

The foreign tax credit was instituted in 1918 to eliminate double taxation of foreign source income.[9] Since its inception, however, the credit has been restricted to foreign income taxes.[10] In *Biddle v. Commissioner*,[11] the Supreme Court held that to be creditable a

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the amount of the United States tax on aggregate foreign source income. Section 903 allows credit for taxes paid in lieu of income, war profits and excess profits taxes. This provision was not at issue in the instant case.

6. Taxes that are not allowed as credits against a taxpayer's tax liability are allowed as deductions for the taxable year within which paid or accrued under § 164(a)(3).

7. Pursuant to Court of Claims' Rule 53(a), every case commenced in the Court of Claims is referred to a trial commissioner, unless otherwise ordered by the court. Rule 52 sets forth the authority of the trial commissioner. The Court of Claims Rules are found in 18 U.S. SUPREME COURT DIGEST (LAWYER'S EDITION) ANNOTATED (1968).

8. The Thailand Business Tax, Type 1 and Type 2, the Philippines Tax on Banks and the City of Buenos Aires Tax on Profit-Making Activities.

9. Basically, Congress reaffirmed its decision to tax United States citizens and corporations on worldwide income. The argument that the burden of taxation in the foreign jurisdiction and in the United States placed American corporations at a disadvantage led to the elevation of foreign taxes from the status of deductions to credits. Surrey, *Current Issues in the Taxation of Corporate Foreign Investment* 56 COLUM. L. REV. 815, 818 (1956). One should keep in mind that the avoidance of double taxation is closely connected with two of the basic principles of our tax system—tax equity and tax neutrality. Tax equity dictates that all citizens who are similarly situated and located in the same tax jurisdiction should be subject to the same tax burden. Tax neutrality is related to economic decision making. The tax system should not be a significant factor for the investor to consider when weighing the relative merits of various investment locations. The tax system should not provide incentives or disincentives to foreign investment. The logical result of tax equity and tax neutrality is that foreign source income should be taxed just as domestic source income, unless already taxed in the foreign jurisdiction. L. KRAUSE & K. DAM, FEDERAL TAX TREATMENT OF FOREIGN INCOME 44-56 (1964).

10. Surrey, *supra* note 9, at 819.

11. 302 U.S. 573 (1938).

foreign tax[12] must conform to the United States concept of an income tax as articulated in the applicable revenue statute.[13] A recurring question has been the extent to which gross receipts[14] must be reduced by deductions to arrive at "income" as that term is interpreted under United States revenue law.[15] Several courts have held that taxes

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12. A threshold question not in issue in the instant case is whether the levy is a tax. The criteria for this determination are that the purpose is to collect revenues, that the proceeds are paid to a government and used for public purposes and that the levy is not payment for specific services. E. OWENS, THE FOREIGN TAX CREDIT 31-33 (1961).

13. The Court stated: "The phrase 'income taxes paid' as used in our own revenue laws, has for most practical purposes a well understood meaning to be derived from an examination of the statutes which provide for the laying and collection of income taxes. It is that meaning which must be attributed to it as used in § 131 [now § 901]." 302 U.S. 573, 579 (1938). The statement is actually dictum, since the issue in *Biddle* was not the definition of "income taxes paid." In *Biddle,* the question presented was whether the taxpayer, as a shareholder in a British corporation, was entitled to a credit for the British standard tax withheld by the corporation from the taxpayer's dividends. Nevertheless, *Biddle* is often cited for the proposition that the United States concept of an income tax is controlling. For a discussion of the *Biddle* case see OWENS, *supra* note 12, at 29-30, 364-66.

14. Gross receipts less the costs of goods sold is the general definition of gross income. Treas. Reg. 1.61-3(a)(1957). Net income is determined by deducting general business expenses from gross income. It should be noted that in businesses dealing in services as opposed to goods, as in the instant case, gross receipts equal gross income. OWENS, *supra* note 12, at 40.

15. In the initial cases on the sixteenth amendment, the Court merely held that the amendment insured that taxes on income remained in the indirect category of taxes, thereby avoiding the requirement of apportionment found in article I, § 9, clause 4 of the Constitution. The Court held that Congress always had the power to tax income. Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916); Stanton v. Baltic Mining Co., 240 U.S. 103 (1916). In *Eisner v. Macomber,* 252 U.S. 189 (1920), however, the Court took a different tack and held that a tax on income was a direct tax but that the apportionment requirement did not apply so long as the tax was on income. A definition of income, therefore, was required; the Court defined income as "the gain derived from capital, from labor, or from both combined." 252 U.S. at 207. In a ruling under the 1909 corporate income tax, the Court held that to determine gain an amount equal to the recovery of capital must be deducted from gross receipts. Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185 (1918); *accord,* Stratton's Independence, Ltd. v. Hobert, 231 U.S. 399, 415 (1913). Beyond the recovery of capital, however, deductions appear to be a matter of legislative grace. *See* Deputy v. Du Pont, 308 U.S. 488, 493 (1940); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). These decisions lead to the conclusion that income is a gross, rather than a net, concept. More recently,

not levied[16] on net income do not qualify as income taxes within the meaning of the tax credit provisions. These taxes have been characterized consistently as privilege,[17] franchise or excise taxes.[18] For example, in *Allstate Insurance Co. v. United States*,[19] the Court of Claims found that the premiums tax in question was measured by gross income or gross receipts. The court held that since the United States concept of income is based on gain or profit, as opposed to gross income or gross receipts, the premiums tax was an excise tax and therefore not creditable as an income tax. Similarly, several revenue rulings have held that to be creditable a foreign tax on business revenues must be levied on profit.[20] A separate line of authority, however, has held that a tax on gross income does qualify for the tax credit.[21] In *Seatrain Lines, Inc. v. Commissioner*,[22] the taxpayer paid

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however, in determining that punitive damages constitute taxable income, the Court stated that the definition in *Eisner* "was not meant to provide a touchstone to all future gross income questions." Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). The question whether "income" in the United States tax system is a gross or net concept—a question that is a function of the deductions required—has not been resolved. *See* R. MAGILL, TAXABLE INCOME 335-73 (rev. ed. 1945); J. SNEED, THE CONFIGURATIONS OF GROSS INCOME 115-26 (1967).

16. The distinction between taxes levied on gross income and those measured by gross income must be noted. Taxes levied on gross income have generally been held to be income taxes, whereas taxes merely measured by gross income have been held to be excise taxes. OWENS, *supra* note 12, at 39 n.39.

17. In *Keasbey & Mattison Co. v. Rothensies*, 133 F.2d 894 (3d Cir.), *cert. denied*, 320 U.S. 739 (1943), the tax involved, which was imposed by the Quebec Mining Act, was measured by gross income. The taxpayer was allowed to deduct costs incurred in the actual mining operation, but not general business expenses. The court held that the tax was on the privilege of mining, because it was independent of realization, gain or derivation of profit.

18. In *St. Paul Fire & Marine Ins. Co. v. Reynolds*, 44 F. Supp. 863 (D. Minn. 1942), the court ruled that a Canadian premiums tax was an excise tax. The court found that the tax was not based on gain or profit, even though measured by a percentage of net premiums less net premiums paid for reinsurance.

19. 419 F.2d 409 (Ct. Cl. 1969).

20. Rev. Rul. 55-455, 1955-2 CUM. BULL. 288; Rev. Rul. 3778, 1946-1 CUM. BULL. 111; I.T. 3774, 1945 CUM. BULL. 204; G.C.M. 18182, 1937-1 CUM. BULL. 149.

21. In addition to the authorities that have specifically held that a gross income tax qualifies for the credit, others have implied that these taxes qualify. In *Eitingon-Schild Co. v. Commissioner*, 21 B.T.A. 1163 (1931), the Board of Tax Appeals found that a French turnover tax (a tax imposed on the amount of business done in France) was an excise tax. The Board, however, indicated that a

a three per cent tax on gross income imposed by Cuba on foreign shipping companies. This tax had replaced a six per cent tax on net income in the Cuban tax structure. For this reason, the Board of Tax Appeals stated that the tax was an income tax, not an excise tax. In addition, the Board held that under the sixteenth amendment Congress could tax gross income, and that the allowance of deductions was solely a matter of legislative grace. The Board then held that gross income taxes were creditable. In *Santa Eulalia Mining Co. v. Commissioner*,[23] the taxpayer owned a mining concession and had a royalty agreement with the Mexican corporation that operated the mine. The Mexican Government imposed a ten per cent tax on royalties, which were measured by the amount of ore extracted with allowable deductions for mining expenses but not business expenses. Although the Internal Revenue Service had ruled that the tax was not creditable,[24] the court applied the *Seatrain* rationale and held that the tax was creditable as an income tax even though it was imposed on gross income. Compounding the uncertainty in this area, the Internal Revenue Service has ruled that a Brazilian tax levied on the gross

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tax on gross income might qualify as an income tax: "We find no provision in the French statute in question which we are able to construe as imposing a tax on income or profits, *either gross or net* [emphasis added]." 21 B.T.A. at 1174. The Board made the same determination in ruling on a Philippine "privilege" tax that was based on the value of goods exported. Elias Mallouk v. Commissioner, 34 B.T.A. 269, 273 (1936).

22. 46 B.T.A. 1076 (1942).

23. 2 T.C. 241 (1943).

24. Rev. Rul. 3320, 1939-2 CUM. BULL. 191. The Internal Revenue Service has not acquiesced in either of these two decisions. When the Internal Revenue Service loses a case in the Tax Court, the Commissioner will often indicate in the Internal Revenue Bulletin whether or not he acquiesces. This notice indicates whether the Service accepts the principle enunciated in the case. If the Commissioner does not acquiesce, the Service will not utilize the principle of that case in disposing of other cases and may litigate the same issue if it arises again. J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION 14 (1968). The nonacquiescences are noted at 1942-2 CUM. BULL. 31 (*Seatrain*) and 1943 CUM. BULL. 39 (*Santa Eulalia*).

The first line of authority usually distinguishes the second by holding that the tax in question is an excise tax, not an income tax. One writer has attempted to reconcile these decisions by distinguishing between those in which the taxes are imposed on separate items of income and those in which the taxes are imposed on general business receipts. The former is construed as income, unless the purpose of the tax is not to reach income. The latter, however, is not an income tax unless the tax base is net income. OWENS, *supra* note 12, at 52-53. This categorization, however, does not satisfactorily account for the *Seatrain* decision.

income derived from real property of nonresident individuals and corporations may be credited.[25]

In the instant case, the court found that because plaintiff was not allowed to deduct business expenses, the taxes in question were imposed on gross income. However, the court also found that the taxes in question were not franchise, privilege or excise taxes. The court noted that while the Supreme Court has indicated that Congress may impose taxes on gross income, tax legislation consistently has reached only net gain. The court concluded, therefore, that the overriding consideration is not whether the foreign income tax is labelled a gross income or net income tax, or whether deductions are specifically allowed, but whether the foreign government is attempting to reach some net gain. In reaching its decision, the court reasoned that a tax imposed on gross income would be directed at net gain if expenses were clearly less than gross income, *i.e.* that there would always be some net gain remaining. The court noted that crediting only such taxes would eliminate or minimize the double taxation of income. Since the three per cent tax on gross income in *Seatrain* had replaced a six per cent tax on net income in the Cuban tax structure, the court concluded that it was a "formulary" tax—a gross income tax that inherently recognizes the taxpayer's costs and expenses. Similarly, the court determined that because the taxpayer in *Santa Eulalia* did not operate the mine, but merely received royalties, no expenses of the taxpayer were likely to outbalance the gain. In addition, it was concluded that the Brazilian tax on nonresidents' gross income was credited because the tax eventually reached net gain and that the Internal Revenue Service must have assumed that income from investment, taxed at its source, rarely is offset entirely by expenses.[26] The court noted that in the cases in which nondeductible expenses could have negated gross income, which would result in a loss to the tax-

25. Articles 96 and 97 of the Brazilian Income Tax Law No. 4178, dated March 13, 1942, *as amended* by Decree-Law No. 5844 of September 23, 1943 and Law No. 154 of November 25, 1947, subject income derived by individuals and corporations from sources in Brazil to the withholding tax at the source. The ruling noted the similarity of these provisions to the treatment accorded nonresident alien individuals and nonresident foreign corporations in § 211 and § 231(a) of the 1939 Internal Revenue Code [§§ 871, 881 of the 1954 Code]. Rev. Rul. 4013, 1950-1 CUM. BULL. 65.

26. Reviewing the current federal income taxes on gross income, namely the social security provisions and §§ 871, 881, 882 and 1441 pertaining to nonresident aliens, the court also concluded that these are imposed only in those instances in which it is clear that costs would not negate gross income.

payer, credit for foreign taxes had not been allowed. The court held that because the nondeductible expenses in the instant case could produce a loss, the foreign taxes in question were not directed at net gain [27] and therefore were not creditable.

The instant decision is the first case in which a court has found that the tax in question was not a franchise, privilege or excise tax and still refused to allow the credit. In attempting to reconcile the two lines of prior authority, the court has, in effect, created a third category—a noncreditable income tax. The test established by the court—whether the tax in question is directed at net income—was founded on unwarranted assumptions and erroneous distinctions. For example, the court cited no authority for the proposition that the basis of the revenue rulings concerning nonresident gross income taxes is the Service's assumption that nonresident gross income rarely is offset entirely by expenses. Moreover, the court distinguished *Seatrain* by finding the tax in question to be a "formulary" income tax, and by determining that the Board of Tax Appeals credited the tax because it was directed at net income. The court distinguished *Seatrain* on the Board's finding that the three per cent gross income tax had replaced a six per cent net income tax in the Cuban tax structure. The Board of Tax Appeals, however, had examined the Cuban tax structure merely to ascertain whether the tax in question was an excise or an income tax—all income taxes, whether on net or gross income, were considered creditable. Secondly, the court's test provides no guidelines for determining whether a gross income tax is directed at net gain. The court stated merely that a tax is not so directed if expenses could offset gross income. Under this rationale, no tax on gross business income that did not allow deductions for expenses could be construed as a creditable income tax. If this is the court's position, a more direct solution would have been to follow *Allstate* and hold that the tax is an excise tax. Notwithstanding the court's methodology, the instant decision has advanced the state of the law to the extent that it was based on the purpose of the foreign tax credit, *i.e.* the avoidance of double taxation. Consequently, the court avoided the irrelevant constitutional question whether income is a gross or net concept. The primary consideration is whether the foreign tax has an equivalent in the United States tax system. The present tax statutes, with their liberal allowance of deductions, can be characterized as imposing taxes on net income. Therefore, only a foreign tax on net income will subject a

27. The court also noted that these taxes were imposed in addition to general net income taxes levied in each of the three jurisdictions. Plaintiff had received credit for the net income taxes.

taxpayer to double taxation. An argument against this position is that because net income is included in gross income a foreign tax on gross income still subjects the income to double taxation. It is generally accepted, however, that taxes on gross income can be shifted.[28] In practice, therefore, the taxpayer would not bear the burden of a foreign tax on gross income. Aside from the economic arguments, crediting only net income taxes—as a matter of statutory interpretation—comports well with the purpose of the tax credit. Since Congress has not chosen to tax gross business income,[29] the decision to credit such foreign taxes should be made by Congress.

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28. OWENS, *supra* note 12, at 85 & n.179.

29. In some instances Congress has taxed gross income. *See* materials cited note 25 *supra.* But Congress has not taxed the gross income of domestic corporations, so that the taxpayer would be subjected to double taxation if he were required to pay a foreign gross income tax.