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Recent Decisions

ADMIRALTY—COGSA—BILL OF LADING CARGO DESCRIPTION AND PACKER IDENTITY DETERMINE WHEN A CONTAINER IS A PACKAGE IN COGSA LIABILITY PROCEEDINGS

Plaintiff, a consignee, brought an action in admiralty against defendant carrier seeking recovery for loss of cargo under section 4(5) of the Carriage of Goods by Sea Act (COGSA).[1] The goods in question[2] had been packed in a single shipping container[3] by plaintiff's agent in Germany and then presented sealed to defendant for transport to the United States. Neither the shipper nor the shipping documents indicated the container's contents.[4] The container arrived in good order in New York but while in a dock storage

1. Section 4(5) provides: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained." 46 U.S.C. § 1304(5) (1970).

2. Pursuant to plaintiff's order, a German manufacturer delivered 350 adding machines to a German freight forwarder who in turn shipped them to defendant. Plaintiff estimated replacement cost of the machines at $28,959.61. Royal Typewriter Co. v. M/V Kulmerland, 346 F. Supp. 1019, 1023 (S.D.N.Y. 1972).

3. Each adding machine was encased in a corrugated box. The freight forwarder loaded all the boxed machines into a single shipping container, which was then sealed and delivered to defendant. The metal shipping container weighed in excess of two tons when loaded.

4. The ocean bill of lading described the container as "1 Container said to contain machinery" and contained the notation "Shipper's Load, Stowage and Count." 346 F. Supp. at 1024.

area awaiting final delivery its contents were stolen.[5] Plaintiff contended that each parcel packed within the container constituted a "package"[6] under the package liability limitation provision of COGSA section 4(5). Defendant contended that the shipping container constituted a single package under the COGSA rule. The United States District Court for the Southern District of New York, *held*, plaintiff was entitled to recover for the loss of one package. When a shipper packs goods in a container, delivers the sealed container to the carrier, and fails to describe its contents in the bill of lading, the package limitation provisions of COGSA will apply to the container as a whole and not to its constitutent parts. *Royal Typewriter Co. v. M/V Kulmerland*, 346 F. Supp. 1019 (S.D.N.Y. 1972).

In response to attempts by carriers to limit inordinately their liability for damaged cargo[7] and to the need for international

5. Although the loss occurred on land, after the act of carriage was complete, the maritime contract continued to govern the relationship between the shipper and the carrier until final delivery was effected. *See* David Crystal, Inc. v. Cunard S.S. Co., 339 F.2d 295, 297 (2d Cir. 1964).

6. The Act does not define "package." The framers attempted to establish a common sense standard involving a unit that would be fairly predictable in size, so the parties would know at the time of contracting whether additional coverage was required. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiff-fahrts-Gesellschaft, 375 F.2d 943, 945 (2d Cir. 1967).

7. *See* H. R. REP. No. 2218, 74th Cong., 2d Sess. 3 (1936). Prior to 1936, when COGSA was passed, carriers had been able to limit their liability for loss of cargo to insignificant amounts. *Hearings on S. 1152 Before the Senate Comm. on Commerce*, 74th Cong., 1st Sess. 45 (1935) [hereinafter cited as *Hearings*].

8. *See Hearings, supra* note 7, at 15.

9. International Convention for the Unification of Certain Rules Relating to Bills of Lading, *opened for signature* August 25, 1924, 120 L.N.T.S. 155. The Hague Convention was accepted without substantial change by the United States in the form of domestic legislation in 1936. Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), *as amended*, 46 U.S.C. §§ 1300-15 (1970).

10. *See* Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 11 (2d Cir. 1969); *Hearings, supra* note 7, at 45.

11. 46 U.S.C. §§ 1300-15 (1970).

12. 46 U.S.C. § 1304(5) (1970). The parties cannot lower the carrier's liability below $500. 46 U.S.C. § 1303(8) states in part: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss of or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . . ." Pursuant to § 1304 (5), however, the carrier will in no event be liable for more than the actual worth of the lost goods. This appears to be the only situation in which the carrier's liability would be less than $500 per package.

uniformity in ocean carriage documentation,[8] an international convention at The Hague[9] drafted rules to standardize documentation practice.[10] These rules are embodied in the Carriage of Goods by Sea Act (COGSA).[11] COGSA fixes carrier liability at 500 dollars per package, unless actual damages are less.[12] Additional coverage remains a matter of private agreement between the parties.[13] Thus the carrier is relieved of the burden of total indemnification for ruined goods.[14] COGSA, however, does not define "package."[15] The determination of what constitutes a package consequently has become a source of frequent litigation resulting in numerous judicial attempts to fashion a definition. Neither size and weight of the cargo,[16] nor extent of protective covering[17] appears to be critical in delimiting a package. Rather, the courts have examined the presence and extent of packaging preparation used to facilitate handling.[18] Recent technological advances in the use of large shipping containers holding many smaller parcels have compounded the definitional problems,[19] leading the courts to formulate new tests. In *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft*,[20] the Second Circuit defined a package by examining the shipping documents' characterization of the cargo[21] and the identity of the cargo's packer, and held that the shipping container was one package within

13. 2 P. MANCA, INTERNATIONAL MARITIME LAW 229 (1970). *See also* H. LONGLEY, COMMON CARRIAGE OF CARGO 198-99 (1967).

14. 2 P. MANCA, INTERNATIONAL MARITIME LAW 229 (1970).

15. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 945 (2d Cir. 1967).

16. *See* Mitsubishi Int'l Corp. v. S.S. Palmetto State, 311 F.2d 382, 384 (2d Cir. 1962) (32½ ton roll of steel enclosed in a wooden box held one package, entitling shipper to $500 recovery for its loss).

17. *See* Gulf Italia Co. v. American Export Lines, Inc., 263 F.2d 135, 137 (2d Cir. 1959) (court rejected test dependent on the extent of external covering).

18. *See* Aluminios Pozuelo Ltd. v. S.S. Navigator, 407 F.2d 152, 155 (2d Cir. 1968) (court relied on the test whether the goods were "put up in a form suitable for transportation or handling").

19. The impact of the "container revolution" in transportation that occurred after the formulation of COGSA is discussed briefly in *Standard Electrica*. 375 F.2d at 945.

20. 375 F.2d 943 (2d Cir. 1967).

21. The shipping documents to which the court referred were the bill of lading, the dock receipt and the shipper's invoice. These documents all described the cargo in terms of containers where package information was required. 375 F.2d at 946.

the meaning of section 4(5) of COGSA.[22] Thus in delineating a package, the court attached considerable significance to the actions of the parties.[23] This analysis was followed in *Leather's Best, Inc. v. S.S. Mormaclynx*,[24] which, however, reached the opposite conclusion that each parcel, not the container, was a package. The different results were justified primarily by different cargo descriptions in the shipping documents.[25] The *Leather's Best* opinion suggested as a matter of policy that applying the 500 dollar limitation to containers would reduce carrier liability below that envisioned by COGSA's framers.[26] In the factual situation presented, however, the court found it unnecessary to reconcile this policy with the documentation test.[27] The proposed amendments to COGSA contained in the Brussels Protocol of 1968 employ *Standard Electrica's* documentation test, but establish carrier liability at the higher of 10,000 francs per package or 30 francs per kilo.[28] In this way, a reasonable minimum carrier

22. Judge Feinberg, in a vigorous dissent, challenged the test employed by the majority and the result reached. 375 F.2d at 947-48.

23. The court stated: "[S]uch characterizations [by the parties] are entitled to considerable weight in that the parties each had the same understanding as to what constitutes a 'package' and those characterizations further reflect the meaning given that term by the custom and usage of the trade." 375 F.2d at 946.

24. 451 F.2d 800 (2d Cir. 1971).

25. In *Standard Electrica* the container had been packed by the shipper and the documents referred to the number of containers in the shipment, not the number of parcels. In *Leather's Best* the carrier packed the container and the bill of lading enumerated the contents of the container.

26. "[W]e cannot escape the belief that the purpose of § 4(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that 'package' is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be 'contained.' " 451 F.2d at 815. *See also* 313 F. Supp. 1373, 1380 (E.D.N.Y. 1970), in which the district court stated that "[t]he language of the package provision in COGSA is basically inconsistent with treating a loaded container as a package." The Second Circuit seems not to have gone that far.

27. If indeed the court views the container as merely a functional part of the ship, then it should make little difference how the cargo is described in the documents, especially in light of COGSA's policy motivations, which were noted by the court. The factual situation in the instant case did not require a choice by the court between the test it employed and the policy considerations that it noted.

28. The proposed amendment to § 4(5) reads in part: "Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of

liability is maintained regardless of whether the container or its parcels are found to be "packages."

The court in the instant case, faced with a container versus parcel package dispute, employed the tests developed in *Standard Electrica.* After distinguishing the instant case from *Leather's Best* on the facts, the court observed that in this case the shipper packed the goods in a container and delivered it sealed to the carrier. The court also noted that the bill of lading described the goods as "one container."[29] Finding no separate statements of higher value, nor of the container's contents,[30] the court reasoned that since plaintiff's shipper had chosen the container and so described it in the bill of lading, the container constituted a package for COGSA purposes. Plaintiff was accordingly limited to a single 500 dollar recovery.

The *Kulmerland* court was presented with the clash presaged in *Leather's Best* between shipping documents that characterized the container as a package and a policy that individual parcels are packages for purposes of COGSA. By following the analysis developed in *Standard Electrica,* the court continued to place interpretive responsibility on the actions of the parties[31] rather than reconciling

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transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit." Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, art. 2(c), in 2 P. MANCA, INTERNATIONAL MARITIME LAW 256 (1970). This should be read in conjunction with another subsection that states: "Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of Frcs. 10,000 per package or unit of Frcs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the *higher." Id.* art. 2(a), at 255-56 (emphasis added). Thus, even if the container was delimited a package, carrier liability would presumably be based on the per kilo figure, due to the container's weight, and the COGSA policy of setting a reasonable figure below which carrier liability should not be permitted to fall would be maintained.

29. 346 F. Supp. at 1024.

30. *Id.*

31. By referring to the parties' own actions in determining liability, the court ran the risk of contravening § 3(8) of COGSA, which states in part that "[a]ny clause . . . in a contract of carriage relieving the carrier . . . from liability . . . or lessening such liability otherwise than as provided in this chapter, shall be null and void." 46 U.S.C. § 1303(8) (1970).

container usage with any policy standard contemplated by COGSA. This would seem to indicate that the court is prepared to accept containers as "packages" within the meaning of COGSA when the parties do so. Such an approach discourages any uniform judicial treatment of containers. More importantly, however, judicial acceptance of containers as packages effectively causes a regression to the situation existing prior to The Hague Convention, when carrier cargo liability was extraordinarily low.[32] When combined with *Standard Electrica*, the instant case places responsibility on the shipper, not the carrier, to insure that cargo is properly identified in the shipping documents. Thus a carrier enjoys substantially reduced liability if either he or the shipper fails to note in the bill of lading the contents of containers prepacked by the shipper. Such a result ignores the inevitable benefit inuring to the carrier, regardless of who chooses the container.[33] This result also conflicts with the underlying policy of COGSA that carrier liability should at all times be something more than nominal.[34] The language of sections 4(5)[35] and 3(8)[36] of COGSA makes it clear that a minimum carrier liability was intended despite actions by the parties to circumvent the liability imposed.[37] The treatment afforded containers by the proposed amendments to COGSA in the Brussels Protocol of 1968 further argues against the result in the instant case. The Protocol provides for reference to the shipping documents in deciding what will be a package. Presumably, the test will be applied in the manner currently employed by those courts following[38] *Standard Electrica.* By coupling this test with a liability provision based on the higher of a per package or per kilo figure, however, the Protocol preserves the carrier's irreducible minimum liability in a way not possible under the instant holding. The Protocol thus argues strongly against attempts to characterize containers as packages under present conditions.[38] In effect, the amendments obviate the container-package problem. The instant case, in its use of the documentation test, partly anticipates the judicial

32. *See* note 7 *supra.*

33. By use of a container, the carrier can reduce by over 90% the time required for loading and unloading a vessel. *See* Leather's Best, Inc. v. S.S. Mormaclynx, 313 F. Supp. 1373, 1376 (E.D.N.Y. 1970).

34. *See* note 7 *supra.*

35. *See* note 1 *supra.*

36. *See* note 12 *supra.*

37. *Id.*

38. *See generally* Inter-American Foods, Inc., v. Coordinated Caribbean Transport, Inc., 313 F. Supp. 1334 (S.D. Fla. 1970).

approach suggested by the amendments. Absent the safeguards afforded the shipper by these amendments, however, the documentation test may yield a result contrary to the basic intention of COGSA. It can be hoped that the instant decision will spur efforts aimed at ratifying the Protocol. In the interim, the onus will remain on the shipper to insure complete cargo description in the shipping documents in order to guarantee recovery for ruined goods in the amounts contemplated by COGSA.

Alan L. Marchisotto

ADMIRALTY—JURISDICTION OVER AVIATION TORT CLAIMS—ADMIRALTY JURISDICTION DOES NOT EXTEND TO AVIATION TORT CLAIMS IN THE ABSENCE OF A SIGNIFICANT RELATIONSHIP BETWEEN THE TORT AND TRADITIONAL MARITIME ACTIVITIES

Immediately after takeoff from a lakefront airport in Cleveland, the jet engines of petitioners' aircraft ingested several seagulls that had been flushed from the runway. Consequently, the airplane lost power and crashed into the navigable waters of Lake Erie.[1] Petitioners brought an action in admiralty[2] to recover damages for the loss of the aircraft, alleging that respondents[3] were negligent in failing to keep the runway free of birds and in failing to give proper warning of the birds' presence. The district court found that petitioners' allegations failed to satisfy the criteria for admiralty jurisdiction over torts and dismissed the complaint.[4] The Court of Appeals for the Sixth Circuit

1. While the aircraft sustained some initial damage on land when it struck the airport's perimeter fence and a parked pickup truck, it subsequently sank in Lake Erie a short distance from the end of the runway and as a consequence was a total loss. No passengers were on board at the time, and there were no injuries to the crew.

2. Admiralty jurisdiction was asserted under 28 U.S.C. § 1333 (1970), which provides in part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

3. The city of Cleveland, as owner and operator of the airport, the airport manager and the air traffic controller, who was responsible for clearing the aircraft for takeoff, were named as defendants in the suit.

4. The district court held that admiralty jurisdiction over torts may properly be invoked when two criteria are met: first, the locality where the alleged tortious wrong occurred must have been on navigable waters; and secondly, there must have been a relationship between the wrong and some maritime service, navigation or commerce on navigable waters. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 251 (1972) (the district court's opinion is unreported, but it is summarized and reproduced in part in the text of the Supreme Court's opinion). The district court found that in this case "the alleged negligence became operative upon the aircraft while it was over the land" and that "the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines [over the land]." 409 U.S. at 251-52. The court concluded therefore that the first criterion had not been satisfied. In addition, the court held that the second criterion had not been satisfied because the wrong bore no relationship to maritime service, navigation or commerce: "[T]he operative facts of the claim in this case are concerned with the land-connected aspects of air-commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off." 409 U.S. at 252.

concluded that because the birds were encountered over the runway the alleged tort was nonmaritime and therefore affirmed the dismissal.[5] On writ of certiorari from the United States Supreme Court, *held*, affirmed. Absent a significant relationship to traditional maritime activities, aviation tort claims arising from flights within the continental United States by land-based aircraft are not cognizable in admiralty. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

The United States Constitution grants the federal judiciary subject matter jurisdiction over "all Cases of admiralty and maritime Jurisdiction."[6] While federal maritime jurisdiction over contracts is dependent on a subject matter conceptualization of the pendant contract,[7] federal maritime tort jurisdiction traditionally has been dependent on a spatial conceptualization of the location of the tort.[8] Early American courts sitting in admiralty required that the wrong be committed on the high seas or within the ebb and flow of the tide in order to be a "maritime" tort. Thus, in the early leading case of *Thomas v. Lane*,[9] Justice Story held that a libel for assault and battery and false imprisonment could not be maintained in admiralty because there were no allegations that the torts were committed on

5. The Court of Appeals for the Sixth Circuit affirmed solely on the ground that "the alleged tort in this case occurred on land before the aircraft reached Lake Erie . . . ." Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 154 (6th Cir. 1971). The court of appeals therefore found it unnecessary to decide whether a maritime nexus or relationship was necessary to invoke admiralty jurisdiction. 448 F.2d at 154.

6. U.S. CONST. art. III, § 2, cl. 1. For interpretive discussions of this constitutional grant see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 1-9 (1957); 7A J. MOORE, FEDERAL PRACTICE ¶ .200[2], at 2031 (2d ed. 1972).

7. In the early leading case of De Lovio v. Boit, 7 F. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815), Justice Story held that the federal maritime jurisdiction "extends over all contracts (wheresoever they be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." 7 F. Cas. at 444. *See generally* G. GILMORE & C. BLACK, *supra* note 6, at 18-28.

8. In a frequently quoted passage, Justice Story stated: "On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality . . . ." De Lovio v. Boit, 7 F. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815) (dictum).

9. 23 F. Cas. 957 (No. 13,902) (C.C.D. Me. 1813).

the high seas.[10] Subsequently, the locality test for federal maritime tort jurisdiction was expanded to include not only high seas and tidewaters but all navigable waters, including lakes and rivers.[11] The locality test became even more firmly entrenched in federal maritime jurisprudence in 1866 when, in *The Plymouth*,[12] the Supreme Court held that federal maritime tort jurisdiction did not embrace a wrong that had originated on the water but which had ultimately caused injury on land.[13] While the Court defined the locality test narrowly,[14] it indicated that locality alone, regardless of whether the transaction or activity was essentially "maritime," was the determinative factor in delineating the boundaries of federal maritime tort jurisdiction.[15] The strict use of the locality test was first questioned by the judiciary[16] in 1903 in *Campbell v. Hackfield &*

10. Concerning maritime tort jurisdiction, Justice Story opined: "In regard to torts I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813).

11. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). *See generally* G. GILMORE & C. BLACK, *supra* note 6, at 28-30.

12. 70 U.S. (3 Wall.) 20 (1865).

13. A fire had begun on board ship and spread to the shore, destroying a wharf and a packing house. The Court held that a libel brought against the ship for the damage done ashore was not cognizable in admiralty. 70 U.S. (3 Wall.) at 36.

14. The Court defined the locality test as follows: "[T]he wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction.... The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed on the high seas or other navigable waters." 70 U.S. (3 Wall.) at 35.

15. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." 70 U.S. (3 Wall.) at 36.

16. Judge Erastus Benedict, in his 1850 treatise on admiralty, had earlier questioned the strict use of the locality test to determine maritime tort jurisdiction: "It may, however, be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction, in cases of contracts, applies. If one of several landsmen bathing in the sea, should assault, or imprison, or rob another,

Co.[17] In *Campbell*, the Court of Appeals for the Ninth Circuit held that in the absence of a maritime nexus a tort committed on the high seas or in navigable waters was not within admiralty jurisdiction.[18] Subsequent courts found the strict application of the locality test to be problematic,[19] and, even in cases in which the maritime locality of the tort was clear, the strict application of the locality test often led to absurd results.[20] Nevertheless, most courts adhered to a mechanical application of the strict locality rule[21] and sustained admiralty jurisdiction despite a lack of any connection between the wrong and

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it has not been held here that the admiralty would have jurisdiction of the action for the tort." E. BENEDICT, THE AMERICAN ADMIRALTY § 308 (3d ed. 1894). *See* 409 U.S. at 257.

17. 125 F. 696 (9th Cir. 1903).

18. In *Campbell*, a longshoreman was injured while unloading cargo from a ship anchored in navigable waters off Honolulu. He brought a libel against the vessel, its owner, officers and crew, although his primary allegations were against his stevedore-employer and fellow employees. The court said: "In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the law maritime prevails. But this is by no means saying that a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is, as has been seen, only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction." 125 F. at 700. *But cf.* Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914).

19. For example, in Smith & Son v. Taylor, 276 U.S. 179 (1928), a longshoreman unloading a vessel was standing on the pier when he was struck by a cargo hoist attached to the ship and knocked into the water where he was later found dead. The Supreme Court held that there was no admiralty jurisdiction over this case, despite the fact that the longshoreman was knocked into the water, because the blow by the sling was what gave rise to the cause of action, and it took effect on land: "The substance and consummation of the occurrence which gave rise to the cause of action took place on land." 276 U.S. at 182. In the converse factual situation, however, in which a longshoreman working on the deck of a vessel was struck by a cargo hoist and knocked onto the pier, the Court upheld admiralty jurisdiction because the cause of action arose on the vessel, which was on navigable waters. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935). *See also* The Admiral Peoples, 295 U.S. 649 (1935).

20. *See, e.g.,* Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (admiralty jurisdiction applied in case concerning injury to a swimmer by a surfboard); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (admiralty jurisdiction applied in case concerning injuries to a water skier).

21. *See* 7A J. MOORE, *supra* note 6, ¶ .325[3], at 3526.

22. *See, e.g.,* cases cited note 20 *supra.*

traditional forms of maritime commerce and navigation.[22] Other courts, however, began to consider a "locality plus" standard—locality plus maritime nexus—to avoid the application of admiralty law to cases unrelated to traditional maritime activities.[23] Because the development of air commerce involved occasional accidents over the seas, the strict use of the locality test raised special problems. Courts initially declined admiralty jurisdiction both because aircraft could not be characterized as maritime "vessels" and because aviation was

23. *See, e.g.,* McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961). In *McGuire,* a bather at a public beach sued in admiralty when her hand was injured by a submerged object. The court reasoned that the law of admiralty should be extended when commercially necessary: "Admiralty jurisdiction as a protective companion to commerce has grown with the needs of commerce and retained a marked degree of flexibility. It is proper that admiralty jurisdiction be extended where commercial necessity so dictates." 192 F. Supp. at 871. The court noted that the commencement of an admiralty action unrelated to maritime commerce "misinterpret[s] the nature of admiralty jurisdiction." 192 F. Supp. at 872. Accordingly, the court held that the facts in that case did not justify the recognition of a cause of action in admiralty. *Accord,* Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972) (admiralty jurisdiction denied plaintiff who sought damages for injuries allegedly received in a rear end collision on a floating pontoon at ferry landing); Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969) (insufficient nexus to traditional maritime activities to sustain admiralty jurisdiction for injury resulting from fall from lighthouse); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967) (insufficient maritime relationship to sustain admiralty jurisdiction when swimmer injured at public beach). *See also* Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 COLUM. L. REV. 259, 264 (1950); Note, *The Bases and Range of Federal Maritime Law: Indicia of Maritime Competence,* 6 VAND. J. TRANSNAT'L L. 187 (1972); 64 COLUM. L. REV. 1084 (1964); 44 TUL. L. REV. 166 (1969).

The strict application of the locality test has also been assailed in the converse situation—*i.e.* when the tort has no maritime locality, but does bear a relationship to maritime service, commerce or navigation. For example, in O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943), the Court sustained the applicability of the Jones Act (46 U.S.C. § 688 (1970)) to injuries to a seaman on land, because of the seaman's connection with maritime commerce. The Court in that case relied on an analogy to the landward applicability of the traditional seamen's remedy of maintenance and cure: "[T]he maritime law . . . has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or land." 318 U.S. at 41-42. Similarly, Congress passed the Admiralty Extension Act of 1948, 46 U.S.C. § 740 (1970), which provides: "The admiralty and maritime jurisdiction of the United States shall extend to and

not restricted to the airspace over the navigable waters.[24] Although a few courts held that a seaplane, while afloat, was a "vessel" and therefore subject to admiralty jurisdiction,[25] there was doubt whether admiralty jurisdiction should apply at all in the field of aviation.[26] The court in *Choy v. Pan-American Airways Co.*[27] finally established a definite rule bringing aircraft within admiralty jurisdiction in actions brought pursuant to the Death on the High Seas Act (DOHSA).[28] In *Choy*, the court sustained admiralty jurisdiction

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include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." The House Report on the Extension of Admiralty Jurisdiction Act stated that the Act was being passed to remedy the "inequities" of such cases as Martin v. West, 222 U.S. 191 (1911), The Troy, 208 U.S. 321 (1908) and Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316 (1908), which had held that there was no admiralty jurisdiction to provide a remedy for damage done by ships on navigable waters to land structures. H.R. REP. No. 1523, 80th Cong., 2d Sess. 2 (1948).

24. The Crawford Bros. No. 2, 215 F. 269 (W.D. Wash. 1914) (libel in rem for repairs against an airplane that had crashed in navigable waters).

25. *See, e.g.,* United States v. Northwest Air Serv., Inc., 80 F.2d 804 (9th Cir. 1935) (seaplane held not a vessel within admiralty jurisdiction while stored in a hangar on dry land); Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921) (admiralty jurisdiction upheld when claimant injured while trying to save a seaplane drifting toward beach). *Contra,* Wendorff v. Missouri State Life Ins. Co., 318 Mo. 363, 1 S.W.2d 99 (1927) (seaplane held to be a flying machine not subject to admiralty jurisdiction).

26. Courts were justifiably concerned with the applicability of admiralty law to aircraft and air commerce, particularly after the passage of the Air Commerce Act of 1926, which provides in part: "The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." 49 U.S.C. § 177 (1946), *as amended,* 49 U.S.C. § 1509(a) (1970). *See* United States v. Peoples, 50 F. Supp. 462 (N.D. Cal. 1943). *See also* Dollins v. Pan Am. Grace Airways, 27 F. Supp. 487 (S.D.N.Y. 1939); Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939).

27. 1941 A.M.C. 483 (S.D.N.Y. 1941) (action for wrongful death of passenger of seaplane that crashed into the Pacific Ocean).

28. 46 U.S.C. §§ 761-68 (1970). DOHSA provides a wrongful death cause of action in admiralty for death caused by wrongful acts or negligence occurring on the high seas beyond one marine league from shore of the United States. 46 U.S.C. § 761 (1970). Since *Choy,* federal maritime jurisdiction has consistently been sustained in cases involving actions for wrongful death under DOHSA arising out of aircraft crashes into or accidents over the high seas beyond one marine

under DOHSA without regard to the existence of a maritime nexus.[29] The rationale of the DOHSA cases involving aircraft—that federal maritime jurisdiction under DOHSA should not be defeated merely because the instrumentality was an aircraft—was subsequently extended, however, to invoke admiralty jurisdiction over claims arising out of aircraft crashes into or accidents over the high seas beyond one marine league from shore even when DOHSA was inapplicable.[30] In *Weinstein v. Eastern Airlines, Inc.*,[31] the Third Circuit extended federal maritime tort jurisdiction over aircraft accidents even further by allowing an action in admiralty for wrongful death resulting from an airplane crash in the navigable waters of Boston Harbor, within the territorial waters of Massachusetts. Although jurisdiction was sustained on the basis of locality, the court noted that the dangers to persons and property resulting from an aircraft crash in navigable waters are similar to those arising from the sinking of a ship or a collision between two vessels.[32] Moreover, the court found a significant relationship between ships and aircraft because they perform similar functions over and across the same waters.[33] Courts subsequent to *Weinstein*, however, relied solely on maritime locality to sustain admiralty jurisdiction over aviation tort claims[34] and

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league from shore. *See, e.g.*, Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971). *See also* cases cited, 409 U.S. at 263 n.13. Accordingly, the Court in the instant case noted: "Indeed, it may be considered as settled [law] today that this specific federal statute gives the federal admiralty courts jurisdiction of such wrongful death actions." 409 U.S. at 263-64.

29. The court in *Choy* avoided conflict with the Air Commerce Act of 1926 by stating that the DOHSA is not strictly a navigation or shipping law. 1941 A.M.C. at 485.

30. Several cases held that actions for personal injuries arising out of aircraft crashes into the high seas more than one marine league off shore or arising out of aircraft accidents in the airspace over the high seas were cognizable in admiralty because of the maritime locality, although they were not within the scope of DOHSA or any other specific federal legislation. *See, e.g.*, Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966); Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965); Bergeron v. Aero Associates, Inc., 213 F. Supp. 936 (E.D. La. 1963).

31. 316 F.2d 758 (3d Cir. 1963).

32. 316 F.2d at 763.

33. 316 F.2d at 763.

34. *See, e.g.*, Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971) (action against manufacturer of jet bomber and the United States for death of bailee's employee over the high seas when employee fell from aircraft); Harris v. United Air Lines, Inc., 275 F. Supp. 431 (S.D. Iowa 1967) (wrongful death action arising from airplane crash in navigable waters of Lake Michigan).

continued to uphold federal maritime jurisdiction over claims arising out of crashes into or accidents over navigable waters that were within state territorial limits.[35]

In the instant case the Court concluded that maritime locality alone is not sufficient to invoke admiralty jurisdiction over claims arising from airplane accidents.[36] The Court noted that strict application of the locality test could produce absurd results[37] and reasoned that in deciding whether claims arising from aircraft crashes into or accidents over navigable waters are cognizable in admiralty, reliance on the relationship of the alleged wrong to traditional maritime activity is far more reasonable and consistent with the history and purposes of maritime law.[38] The opinion of the Court expressly recognized two avenues that are open for bringing admiralty actions based on aviation torts: first, statutes such as DOHSA provide the basis for admiralty jurisdiction in some aviation tort cases;[39] and secondly, in the absence of specific federal legislation, the wrong must "bear a significant relationship to traditional maritime activity."[40] While the Court criticized the *Weinstein* court's conclusion that any plane crash in navigable waters had a significant relationship to maritime activity,[41] it suggested that in some circumstances an aviation tort may be sufficiently related to traditional maritime activity to be cognizable in admiralty.[42] Because the Court found that the crash of petitioners' plane in the navigable waters of Lake Erie was wholly fortuitous and bore no significant relationship to traditional maritime

35. Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970); Harris v. United Air Lines, Inc., 275 F. Supp. 431 (S.D. Iowa 1967); *cf.* Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3d Cir. 1968) (en banc).

36. 409 U.S. at 268.

37. 409 U.S. at 265-68. *Cf.* Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Hastings v. Mann, 226 F. Supp. 962 (E.D.N.C. 1964), *aff'd,* 340 F.2d 910 (4th Cir. 1965); McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961).

38. 409 U.S. at 261.

39. *See* note 28 *supra.*

40. 409 U.S. at 268.

41. *See* note 32 *supra* and accompanying text.

42. The Court hypothesized that domestic aviation may come within the admiralty jurisdiction when a transoceanic or coastal flight crashes at sea or possibly when a plane performs a task traditionally performed by waterborne vessels. 409 U.S. at 271 & n.22, 274 & n.26. *See also* Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970) (suit involving mid-air collision over Gulf of Mexico between two aircraft employed to spot schools of fish properly brought in admiralty).

activities involving navigation and commerce, it held that the pendant action was not cognizable in admiralty.

While the Court's holding in the instant case was directed toward claims arising from airplane accidents, the instant decision represents Supreme Court recognition of the "locality plus" test of federal maritime tort jurisdiction;[43] as a result it will undoubtedly have a substantial impact in other areas of federal maritime tort jurisdiction.[44] The Court's strong preference for the additional requirement of a maritime nexus in maritime tort cases—that the history and purpose of admiralty would be served best by requiring that a wrong bear a significant relationship to traditional maritime activity involving navigation and commerce[45]—makes it conceptually inconsistent for tort claims arising from other, nonaviation activities on navigable waters that are unrelated to the traditional maritime activity of navigation and commerce to be brought in admiralty.[46] The instant decision therefore signals a significant and jurisprudentially sound movement toward delimiting the boundaries of admiralty competence by reference to the needs and usages of traditional maritime commerce.[47] Unfortunately, however, the opinion expands the present legal vacuum in the area of aviation law. Actions that may be brought in admiralty pursuant to a federal statute such as the Extension of Admiralty Jurisdiction Act[48] or

43. Under the Court's holding, the basis of admiralty jurisdiction over claims arising from aircraft accidents in the absence of specific legislation is a "significant relation to traditional maritime activity" as well as the traditional locality requirement. 409 U.S. at 268.

44. *Cf.* Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (action brought in admiralty by swimmer injured by surfboard); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (action brought in admiralty by injured water skier); Blevens v. Sfetku, 259 Cal. App. 2d 527, 66 Cal. Rptr. 486 (1968) (action brought in admiralty by injured water skier).

45. 409 U.S. at 261.

46. *See* cases cited note 44 *supra.*

47. It has been argued effectively that "[a] court should have competence in admiralty to render a decision in a particular case if the case concerns the needs and usages of maritime commerce. The bases and range of federal maritime law indicate that a case concerns the needs and usages of maritime commerce if it is one in which the cause of action is based on a relationship . . . (1) between two or more parties, one of whom is a [sea] carrier; and, (2) that creates a consensual or legal obligation the object of which is activity to regulate either the profits produced by the use of the vessel or the losses to which the use of the vessel is subject." Note, *The Bases and Range of Federal Maritime Law: Indicia of Maritime Competence,* 6 VAND. J. TRANSNAT'L L. 187, 222 (1972).

48. *See* note 23 *supra.*

DOHSA[49] remain unaffected by this decision. Since the Court reserved the question whether aviation torts not embraced by the provisions of DOHSA or other specific federal legislation can ever have sufficient maritime nexus to come within admiralty jurisdiction,[50] the Court reserved also the possible alternative of applying admiralty rules and concepts to govern these cases. Therefore, the unresolved question pertains not to the possibility of upholding admiralty jurisdiction in these situations but to the desirability and consistency of doing so in relation to the tradition, needs and usages of maritime commerce. Moreover, in the area of international air commerce, the Court offered several factors in addition to locality and maritime nexus that should be considered in determining whether an action arising from an airplane accident should come within federal maritime tort jurisdiction. These factors included choice of forum problems, choice of law problems and problems involving international agreements—all of which may require the application of a developed and uniform body of federal law such as admiralty.[51] Because the application of a uniform body of federal law eliminates the disparate results created by the application of different state laws and different state courts' interpretations of such problems as choice of law,[52] the Court has sacrificed uniformity of result in many aviation tort cases[53] in order to move toward a definition of maritime competence that more closely corresponds to traditional maritime activities. The availability

49. *See* note 28 *supra.*

50. 409 U.S. at 271.

51. 409 U.S. at 271-72. In the area of international law, it may be argued that air accidents over navigable waters are within the scope of the Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876. Several cases have held that the Convention provides no independent cause of action. *See* Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874, 877 (W.D. Pa. 1965); Noel v. Linea Aeropostal Venozolana, 144 F. Supp. 359, 360 (S.D.N.Y. 1956). *See also* 7A J. MOORE, *supra* note 6, ¶ .330[4], at 3721. Maritime principles, therefore, should be applied to provide a uniform legal framework for litigation arising pursuant to the Warsaw Convention. *Id.*

52. Without the use of a uniform body of law such as admiralty, suits could be brought in several states, subject to varying bodies of law. 7A J. MOORE, *supra* note 6, ¶ .330[5], at 3771.

53. Cases involving claims arising from aircraft crashes into navigable waters that because of the instant decision are not now cognizable in admiralty will be brought in state courts, or in federal courts (under diversity jurisdiction), either of which will apply the appropriate state's common law or wrongful death statute. The Court recognized that its present holding may lead to "divergent results and duplicitous litigation in multi-party cases" in these instances. 409 U.S. at 273.

of admiralty jurisdiction even to those aviation torts sanctioned as "maritime" by the instant decision still will not depend completely on the activity but on the fortuitous locality of the accident or destination of the flight. The air traveler from New York to Los Angeles should be entitled to the same protection and remedies as the air passenger traveling from New York to London, whose claim might be within admiralty jurisdiction. Under the instant decision, however, the outcome of an action arising from an aviation accident may differ widely depending on the direction in which the aircraft flies. Moreover, the passenger embarking on a transoceanic flight should find his remedies in domestic courts the same whether his plane crashes on land during takeoff or on the high seas en route. Air commerce is now subject to a variety of laws but uniformity cannot be achieved by sporadically applying admiralty rules to aviation. While the instant decision resolves a troublesome question concerning the applicability of maritime principles to a particular class of aviation torts, the decision is but a small step toward clarifying the limits of admiralty jurisdiction over air commerce. The Court's decision implies correctly that the needs of air commerce are not the same as those of the maritime community and that the body of law that grew up in response to the needs of maritime commerce is not necessarily appropriate to govern the needs of air commerce. Accordingly, in view of both the uncertainty that presently surrounds the question of which body of law governs aviation accidents and the disparate legal results that accrue once that question is resolved by respective courts, the Supreme Court's invitation to Congress to provide comprehensive federal legislation[54] to clarify the area seems most appropriate.

W. H. Schwarzschild III

54. "If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free . . . to enact legislation applicable to all such accidents, whether on land or water, and adapted to the specific characteristics of air commerce." 409 U.S. at 274.

ALIENS—ALIENS MAY MAINTAIN A CAUSE OF ACTION FOR PRIVATE EMPLOYMENT DISCRIMINATION UNDER 42 U.S.C. § 1981 (1970)

Plaintiff, a Mexican national registered as a resident alien, brought suit against his employer and his union under 42 U.S.C. § 1981[1] and Title VII of the Civil Rights Act of 1964,[2] to enjoin further alleged employment discrimination and to recover damages for past discrimination. Plaintiff worked in defendant corporation's Dock and Commodity Department in which insurance coverage for employees' families living in the United States was included as a fringe benefit. Plaintiff's family did not qualify for this insurance benefit, however, because they resided in Mexico. Subsequently, defendant union voted that Mexican nationals maintaining families in Mexico be given last preference for jobs in the Dock and Commodity Department. Pursuant to this vote, plaintiff was transferred to the Cotton Compress and Warehouse Department, where family insurance was not offered as a fringe benefit. Plaintiff terminated his employment and brought

1. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (1970).

2. 42 U.S.C. §§ 2000e-1 to 2000e-15 (1970). Subsection 2000e-2(a) states: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Subsection 2000e-2(c) states: "It shall be an unlawful employment practice for a labor organization—(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its memberships, or to classify or fail or refuse for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

suit.[3] Defendants contended that section 1981 is inapplicable to private employment discrimination and that aliens are not within the scope of section 1981. On stipulation of the above facts both parties moved for summary judgment. The District Court for the Southern District of Texas, *held*, injunction granted. The court dismissed that part of the action based on Title VII of the Civil Rights Act of 1964[4] because the record did not reveal any discrimination based on the five prohibited classifications of Title VII, *i.e.* race, color, religion, sex or national origin.[5] Aliens, however, are members of the class intended to be protected by section 1981 and employment discrimination based on alien status is actionable under this provision. *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex. 1972).

The legislative history and the judicial interpretations of section 1981 have been the source of much controversy and conflict, concerning both the type of action that may be maintained and the scope of the class to be protected. The type of action that may be maintained under section 1981 depends on whether Congress enacted section 1981 pursuant to its power to enforce the thirteenth amendment or pursuant to its power to enforce the fourteenth amendment. The United States Code cites the Civil Rights Act of

3. Plaintiff worked for sixteen months and did not bring suit until four years after his transfer. The court noted that since there is no statute of limitations for § 1981, the Texas statute of limitations for general civil actions (TEX. REV. CIV. STAT. art. 5529 (1948)) or for contract claims (TEX. REV. CIV. STAT. art. 5527 (1948)) was applicable. Both these statutes provide four-year limitation periods. This seemingly barred plaintiff's claim, but the court held that plaintiff's filing a complaint with the Equal Employment Opportunity Commission after his transfer and before he terminated his employment tolled the running of the statute of limitations for the claim based on § 1981. Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 532 (S.D. Tex. 1972).

4. It has been held that discrimination based on alienage or citizenship is not within the scope of Title VII. Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972). In *Espinoza,* plaintiff, a registered alien, was denied employment because she was not a United States citizen. Plaintiff claimed that the denial was discrimination based on national origin and thus prohibited by Title VII. The court noted that defendant employed many persons of plaintiff's nationality who were citizens. Thus the sole basis for defendant's discrimination was plaintiff's noncitizenship. On examining the legislative history and the plain meaning of Title VII, the court concluded that Congress did not intend to include discrimination based on alienage within the scope of Title VII. 462 F.2d at 1334.

5. 350 F. Supp. at 533. The court further stated that any actual discrimination practiced by defendants was based on the foreign residency of plaintiff's family and on plaintiff's status as an alien, and that neither of these bases is among the prohibited classifications of Title VII.

1870[6] as the source of section 1981. The 1870 Act was passed under the authority of Congress to enforce the fourteenth amendment,[7] and the Supreme Court has held that the 1870 Act was a constitutional exercise of that power.[8] These facts seemingly place section 1981 under the fourteenth amendment. Section 18 of the 1870 Act, however, reenacted the Civil Rights Act of 1866[9] and stated that section 16 of the 1870 Act, the predecessor of section 1981, was to be enforced under the provisions of the 1866 Act.[10] The 1866 Act had been passed pursuant to Congress's power to enact legislation to enforce the thirteenth amendment.[11] In *In Re Turner*,[12] the court determined that the 1866 Act was a constitutional exercise of congressional power under that amendment. These facts seemingly place section 1981 under the thirteenth amendment. Thus the courts were confronted with the problem of deciding whether a cause of action based on section 1981 had to satisfy the requirements of the thirteenth or the fourteenth amendment. Although both amendments are designed to attack discrimination, their requirements are different. The fourteenth amendment requires that the discrimination be the result of state action; the thirteenth amendment has no state action requirement. One theory postulated that section 1981 was enacted pursuant to the thirteenth amendment, which was designed to prohibit private discrimination,[13] and that, therefore, section 1981 could be the basis of a cause of action for private discrimination. The

6. Act of May 31, 1870, ch. 144, § 16, 16 Stat. 144.

7. U.S. CONST. amend. XIV, § 5.

8. The Court quoted the statutory language of § 1981 and stated that "[t]his Act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions." Strauder v. West Virginia, 100 U.S. 303, 312 (1880).

9. Act of April 9, 1866, ch. 31, 14 Stat. 27.

10. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

11. U.S. CONST. amend. XIII, § 2.

12. 24 F. Cas. 337 (No. 14,247) (C.C.D. Md. 1867). *In Re Turner* involved an indenture of apprenticeship that did not contain certain security provisions required by state law for the protection of the apprentice, a former slave. The court said that this constituted involuntary servitude and contravened § 1 of the Civil Rights Act of 1866. The court then stated: "This law having been enacted under the second clause of the thirteenth amendment . . . is constitutional . . . ." 24 F. Cas. at 339.

13. This theory, while never stated explicitly by the Supreme Court, was plausible in light of statements made by the Court. For example, the Court had stated that "[u]nder the Thirteenth Amendment, the legislation, so far as

Supreme Court, however, rejected this theory in *Hodges v. United States*,[14] holding that a cause of action based on section 1981 could not be maintained in federal court if only private discrimination was involved. This decision effectively placed section 1981 under the fourteenth amendment and thus required state action whenever the statute was to be the basis of an action. *Hodges* remained the law until 1968, when the Supreme Court in *Jones v. Alfred H. Mayer Co.*[15] held that a cause of action based on private discrimination in the sale of real property was authorized by 42 U.S.C. § 1982 since that provision was enacted pursuant to the thirteenth amendment. Although restricting the holding in *Jones* to private discrimination relating to real property, the Court used broad language to describe

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necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth ... it [legislation] must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings." Civil Rights Cases, 109 U.S. 3, 23 (1883). In another case, the Court stated: "It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation." Clyatt v. United States, 197 U.S. 207, 218 (1905).

14. 203 U.S. 1 (1906). Plaintiffs, all Negroes, were hired as laborers in a sawmill. Defendants, all white men, threatened plaintiffs with bodily harm unless they quit their jobs. Plaintiffs quit their jobs and brought suit in federal court under R.S. § 1977 (the statutory forerunner of § 1981). Defendants were convicted in federal district court for interfering with plaintiffs' employment contracts. The Supreme Court reversed, stating that the federal courts did not have jurisdiction under R.S. § 1977 and that plaintiffs must seek relief in the state courts. The Court stated that private interference with an employment contract did not constitute slavery or involuntary servitude—the evils against which the thirteenth amendment was specifically directed. Plaintiffs' remedy was an action either for trespass or for assault brought in the state court. 203 U.S. at 17-18.

15. 392 U.S. 409 (1968). It is important to note that this case was decided on the basis of 42 U.S.C. § 1982 (1970). This statute, which is derived from the Civil Rights Act of 1866, guarantees all citizens equal rights concerning real and personal property. Plaintiff alleged that defendant refused to sell him a house solely because of plaintiff's race, thus violating § 1982. Defendant contended that this statute applied only to state action and not to private discrimination. The Court held "that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 413.

congressional powers under the thirteenth amendment.[16] More importantly, the Court intimated that section 1981 was applicable to private discrimination in contracts for employment, noting that section 1981 was derived from the Civil Rights Act of 1866.[17] The effect has been to place section 1981 under the thirteenth amendment powers, thus making possible certain causes of action based on private employment discrimination.[18] The second problem area concerning section 1981 is the scope of the class intended to be protected by the statute. The solution of this problem is dependent on the intent of

16. The Court cited both the *Civil Rights Cases* and the *Clyatt* case for the proposition that Congress has the power to regulate the conduct of individuals. 392 U.S. at 438. *See* note 13 *supra.* The Court also stated that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." 392 U.S. at 440.

17. The Court stated that the right to contract for employment was a right secured by § 1981 and noted that the Court in the *Hodges* case had construed the thirteenth amendment and congressional power under that amendment very narrowly. "The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today [in the *Jones* case], it is hereby overruled." 392 U.S. at 441 n.78. Thus the Court expressly rejected a narrow interpretation of either the thirteenth amendment or congressional power under that amendment.

18. In cases subsequent to the *Jones* decision, a preponderant majority of federal circuit and district courts have held that § 1981 is a basis for an action for private employment discrimination. Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971) (dismissal from job allegedly due solely to race). *See also* Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971) (alleged racial discrimination in hiring); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970) (alleged racial discrimination in union hiring); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968) (alleged racial discrimination in union hiring). Only one court has refused to apply § 1981 to private employment discrimination based on race since the *Jones* decision. Smith v. North Am. Rockwell Corp., 50 F.R.D. 515 (N.D. Okla. 1970). The court based its decision on a narrow reading of the *Jones* decision, pointing out that *Jones* was based on 42 U.S.C. § 1982, not § 1981. The court specifically disapproved of the *Dobbins* decision, as an unwarranted extension of the *Jones* decision. 50 F.R.D. at 521. The court also said that Title VII of the Civil Rights Act of 1964 specifically preempted an action for private employment discrimination based on § 1981. Five reasons were given for this preemption: a

Congress when the Civil Rights Act of 1870 was passed. One line of authority maintains that section 1981 applies only when the discrimination involved is racially motivated. This rationale relies heavily on *Georgia v. Rachel*,[19] in which the Court analyzed the legislative history of the Civil Rights Act of 1866 and concluded "that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality."[20] The other line of authority maintains that aliens are included within the class intended to be protected by section 1981, pointing to the textual change in the statute that occurred when the Civil Rights Act of 1866 was reenacted in the Civil Rights Act of 1870. While the 1866 Act included "all persons born in the United States,"[21] the 1870 Act was changed to include "all persons within the jurisdiction of the United States,"[22] a phrase that has been held to include aliens.[23] In addition, aliens have been included as proper subjects of civil rights legislation in Supreme Court decisions dealing with state discrimination.[24] In each of these

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contrary rule would make Title VII redundant; the prospective nature of Title VII indicates that it is novel legislation; Title VII is more comprehensive than § 1981; Title VII provides administrative machinery to handle such claims without resorting to litigation; and to permit an action under § 1981 would require extraordinary judicial tasks. 50 F.R.D. at 519-21.

19. 384 U.S. 780 (1966).

20. 384 U.S. at 791. Although the *Rachel* case was not decided on the basis of § 1981, it specifically dealt with the Civil Rights Act of 1866. Given the Court's intimation in the *Jones* decision that § 1981 is derived from the 1866 Act, it is reasonable to conclude that § 1981 is designed to secure racial equality. Several federal courts have dismissed actions based on § 1981 that did not involve racial discrimination. *E.g.*, Marshall v. Plumbers Local 60, 343 F. Supp. 70 (E.D. La. 1972) (§ 1981 extends only to racial discrimination); Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51 (W.D.N.Y. 1972) (§ 1981 extends only to racial discrimination); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972) (§ 1981 does not extend to employment discrimination based on sex); Schetter v. Heim, 300 F. Supp. 1070 (E.D. Wis. 1969) (§ 1981 does not extend to discrimination based on religion or national origin).

21. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

22. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144.

23. Roberto v. Hartford Fire Ins. Co., 177 F.2d 811, 814 (7th Cir. 1949), *cert. denied*, 339 U.S. 920 (1950); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576, 577 (N.D. Ill. 1936). Both of these cases involved the right of aliens to maintain suit under § 1981.

24. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (discriminatory distribution of welfare benefits); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (discriminatory licensing statute); Yick Wo v. Hopkins, 118 U.S. 356

cases the Court cited section 1981 or its statutory forerunners for the proposition that aliens are entitled to the protection of the fourteenth amendment guarantees. Prior to the instant case, however, the question whether an alien may maintain an action under section 1981 for private discrimination involving neither racial discrimination nor state action had not been considered.

In the instant case, the court first examined extensively the legislative history of the Civil Rights Act of 1870 to determine the Act's intended coverage. The court found that the 1870 Act had its origins in a Senate bill to reenact the Civil Rights Act of 1866 and to extend its coverage.[25] The court noted that this proposed bill referred to "all persons within the jurisdiction of the United States."[26] Legislative discussions of the bill indicated that aliens were within the class of persons to be protected by the bill.[27] The court then examined the line of cases stating that aliens are protected by the fourteenth amendment guarantees.[28] The court viewed these decisions as indicative of a statutory policy protecting an alien's right to work.[29] After analyzing the textual difference between the 1870 Act and the 1866 Act, the legislative discussion indicating that aliens were included in the phrase "all persons within the jurisdiction of the United States" and the decisions protecting an alien's right to work under the fourteenth amendment, the court concluded that aliens are within the scope of section 1981.[30] The court next questioned whether section 1981 was an appropriate basis for a suit alleging private discrimination. While acknowledging that the 1870 Act was enacted pursuant to the fourteenth and fifteenth amendments and,

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(1886) (discriminatory enforcement of a municipal ordinance). Each of these cases involved state statutes or ordinances that either discriminated against aliens or were enforced discriminately against aliens. This discrimination was declared violative of the equal protection clause.

25. CONG. GLOBE, S. 365, 41st Cong., 2d Sess. 1536 (1870).

26. *Id.*

27. *Id.* Although this particular bill was never considered by the Senate, Senator Stewart of Nevada, who introduced it, succeeded in amending with his proposed bill a House of Representatives bill designed to enforce the fifteenth amendment. This amended bill, again including the words "all persons within the jurisdiction of the United States" rather than the words "all persons born in the United States" of the 1866 Act, became the Civil Rights Act of 1870, with Senator Stewart's amendment constituting §§ 16-18 of the Act. Act of May 31, 1870, ch. 114, §§ 16-18, 16 Stat. 144.

28. *See* note 24 *supra.*

29. 350 F. Supp. at 536.

30. 350 F. Supp. at 536.

therefore, would require state action for the maintenance of a suit, the court pointed out that section 18 of the 1870 Act expressly required that section 16 of the 1870 Act (the origin of section 1981) be enforced under the provisions of the Civil Rights Act of 1866. The court noted that the 1866 Act, as interpreted by the Supreme Court in the *Jones* decision,[31] has no state action requirement and that Congress had the power under the thirteenth amendment to outlaw public and private discrimination. Based on these considerations, the court held that section 1981 permits an alien to bring an action for private employment discrimination.[32]

The instant case is the first to extend the prohibitions of section 1981 to nonracial private discrimination. In light of the legislative history of the Civil Rights Act of 1870, this decision is correct. The statements by some courts that section 1981 applies only to racial discrimination are dicta. The courts in those cases were confronted with suits brought by women for sex discrimination,[33] white union members for employment discrimination[34] and Seneca Indians for alleged violation of their civil rights.[35] These cases hold only that the plaintiffs in each case are not members of the class intended to be protected by section 1981. Therefore, the statement by each of the courts in the above cases that section 1981 applies only to racial discrimination must be considered dicta and seems clearly wrong in light of the *Guerra* decision. The instant decision presents a convincing argument that aliens are protected by section 1981. The decision also takes on added significance in light of *Espinoza*,[36] which held that Title VII of the Civil Rights Act of 1964 does not prohibit private employment discrimination based solely on alien status. If plaintiff's action under section 1981 had been dismissed, aliens would have no remedy for private employment discrimination, and such discrimination might thereby be promoted. Finally, this decision further implements the policy of extending to lawfully admitted aliens a substantial portion of the rights guaranteed by the Constitution. In *Truax v. Raich*,[37] decided on equal protection grounds, the Supreme

31. *See* note 15 *supra* and accompanying text.

32. 350 F. Supp. at 538.

33. Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972).

34. Marshall v. Plumbers Local 60, 343 F. Supp. 70 (E.D. La. 1972).

35. Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51 (W.D.N.Y. 1972).

36. Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972).

37. 239 U.S. 33 (1915). *Truax* involved an Arizona statute that regulated employment opportunities on the basis of citizenship. Eighty per cent of all

Court stated that the right to a livelihood is the essence of the personal freedom and opportunity protected by the fourteenth amendment,[38] and that aliens are included in this constitutional guarantee. Although *Guerra* is based on thirteenth amendment grounds, a strong analogy can be drawn to the *Truax* decision because the purpose of both the thirteenth and fourteenth amendments is to eliminate discrimination. Congress, through the exercise of its power under the thirteenth amendment, has included aliens within the protected class. The *Guerra* decision, when coupled with the decisions under the fourteenth amendment, secures for aliens the equal opportunities in employment essential to successful residency in the United States.

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workers in establishments employing five or more workers were required to be United States citizens or resident aliens for a specified length of time. Plaintiff, faced with the loss of his job, brought suit to enjoin the enforcement of this statute. The Supreme Court struck down this statute as violative of the equal protection clause of the fourteenth amendment. *See also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

38. 239 U.S. at 41.

ANTITRUST—ARTICLE 86 OF THE EEC TREATY APPLIES TO CERTAIN CHANGES IN INTERNAL CORPORATE STRUCTURE

The Commission of the European Communities (Commission) initiated a proceeding under article 86[1] of the Treaty of the European Economic Community (EEC) to determine whether Continental Can Co., Inc., U.S.A. (Continental) had violated the antitrust rules of the EEC by its acquisition of Thomassen and Drijver-Verblifa N.V. (T.D.V.), a Dutch packaging firm, and the subsequent merger of T.D.V. with Schmalback-Lubeca-Werke A.G. (S.L.W.), a German packaging producer controlled by Continental. Acting through a holding company incorporated in the United States, Europemballage Corporation (Europemballage), Continental had acquired a 91 per cent interest in T.D.V. after contributing its 85 per cent interest in S.L.W. to the holding company. Europemballage thus had merged the largest producer of light metal containers in continental Europe, S.W.L., and the largest manufacturer of metal containers in the Benelux countries, T.D.V. The Commission contended that the acquisition of T.D.V. by Europemballage constituted an abuse of Continental's "dominant position"[2] in the EEC since the acquisition eliminated actual and potential competition in a substantial part of the EEC and reinforced Continental's financial, economic and

1. The following is the English text of article 86 of the EEC Treaty, which became authentic on January 1, 1973: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (*a*) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (*b*) limiting production, markets or technical development to the prejudice of consumers; (*c*) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (*d*) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." Treaty Establishing the European Economic Community, Jan. 1, 1958, art. 86, 298 U.N.T.S. 3, in 1 CCH COMM. MKT. REP. ¶ 2101 (1973) (authentic English text) [hereinafter cited as EEC Treaty].

2. In Deutsche Grammophon v. Metro-SB-Grossmarkte, 2 CCH COMM. MKT. REP. ¶ 8106 (1971) (English translation), the European Court of Justice defined "dominant position" as a market position in which a producer or group of producers has the ability to prevent effective competition on an important part of the relevant market, taking into account the existence of any other producers selling similar products and their positions in the market.

technical capacities to maintain its dominant position.[3] Continental argued that the Commission had not established that Continental occupied a dominant position because the Commission had failed to define properly the relevant product market.[4] Continental also contended that the Commission had failed to show that T.D.V. and S.L.W. occupied the same geographic market, a prerequisite to a finding of elimination of competition. Finally, Continental attacked the Commission's reliance on article 86 as an antimerger provision; Continental contended that the provision was intended to prevent companies from abusing existing market positions by external market practices rather than to block mergers.[5] In an original proceeding the Commission held that Continental had violated article 86[6] and ordered Continental to terminate the merger. On appeal, the European Court of Justice, *held*, reversed. The enhancement of a dominant market position that results in the elimination of actual or potential competition in a relevant product market throughout a substantial part of the EEC is an abuse of that position; this abuse does constitute a violation of article 86, but the Commission must prove that no sufficient counterbalance can be provided by the remaining competitors. *Europemballage Corp. and Continental Can Co. v. The Commission of the European Community*, 2 CCH COMM. MKT. REP. ¶ 8171 (1973).[7]

Under article 66[8] of the European Coal and Steel Community (ECSC) Treaty, the forerunner of the EEC Treaty, all mergers were subject to prior approval by the ECSC High Authority (now absorbed

3. The Commission contended that Continental held a dominant position in the EEC because S.L.W. occupied a dominant position in the Federal Republic of Germany and Continental controlled S.L.W.

4. Continental further contended that its market position was not properly characterized because the Commission had failed to account for flexibility of the market, ease of entry and potential competitors in related markets.

5. Prior to the completion of this merger, the Commission had warned T.D.V., S.L.W. and Continental that the contemplated merger might violate article 86, and it called the legal and financial consequences that might result from the finding of a violation to the attention of these parties.

6. 8 E.E.C. J.O. 25 (1972). For an unofficial English translation see 2 CCH COMM. MKT. REP. ¶ 9481 (1972).

7. The official opinion is not yet available.

8. The following is the applicable section of article 66 of the European Coal and Steel Community Treaty: "1. Except as provided in paragraph 3 below, any transaction which would have in itself the direct or indirect effect of bringing about a concentration, within the territories mentioned in the first paragraph of Article 79, involving enterprises of which at least one is subject to the application

in the EEC Commission). Article 86 of the EEC Treaty contains no prohibition of corporate consolidations.[9] Nevertheless, the Commission gradually has laid the groundwork for the application of article 86 to corporate combinations. In 1965, the Commission pronounced the basic criteria for the determination of an unlawful merger. The determination is based on two predominant factors:[10] first, whether either of the combining enterprises occupies a dominant market position in a substantial portion of the EEC; and secondly, whether there has been an abusive exploitation of that position by virtue of the combination.[11] Discussing the conditions under which the exercise of a trademark right is prohibited by article 86, in *Sirena S.r.l v. Eda GmbH*[12] the European Court of Justice defined dominant position as the power to prevent the maintenance of effective competition in a substantial part of the relevant market, considering the existence and position of producers and distributors that market similar goods. Enterprises are found to occupy a dominant position, therefore, when, as a result of their market shares and their access to economic,

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of Article 80, shall be submitted to a prior authorization of the High Authority. This obligation shall be effective whether the transaction in question is carried out by a person or an enterprise, or a group of persons or enterprises, whether it concerns a single product or different products, whether it is effected by merger, acquisition of shares or assets, loan, contract, or any other means of control. For the application of the above provisions, the High Authority will define by a general regulation, drawn up after consulting the Council, what constitutes control of an enterprise." Treaty Establishing the European Coal Community, in W. FREIDMANN, ANTI-TRUST LAW 579, 581 (1956).

9. Since the EEC desired the rapid economic expansion inherent in corporate acquisitions and mergers, a scheme of statutory merger control was not incorporated into the EEC Treaty. *See* R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION 293 (1970).

10. Concentration of Firms in the Common Market, [1965-1969 Transfer Binder] CCH COMM. MKT. REP. ¶ 9081, at 8171 (1966) [hereinafter cited as *Memorandum on Concentration*].

11. Enterprises must occupy both the same product and same geographical markets, and they must hold the dominant position in these markets before article 86 will apply. The product market is defined by functional interchangeability, *i.e.* all products that may reasonably be employed for the same purpose. The geographical market is confined to the Common Market boundaries and must constitute a substantial part of the Common Market. *See* C. OBERDORFER, A. GLEISS, & M. HIRSCH, COMMON MARKET CARTEL LAW ¶ 206, at 206 (1963).

12. For an unofficial English translation see 2 CCH COMM. MKT. REP. ¶ 8101 (1972).

financial and technical resources, they can act independently of competitors, buyers or suppliers.[13] The Commission's *Memorandum on Concentration* was the first official indication that the mere combination and resulting elimination of competition by a dominant firm constituted abusive market behavior under article 86.[14] Previously, only external predatory practices, such as those listed in article 86, or, at most, predatory practices used by a dominant firm to force a merger, were thought to constitute abusive market behavior by a dominant firm.[15] In recent years, the Commission and the Court have held various external market practices by enterprises to be abusive of their dominant position. In proceedings against the Gesellschaft für musikalische Ausführungs-und mechanische Vervielfältigungsrechte (GEMA),[16] a German company holding copyrights on musical works, the Commission considered abusive horizontal practices. The Commission found that the following practices constitute abuse of a dominant position: discriminating against citizens of other Member States of the EEC; placing unreasonable restrictions on the rights of members to join other associations; impeding the creation of a continental market for services; and discriminating against importers and imports in favor of national producers.[17] In an action initiated at the request of Laboratorio Chimico Farmaceutico Giorgio Zoja S.p.A. (Zoja), against Commercial Solvents Corporation (C.S.C.) and its wholly owned Italian subsidiary, Instituto Chemioterapico Italiano (I.C.I.),[18] the Commission held that a refusal by I.C.I. to sell primary materials to Zoja[19] was an abusive exploitation of a vertically integrated dominant

13. For a discussion of the relevant market in applications of article 86 see C. OBERDORFER, A. GLEISS, & M. HIRSCH, COMMON MARKET CARTEL LAW ¶ 206 (1963).

14. *Memorandum on Concentration, supra* note 10, at 8173.

15. R. JOLIET, *supra* note 9, at 286-87.

16. 15 E.E.C. J.O. 134 (1971); 22 E.E.C. J.O. 166 (1972). For an unofficial English translation see [1970-1972 Transfer Binder] 2 CCH COMM. MKT. REP. ¶ 9438 (1971).

17. *See* Brown, *Report to the Monte Carlo Conference on Topic No. 6: Industrial Growth and Antitrust,* 1972 INT'L BAR J. 93, 99.

18. 51 E.E.C. J.O. 299 (1972). For an unofficial English summary see 2 CCH COMM. MKT. REP. ¶ 9543 (1972).

19. C.S.C. and its subsidiary I.C.I. established a dominant position in the production of nitropropane and the marketing of its derivative amino butanol, which is used in drugs for the treatment of tuberculosis. Zoja was I.C.I.'s principal client for amino butanol. I.C.I. refused to sell the product to Zoja and Zoja was unable to locate another supplier. As a result, Zoja was forced out of the market.

position occupied by C.S.C. and I.C.I.[20] Furthermore, the Commission alleged in an action against the principal sugar enterprises in the EEC[21] that unilateral measures[22] taken by the producers to reinforce the existing division of markets among themselves constituted an abuse of their dominant position in the EEC. These instances of abuse of a dominant position exclusively concerned external market practices; the instant action is the first suit the Commission has brought under the theory that a corporate combination and the resulting elimination of competition by a dominant firm constitute abusive market behavior under article 86.

In the instant case, the Court confirmed the interpretation of article 86 rendered by the Commission in its original proceeding but reversed the original decision because the Commission failed to establish that Continental and its subsidiaries occupied a dominant market position in a substantial part of the EEC. First, the Court found that the three separate legal entities of S.L.W., Europemballage and Continental were merged into one economic unit over which the Court was competent to exercise jurisdiction in an antitrust case.[23] In its interpretation of article 86, the Court rejected the argument that control of corporate mergers is not within the ambit of the provision. The Court considered the suggestion that the prohibitions of article 86 should be directed solely toward external market practices rather than changes in the internal structure of an enterprise. The Court, however, rejected this interpretation of article 86 since internal structural changes in an enterprise may have significant external market effects. To support its

20. For an analysis of the effects of such abuses see P. AREEDA, ANTITRUST ANALYSIS 521-23 (1967).

21. Press Release from the Commission of the European Communities, [1970-1972 Transfer Binder] 2 CCH COMM. MKT. REP. ¶ 9522 (1972) (unofficial CCH translation).

22. In its complaint, the Commission listed a number of restrictive measures: intra-Community trade in sugar intended for human consumption was carried on only between the principal producers; deliveries of such sugar to dealers and to processing industries in other Member States were either refused or authorized only at higher prices; and participation in tenders for export refunds, as provided for under the Community system, took place only after the principal enterprises agreed to act in concert.

23. The Court considered and dismissed several threshold arguments by Continental. Continental argued that the Commission handed down its decision in the wrong language, that the Commission did not give notice of the proceedings to Continental through diplomatic channels and that the Commission did not have jurisdiction over Continental. *See* 2 CCH COMM. MKT. REP. ¶ 8171, at 8284 (1973).

liberal interpretation of article 86, the Court relied on general principles of economic policy contained in articles 2 and 3 of the EEC Treaty and placed substantial emphasis on the Court's duty to establish "a system ensuring that competition in the common market is not distorted."[24] In addition, the Court recognized that if article 86 is literally interpreted a gap apparently exists between the antitrust coverage of articles 85[25] and 86, *i.e.* ends prohibited by article 85 might be accomplished by means that are allowable under article 86.[26] The Court determined that article 86 should be interpreted to complement article 85 since the purposes of the articles are identical—the maintenance of workable competition within the

24. EEC Treaty, art. 3(f), 1 CCH COMM. MKT. REP. ¶ 171, at 211 (1973).

25. Article 85 provides that:

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(*a*) directly or indirectly fix purchase or selling prices or any other trading conditions;

(*b*) limit or control production, markets, technical development, or investment;

(*c*) share markets or sources of supply;

(*d*) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(*e*) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:—any agreement or category of agreements between undertakings; —any decision or category of decisions by associations of undertakings; —any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(*a*) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(*b*) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." EEC Treaty, art. 85, 1 CCH COMM. MKT. REP. ¶ 2051, at 1661 (1973).

26. For example, a single enterprise, through a dominant market position, may control a market share that a group of enterprises would not be allowed to control under the provisions of article 85.

Common Market.[27] Even though it interpreted article 86 liberally, the Court held for Continental because the Commission failed to establish that Continental held a dominant market position in the EEC. The Court's holding was based on its consideration of four distinct factors: the market share for the relevant products held by the enterprise after the merger; the relative size of the new unit formed by the merger in comparison with the size of any competitors in that market; the economic strength of buyers in relation to the economic strength of the new unit; and the potential competition from producers of the same products in other geographical markets or from producers of other products within the Common Market.[28] Although S.L.W. had occupied a very large market share in the manufacture of metal containers in Germany, the Court noted that this market position may have been diluted by competition from substitute products such as glass and plastic containers. The Court then determined that the Commission had failed to establish either that the metal container industry was impervious to such competition, especially in light of the accessibility of that market, or that a reasonable basis existed for considering the metal container industry as a separate submarket from other container industries in the application of the provisions of article 86.[29] Finally, the Court found that the Commission had failed to establish that T.D.V. and S.L.W. shared the same geographical market sphere.

In this decision, the Court fashioned a concrete antimerger precedent that gives new life to a previously ineffective provision. In order to broaden the scope of article 86, the Court was forced to disregard the argument that article 86 was not intended to control mergers since it did not contain the merger control provisions of article 66 of the ECSC Treaty.[30] Implicitly, the Court's liberal

27. Arguments against this interpretation, based on a comparison of article 86 with article 66 of the ECSC Treaty, were dismissed by the Court without explanation.

28. 2 CCH COMM. MKT. REP. ¶ 8171, at 8301 (1973).

29. For a description of submarket analysis see United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

30. While article 85 incorporated the substance of its predecessor provision, article 65 of the ECSC Treaty, article 86 did not contain the merger control provisions found in article 66 of the ECSC Treaty. Yet, under the Court's interpretation, article 86 would operate against mergers in much the same fashion as article 66 of the ECSC Treaty. Further, it appears on the face of article 86 that the provision is not hostile to the mere creation or existence of market power. Changes in internal corporate structure are not included among the prohibited

interpretation probably was motivated by the pressures of two substantial economic and political conditions: the economic necessity to inhibit the movement of market concentration that menaces the existence of a healthy economic climate in the EEC; and, the virtual political impossibility of obtaining an amendment to the EEC Treaty that would provide for effective control of economic concentration. The Court explicitly adopted a liberal interpretation of article 86 to place the provision within the context of the general policy of the EEC Treaty and to enable the article to be utilized as a complement to article 85. Although the Court relied heavily on the policy considerations of articles 2 and 3, article 86 was not designed to accomplish effectively the purpose outlined in article 3(f) of the EEC Treaty, *i.e.* to insure that competition in the Common Market is not distorted.[31] Even with the Court's liberal interpretation, the provision is insufficient to insure a balanced policy toward economic concentration.[32] Article 86 is too narrow in scope to meet the challenge of a conglomerate concentration in which no single enterprise would occupy a dominant position in any one product market. Large concentrations of economic power could be effected through the acquisition of unrelated small- and medium-sized enterprises. Under the strict standards of proof required by the Court, the provision is a patently unsuitable means of counteracting the creation and consolidation of market power.[33] Furthermore, the Court's interpretation maintains a tenuous distinction between establishing or creating a dominant market position, a permitted course of action, and reinforcing or defending an existing dominant position, a prohibited course of action.[34] The vagueness of the law in this area may discourage the attempts of smaller firms to reach optimum size and thus may inhibit the "continuous and balanced expansion" of enterprises to levels of economies of scale and increased competi-

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practices mentioned by the article and the article fails to provide for exceptions as does article 85. *See* R. JOLIET, *supra* note 9, at 290-93; Markert, *Antitrust Aspects of Mergers in the EEC,* 5 TEXAS INT'L L.F. 32, 46-47 (1969).

31. *See* R. JOLIET, *supra* note 9, at 290-93.

32. For a discussion of this disability see Mestmäcker, *Concentration and Competition in the EEC,* 7 J. WORLD TRADE L. 37 (1973).

33. It is obvious under the standard of proof required by the Court that the Commission will have to be extremely selective in its enforcement of article 86. The Commission simply does not have the resources to attack and prove every violation of the provision.

34. *See* R. JOLIET, *supra* note 9, at 290-93.

tion.[35] Nevertheless, the Court, in the face of the dangers of legislative inaction, has fashioned a stop-gap measure that implements basic treaty policy[36] consistent with changing circumstances[37] and puts corporate investors on notice that they must direct their expansion investment through channels that will insure that competition in the Common Market is not distorted.

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35. *Cf.* United States v. Von's Grocery Co., 384 U.S. 270 (1966), in which the combination of small markets to compete with chain markets was held to violate § 7 of the Clayton Act.

36. For an explanation of the political background of the EEC Treaty see W. KITZINGER, THE POLITICS AND ECONOMICS OF EUROPEAN INTEGRATION 1-96 (1963).

37. There are three important changes in circumstances that may form the basis for a liberal interpretation of article 86: the needs of the Community—in addition to encouraging rapid economic expansion through mergers and acquisitions, the Community must presently inhibit harmful market concentration; the structure of the Community—as the Community has become more politically and economically interdependent, the role of the Court has been enhanced so that it may fashion expansive interpretations of the Treaty consistent with changes in the needs of the Community; and the nature of corporate mergers—the large multinational corporation has attained such size and power that it is imperative that some means be employed to regulate the ability of large corporations to make acquisitions that are harmful to a competitive economic climate.

CONSTITUTIONAL LAW—EXECUTIVE POWER—PRESIDENTIAL AUTHORITY TO NEGOTIATE FOREIGN COMMERCIAL AGREEMENTS PURSUANT TO FOREIGN AFFAIRS POWER IS NOT CIRCUMSCRIBED ABSENT EXPLICIT LEGISLATION

Plaintiff, a consumer organization, sought a declaratory judgment and an injunction against the Secretary of State[1] and several major foreign steel companies[2] who participated in a steel import limitation agreement.[3] At the direction of the President,[4] the Secretary of State had initiated negotiations between the steel companies to reduce the importation of foreign steel into the United States. Plaintiff contended that the President and the Secretary of State lack the authority either to initiate or to encourage these arrangements because the Executive cannot negotiate any agreement that is prohibited by the antitrust laws as a restraint of trade, and the arrangements contravene specific procedures established by the Trade Expansion Act of 1962.[5] Plaintiff also contended that the Sherman Anti-Trust Act[6] and the Trade Expansion Act of 1962 constitute a comprehensive preemption of unilateral presidential action in the area of the regulation of competition in foreign commerce. Defendants argued that the foreign affairs power of the President empowered him to negotiate these arrangements; and that since the Sherman Act and the

1. Deputy Assistant Secretary of State Julius Katz was also included as a party defendant.

2. Nine Japanese steel corporations, the British Steel Corp. and various Western European steel manufacturers belonging to the European Coal and Steel Community were involved. These companies account for 85% of United States steel imports.

3. The Voluntary Restraint Arrangements on Steel were finalized in May 1972 and were to extend through 1974. N.Y. Times, May 7, 1972, at 1, col. 4.

4. The arrangements were made collectively among the steel companies. Since the United States was not a party to any of the agreements, the case does not concern the President's power to enter into executive agreements in restraint of trade with private companies. The issue is the presidential power to negotiate and encourage the agreements among these companies.

5. 76 Stat. 872 (codified in scattered sections of 19, 26 U.S.C.). The procedures allegedly contravened are found in 19 U.S.C. §§ 1862, 1981 and 1982. Plaintiff initially alleged that the arrangements also violated the Sherman Anti-Trust Act, but withdrew this contention with prejudice. Thus the issue whether the President can unilaterally exempt private foreign corporations from the antitrust laws was not before the court.

6. 15 U.S.C. §§ 1-7 (1970) [hereinafter referred to as the Sherman Act].

Trade Expansion Act are only general legislation concerning trade agreements and the regulation of competition, they cannot be read as an explicit preemption of the President's foreign affairs power. The District Court for the District of Columbia, *held*, the procedures established in the Trade Expansion Act of 1962 are not exclusive. When no explicit legislation circumscribes presidential action, the President has the authority to encourage commercial agreements with foreign companies pursuant to his foreign affairs power. *Consumers Union of the United States, Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973).

Article I, section 8 of the Constitution grants Congress the power to regulate interstate and foreign commerce. Pursuant to this power, Congress passed the Sherman Act, which prohibits contracts, combinations and conspiracies in restraint of interstate and foreign commerce.[7] The literal wording of the Sherman Act encompasses every commercial contract and combination;[8] the Supreme Court, therefore, in *Standard Oil Co. v. United States*[9] enunciated the "rule of reason"—a restraint violates the Sherman Act only if it is "unreasonable." The Court modified the rule of reason in *United States v. Trenton Potteries Co.*[10] by enunciating the "per se" rule whereby certain restraints, such as price-fixing, are presumed conclusively to be unreasonable.[11] Although these cases involved domestic violations of the Sherman Act, the Court declared in *Timken Roller Bearing Co. v. United States*[12] that the Sherman Act also applies to restraints of foreign commerce.[13] Congress also has delegated much of its power in the area of foreign commerce to the Executive. For example, the

7. 15 U.S.C. § 1 (1970). *See* 15 U.S.C. § 8 (1970).

8. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (§ 1 of the Sherman Act held to condemn "every" restraint of trade with no exceptions).

9. 221 U.S. 1 (1911).

10. 273 U.S. 392 (1927).

11. 273 U.S. at 396-97. Defendants, therefore, are not allowed to introduce evidence that the anticompetitive impact of the restraint is outweighed by any social or economic benefit derived from the restraint.

12. 341 U.S. 593 (1951).

13. 341 U.S. at 599. While *Timken* involved a domestic corporation and its subsidiaries acting in restraint of foreign commerce, United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945), established that foreign persons acting outside the territorial jurisdiction of the United States may be subject to liability if their actions contravene the antitrust laws and are intended to affect foreign commerce. *Accord,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962).

Trade Agreements Act of 1934[14] and the Trade Expansion Act of 1962 authorized the President to enter foreign trade agreements.[15] The Sherman Act, however, made no delegation of power. In addition to congressional delegations, the President possesses powers independent of Congress in foreign affairs[16] and foreign commerce.[17] Although extensive presidential powers over foreign relations have long been asserted,[18] the first judicial recognition of these powers was announced in *United States v. Curtiss-Wright Export Corp.*[19] Mr. Justice Sutherland stated, in dictum, that the President has plenary and exclusive power as "the sole organ of the federal government in the field of international relations . . . ."[20] Although

14. 48 Stat. 943, *as amended,* 19 U.S.C. §§ 1001, 1201, 1351-54 (1970).

15. The President's authority under the Trade Agreements Act to enter into foreign trade agreements with foreign governments or their instrumentalities for the purpose of expanding markets for United States products lapsed in 1962. 19 U.S.C. § 1352 (1970). Similar authority was granted the President under the Trade Expansion Act of 1962, but that power lapsed in 1967. 19 U.S.C. § 1821 (1970). The President still possesses the power to adjust tariffs after a finding by the Tariff Commission that such action is warranted. 19 U.S.C. § 1902 (1970).

16. *See, e.g.,* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

17. The President's foreign affairs power was declared to extend into the area of foreign commerce in Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948). In that case, the Supreme Court considered the possibility of judicial review of the Civil Aeronautics Board's determination on applications by civilian carriers to engage in overseas and foreign air transportation and commerce. The Board's decisions were subject to approval by the President under § 801 of the Civil Aeronautics Act. The Court noted that the President's power of review drew validity from either the congressional delegation of power or the inherent power of the President in foreign affairs. 333 U.S. at 109-10. The statement of the extent of the President's foreign affairs power is dictum, however, because the Court upheld the congressional delegation of power; but the Court did place great emphasis on the inherent powers of the President in sustaining presidential action.

18. Alexander Hamilton wrote that the foreign affairs power is incident to the "executive function" and the other enumerated powers of the President. Hamilton expressed this theory in the "Pacificus Papers," which was written in support of Washington's unilateral proclamation of neutrality. E. CORWIN, THE PRESIDENT 179, 426 n.31 (4th ed. 1957). In 1908, Woodrow Wilson wrote: "One of the President's powers is . . . his control, which is very absolute, of the foreign relations of the nation." *Quoted in* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 304 n.33 (1972). *See generally id.* at 37-65. Of course, these early assertions did not go unchallenged. *See* E. CORWIN at 180-81.

19. 299 U.S. 304 (1936).

20. 299 U.S. at 320. The statement is dictum because the case involved congressional delegation of power and not the power of the President acting

the constitutional underpinnings of the President's foreign affairs power have been questioned,[21] in reality the President possesses broad, albeit undefined, power over the area.[22] When constitutional power is vested in coordinate branches of government, the question arises whether the power of one branch preempts the concurrent power of the other branch.[23] In *Shurtleff v. United States*,[24] the Supreme Court declared that the existence of a general power in Congress to rescind the President's power of removal should not be held to preempt the President's use of his concurrent power to remove executive officials absent a clear expression of congressional intent to do so.[25] Analogous to the preemption problem in *Shurtleff* is *Parker v. Brown*,[26] which involved the applicability of the Sherman Act to the concurrent commerce powers of the state and federal governments. In *Parker*, the Court held that the power of a state legislature to enact a price stabilization program could not be nullified impliedly by the mere existence of the unexercized power in Congress to prohibit such actions.[27] In *Youngstown Sheet & Tube Co. v. Sawyer*,[28] the

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alone. Justice Sutherland also cited John Marshall's statement in the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 299 U.S. at 319. The statement, however, was taken out of the context in which Marshall used it. 10 ANNALS OF CONG. 613-14 (1800). Sutherland used it to support his broadened concept of executive power in foreign affairs. *See* L. HENKIN, *supra* note 18, at 300 n.18; Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 15-17 (1972).

21. *See, e.g.*, L. HENKIN, *supra* note 18, at 37-44; Berger, note 20 *supra*.

22. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). *See generally* E. CORWIN, *supra* note 18, at 204-06; L. HENKIN, *supra* note 18, at 44-50.

23. The issue of preemption by one branch of government when concurrent power in both branches is involved (*e.g.*, congressional commerce power and presidential foreign affairs power) has not been heavily litigated. As the court noted in the instant case, the judiciary will avoid deciding issues that concern the allocation of power between the political branches of government unless a clearly justiciable controversy arises. 352 F. Supp. at 1322. *Cf.* Baker v. Carr, 369 U.S. 186 (1962).

24. 189 U.S. 311 (1903).

25. 189 U.S. at 315. The Court assumed, for the purposes of the case, that Congress has the concurrent power to condition the removal of executive officials. 189 U.S. at 314.

26. 317 U.S. 341 (1943).

27. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from

Court held that the President lacked the authority under his war powers to seize the steel mills without congressional authorization. The critical factor for four justices of the majority was Congress's explicit denial of this power to the President.[29] Similarly in *United States v. Guy W. Capps, Inc.*,[30] the Fourth Circuit invalidated an executive agreement with Canada because it contravened express congressional regulations concerning the procedures that the President must follow when imposing import restrictions.[31] The inference to be drawn from these decisions is that in areas of concurrent authority in coordinate branches of government Congress must expressly act to preempt Executive power.

In the instant case, the court acknowledged that the President is prohibited from acting in contravention of legislation preempting the area of foreign commerce.[32] The court observed, however, that while the President had failed to follow the procedures established by the Trade Expansion Act of 1962, nothing in the Act made its procedures exclusive.[33] Noting that the Sherman Act, as general legislation, exhibits no congressional intent to preempt the President's "independent authority over foreign commerce,"[34] the court concluded that while these Acts are comprehensive in scope, they do not contain the explicit language necessary to preempt the President's inherent foreign affairs powers. The court then observed, in dicta, that the actions of the private participants to the arrangements are subject to the prohibitions of the Sherman Act notwithstanding executive

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their authority, an unexpressed purpose to nullify a state's [legislative] control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

28. 343 U.S. 579 (1952).

29. 343 U.S. at 603 (Frankfurter, J.), 639 (Jackson, J.), 660 (Burton, J.), 662 (Clark, J.). *See generally* L. HENKIN, *supra* note 18, at n.11.

30. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955).

31. By way of dicta the court denied that the President has any concurrent power in the area of foreign commerce (204 F.2d at 658), but this position was not affirmed by the Supreme Court. The holding of the case left open the question of the power of the Executive to enter into trade agreements when there has been no congressional action. 204 F.2d at 659-60. *See generally* L. HENKIN, *supra* note 18, at 180-81, 186.

32. 352 F. Supp. at 1322.

33. 352 F. Supp. at 1322.

34. 352 F. Supp. at 1323. By citing *Youngstown Sheet & Tube Co. v. Sawyer* as the sole authority for this proposition, while calling attention to the specific factual situation in that case, the court apparently suggested that Congress must act expressly to deny the President power in foreign affairs.

involvement in the negotiations.[35] The court therefore determined that the President has no authority to exempt arrangements from the operation of the Sherman Act because, as executor of the laws, he cannot contravene the legislatively established national policy.[36]

The importance of the court's holding is its limited scope. Since the President did not enter into an "executive agreement," the only presidential power affirmed by the court was the power to encourage and negotiate international trade agreements, regardless whether these agreements violate the Sherman Act. Unless Congress explicitly prohibits such presidential actions, the President's power to negotiate is the direct consequence of his role as the "sole organ" in foreign relations. The contents of such arrangements, however, still are subject to preemption by congressional legislation,[37] and the court in the instant case clearly indicated that the present agreements are preempted by, and subject to, the Sherman Act.[38] Thus while the Sherman Act does not preempt presidential power to negotiate foreign trade agreements, it does preempt presidential power to exempt the agreements from the operation of the Act. The granting of exemptions to the antitrust laws is historically a function reserved to Congress.[39] Congress has specifically authorized presidential actions similar to those taken in the present case and has exempted the private parties involved from the antitrust laws.[40] The government's argu-

35. 352 F. Supp. at 1323. The court further implied that the agreements probably violate the Act. 352 F. Supp. at 1323-24.

36. 352 F. Supp. at 1323.

37. *See* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953).

38. "A flat agreement among private foreign producers mutually to limit a substantial amount of goods to be sold in the United States is a violation of the Sherman Act . . . ." 352 F. Supp. at 1323; *accord,* United States v. National Lead Co., 63 F. Supp. 513, 523 (S.D.N.Y. 1945), *aff'd,* 332 U.S. 319 (1947).

39. *See, e.g.,* 63 F. Supp. at 526; Export Trade Act, 15 U.S.C. §§ 61-65 (1964) (exempts from the operation of the antitrust laws agreements or acts entered into in the course of, and for the sole purpose of engaging in, the export trade). The Miller-Tydings Fair Trade Act, 15 U.S.C. § 1 (1970), added two provisos to § 1 of the Sherman Act that exempt agreements setting minimum resale prices for trademarked or brand name commodities from the Sherman Act and from § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970).

40. 31 U.S.C. §§ 931-38 (1970). Section 932(a) of the Act grants to the President the power to stimulate voluntary agreements with private persons for the purposes of curtailing the expansion of the private flow of dollar funds from the United States and of aiding in the improvement of the United States' balance of payments. Pursuant to these purposes, subsections (b) and (c) provide antitrust exemptions to all persons who enter into such voluntary arrangements pursuant to presidential initiative.

ment in the instant case places unwarranted reliance on *Parker v. Brown*[41] because in that case federalism was the sole issue.[42] The present conflict, however, is between the legislative and executive branches of the federal government. While the President has the power to execute existing legislation, he is powerless to act contrary to existing legislation.[43] To allow the President unilaterally to create exemptions to the Sherman Act would constitute an unconstitutional usurpation of the legislative function.[44] On the other hand, to subject the private defendants to treble-damage actions under the Sherman Act would invite protests and possible commercial retaliation from the governments of the foreign nationals. Two possible solutions to the dilemma are available. One solution is judicial application of the rule of reason to the actions of the private corporations. In *Timken Roller Bearing Co. v. United States*, the Court denied the defense of reasonableness but did not state that defendants' actions were subject to the per se rule.[45] The per se rule is a judicially created rule of

41. Brief for Apellant at 28-35. The Sherman Act does not prohibit "a state or its officers or agents from activities directed by its legislature" but a "state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." Parker v. Brown, 317 U.S. 341, 350-51 (1943).

42. The Court in *Parker* also emphasized that the division of markets and price-fixing system established by California was approved because it was passed pursuant to the state's legislative authority. The California prorate program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." 317 U.S. at 350.

43. *See* U.S. CONST. art. I, § 1; art. II, § 1. This statement does not apply, of course, when Congress lacks the constitutional power to act. *Compare* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), *with* Myers v. United States, 272 U.S. 52 (1926).

44. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953); Note, *Steel Imports: Congressional Limits on Executive Recourse to Voluntary Export Restraint Agreements,* 4 LAW & POL. INT'L BUS. 110, 125 (1972).

45. 341 U.S. at 599. "Although the Supreme Court in the Timken case rejected a claim of 'reasonableness' by the defendants, who had eliminated competition among themselves in England, France, and the United States, defendant's claim was unpersuasive in view of the finding that competition was possible and would have occurred absent the long-standing restraint." P. AREEDA, ANTITRUST ANALYSIS 68 n.204 (1967). Thus, Areeda suggests, *Timken* need not be read as requiring that the per se rule automatically be applied to international conduct. *See* Carlston, *Antitrust Policy Abroad,* 49 NW. U.L. REV. 569, 591-92 (1954).

convenience,[46] not a legislative creature; as such it is subject to judicial amendment without legislative authorization. The application of the rule of reason in cases of international violations of the antitrust laws would acknowledge the difference in the structures of international and domestic markets.[47] Thus the artificial presumptions of the per se rule,[48] which were fashioned for domestic problems, would not be imposed on an economic structure for which the rule is neither designed nor suited.[49] The other possible solution is congressional action ratifying the President's implicit guarantee to the

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46. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

47. Areeda states that per se rules are used domestically because the conduct circumscribed is, generally, potentially dangerous and of no redeeming value, while these presumptions lose their validity in an international context where the same conduct might even be beneficial. P. AREEDA, *supra* note 45, at 67-68.

48. The per se rule developed because, although the Sherman Act had been construed to preclude only "unreasonable" restraints of trade, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are *conclusively presumed* to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged investigation . . . to determine at large whether a particular restraint has been unreasonable . . . ." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (emphasis added).

49. "[D]ivision of territory [is not] so self-operating a category of Sherman Law violations as to dispense with analysis of the practical consequences of what on paper is a geographic division of territory . . . . Of course, it is not for this Court to formulate economic policy as to foreign commerce. But the conditions controlling foreign commerce may be relevant here. When as a matter of cold fact the legal, financial, and governmental policies deny opportunities for exportation from this country and importation into it, arrangements that afford such opportunities to American enterprise may not fall under the ban of a fair construction of the Sherman Law because comparable arrangements regarding domestic commerce come within its condemnation." Timken Roller Bearing Co. v. United States, 341 U.S. 593, 605-06 (1951) (Frankfurter, J., dissenting). In the present case, the General Agreement on Tariffs and Trade (GATT) prevented the President from seeking and making formal agreements with foreign *countries,* who, of course, do not fall within the scope of the antitrust laws. *See* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *Cf.* 341 U.S. at 608 (Jackson, J., dissenting).

parties of the legality of the agreements.[50] Such congressional action would exempt those who entered into these agreements, and it would eliminate the potential conflict between the United States and governments of the steel producers.

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50. Such a statute would ratify the power of the President to grant antitrust exemptions to all persons who entered into these agreements pursuant to presidential initiative. *Cf.* 31 U.S.C. §§ 931-38 (1970); note 40 *supra.* It is well established that Congress has the power to ratify prior unauthorized official conduct of government officers, thus giving these actions the force of law. Swayne & Holt, Ltd. v. United States, 300 U.S. 297, 301-02 (1937); United States v. Heinszen & Co., 206 U.S. 370 (1907); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 HARV. L. REV. 692, 704 (1960). Such retroactive ratification is permissible even if judicial action is pending on the matter. 206 U.S. at 387; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 HARV. L. REV. 692, 703-06, 717-18 (1960). The court in the instant case held that, while the President had the power to negotiate, the results of that negotiation could not contravene congressional legislation. The effect of a statute such as the one suggested would be to legitimate these results.

JURISDICTION—SECURITIES EXCHANGE ACT OF 1934—SECTION 10(b) APPLIES TO A TRANSACTION IN UNLISTED FOREIGN SECURITIES WHEN SIGNIFICANT FRAUDULENT CONDUCT OCCURS IN THE UNITED STATES

Plaintiff, an American conglomerate,[1] sought damages from defendants, British citizens and corporations,[2] for losses resulting from plaintiff's purchases of shares of a British company listed on the London Stock Exchange. Plaintiff alleged that defendants, by making false and misleading statements concerning financial data and the recent profitability of defendants' various activities, had conspired to induce plaintiff's purchases of the shares and thus violated section 10(b) of the Securities Exchange Act of 1934.[3] Plaintiff further claimed that many of these misrepresentations had occurred in New York during negotiations for a takeover of the British corporation.[4] Defendants sought dismissal on the grounds that the district court lacked subject matter jurisdiction because the transactions were

1. There were two plaintiffs: Leasco Data Processing Equipment Corporation and Leasco World Trade Company (U.K.), Ltd. The reasons for joining the latter were not apparent. At trial in the district court, Leasco Data is to be joined by Leasco International N.V., which is a Netherlands Antilles corporation, a wholly owned subsidiary of Leasco Data and the party who made the actual stock purchases in London on Leasco Data's behalf.

2. Defendants were Pergamon Press, Ltd., a large British publishing house with diversified subsidiaries (some of whom were also defendants), Pergamon's founder Robert Maxwell, various Pergamon executives, a firm of London solicitors and a British accounting firm.

3. Plaintiffs argued that the district court had personal jurisdiction under the Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1970). Section 27 provides, *inter alia,* that the federal courts have exclusive jurisdiction to enforce liabilities created by the Act and that suit on these liabilities may be brought in the district in which any act constituting the violation occurred or in which the defendant is found, is an inhabitant or transacts business. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1970), makes it unlawful, *inter alia,* for any person, through the use of any instrumentality of interstate commerce, "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device" in contravention of the rules prescribed by the Securities and Exchange Commission "necessary or appropriate in the public interest or for the protection of investors." Plaintiffs also alleged violations of Rule 10b-5, 17 C.F.R. § 240.10b-5 (1972), but this allegation had no effect on the question of subject matter jurisdiction.

4. The following are relevant portions of the district court's summary of the complex facts: "Negotiations [for the takeover] took place both in England and in New York. Two rounds of discussion are particularly important . . . : the first occurred in England, over a four-day period in early June 1969, and the second in New York shortly thereafter . . . . The negotiations culminated in an agreement

foreign in all material respects[5] and that, in any event, choice of law principles favored application of English law.[6] Interpreting the Second Circuit's decision in *Schoenbaum v. Firstbrook*[7] to require only a showing of "substantial impact" on an American securities market, the district court denied defendant's motions.[8] On interlocutory appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed on other grounds.[9] When fraudulent conduct in connection

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executed by Leasco and Maxwell on June 17 in New York, providing in relevant part for (a) the purchase by Leasco of Pergamon stock from Maxwell; [and] (b) a tender offer by Leasco for the stock of Pergamon held by the public .... Following the execution of the June 17th agreement, Leasco purchased on the open market [the London Stock Exchange] over 5,000,000 shares of Pergamon stock, at a cost of approximately $22 million....

"... Leasco alleges that during the negotiations leading to the June 17th agreement it was misled by defendants as to the financial status of Pergamon and other of Maxwell's companies and also as to the commercial relations between Pergamon and the other companies.... Maxwell, in turn, has counterclaimed, charging that [Leasco's] aim was to depress Pergamon's market price ...." Leasco is asking for $22 million in actual damages and an unspecified amount of exemplary damages. Leasco Data Processing Equip. Corp. v. Maxwell, 319 F. Supp. 1256, 1258-59 (S.D.N.Y. 1970).

5. Defendants also sought dismissal for lack of personal jurisdiction because their contacts with the United States were tenuous. In addition, defendants sought dismissal in favor of British courts on the ground of *forum non conveniens*: this doctrine allows a court to dismiss a cause when defendant can meet a burden of showing that convenience of litigation strongly favors some other jurisdiction. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); F. JAMES, CIVIL PROCEDURE § 12.17 (1965).

6. This argument was first treated by the court on appeal.

7. 405 F.2d 200 (2d Cir.), *rev'd on rehearing*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

8. There were two district court dispositions. In the first, Judge Lasker granted certain motions to dismiss for lack of personal jurisdiction. Leasco Data Processing Equip. Corp. v. Maxwell, 319 F. Supp. 1256 (S.D.N.Y. 1970). In the second disposition, Judge Ryan denied motions to dismiss for lack of personal and subject matter jurisdiction and on the ground of *forum non conveniens*. In the ruling on subject matter jurisdiction, Judge Ryan concluded that *Schoenbaum* implied an "impact test," *i.e.* subject matter jurisdiction may be exercised whenever the transaction has a significant impact on a domestic securities market. Judge Ryan believed that plaintiffs had met this standard. The district court did not rule on the *forum non conveniens* argument. Leasco Data Processing Equip. Corp. v. Maxwell, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,454 (S.D.N.Y. 1972).

9. One of the motions to dismiss for lack of personal jurisdiction was affirmed, one was reversed and one was remanded for further proceedings. The

with securities transactions occurs within the United States, the Securities Exchange Act of 1934 is applicable even though the transactions involve foreign securities not listed on an American exchange and are consummated abroad. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

When Congress has specified the extent to which a statute is to apply to transactions having foreign elements, the courts must apply the statute as written, subject only to the requirement of fair play and substantial justice inherent in fifth amendment due process, even if the statute violates international law.[10] Most economic regulatory statutes, however, contain only general[11] or incomplete[12] guidelines concerning transnational activities; the courts have the task of filling the lacunae.[13] Two issues have arisen in the judicial resolution of this

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appeals court declined to order dismissal under the *forum non conveniens* doctrine. *See* note 39 *infra*. The instant case has already been followed by the Eighth Circuit in a closely similar factual situation. *See* Travis v. Anthes Imperial, Ltd. [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,718 (8th Cir. 1973).

10. This formulation of the due process constraint on judicial jurisdiction, derived from International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), has been discussed in its transnational context primarily in dicta. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945). *See also* Note, *Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act*, 20 VAND. L. REV. 1030, 1033 (1967) [hereinafter cited as *Extraterritorial Application of Antitrust Laws*].

11. *See, e.g.*, Sherman Act § 1, 15 U.S.C. § 1 (1970) ("[e]very contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal"); Carriage of Goods by Sea Act §§ 1-15, 46 U.S.C. §§ 1300-15 (1970) (§ 1312 provides: "This chapter shall apply to all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade").

12. The Securities Exchange Act of 1934 § 30(b), 15 U.S.C. § 78dd(b) (1970), specifically states that the Exchange Act does not apply to anyone "insofar as he transacts a business in securities" outside the United States unless he does so in contravention of Securities and Exchange Commission rules. In the instant case, Pergamon was not transacting a business in securities since only one large purchase was contemplated. Thus the limitation has no application to the present case. *See generally* Note, *United States Taxation and Regulation of Off Shore Mutual Funds*, 83 HARV. L. REV. 404, 442-52 (1969).

13. *See, e.g.*, Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949) (federal Eight Hour Law interpreted not to extend to employees of United States employers in Iraq); Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956) (Lanham Act interpreted not to reach defendant's alleged patent infringements in Canada); Branch v. FTC, 141 F.2d 31 (7th Cir. 1944)

problem: first, despite unclear congressional intent, whether it would be consistent with the overall statutory purposes for the court to assume jurisdiction; secondly, what constraints are placed on the extraterritorial reach of domestic regulation by principles of international law.[14] In the early 20th century, the issue of statutory purpose overshadowed questions of international legality by means of a presumption, first announced by the Supreme Court in *American Banana Co. v. United Fruit Co.*,[15] that Congress did not intend for a statute to apply to transactions with foreign elements such as citizenship of the parties or locus of the significant events. Clear language was required to overcome this presumption.[16] As international principles of jurisdiction became more clearly formulated, however, this strong negative presumption weakened. Courts became more confident that they could avoid excessive claims of jurisdiction through a careful inquiry into international principles of jurisdic-

(Federal Trade Commission Act interpreted to apply to United States citizen's fraudulent acts in Latin America). The cases developing approaches to regulated activity with foreign aspects coming under the Securities Exchange Act have drawn on this body of decisions. *See, e.g.*, Roth v. Fund of Funds, Ltd., 279 F. Supp. 935 (S.D.N.Y. 1968) (§ 16(b) of the Exchange Act applies to activities instigated abroad but consummated on a domestic securities exchange); Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966) (Exchange Act applies when instrumentalities of United States interstate commerce used in a transfer of control of corporation executed in Canada). Thus as a general proposition, cases concerning transnational regulated activity contain similar jurisdictional considerations.

14. There is no significance to the order in which a court might treat these questions. Courts deciding not to assume jurisdiction, however, usually resolve the question supporting their decision first and often ignore the other. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952) (whether district court had jurisdiction is question "solely of the purport of the municipal law").

15. 213 U.S. 347 (1909). Although both parties were domestic American companies, the Court refused to apply the Sherman Act to defendant's activities in Latin America. *See also* Blackmer v. United States, 284 U.S. 421 (1932). This extreme position is no longer espoused. *See* United States v. Pacific & Arctic Ry. & Navigation, 288 U.S. 87 (1913) (Court may enjoin acts of American in Alaska pursuant to agreement in restraint of trade made in Canada). Nevertheless, the presumption survives in less extreme form. *See, e.g.*, Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956), in which the court implied that the presumption of domestic applicability might be overcome if there were no conflicts with international law or problems of enforcement. *See also* Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960) (Congress's primary concern with domestic conditions is basis for presumption).

tion.[17] In *Foley Bros., Inc. v. Filardo*,[18] the Supreme Court, although paying lip service to this presumption, finally indicated that in determining whether the overall statutory purposes would be advanced by assuming jurisdiction the judiciary's most important task should be to carry out an open and frank consideration of the policies, administrative burdens and economic problems involved in extra-territorial enforcement.[19] In resolving the issue of the spatial reach of domestic regulation, the courts have placed increasing reliance on the territorial principle of jurisdiction, which has been further refined into the objective territorial principle and the subjective territorial principle.[20] The courts have often confused the objective territorial principle with the protective principle. The objective territorial principle, as expounded by Judge Learned Hand in *United States v. Aluminum Co. of America*,[21] grants a state jurisdiction to impose liabilities on conduct occurring outside its territory that was both intended to and did produce effects within its territory violative of some domestic rule of law.[22] The protective principle, on the other hand, is directed at extraterritorial conduct that has an adverse effect

16. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952).

17. *Compare* American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) *with* United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945).

18. 336 U.S. 281 (1949).

19. 336 U.S. at 285.

20. The territorial principle is the most important of the five fundamental principles of jurisdiction. The other four, in generally declining order of acceptance and importance, are: "second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offense; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense." Harvard Research in International Law, *Introductory Comment, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935) [hereinafter cited as Harvard Research]. Courts often have not distinguished between the objective and subjective branches when using the territorial principle and, in effect, rely on both. *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 278 (1927).

21. 148 F.2d 416 (2d Cir. 1945) (on certification from the United States Supreme Court for failure of a quorum of qualified Justices).

22. 148 F.2d at 443-44. One commentator has stated that the intent portion of the *Alcoa* formula could not have been intended to relate to the question of

on a state's security or governmental interests.[23] A broader expression of the objective principle is found in section eighteen of the *Restatement (Second) Foreign Relations Law of the United States*,[24] which provides that effects within the nation need only be foreseeable. The most assertive interpretation of the objective territorial principle was pronounced in *Schoenbaum v. Firstbrook*,[25] in which fraudulent transactions in the securities of a foreign corporation occurred entirely outside the United States. Nonetheless, the Second Circuit held that the district court had subject matter jurisdiction "at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors."[26] Problems of enforcing judgments

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the court's jurisdiction but rather relates only to the question of a violation of the Sherman Act, because the legitimate power of the state to take jurisdiction over defendant's acts cannot depend on defendant's subjective intent. Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558, 560 n.8 (1967). *But see* Strassheim v. Daily, 221 U.S. 280 (1911). The Court in *Strassheim* established a foundation for the *Alcoa* rule: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm ...." 221 U.S. at 285. A leading discussion of the objective territorial principle as it relates to criminal jurisdiction is found in *Case of the S.S. Lotus* in which the Permanent Court of International Justice reasoned that criminal law extended to foreign actors "if one of the constituent elements of the offense, and more especially its effects," took place in the territory of the injured state. [1927] P.C.I.J., ser. A, No. 9, at 23.

23. Thus the protective principle is traditionally used to reach criminal acts against the state such as counterfeiting of currency. *Committee Report, The 1964 Amendments to the Securities Exchange Act of 1934 and the Proposed Securities and Exchange Commission Rules–International Law Aspects*, 21 RECORD OF N.Y.C.B.A. 240, 245 (1966). For a discussion of the distinction between the objective territorial and protective principles see United States v. Pizzaruso, 388 F.2d 8, 10 (2d Cir. 1968) (misrepresentation of facts to immigration officials establishes protective principle jurisdiction). *Compare* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) *with* § 33.

24. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). The growth in federal economic regulatory legislation during the 20th century coupled with the increasing frequency of regulated activities having foreign elements probably has been the major force underlying the American evolution of the objective principle. *See Extraterritorial Application of Antitrust Laws, supra* note 10, at 1049-61 (1967); Harvard Research, *supra* note 20, at 443; 69 COLUM. L. REV. 94 (1969).

25. 405 F.2d 200 (2d Cir.), *rev'd on rehearing*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

26. 405 F.2d at 208.

adverse to a foreign litigant also have confronted courts. A British court refused to enforce an American judgment on patent rights obtained in *United States v. Imperial Chemical Industries, Ltd.*[27] because it concluded that the American court's action violated a British party's rights under British law.[28] The second basis used to extend the spatial reach of domestic regulatory statutes is the well-established subjective territorial principle.[29] Section seventeen of the *Restatement (Second) Foreign Relations Law of the United States*[30] provides that a nation has jurisdiction to prescribe a rule of law regulating conduct occurring within its territory and related to some local interest even though the effects of the conduct take place outside the territory. Opinions vary about how extensive the conduct in the territory must be to sustain jurisdiction under the subjective principle.[31] The cases indicate, however, that the courts will assert jurisdiction more readily if, in addition to conduct within the United States, the defendant is an American citizen or effects within the United States can be demonstrated.[32] As to the minimum conduct necessary to sustain a violation of the securities laws, the Supreme Court, in *Mills v. Electric Autolite Co.*,[33] indicated that conduct in

27. 105 F. Supp. 215 (S.D.N.Y. 1952) (when transnational restraints on trade were effected by patents, court would order compulsory licensing of patents).

28. British Nylon Spinners, Ltd. v. Imperial Chemical Indus., Ltd., [1952] 2 All E.R. 780 (C.A.). One commentator has suggested that courts largely could avoid these problems by applying choice-of-law principles. Generally, these principles would illuminate the propriety of asserting jurisdiction by indicating which state has the most significant interest in the litigation. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation,* 22 OHIO ST. L.J. 586, 611-27 (1961). *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 6, 148 (1971).

29. Harvard Research, *supra* note 20, at 444.

30. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

31. Judge, later Mr. Justice, Cardozo stated that in criminal cases the acts must at least amount to an attempt. People v. Werblo, 241 N.Y.S. 55, 148 N.E. 786 (1925). This test was never widely adopted, however, and the Draft Convention on Jurisdiction with Respect to Crime requires only that a crime be committed "in whole or in part" within the jurisdiction. Draft Convention on Jurisdiction with Respect to Crime art. 3, in Harvard Research, *supra* note 20, at 439.

32. *See, e.g.,* Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (American defendant). *See also* Raymond, *supra* note 22, at 559 n.4 and authorities cited therein.

33. 396 U.S. 375 (1970).

the form of misleading proxy solicitations that constituted an "essential link" in the causation of a transaction would entitle plaintiff to relief under the proxy rules.[34] The Court's opinion was unclear, however, whether a similar broad, "but for" test[35] would be applied as a basis for deciding whether a court should take jurisdiction under the subjective territorial principle.

The court in the instant case first distinguished the facts from those in *Schoenbaum v. Firstbrook.*[36] The *Schoenbaum* court found injury to United States investors and markets resulting from acts committed outside the United States and thus based jurisdiction on the objective territorial principle. In the instant case, however, the court stated that the impact in the United States alone would not have been a sufficient basis for jurisdiction under the objective territorial principle.[37] Reasoning that satisfaction of the *Mills v. Electric Autolite Co.* standard indicates ample conduct to assume jurisdiction under the subjective territorial principle,[38] the court determined that it would be more appropriate to assert jurisdiction under the subjective territorial principle since plaintiff had alleged sufficient incidents of fraud occurring in New York to satisfy the *Mills* causation requirements. The court next concluded that asserting jurisdiction would be consistent with the overall statutory purpose of the Securities Exchange Act, opining that if Congress had considered this

34. 396 U.S. at 385.

35. "But for" refers to the tort law concept of causation in fact, *i.e.* if A would not have happened but for B, B is a necessary cause of A. *See generally* W. PROSSER, LAW OF TORTS § 41 (4th ed. 1971).

36. *See* notes 21 & 22 *supra* and accompanying text. The court warned that it was assuming the verity of plaintiff's allegations, and instructed that the trial court might be compelled to order dismissal if the contacts with the United States proved de minimis, because "the issue of subject matter jurisdiction persists." 468 F.2d at 1330.

37. "If all the misrepresentations here alleged had occurred in England, we would entertain most serious doubt whether, despite United States v. Aluminum Co. of America . . . and *Schoenbaum,* § 10(b) would be applicable simply because of the adverse effect of the fraudulently induced purchases in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its shareholders." 468 F.2d at 1334.

38. "[I]f defendant's fraudulent acts in the United States significantly whetted Leasco's interest in acquiring Pergamon shares, it would be immaterial, from the standpoint of foreign relations law, that the damage resulted, not from the contract whose execution Maxwell procured in this country, but from interrelated action which he induced in England or, for that matter, which Leasco took there on its own." 468 F.2d at 1335.

matter more thoroughly it would have wished to protect an American investor from a foreigner who comes to this country and fraudulently induces the investor to purchase securities abroad. Finally, the court rejected defendants' contention that choice of law rules require that the court apply English law. The court stated that since it was properly seized of the cause of action under the subjective territorial principle, it had jurisdiction to displace foreign law.[39]

The use of the objective territorial principle impact test exemplified in *Schoenbaum* and *Imperial Chemical Industries* has been criticized as "potentially limitless" since virtually any commercial transaction can reasonably be said to have some effect on American commerce.[40] Others have warned that if states with widely divergent economic and social values were to assert jurisdiction merely on the basis of some effect within their territory, international commerce could be subjected to conflicting regulation.[41] Thus, by basing their jurisdiction to regulate solely on conduct occurring within the United States, *i.e.* the subjective territorial principle, the *Leasco* court has circumvented these problems associated with the objective principle. Moreover, the court initially distinguished the validity of exercising jurisdiction under international law from the desirability of doing so. Yet, by deciding that the subjective territorial principle allows the court to displace foreign law, the court has engaged in a circularity that in future cases could negate the benefits of this recognition because it does not acknowledge the open, frank determinations of economic and administrative burdens called for in the *Foley Bros., Inc. v. Filardo* approach.[42] Ironically the court's rationale easily could give rise to the problems that the court desired to avoid by rejecting

39. The court also disposed of the motions to dismiss for lack of personal jurisdiction and for *forum non conveniens,* believing that personal jurisdiction would be limited only by the due process clause of the Constitution as expressed in Hanson v. Denckla, 357 U.S. 235 (1958). The court interpreted the principles expressed in *Hanson* to mean "where a defendant has acted within a state or sufficiently caused consequences there, he may fairly be subjected to its judicial jurisdiction . . . ." 468 F.2d at 1340. The court affirmed the denial of the motion to dismiss on the ground of *forum non conveniens* because the balance of convenience, which favored trial in England, was not strong enough to warrant dismissal in light of the strong presumption in favor of plaintiff's choice of forum. 468 F.2d at 1344.

40. *See* Raymond, *supra* note 22, at 562; *Extraterritorial Application of Antitrust Laws, supra* note 10, at 1039.

41. Becker, *Extraterritorial Dimensions of the Securities Exchange Act,* 2 N.Y.U.J. INT'L L. & POLITICS 233, 234 (1969).

42. *See* authorities cited note 28 *supra.*

the *Schoenbaum* rationale. Thus, a court in England following the approach used by the *Leasco* court could find that the subjective principle would allow it to assert jurisdiction since an "essential link," the actual closing of the deal, occurred there. Yet if the English court also argued that the subjective principle allowed it to displace foreign law, the Securities Exchange Act of 1934, and to apply its own, possibly different, standard,[43] international commerce could be subjected to conflicting regulatory standards.[44] This potential problem demonstrates the need for courts faced with international transactions to apply choice-of-law principles. These principles would assist the courts by addressing the policy considerations involved. One commentator has suggested five factors that should be considered in the choice-of-law determinations: (1) the importance to the forum state of a particular regulatory policy; (2) the policy and law of other jurisdictions; (3) the relative importance to other jurisdictions of the regulatory scheme; (4) the degree to which parts of transactions are related to various jurisdictions; and (5) the weights to be given these factors.[45] Application of each of these considerations in the instant case probably would not have resulted in a dismissal for lack of subject matter jurisdiction, but a thorough discussion of each would have established a precedent useful in insuring the extraterritorial recognition of future, more doubtful cases. An additional difficulty with the instant decision stems from its treatment of the *Mills* causation requirement. The *Mills* "but for" test does not require that injury to plaintiff be foreseeable.[46] Yet the present court insists that damage to plaintiff must occur "within the scope of the risk" of loss. Thus it is unclear whether future courts will require not only satisfaction of a "but for" standard for purposes of jurisdiction, but also that a more stringent foreseeability test be met.[47]

Isaac H. Braddock

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43. For a discussion of the British analogues to § 10(b) see Knauss, *Securities Regulation in the United Kingdom: A Comparison With United States Practice*, 5 VAND. J. TRANSNAT'L L. 47, 106-10, 128-32 (1971).

44. *See* note 26 *supra*.

45. Trautman, *supra* note 28, at 611-27.

46. Note, *Causation and Liability in Private Actions for Proxy Violations*, 80 YALE L.J. 107, 123-25 (1970).

47. In the case of the objective territorial principle, as formulated in the *Restatement*, mere satisfaction of this "but for" test is clearly insufficient since "the effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory." RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 comment *f* (1965).

TARIFFS—TRADE AGREEMENT CONCESSIONS MAY BE SUSPENDED ON A MOST-FAVORED-NATION BASIS WHEN SUCH TREATMENT IS REQUIRED BY INTERNATIONAL AGREEMENTS OF THE UNITED STATES

Plaintiff, an importer of brandy, brought an action against the United States to protest an increase[1] in the duty assessed on brandy imported from Spain. Presidential Proclamation No. 3564[2] had

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1. The increase was from $1.25 per gallon to $5.00 per gallon.

2. Presidential Proclamation No. 3564, 77 Stat. 1035 (1963), provides: "Whereas the European Economic Community maintains unreasonable import restrictions upon imports of poultry from the United States;

"Whereas such unreasonable import restrictions directly and substantially burden United States commerce;

"Whereas products of the European Economic Community receive benefits of trade agreement concessions made by the United States;

"Whereas it is consistent with the purposes expressed in Section 102 of the Trade Expansion Act of 1962 (19 U.S.C. 1801) for the United States to suspend the application of the benefits of certain of those trade agreement concessions;

"Whereas, having due regard for the international obligations of the United States, particularly paragraph 3 of Article XXVIII of the General Agreement on Tariffs and Trade . . . requiring any suspension of trade agreement concessions to be made on a most-favored-nation basis, I am taking steps to suspend, on a most-favored-nation basis, certain trade agreement concessions in the United States schedules to that Agreement; and

"Whereas rates of duty suspended by this proclamation will not be required or appropriate to carry out any trade agreement on and after January 7, 1964:

"Now, Therefore, I, Lyndon B. Johnson, President of the United States of America, acting under the authority vested in me by the Constitution and statutes of the United States of America, including Section 252(c) of the Trade Expansion Act of 1962 (19 U.S.C. 1882(c)) and Section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351(a)(6)), and in order to suspend the application of the benefits of certain trade agreement concessions, do hereby proclaim (until such time as the President of the United States of America otherwise proclaims)—

"(1) the termination of that part of any prior proclamation which proclaims rates of duty inconsistent with those provided for in the amendment made by paragraph (2) of this proclamation; and

"(2) the amendment of the Tariff Schedules of the United States (28 F.R. 8599, as corrected, 28 F.R. 9131) by inserting under the heading 'Subpart B' of Part 2 of the Appendix thereto the following:

. . . .

945.16	Brandy, valued over $9.00 per gallon (provided for in items 168.20 and 168.22)	$5 per gal."

effected the increase by suspending on a most-favored-nation basis[3] previously proclaimed trade agreement concessions in response to the implementation of the Common Agricultural Policy by the European Economic Community (EEC).[4] Plaintiff contended that neither section 252(c) of the Trade Expansion Act of 1962[5] nor article

3. Most-favored-nation (MFN) clauses may be conditional or unconditional. The conditional type usually provide that any favor, privilege or concession granted by one of the contracting parties to a third state in relation to a given subject shall be extended to products of the other contracting party if that contracting party reciprocates with equivalent concessions. Unconditional most-favored-nation clauses do not require that the other contracting party reciprocate; the concessions are extended automatically. W. BISHOP, INTERNATIONAL LAW 159-60 (3d ed. 1971). Suspending concessions on a most-favored-nation basis means that nations that have gained the benefit of the concessions through the operation of MFN treatment lose that benefit when the concession is suspended between the parties that originally negotiated the concession.

4. This controversy is referred to as the "chicken war." In the latter 1950's, the American poultry industry discovered a thriving market in Germany. Sales grew from $2.5 million in 1958 to $35.5 million in 1961. On July 1, 1962, however, the EEC's import regime replaced Germany's national tariff on poultry. The tariff tripled and American shipments dropped sharply. The American reaction to the increased rate on poultry was influenced greatly by questions concerning the effect of the Common Agricultural Policy on other American agricultural exports to the EEC. Article XXIV(6) of the General Agreement on Tariffs and Trade provides that the procedures of article XXVIII apply if, in the formation of a customs union, any duty is increased so as to breach an obligation under article II. Negotiations were commenced on September 1, 1960, pursuant to article XXIV(6), but by July 1, 1962, no agreement concerning poultry had been reached between the United States and the EEC. The United States took retaliatory action under article XXVIII(3) by raising tariff rates on trucks valued over $1000, brandy valued over $9 per gallon, potato starch and dextrine. These items were selected because of their major impact on EEC countries and their supposed minor injury to third party countries. Walker, *Dispute Settlement: The Chicken War,* 58 AM. J. INT'L L. 671 (1964). Although Spain is not a member of the EEC, the increase was applicable to Spanish products through operation of the most-favored-nation clause.

5. 19 U.S.C. § 1882(c) (1970): "Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States—(1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or (2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality."

XXVIII(3)[6] of the General Agreement on Tariffs and Trade[7] authorized the suspension of trade agreement concessions on a most-favored-nation basis. The Customs Court adopted plaintiff's position.[8] On appeal to the United States Court of Customs and Patent Appeals, *held*, reversed. Section 252(c) of the Trade Expansion Act of 1962 authorizes the President to suspend trade agreement concessions on a most-favored-nation basis when such treatment is required by the international obligations of the United States. *United States v. Star Industries, Inc.*, 462 F.2d 557 (C.C.P.A. 1972), *cert. denied*, 41 U.S.L.W. 3241 (U.S. Oct. 31, 1972).

The Constitution vests the power to regulate foreign commerce in the Congress;[9] however, Congress has delegated much of its authority

6. Article XXVIII provides for the modification of tariff schedules: "3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party. (b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of the Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party."

7. General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. For a general discussion of GATT see K. DAM, THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); J. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

8. 320 F. Supp. 1018 (Cust. Ct. 1970). The Customs Court also ruled that the President's alternate reliance on the termination power under 19 U.S.C. § 1351(a)(6) was misplaced, since the proclamation was a temporary modification. Therefore, § 1882 regulated § 1351(a)(6) in this case and most-favored-nation treatment was denied. 320 F. Supp. at 1023-24.

9. U.S. CONST. art. I, § 8.

to the executive.[10] Section 350(a) of the Trade Agreements Act of 1934[11] authorized the President to enter foreign trade compacts with foreign governments or instrumentalities for the purpose of expanding markets for United States products.[12] In *Star-Kist Foods, Inc. v. United States*,[13] the court considered the validity of an executive agreement with Iceland pursuant to section 350(a). Plaintiff contended that the agreement was void because it had not received the advice and consent of the Senate. The court, however, concluded that the agreement was an international compact authorized by Congress. The court also noted that the President has the responsibility for the conduct of foreign affairs and that Congress had given him the added responsibility of negotiating trade agreements in accordance with the policy of the Act.[14] The President, relying on an extension of the power to enter foreign trade agreements pursuant to the Trade Agreements Extension Act of 1945, entered the General Agreement on Tariffs and Trade (GATT) in 1947.[15] Although GATT has never been submitted to Congress[16] and no court has ever ruled on its validity,[17] it is clearly a binding international obligation of the United

10. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250 (1967). The constitutionality of congressional delegation in this area has been upheld. *See, e.g.*, Hampton & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

11. 19 U.S.C. § 1351(a) (1970).

12. This power was extended eleven times from 1934 to 1962. 19 U.S.C. § 1352(c) (1970). The Trade Expansion Act of 1962 granted similar authority effective through July 1, 1967. 19 U.S.C. § 1821 (1970). This authority, however, was not extended.

13. 275 F.2d 472 (C.C.P.A. 1959).

14. Presidential action in the area of foreign commerce may be invalidated, however, if the action contravenes the exclusive procedures of the statutory delegation. *See* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953).

15. Jackson, *supra* note 10, at 255.

16. GATT was conceived as the forerunner of the International Trade Organization (ITO), which never came into existence. The Executive intended to submit the ITO agreement to Congress and thereby to give Congress an opportunity to review the provisions of GATT, many of which were worded identically in both agreements. The ITO was abandoned, however, and Congress has never formally approved GATT. Jackson, *supra* note 10, at 265.

17. The validity of GATT was raised in only one case, and that case was dismissed on other grounds. Morgantown Glasswork Guild v. Humphrey, 236 F.2d 670 (D.C. Cir. 1956). Other cases, however, have implied that GATT is valid. *See, e.g.*, Talbot v. Atlantic Steel Co., 275 F.2d 4 (D.C. Cir. 1960); Bereut-Vandervoort v. United States, 151 F. Supp. 942 (Cust. Ct. 1957).

States.[18] Furthermore, GATT has been implemented as domestic law by Presidential proclamation.[19] The most-favored-nation clause, found in article I, is the heart of GATT.[20] The basic most-favored-nation clause of article I(1) applies only to a specified list of obligations, but when considered in conjunction with other GATT most-favored-nation clauses, it appears that all obligations under GATT are subject to the principle of nondiscrimination.[21] Article XXIII, which provides the primary dispute-settlement mechanism, constitutes an exception to most-favored-nation treatment.[22] Article XXIII provides for an investigation by the CONTRACTING PARTIES[23] of a complaint by a contracting party that a benefit accruing to it under GATT is being nullified or impaired. If the CONTRACTING PARTIES find that the benefit is being nullified or impaired, they may authorize the complainant to suspend the application to any contracting party of such GATT obligations (including most-favored-nation treatment) as they determine to be appropriate. Article XXIII indicates that GATT uses a political rather than a legal approach to resolve disputes.[24] GATT does not provide legal sanctions because it is a system of reciprocal rights and obligations that are to be maintained in balance.[25] The main objective of the International Trade Organization, of which GATT was to be a portion, was to remove or soften those elements of a conventional jurisprudence that

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18. Jackson, *supra* note 10, at 273-74.

19. *Id.* at 290-91. The Agreement was proclaimed by Presidential Proclamation No. 2761A, 61 Stat. 1103 (1947). Subsequent proclamations have followed.

20. Article I of GATT reads, in part: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

21. J. JACKSON, *supra* note 7, at 270. Exceptions to most-favored-nation treatment are specifically enumerated in the various articles of GATT, *e.g.*, articles XX and XXI (security exceptions), article XIV (quantitative restrictions in case of balance of payments difficulties) and article XXIV (customs unions, free trade areas and certain cases of frontier traffic and contiguous territory).

22. For a discussion of article XXIII see K. DAM, *supra* note 7, at 351-75; J. JACKSON, *supra* note 7, at 163-89.

23. When used in all capitals, this term refers to the CONTRACTING PARTIES acting jointly under authorization of article XXV(1) or other clauses of GATT. Otherwise, "contracting parties" refers to the signatories of GATT individually.

24. K. DAM, *supra* note 7, at 351-52.

25. *Id.* at 352.

lead to direct confrontation.[26] GATT created formal legal structures, but the extent to which these structures operate in a given situation will vary according to the prevailing community sentiment.[27] Failure to respect a tariff concession, therefore, is not "illegal," but is viewed as an event giving the affected party the right, subject to the approval of the CONTRACTING PARTIES, to suspend reciprocal concessions.[28] GATT, however, discourages retaliation by providing procedural limitations in article XXIII.[29] Alternative procedures, such as article XXVIII negotiations, also are available for dispute resolution before the article XXIII stage is reached.[30] In addition to the authority to withdraw concessions under the applicable provisions of GATT, section 252(c) of the Trade Expansion Act of 1962[31] permits the President to suspend, withdraw or prevent the application of any trade agreement concessions accruing to the products of a country or instrumentality maintaining unreasonable import restrictions. Although the language of section 252(c) suggests that most-favored-nation treatment may not be applicable, section 251[32] states that most-favored-nation treatment shall be applied except as otherwise provided in the subchapter. Furthermore, section 252(c) states that the President may, "having due regard for the international obligations of the United States"[33] suspend, withdraw or prevent the application of the concessions. Therefore, the application of most-favored-nation treatment under section 252(c) in many cases will depend on the interpretation of a specific international obligation.

In the instant case, the court found that article XXVIII(3) of GATT requires the application of most-favored-nation treatment. The court stated that the most-favored-nation clause, embodied in article I and numerous other articles of the Agreement, furthers one of the primary purposes of GATT as stated in the preamble—the elimination of discriminatory treatment in international commerce. Since exceptions to this principle are delineated clearly in GATT, the court reasoned that the absence of such language indicated that article XXVIII(3) was not meant to be one of the exceptions. In addition, the court relied on the history of the GATT proceedings, which indicated that the

26. Hudec, *The GATT's Legal System: A Diplomat's Jurisprudence,* 4 J. WORLD TRADE L. 615, 629 (1970).
27. *Id.* at 665.
28. K. DAM, *supra* note 7, at 352.
29. *Id.*
30. *Id.* at 353.
31. 19 U.S.C. § 1882(c) (1970). *See* note 5 *supra.*
32. 19 U.S.C. § 1881 (1970).
33. 19 U.S.C. § 1882(c) (1970).

framers of GATT intended most-favored-nation treatment to apply to article XXVIII(3). Furthermore, the court found that most-favored-nation treatment under section 252(c) of the Trade Expansion Act of 1962 would not be inconsistent with the purposes of the Act.[34] The court noted that the legislative history of the Act indicated that the phrase "having due regard for the international obligations of the United States" barred any indiscriminate breach of most-favored-nation treaties. The court then considered the legislative purpose of the Act, which is to provide the President with strong measures to combat foreign trade discrimination. Since Presidential Proclamation No. 3564 focused on the instrumentality maintaining the unreasonable import restrictions, *i.e.* the EEC, the court concluded that the President had complied with the intent of Congress and had adhered to international obligations of the United States. Therefore, the court held that the President had not exceeded his authority under section 252(c) by issuing Proclamation No. 3564.

The court's conclusion that section 252(c) of the Trade Expansion Act of 1962 authorizes most-favored-nation treatment in the instant case is reasonable in light of the congressional delegation authorizing the President to enter trade agreements.[35] Congress merely has provided the President with the necessary powers to insure that the purposes of the agreement are fulfilled. Moreover, since Congress has the power to terminate any of these trade agreements by enacting subsequent contradictory legislation,[36] the court properly concluded that the phrase "having due regard for the international obligations of the United States" indicates that Congress did not intend to abrogate any of the existing agreements. Therefore, in resolving an apparent conflict between section 252(c) and a prior international obligation, the courts should examine the agreement in question. The court, in accordance with the general principle of determining the intent of the

34. The purposes are listed in 19 U.S.C. § 1801: "(1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce; (2) to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world; and (3) to prevent Communist economic penetration."

35. Congress allowed this authority to lapse in 1967. *See* note 12 *supra.* Section 252(c), however, was not altered. The failure to renew the President's power to enter foreign trade agreements, therefore, should not affect an interpretation of § 252(c).

36. *See* Head Money Cases, 112 U.S. 580 (1884). *See also* United States v. Rathjen Bros., 137 F.2d 103 (C.C.P.A. 1943).

parties,[37] placed great weight on the history of the negotiations. Strong policy arguments support the holding of the court. Under article XXVIII(1) negotiations may be initiated between the applicant contracting party and the party with whom the concession was originally negotiated. Third parties also may have benefited from this concession through the operation of the most-favored-nation clause when the concession was negotiated. Although this benefit may have been of marginal value to the third party at the time of negotiation, that party may take part in the negotiations if it subsequently has developed a substantial interest in the concession.[38] This procedure indicates that the third party may enter the negotiations because the most-favored-nation clause would operate to suspend the benefit of the concession to that party. As the Government noted in its brief, there is little reason to continue granting Spain a concession gained through most-favored-nation treatment after the original concession has been withdrawn.[39] Significantly, Spain has not brought any action under article XXIII. The instant case also raises the broader question of the application of GATT's jurisprudence in domestic courts.[40] The advantage of GATT's flexible approach to dispute resolution is the possibility for growth and development. The obvious disadvantage is the necessary transition from GATT as an international system to GATT as domestic law in United States courts. In future cases the courts may have to resolve less clearly defined issues than the instant one. If the CONTRACTING PARTIES have resolved the issue, that decision will be binding on the courts. If the courts must resolve an issue before the CONTRACTING PARTIES do so, however, the respective determinations may conflict since the courts make legal decisions and the CONTRACTING PARTIES render political decisions. The issue presented is thus analogous to a "political question." As the Supreme Court noted in *Baker v. Carr*,[41] political questions are basically a function of the separation of powers.[42] Many questions concerning foreign relations demand a single-voiced statement of the United States position.[43] A judicial ruling on an issue relating to foreign affairs may prove embarrassing to the executive, if the

37. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 146-47 (1965).

38. GATT, art. XXIII.

39. 462 F.2d at 561.

40. *See* notes 26 & 27 *supra* and accompanying text.

41. 369 U.S. 186 (1962).

42. 369 U.S. at 210.

43. *See* 369 U.S. at 211.

executive subsequently advocates a different position on the same issue in an international decision-making process. One solution to this dilemma would be to characterize an interpretation of GATT as a nonjusticiable political question. A more viable solution would be to treat the executive's interpretation as authoritative.[44] The latter course would allow the judiciary to function in accordance with its responsibilities under article III of the Constitution, but also would permit the executive to conduct foreign affairs effectively.[45]

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44. *See* Cheatham & Maier, *Private International Law and Its Sources,* 22 VAND. L. REV. 27, 79 (1968).

45. This approach is essentially the one taken by the courts in the area of sovereign immunity. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943). For a general discussion of these cases see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 57-59 (1972).