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Recent Decisions

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RECENT DECISIONS

ACT OF STATE DOCTRINE—ACT OF STATE DOCTRINE DOES NOT PRECLUDE ADJUDICATION OF ANTITRUST CLAIM INVOLVING ALLEGED FRAUDULENT PROCUREMENT OF FOREIGN PATENTS

I. FACTS AND HOLDING

Plaintiff,[1] a United States manufacturer of embossed vinyl flooring and a licensee of defendant's[2] United States patents,[3] brought an antitrust suit against defendant for alleged anticompetitive activities[4] occurring in foreign countries. Plaintiff asserted that defendant had made representations[5] that would be fraudulent under United States law in order to obtain foreign patents. According to plaintiff, these foreign patents violated United States antitrust law because the fraudulent procurement of patents may constitute an antitrust violation under § 2 of the Sherman Act if the other sub-

1. Mannington Mills, Inc.

2. Congoleum Corporation.

3. Defendant holds patents on chemically embossed vinyl flooring in twenty-six foreign countries. Plaintiff previously claimed similar rights under defendant's foreign patents; however, the court ruled against such rights in a companion case. Mannington Mills, Inc. v. Congoleum Industries, Inc., 197 U.S. Pat. Q. 145 (D.N.J. 1977). Subsequently, defendant filed patent infringement suits against plaintiff in Australia, Canada, Japan, and New Zealand.

4. The plaintiff claims that defendant's licensing practices in foreign markets violated § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (1976), which provides the following:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, or monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

5. Plaintiff's complaint listed four general categories of fraudulent representations:

> 1. False statements about the reactions and performance of some of the chemical components of the vinyl flooring;
> 2. Misrepresentation of test data;
> 3. Suppression of information critical to the practice of the invention;
> 4. Misleading statements about the status and contents of the United States patent applications.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1290 (3d Cir. 1979).

stantive elements of the violation are present.[6] Plaintiff claimed that defendant's enforcement of the foreign patents both restricted the foreign export business of plaintiff and other United States competitors and demonstrated defendant's intent to monopolize.[7] Defendant, claiming that the act of state doctrine prohibited the court from enjoining defendant's enforcement of foreign patents in other countries, brought a motion to dismiss.[8] The United States District Court for the District of New Jersey granted the motion to dismiss on the grounds that the validity of foreign patents must be determined by the courts of the issuing countries and that United States persons need not apply for foreign patents in a manner other than required by foreign law.[9] On appeal to the Court of Appeals for the Third Circuit, *reversed and remanded.*[10] *Held:* The issuance of patents by a foreign government is a ministerial activity that does not concern the executive branch in its conduct of foreign relations and does not force defendant to exclude plaintiff from foreign markets; therefore, neither the act of state doctrine nor its correlative, foreign compulsion, bars the court's consideration of the antitrust claim. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

II. LEGAL BACKGROUND

Underhill v. Hernandez[11] provides the classical statement of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[12]

6. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965). *See also* note 4 *supra.*

7. 595 F.2d at 1298. In addition, plaintiff brought a treaty violation claim and a pendent state unfair competition claim.

8. Defendant also claimed that no relief could be granted on the alleged treaty violations since the treaties established no private right of action. Additionally, defendant requested dismissal of the state claim for lack of a federal question if the court dismissed the other two claims.

9. 595 F.2d at 1290.

10. The instant court affirmed the district court's dismissal of the treaty violation claim but reversed the dismissal of the pendent state claim.

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

12. *Id.* at 252.

The act of state doctrine does not operate to deprive a court of jurisdiction,[13] instead, it only requires that a court refrain from questioning the validity of a sovereign's acts.[14] Thus, the United States court applies the foreign state's law as a rule of decision and considers the sovereign's act valid under that nation's law.[15] Courts based the act of state doctrine on two different theories. The earlier cases explained the doctrine in terms of preservation of international comity,[16] while the more recent cases emphasized separation of powers among the branches of federal government.[17] The earliest application of the act of state doctrine in an antitrust case is found in *American Banana Co. v. United Fruit Co.*[18] In that case plaintiff claimed that defendant attempted to monopolize the banana trade in violation of the Sherman Antitrust Act. In carrying out this purpose, defendant allegedly induced the Costa Rican government to seize part of plaintiff's operations within its country. The Supreme Court held that the appropriation was an act by a foregn sovereign accomplished within its borders and, although allegedly induced by defendant, was not within the scope of the Sherman Act.[19] The Court stated "that it is a contradiction in terms to say that within [the foreign power's] jurisdiction it is unlawful to persuade a foreign power to bring about a result that it declares by its conduct to be desirable and proper . . . . [The sovereign] makes the persuasion lawful by its own act."[20] Although later cases have not overruled *American Banana,* they have limited its scope; it is now clear that the Sherman Act applies extraterritorially.[21] In

13. *See* Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918).

14. Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns,* 77 COL. L. REV. 1247, 1255 (1977).

15. *Id.* n.36.

16. *See, e.g.,* Oetjen v. Central Leather Co., 246 U.S. 297 (1819); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). In *Oetjen,* the court states: "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency." 246 U.S. at 303-04.

17. *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In *Sabbatino,* the Supreme Court stated that neither international law nor the United States Constitution required application of the doctrine but that its necessity was derived from "the basic relationships between branches of government in a system of separation of powers." *Id.* at 421, 423.

18. 213 U.S. 347 (1909).

19. *Id.* at 357.

20. *Id.* at 358.

21. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S.

United States v. Sisal Sales Corp.,[22] plaintiff challenged favorable discriminatory laws that defendants had secured from the Mexican and Yucatan governments in furtherance of an alleged combination and conspiracy to monopolize the importation and sale of sisal in the United States. The Court held that the *American Banana* doctrine did not control *Sisal Sales* because the parties entered into the conspiracy within the United States and effectuated it by acts done therein, not merely by acts of a foreign government instigated by defendants.[23] The Supreme Court again refused to apply the *American Banana* holding in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[24] in which plaintiff alleged that defendants had conspired to monopolize trade in ferrovanadium and vanadium oxide in violation of the Sherman Act. One defendant's wholly owned Canadian subsidiary had been appointed by the Canadian government as its exclusive wartime agent for purchasing and allocating vanadium for industries in Canada. Plaintiff claimed that this defendant had violated antitrust law by influencing its subsidiary to facilitate the conspiracy by eliminating plaintiff from the Canadian ferrovanadium market. The liability of the Canadian government's agent was not at issue since the subsidiary was not a party.[25] The court held that the Canadian law permitting the subsidiary's acts did not provide a defense since the subsidiary's acts were not approved or required by the Canadian government.[26] Similarly, *United States v. The Watchmakers of Switzerland Information Center, Inc.*,[27] in which Swiss legislation aided an alleged conspiracy by Swiss and American watchmakers to restrain trade, held that the foreign government's approval did not shield defendants from liability. Although the court did not discuss the act of state doctrine, it stated that only "direct foreign governmental action compelling the defen-

984 (1977); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

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

23. *Id.* at 275-76.

24. 370 U.S. 690 (1962).

25. The court examined the relationship between the acts of defendant and the foreign government and determined that these acts were distinguishable. *Id.*

26. *Id.* at 706-07. "There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme." *Id.* at 707.

27. 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962), *order modified,* 1965 Trade Cases ¶ 70,352 (S.D.N.Y. 1965).

dants' activities"[28] could deprive the court of jurisdiction. In contrast, the district court in *Interamerican Refining Corporation v. Texas Maracaibo, Inc.*[29] found that defendants' alleged antitrust violations resulted from real compulsion by the foreign government.[30] Plaintiff claimed that even if compulsion is a defense in an antitrust case, the compulsion must be valid under the foreign nation's law. The court, however, applied the act of state doctrine and refused to inquire into the validity of the government action under Venezuelan law.[31] In another antitrust suit, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*,[32] the court also invoked the doctrine. In *Occidental,* plaintiff alleged that defendants had conspired with Great Britain, Iran, and two Trucial States[33] to deprive plaintiff of the richest part of its offshore oil concession from one of the Trucial States.[34] The court found that the act of state doctrine precluded adjudication because it would have been necessary to inquire into the validity of the foreign state's decree.[35] Con-

28. *Id.* at 77,457.

29. 307 F. Supp. 1291 (D. Del. 1970). Plaintiff, a United States company, claimed that its United States suppliers of Venezuelan oil had engaged in a boycott prohibited by the Sherman and Clayton Acts. Defendants complied with the Venezuelan government's prohibition of the sale of Venezuelan oil to plaintiff. The government imposed this ban because two of plaintiff's officials were Venezuelan citizens who opposed the government in power.

30. After discussing the *Sisal Sales* and *Continental Ore* cases, the court stated: "Nothing in the materials before the Court indicates that defendants either procured the Venezuelan order or that they acted voluntarily pursuant to a delegation of authority to control the oil industry. The narrow question for decision is the availability of genuine compulsion by a foreign sovereign as defense." *Id.* at 1297.

31. In finding the doctrine applicable in antitrust cases, the court noted: "The reasons of policy which support the doctrine would hardly be served by limiting it to acts of expropriation." *Id.* at 1299.

32. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).

33. Trucial State Sharjah and Trucial State Umm al Qaywayn.

34. Umm al Qaywayn.

35. Plaintiff contended that this doctrine was no longer valid after the Sabbatino Amendment, 22 U.S.C. § 2370(3)(2) (1976), which Congress passed after the *Sabbatino* decision. The court stated: "In intent and in actual effect, then, the statute 'reverses'—in the absence of a request by the executive—the specific holding of the *Sabbatino* case . . . ." 331 F. Supp. at 111. *Sabbatino* held that the courts would not examine the validity of a United States-recognized foreign government's expropriation of property within its own territory in the absence of a treaty, even if the complaint alleges a violation of customary international law. 376 U.S. at 428. The *Occidental* court further stated:

versely, in *Timberlane Lumber Co. v. Bank of America,*[36] the Ninth Circuit vacated the lower court's dismissal that had been based on the act of state doctrine. The court found that the Honduran court order, allegedly obtained by defendants in furtherance of their attempt to control the Honduran lumber trade,[37] was not significant to invoke the act of state doctrine.[38] In deciding whether to apply antitrust laws when the acts of a foreign sovereign were involved, the court weighed the United States' interests in enforcing its antitrust laws against foreign policy interests.[39] The Second Circuit came to the opposite conclusion in the antitrust suit of *Hunt v. Mobil Oil Corp.*[40] In *Hunt,* plaintiff, an independent oil producer, claimed that the seven major oil companies had conspired to protect their Persian Gulf fields by sacrificing their Libyan oil holdings. As a result of an agreement between the parties, plaintiff claimed that defendants' actions placed him in a difficult bargaining position with Libya that provoked nationalization of his assets by that government.[41] Because the court would have had to rule on the motivation behind Libya's nationalization of plain-

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> Congress has thus legislated a judicial 'presumption' with respect to the foreign relations demands of a limited category of act of state cases. . . . In any event, this exception is by its terms extremely narrow, and in all other cases the act of state doctrine remains the law of the land.

331 F. Supp. at 112.

36. 549 F.2d 597 (9th Cir. 1976).

37. In enforcing claims against plaintiff's Honduran predecessor, defendants obtained court ordered embargoes on property of plaintiff's Honduran subsidiaries. The Honduran court appointed an interventor to prevent diminution of the embargoed property, and plaintiff claimed that this interventor was on the payroll of one of the defendants. *Id.* at 604-05.

38. The court states as follows: "It is apparent that the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." *Id.* at 606.

39. The factors considered by the court in this balancing process included the following:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of the corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

Id. at 614.

40. 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977).

41. *Id.* at 76-78.

tiff's oil fields, the court held that "the political act complained of here was clearly within the act of state doctrine and . . . the claim is non-justiciable."[42] Thus, there is a split of opinion concerning the applicability of the act of state doctrine in antitrust cases.

III. The Instant Opinion

The Third Circuit held that it had subject matter jurisdiction under the Sherman Act since the defendant's actions abroad had a substantial effect on United States foreign commerce. The litigation involved two United States corporations contesting alleged foreign antitrust activity that harmed the export business of one of the corporations; thus, the court found a sufficient effect in the United States.[43] The court then addressed the act of state doctrine, holding that it did not bar adjudication of plaintiff's claims. The instant court cautioned that preclusion of a claim should not be imposed lightly. In reaching its conclusion that the act of state doctrine was inapplicable, the court stated that it must analyze the nature of the conduct in question and the effect on the parties, in addition to determining the sovereign's role. The court noted a difference between the confiscation cases, in which the act of state doctrine was first applied, and antitrust cases, finding that the latter involved a public interest as well as private rights. Next, the court distinguished real compulsion by a foreign sovereign[44] from both a party's solicitation of governmental activity[45] and mere gov-

42. *Id.* at 73.

43. The court relied upon the "intended effects" test:

> In oft-quoted language, Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa),* 148 F.2d 416, 443-45 (2d Cir. 1945), concluded that although Congress did not intend the Sherman Act to prohibit conduct having no effect in the United States, it did intend the Act to reach conduct having consequences within this country—even where the parties concerned had no allegiance to the United States—if the conduct is intended to and actually does have an effect upon United States imports or exports. This wide-reaching "intended effects" test has been cited with approval by the Supreme Court.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-92 (3d Cir. 1979).

44. *See* the previous discussion of the Interamerican Refining Corp. litigation, notes 29-31 & accompanying text *supra.*

45. *See, e.g.,* United States v. Sisal Sales Corp., 274 U.S. 268 (1927). *See also* notes 22-23 and accompanying text *supra.*

ernmental approval,[46] holding only the former to be a defense in an antitrust suit. Examining the issuance of patents by foreign governments, the court found that these sovereigns did not require defendant to exclude plaintiff from the foreign markets. The court also stated that this case did not fall within the more traditional applications of the act of state doctrine because the granting of patents would not concern the executive branch in conducting foreign relations. The granting of patents for floor coverings is a ministerial activity, which is not the type of sovereign action contemplated by either the act of state doctrine or foreign compulsion.[47] Next, the court addressed the question of whether jurisdiction should be exercised. In addressing this issue, the court considered the direct and ripple effects that a judgment against defendant would have abroad. In its analysis, the court in the instant case applied a balancing process similar to that in *Timberlane Lumber Co.*[48] The instant court, however, established a slightly modified list of factors[49] to be considered. Since the record was

46. *See, e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). *See also* notes 24-26 and accompanying text *supra.*

47. The instant court distinguishes between the act of state doctrine and foreign compulsion, describing the latter as a correlative of the former. *See also* Timberlane Lumber Co., 549 F.2d at 606. One author in this field describes foreign government compulsion as an offshoot of the act of state doctrine, although it developed independently. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 82 (1973). Although the two concepts both involve actions of a foreign government, there is a valid distinction. Under the act of state doctrine the defendant is not liable because the government committed the act alleged to be illegal. In comparison, the defendant is not liable under the foreign compulsion defense because the foreign government forced the defendant to commit the allegedly illegal act. *Sovereign Compulsion Defense in Antitrust Litigation: New Life for the Act of State Doctrine?,* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 100 (1978). The foreign compulsion defense also is related to the state action defense in domestic antitrust cases. *Id.*; *see also* Parker v. Brown, 317 U.S. 341 (1943).

48. *See* notes 36-39 and accompanying text *supra.* The instant court stated that it was in substantial agreement with the *Timberlane* case.

49. Among the factors to be considered are the degree of conflict with foreign law or policy, the nationality of the parties, the relative importance of the alleged violation of conduct here compared to that abroad, the availability of a remedy abroad and the pendency of litigation there, the existence of intent to harm or affect American commerce and its foreseeability, and the possible effect upon foreign relations if the court exercises jurisdiction and grants relief. Additionally, the court considered the following: whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries if relief is granted; whether the court can make

factually insufficient to permit an application of these factors, the Third Circuit remanded the case to district court for further proceedings.

IV. COMMENT

The trend in antitrust cases, as in other areas of law, is toward a more limited application of the act of state doctrine. The mere fact that a foreign government is involved in the acts complained of does not create immunity for defendants in antitrust suits. Through the instant decision, the Third Circuit joined the Ninth Circuit[50] in the development of a rational means of applying antitrust law to cases involving acts of foreign countries. The instant court applied the following three-part analysis: (1) whether the court has subject matter jurisdiction; (2) whether the act of state doctrine is applicable to preclude adjudication; and (3) whether there are other considerations to influence the court's decision to exercise jurisdiction. The court, however, limited its use of the act of state doctrine and the foreign compulsion defense. By applying the above analysis, the court separates the act of state doctrine from a decision not to adjudicate based upon policy considerations. Thus, a court using this approach would address the act of state issue but would refuse to adjudicate only if the foreign sovereign's act is significant in international relations: a court would not apply the act of state doctrine to ministerial or minor acts of the foreign sovereign. If a court concludes that the doctrine is not controlling, it will then balance the competing antitrust and foreign interests. Although the three circuits[51] that recently considered the act of state doctrine in antitrust cases reached different results concerning the applicability of the doctrine, the inconsistency may be more apparent than real. In *Hunt,* the Second Circuit refused to examine the foreign sovereign's motivation for nationalizing the

its order effective; whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and whether a treaty with the affected nations has addressed the issue. Mannington Mills, Inc., 595 F.2d at 1297-1298. *Cf.,* Timberlane Lumber Co., 549 F.2d at 614. The concurring opinion disagrees with the application of a balancing process at the jurisdictional stage, preferring to consider such factors when fashioning a remedy. 595 F.2d at 1303.

50. Timberlane Lumber Co., 549 F.2d at 597.

51. The three circuits are as follows: (1) the Second Circuit in *Hunt,* (2) the Third Circuit in the instant case, and (3) the Ninth Circuit in *Timberlane.*

plaintiff's assets.[52] The court applied the act of state doctrine and did not use the ad hoc weighing process developed by the Third and Ninth[53] Circuits. In both the instant case and *Timberlane,* however, the courts first found that the acts[54] of the sovereigns were relatively insignificant[55] and then applied the weighing process. Although *Hunt* did not inquire into the foreign government's motivation, it found that both the United States and Libyan governments considered the action political.[56] Thus, application of the instant court's analysis to *Hunt* would probably have yielded the same result[57] since in the second step of the analysis the court addresses the significance of the sovereign's act. If the acts are significant, as in *Hunt,* the court applies the doctrine, thereby never reaching the final step. Such a three-part analysis provides a clearer explanation of the court's decision and a workable approach to the sensitive area of antitrust cases involving foreign sovereigns' acts. Through this balancing process, the court may still limit its jurisdiction without distorting the act of state doctrine.

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52. *See* notes 40-42 and accompanying text *supra.*

53. The Ninth Circuit bases its "evaluation and balancing of the relevant considerations in each case" on the Supreme Court's approach in *Continental Ore.* Timberlane Lumber Co., 549 F.2d at 614.

54. The issuance of patents and a court order, respectively, were the acts involved.

55. *See* notes 36-39, 48 and accompanying text *supra.*

56. 550 F.2d at 73.

57. *See* Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, supra* note 14, at 1264.

ADMIRALTY—DAMAGES FOR WRONGFUL DEATH ON THE HIGH SEAS ARE LIMITED TO PECUNIARY LOSS

I. FACTS AND HOLDING

Plaintiffs, widows of decedents killed when defendant's helicopter crashed on the high seas en route from defendant's offshore oil drilling platform, brought a wrongful death action in their representative capacities, alleging defendant's negligence. Plaintiffs sought damages for pecuniary loss under the Death on High Seas Act (DOHSA)[1] and damages for loss of society under general maritime law.[2] The district court, accepting admiralty jurisdiction,[3] found defendant negligent and awarded pecuniary damages.[4] The court computed loss of society for two of the plaintiffs at $100,000 and $155,000 respectively but held that such loss was not compensable under law.[5] The Fifth Circuit Court of Appeals reversed, holding that plaintiffs were entitled to claim damages for loss of society under general maritime law.[6] On certiorari to the Supreme Court, *reversed. Held:* The measure of damages in an action for wrongful death on the high seas is limited to pecuniary loss by DOHSA and thus damages for loss of society under general maritime law cannot be recovered. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978).

II. LEGAL BACKGROUND

In *The Harrisburg,* the Supreme Court held that no federal wrongful death action existed under general maritime law. Recovery for death could be based only on state or federal wrongful death statutes.[7] Thereafter, all actions for wrongful death occurring at

1. 46 U.S.C. §§ 761-768 (1976).
2. Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164, 1174 (W.D. La. 1973).
3. Admiralty jurisdiction was based on the conclusion that Mobil's helicopter was the functional equivalent of a crewboat. *Id.* at 1167.
4. The two families' pecuniary losses were valued at $362,297 and $163,400 respectively. Higginbotham v. Mobil Oil Corp., 360 F. Supp. 1140 (W.D. La. 1973).
5. *Id.* at 1144-48, 1150. The district court's holding that loss of society was not compensable was rendered prior to Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), which allowed recovery for loss of society in a general maritime wrongful death action.
6. Higginbotham v. Mobil Oil Corp., 545 F.2d 422 (5th Cir. 1977).
7. 119 U.S. 199 (1886).

sea were based on state statutes.[8] In 1920, Congress passed DOHSA, which created an action for any death "caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, . . . [Territory or dependency]."[9] Damages under DOHSA were limited to pecuniary loss.[10] Since DOHSA applied only to the high seas, recovery for death in territorial waters was still governed by state statutes. In 1970, a unanimous Supreme Court overruled *The Harrisburg* in *Moragne v. State Marine Lines*[11] and held that there was a federal remedy for wrongful death under the general maritime law.[12] The Court stated that the creation of a federal remedy would promote uniformity of federal admiralty law by eliminating "discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."[13] The Court rejected a contention that DOHSA manifested a congressional intent to preclude a federal remedy in territorial waters. The Court found that Congress had not intended DOHSA to "foreclos[e] any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law."[14] While *Moragne* involved a death in territorial waters, the

8. G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 359 (2d ed. 1975); *see* The Hamilton, 207 U.S. 398 (1907).

9. 46 U.S.C. § 761 (1976). Section 761 authorizes "a suit for damages in the district courts of the United States, in admiralty . . . ." This has been interpreted as giving federal courts exclusive jurisdiction over DOHSA suits. *See* Devlin v. Flying Tiger Lines, Inc., 220 F. Supp. 924 (S.D.N.Y. 1963).

10. "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . . ." 46 U.S.C. § 762 (1976).

11. 398 U.S. 375 (1970).

12. *Id.* at 409. After a historical analysis of the reasoning behind *The Harrisburg*, the Court concluded that *The Harrisburg* "rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind . . . ." *Id.* at 404.

13. *Id.* at 401. Specifically, the Court cited three anomalies that existed under the law at that time: (1) under some state statutes, conduct which violated federal law created liability for injuries but not for death; (2) claims based on unseaworthiness were remedied under DOHSA but not under state statutes which excluded unseaworthiness claims (thus creating a discrepancy in remedies based on whether a decedent died on the high seas or in territorial waters); (3) under some state statutes, seamen were denied remedy for unseaworthiness within territorial waters while longshoremen had a remedy for unseaworthiness based on the same statute. *Id.* at 395-96.

14. *Id.* at 400. *See* H.R. REP. No. 674, 66th Cong., 2d Sess. 3, 4 (1920); S. REP. No. 216, 66th Cong., 1st Sess. 3, 4 (1919).

Moragne court did not imply that the newly created federal remedy was limited to territorial waters. *Moragne* left the issue of measuring damages under the new remedy to be resolved by lower courts.[15] In *Sea-Land Services, Inc. v. Gaudet,*[16] a divided Supreme Court resolved the issue of damages by holding that plaintiffs in a *Moragne* type action could recover damages for pecuniary loss, loss of society and funeral expenses.[17] By allowing damages for loss of society, the Court aligned the maritime wrongful death remedy with a majority of state wrongful death statutes.[18] Like *Moragne, Gaudet* involved an accident in territorial waters. Yet the site of the accident did not appear to be relevant to the Court's analysis. In fact, the *Gaudet* majority inferred that a *Moragne* action could extend to the high seas and supplement the remedy provided by DOHSA.[19] The applicability of *Moragne* to the high seas was subsequently considered by the lower courts and resulted in disagreement among the First and Fifth Circuits. In *Barbe v. Drummond,*[20] the First Circuit held that funeral expenses were not compensable in an action for wrongful death on the high seas. The court recognized that *Gaudet* allowed recovery of funeral expenses in a *Moragne* action but held that the pecuniary loss standard of DOHSA controlled on the high seas.[21] The court reasoned that *Moragne* was intended to provide an action where one did not previously exist, *i.e.,* in territorial waters, and not to supplement

15. 398 U.S. at 408.

16. 414 U.S. 573 (1974).

17. *Id.* at 584.

18. *Id.* at 580-81. The dissent argued that since DOSHA and the Jones Act, 46 U.S.C. § 688 *et seq.* (1976) (allowing seamen to sue shipowners in negligence), allow only pecuniary loss, those acts should be the model for damages allowed in a *Moragne* action. The dissent cited with approval lower court cases which had limited *Moragne* damages to pecuniary loss. *Id.* at 606-07 (Powell, J., dissenting); *see, e.g.,* Petition of Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971).

19. After citing *Moragne's* interpretation of DOHSA as not "foreclosing any nonstatutory federal remedies," the *Gaudet* majority stated that "[n]othing in the legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional elements of damages for a maritime wrongful death remedy which this Court might deem 'appropriate to effectuate the policies of general maritime law.'" 414 U.S. at 588 n.22.

20. 507 F.2d 794 (1st Cir. 1974).

21. *Id.* at 801. Although DOHSA does not allow recovery for pain and suffering by the decedent, the *Barbe* court allowed such recovery by holding that there was a federal survival action under general maritime law which allowed recovery for pain and suffering without conflicting with DOHSA. *Id.* at 799-800.

DOHSA which already provided a remedy on the high seas.[22] Accordingly, the court refused to ignore the pecuniary loss limitation of DOHSA in order to allow recovery under general maritime law.[23] In *Law v. Sea Drilling Corp.*,[24] the Fifth Circuit rejected *Barbe* and held that a *Moragne* action was available for death on any navigable waters.[25] Noting that the *Gaudet* majority placed no emphasis on the waters where death occurred, the Fifth Circuit took the expansive view that *Gaudet* had "abrogated the pecuniary loss standard of DOHSA."[26] The court felt that failure to extend *Moragne* to the high seas would create discrepancies in recovery which *Moragne* was intended to eliminate. Specifically, the court noted that a possible discrepancy would arise if a plaintiff should elect a common law remedy in lieu of admiralty jurisdiction, as permitted by the Savings to Suitors Clause.[27] In order to resolve the disagreement between the Circuits, the Supreme Court granted certiorari in the instant case.

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22. *Id.* at 801.

23. *Id.*

24. 523 F.2d 793 (5th Cir. 1975).

25. *Id.* at 797-98.

26. *Id.* at 796. The Court also drew support from GILMORE & BLACK:

> The *Moragne* remedy covers deaths within territorial waters as well as deaths on the high seas . . . . [U]nder *Gaudet,* indeed, all the state statutes seem to have joined the federal statutes on the scrap heap. The maritime law death remedy, as explicated in *Gaudet,* is now more comprehensive and provides for a greater recovery than had previously been available under the federal death statutes or under most state death statutes. *Id.* at 796 (G. GILMORE & C. BLACK, *supra* note 8, at 368-70).

27. 28 U.S.C. § 1333 (1976), provides that: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty jurisdiction, saving to suitors in all cases all remedies to which they are otherwise entitled."

The court in *Law* stated as follows:

> Under the *Barbe* holding a claimant under substantive maritime law who brought suit at law . . . under the Savings to Suitors Clause would be entitled to the full panoply of recovery under *Moragne* while those unfortunates who could not meet the requisites of diversity jurisdiction or get personal jurisdiction in either the state or federal court, would be restricted to the DOHSA pecuniary loss. This is because, as Mr. Justice Harlan suggested in *Moragne,* the widely assumed exclusivity of DOHSA does not mean that it is the only remedy. What it does mean is that DOHSA suits must be brought in admiralty—"a suit for damages in the district court of the United States, in admiralty . . . ." 523 F.2d at 796-97.

III. The Instant Opinion

In the instant case, the Supreme Court acknowledged that its opinion in *Gaudet* had not placed any emphasis on the waters in which death occurred.[28] The Court concluded, however, that the *Gaudet* holding was applicable only to territorial waters.[29] The Court stated that damages on the high seas were limited to the pecuniary losses allowed by DOHSA.[30] The Court rejected the arguments that admiralty courts were free to supplement maritime statutes and that it was necessary to supplement DOHSA in order to preserve the uniformity of maritime law.[31] In addition, the Court reasoned that making DOHSA the exclusive remedy on the high seas posed little threat to uniformity.[32] The Court stated, however, that even if damages differed greatly between territorial waters and the high seas, DOHSA could not be ignored for uniformity's sake.[33] Conceding that a comprehensive maritime code has never been enacted by Congress, the Court maintained that when Congress has legislated in a specific area, the Court cannot supplement the legislation in such a manner that it is meaningless.[34] Although the *Moragne* action was intended to supplement federal statutory remedies, the Court found that *Moragne* was dependent on the conclusion that Congress limited DOHSA to the high seas in order to preserve supplemental remedies in territorial waters.[35] The Court stated that Congress did not intend to encourage nonpecuniary supplements by limiting DOHSA recovery to pecuniary loss.[36] Accordingly, the Court refused to substitute its views for those expressed by Congress in DOHSA.

In a dissenting opinion, Justice Marshall, joined by Justice Blackmun, reiterated that neither *Moragne* nor *Gaudet* placed emphasis on the waters in which death occurred.[37] The dissent noted that the majority's narrow view of *Gaudet* made recovery for

28. 436 U.S. at 622-23.
29. *Id.* at 623.
30. *Id.*
31. *Id.* at 624.
32. "The only disparity that concerns us today is the differences between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land." *Id.* at 624 n.18.
33. *Id.* at 624.
34. *Id.* at 625.
35. *Id.*
36. *Id.*
37. *Id.* at 626 (Marshall, J., dissenting).

loss of society depend on how far the decedent was from shore.[38] Marshall viewed this anomaly as similar to those which *Moragne* was designed to eliminate.[39] Quoting from *Moragne,* Marshall criticized the majority's rule for "produc[ing] different results for breaches of duty in situations that cannot be differentiated in policy."[40] Marshall further criticized the majority's interpretation of the congressional intent behind DOHSA. Marshall reasoned that, since DOSHA was intended to remedy problems created by *The Harrisburg,* its remedial nature could not be construed as limiting recovery only to pencuniary loss.[41] Instead, Marshall suggested that Congress meant to ensure DOSHA plaintiffs a minimum recovery of pecuniary losses. According to Marshall, the majority's interpretation of the legislative history was inconsistent with *Moragne's* conclusion that DOHSA was not intended to foreclose any nonstatutory federal remedies.[42] By reading DOHSA as a response to pre-*Moragne* rather than post-*Moragne* law, Marshall concluded that Congress had no intent to preclude recovery beyond pecuniary loss.[43] Consequently, Marshall would have allowed recovery for loss of society in the instant case.

IV. COMMENT

The instant case marks a retreat by the Supreme Court from the recent trend of judicial reformation of maritime law begun by *Moragne.*[44] Under the instant case, the liberality of recovery embodied in *Moragne*[45] ceases to exist beyond three miles from shore. As noted by the dissent, the majority's basis for holding that Congress intended DOSHA to preclude recovery beyond pecuniary loss is questionable. Since DOHSA was enacted at a time when no federal action for wrongful death existed under general maritime

38. *Id.*

39. *Id.* at 627. Marshall specifically compared the majority's result to the second anomaly articulated in the *Moragne* opinion, contained at note 13, *supra.*

40. *Id.* at 627 (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405 (1970).

41. *Id.* at 628.

42. *Id.* at 629.

43. *Id.* at 630.

44. *See* G. GILMORE & C. BLACK, *supra* note 8, at 374.

45. "[I]t better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." 398 U.S. at 387 (quoting The Sea Gull, 21 F. Cas. 909 (C.C. Md. 1865) (No. 12,578).

law, it is doubtful that Congress was intending to preclude that which the Supreme Court had held to be nonexistent. In its historical context, DOHSA should be construed as a remedial statute providing a minimum recovery. Since the courts have been willing to supplement DOHSA with a general maritime survival action,[46] there is no compelling reason why the general maritime wrongful death action should not also supplement DOHSA. Under the majority's narrow reading of *Moragne* and *Gaudet,* congressional action will be necessary before the families of decedents who died on the high seas can recover for their loss of society. It is not clear whether the impact of the instant opinion can be circumvented by applying *Moragne* and *Gaudet* in a suit under the Savings to Suitors Clause. In *Moragne,* Justice Harlan suggested that, although federal courts have exclusive jurisdiction over DOHSA suits, if suit were brought in nonadmiralty court under the Savings to Suitors Clause, *Moragne* could be applied to the high seas.[47] However, since the instant Court rejected *Moragne* as a supplement to DOHSA in an admiralty court, it is likely that nonadmiralty courts would be forced to follow the instant Court's interpretation of DOHSA. Concerning deaths within territorial waters, the majority seems to affirm that plaintiffs in those cases can recover loss of society. This affirmation is significant since the instant majority is comprised primarily of the *Gaudet* dissenters.[48] Rather than adhering to their dissenting views in *Gaudet,*[49] the instant majority affirms *Gaudet* only as it applies to territorial waters.

Michael P. Coury

46. *See* discussion of Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974), at note 21, *supra.*

47. 398 U.S. at 400; *see* G. GILMORE & C. BLACK, *supra* note 8, at 368.

48. The instant majority was comprised of Chief Justice Burger and Justices Stevens, Stewart, White, Powell and Rehnquist. The *Gaudet* dissent was comprised of Chief Justice Burger and Justices Powell, Stewart and Rehnquist.

49. *See* Sea-Land Services v. Gaudet, 414 U.S. 573 (1973).

ANTITRUST—E.E.C. TREATY—JOINT VENTURE AGREEMENT THAT OPERATES TO PRECLUDE ENTRY INTO A GEOGRAPHIC MARKET IS PROHIBITED UNDER ARTICLE 85 OF THE E.E.C. TREATY

I. FACTS AND HOLDING

The Commission of the European Communities (Commission), in a proceeding under article 85 of the European Economic Community Treaty (E.E.C. Treaty)[1] considered the anticompetitive effects of a proposed joint venture agreement[2] between Wasag-Chemie Gmbh (WASAG), a West German manufacturer,[3] and Imperial Chemical Industries Ltd. (ICI), a United Kingdom manufacturer.[4] WASAG is the largest producer of blackpowder[5] in the Common Market. ICI is the major user and the only supplier of blackpowder in the United Kingdom.[6] Under the agreement ICI and WASAG would obtain joint and equal financial control of WANO Schwarzpulver & Co. Kunigunde KG (WANO), a blackpowder manufacturing plant presently wholly owned by WASAG.[7] The agreement committed ICI and WASAG to purchase blackpowder exclusively from WANO.[8] The agreement also provided that an

1. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as E.E.C. Treaty].

2. Regulation 17, article 4, 5 O.J. COMM. EUR. 204 (1962), requires that agreements falling within the description of article 85(1) of the E.E.C. Treaty, and in respect of which parties seek the application of article 85(3), be brought to the Commission's attention. *See* notes 18 & 19 *infra.* Upon notification, the Commission must hear the parties pursuant to Regulation 17, article 19, before determining whether the agreement can proceed.

3. Bohlen Industry AG, of which WASAG is a controlled subsidiary also signed the agreement.

4. The affected portion of the ICI enterprise was Nobel Explosive Co. Ltd., a controlled subsidiary of ICI.

5. Blackpowder is one of the oldest known explosives. It was used for blasting, for military purposes, and as a component in the manufacturing of fireworks, pyrotechnical devices, and safety fuses. The transport and storage of the product is subject to government regulation and licensing.

6. WASAG and ICI both produce a variety of products including chemicals and mechanical devices used in conjunction with explosives.

7. Pursuant to the agreement, ICI would purchase shares of stock and contribute additional capital in order to achieve joint and equal control of WANO. The agreement prohibited either party from taking unilateral action on any issue relating to blackpowder.

8. Under a 1974 letter of intent between the parties, ICI's subsidiary, Noble Explosive Co., would continue operating in its blackpowder plant until its customers' and its own needs could be transferred to the joint venture. After the transfer, the agreement required Nobel Explosive and WASAG to fulfill their

ICI subsidiary[9] would be the exclusive distributor for WANO's product in Great Britain and that WASAG would be the exclusive distributor in West Germany. WASAG and ICI contended that the agreements would not restrict competition in violation of Common Market regulations prohibiting agreements with anticompetitive effects[10] because even without the joint venture the British market for blackpowder would not be competitive. The parties argued that WANO is the only supplier capable of satisfying the United Kingdom's blackpowder requirements.[11] The Commission found that manufacturers in other Common Market countries who were willing and able to sell[12] in the British market would be precluded from competing by the joint venture agreement.[13] In addition, the Commission found that the proposed agreement would have an appreciable effect on competition because of the size and position of the companies involved.[14] Rejecting the parties' arguments that the benefits of the agreement[15] qualified it for exemption from the

total blackpowder requirements from the joint venture. Both parties agreed to assign all their assets related to the manufacture of blackpowder, including know-how, patents and goodwill, to the joint venture.

9. Nobel Explosive Co., Ltd.

10. Article 85(1) of the E.E.C. Treaty prohibits agreements between parties that would restrict competition in the Common Market. For text of article 85(1) *see* note 18 *infra.*

11. The parties argued that: (1) WANO was the only plant capable of supplying the quality of blackpowder necessary to meet British demands; (2) the United Kingdom Ministry of Defense required WANO to fulfull British requirements because only they could meet the military's specifications; and (3) the national regulations concerning the transport and storage of blackpowder made it difficult and impractical for other producers to comply with them.

12. Manufacturers in France and Italy reported to the Commission that they were willing and able to supply blackpowder to the United Kingdom. These firms had the capacity to meet new customer's demands. ICI conceded that the grade of blackpowder produced by these firms would be suitable for certain of their needs.

13. The Commission reasoned that since ICI was the only supplier of blackpowder in the United Kingdom, its agreement to purchase its total blackpowder demand from WANO would exclude all other blackpowder producers from the British market.

14. In the Commission's announcement of May 27, 1970, Concerning Minor Agreements, O.J. EUR. COMM. (No. C 64) 1 (1970), the Commission stated that only agreements having an appreciable effect on market conditions would be subject to the article 85(1) prohibition.

15. The parties argued that their pooled technology and resources would enable them to develop new manufacturing processes. They also contended that the agreement would ensure the Community greater security in its supply of blackpowder.

article 85(1) prohibition, the Commission concluded that the agreement could not be granted an exemption under article 85(3)[16] because ICI's participation in the agreement would effectively preclude competition in the British market for blackpowder. In an original Commission proceeding, *held:* A joint venture that operates to preclude all competitors from entry into a geographic market violates article 85(1) of the E.E.C. Treaty and cannot be exempted under article 85(3). *Re WANO Schwarzpulver Gmbh,* 1 Comm. Mkt. L.R. 403 (1979).

II. LEGAL BACKGROUND

The Commission of the European Economic Community is empowered to investigate agreements between enterprises and to issue and enforce orders terminating those agreements in violation of the anticompetitive regulations of the E.E.C. Treaty.[17] Article 85(1) of the Treaty prohibits activities between enterprises that have prevention, restriction, or distortion of competition within the Common Market as their goal or effect.[18] Agreements prohib-

16. For text of article 85(3) *see* note 19 *infra.*

17. In 1962 the Council of Ministers adopted Regulation 17, 5 J.O. EUR. COMM. 204 (1962), which established the scheme of enforcement for Common Market rules protecting competition. Pursuant to that regulation, the Commission obtained authority to investigate activities between enterprises and review enterprises in violation of article 85 and 86 of the E.E.C. Treaty. The Counsel also authorized the Commission to issue cease and desist orders and impose daily penalties and fines to compel adherence to its decisions.

18. The text of article 85(1) states:

> The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: all agreements between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market and in particular those consisting in:
>
> (a) the direct or indirect fixing of purchase or selling prices or of any other trade conditions;
>
> (b) the limitation or control of production, markets, technical development, or investment;
>
> (c) market-sharing or the sharing of sources of supply;
>
> (d) the application to parties to transactions of unequal terms in respect of equivalent supplies, placing them at a competitive disadvantage;
>
> (e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject

ited under article 85(1), which meet certain conditions, may qualify for an exemption under article 85(3) of the Treaty.[19] This exemption allows the enterprises to proceed with their proposed activity even though the plan technically violates regulations concerning activities with an anticompetitive effect on the Community.[20] In its 1966 Memorandum on Concentration,[21] the Commission clarified that article 85 applies to joint ventures. Recognizing that it would not apply to an actual merger in which the parties involved became one enterprise, the Commission distinguished a joint venture arrangement in which the participating parties retained their economic independence.[22] Although the Commission announced a policy to determine the anticompetitive effects of joint venture agreements on a case by case basis,[23] there has been a definite pattern to its decisions. In a number of situations the

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of such contract.

E.E.C. Treaty, art. 85, para. 1, *supra* note 1 at 47.

19. The text of article 85(3) states as follows:

Nevertheless, the provisions of paragraph 1 (of Article 85) may be declared inapplicable in the case of:

—any agreement or category of agreements between enterprises,

—any decisions or classes of decisions by associations of enterprises and,

—any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom and which:

(a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;

(b) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

E.E.C. Treaty, art. 85, para. 3, *supra* note 1 at 48.

20. The actual effect of an article 85(3) exemption is to admit a violation of article 85(1) but to render 85(1) inapplicable to the agreement in question.

21. Commission of the European Communities, *Memorandum to the Governments of the Member States on Concentration of Enterprises in the Common Market, reprinted in* COMM. MKT. REP. No. 26 (CCH) ¶ 58 at 27 (1966) (out of print). The memorandum resulted from the work of a committee of independent experts formed to deal with the problem of concentrations between enterprises. *Id.*

22. The Commission reasoned that an actual merger is a complete concentration not subject to article 85. The situation in which parties retain their independence does not fall within the term "complete concentration," thus, such agreements are subject to article 85. *Id.* For discussion of the Commission's reasoning on the issue *see* Spinks, *The Contemporary Antitrust Regulation of Joint Ventures in the European Community,* 11 VAND. J. TRANSNAT'L L. 373, 383-84 (1978).

23. COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY 38 (1977).

Commission applied article 85(1) to joint venture arrangements without discussing the unique organizational characteristics of a joint venture.[24] The Commission first discussed the application of article 85 to a joint venture in *SHV/Chevron,*[25] concluding that the article did not prohibit a joint venture arrangement in which the parent companies abandoned their business in the produce area covered by the joint venture.[26] The Commission reasoned that because the parent companies withdrew from the field, they would no longer compete with each other or with the joint venture in the sale of the product manufactured by the joint venture. Thus, the Commission treated such an agreement as a partial merger to which article 85(1) did not apply. It determined that the agreement would not threaten competition in related product markets in which both parties dealt since those markets were distinct from the joint venture area.[27] In *Bayer/Gist,*[28] the Commission determined that an agreement between two competing firms to create joint subsidiaries that would supply them with raw materials would also restrict competition between the parent companies in related product markets.[29]

The Commission reasoned that combined efforts at the raw material level would induce coordinated conduct in the field of intermediate products and cooperation between the parties relating to

24. *See, e.g.,* Henkle/Colgate, 15 J.O. COMM. EUR. (No. L 14) (1972). *See* COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH REPORT ON COMPETITION POLICY 25-26 (1974).

25. *In re* Application of Steenkolen-Handelsvereeniging NV & Chevon Oil Europe, 18 O.J. EUR. COMM. (No. L 38) 15 (1975) [hereinafter cited as SHV/Chevron]. *See* Linssen, *Joint Subsidiaries; The S.H.V./Chevron Case,* 13 COMMON. MKT. L. REV. 105 (1976) for a detailed criticism of the case.

26. The parties, who had previously maintained independent distribution networks for petroleum products, proposed jointly and equally owned subsidiaries to distribute those products in the Common Market. Pursuant to the agreement, both parties would vest all assets of their previous distribution network in the joint companies and agree not to compete with those companies. SHV/Chevron, 18 O.J. EUR. COMM. (No. L 38) 14 (1975).

27. *Id.* The propensity of joint control of a subsidiary to lead to restricted competition was labeled the "group effect" in the *Sidmar* case, EUROPEAN COAL AND STEEL COMMUNITY, THE HIGH AUTHORITY, 11TH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITY 320-25 (1963), a decision under the E.C.S.C. Treaty. In *Sidmar* and other decisions under that treaty, the High Authority found that absent an express agreement not to compete in other areas, the group effect was not an independent restriction subject to the prohibitions of the treaty, but was a natural consequence of joint control.

28. Bayer/Gist-Brocades, 19 O.J. EUR. COMM. (No. L 30) 13 (1976).

29. *Id.*

the marketing of the processed goods.[30] Because the agreement would benefit the Common Market, the Commission granted the parties an exemption conditioned on certain amendments to the agreement.[31] In *Bayer/Gist,* however, the Commission clearly enunciated its objection to joint venture agreements between firms who remained competitors in related markets. Rendering an important determination in the *KEWA* decision,[32] the Commission held that a joint venture agreement would violate article 85(1) if the parent companies possessed the economic and technical ability to compete in the area of the joint venture, even if they were not presently competitors in that field.[33] The Commission adhered to this policy in *Vacuum Interrupters,*[34] in which two large, heavy electrical firms formed a joint venture to develop a new product.[35] The Commission defined the parties as potential competitors because each had the capacity to independently develop and manufacture the product.[36] The agreement would repress potential competition between them since its terms prohibited independent action by either party in the new product area.[37] The Commission

30. Both parties manufactured and sold the raw product as well as intermediate and processed goods containing the product. *Id.*

31. The parties substituted specialization agreements and long-term mutual supply contracts for the joint subsidiary arrangement. Although the Commission indicated it would not exempt the joint subsidiary arrangement as originally purposed, it did not render a firm decision on the issue. *Id.* at 15-16.

32. KEWA, 19 O.J. EUR. COMM. (No. L 51) 15 (1976).

33. Four German firms proposed a joint subsidiary for the commercial reprocessing of nuclear fuels and the marketing of the resultant products. The firms agreed not to operate in the field except through the joint venture. Because all four firms possessed sophisticated technology and experience in areas similar to that of the joint venture, the Commission felt they were capable of manufacturing the product independently. *Id.* at 16.

34. Vacuum Interrupters, 20 O.J. EUR. COMM. (No. L 48) 32 (1977).

35. The parents set up Vacuum Interrupters Inc. to develop, design, manufacture, and sell vacuum interrupters (a new type of circuit breaker). Under the agreement, the parents agreed not to compete with the joint venture. Additionally, the joint venture was to be the source of all their requirements of the product. Although neither company was manufacturing the product independently, the Commission felt that because of their experience, ability, and prior research in the field each could have entered the market alone and thus were potential competitors. *Id.* at 36.

36. *Id.*

37. Both parties to the joint venture agreed to refrain from independently developing, manufacturing, or selling the product of the joint venture. The terms of the agreement required the parties to make all decisions regarding the new company jointly. *Id.*

reasoned that the proposed plan could impede competition in the United Kingdom, since future Community competitors in that market would face one economically and technically powerful competitor rather than two relatively weaker ones.[38] Finding that the possible benefits to the Common Market outweighed the potential reduction in competition, the Commission granted an article 85(3) exemption.[39] In *DeLaval/Stork*[40] and *GEC/Weir*[41] the Commission again found joint venture agreements between competitors in related field violative of article 85(1). In both cases, the Commission objected to the impediment of competition between the parent companies concerning the product manufactured by the joint venture. Additionally, the Commission noted the likelihood of cooperation between the parties in other areas of mutual interest.[42] As in *Bayer/Gist,* however, the Commission exempted the agreements because of their potential benefit to the Common Market.[43] Applying a similar rationale in *ICI/Montedison,*[44] the Commission held

38. The Commission felt that the combined strength of two major British producers would be an insurmountable obstacle to smaller and weaker market entrants. *Id.* at 36.

39. The agreement had been operating since 1968 and the Commission determined that the resultant benefits of reduced prices and stimulated research in the area justified an exemption. The Commission, nevertheless, imposed certain conditions on the exemption to ensure that the joint venture would not lead to collateral restrictions in areas other than the joint venture. *Id.* at 37-38.

40. DeLaval/Stork, 20 O.J. EUR. COMM. (No. L 215) 11 (1977).

41. GEC/Weir Sodium Circulators, 20 O.J. EUR. COMM. (No. L 327) 26 (1977).

42. The DeLaval/Stork agreement provided for a joint venture through which the parent companies would merge their marketing activities in the turbine and compressor industries. The companies remained competitors in some fields relating to the joint venture product. DeLaval/Stork, 20 O.J. EUR. COMM. (No. L 215) at 12-14. In GEC/Weir, two companies of considerable industrial significance entered a joint venture agreement to develop, manufacture, and sell sodium circulators for use in nuclear fast reactors. Prior to the agreement the parties were competitors in the sodium circulator field and at the expiration of the agreement would again become competitors. During the operation of the agreement, the companies would independently retain horizontally competitive vertically overlapping activities in related markets of the field. 20 O.J. EUR. COMM. (No. L 327) at 27-29.

43. The Commission found that the appreciable economic advantages offered by the DeLaval/Stork agreement justified an exemption. DeLaval/Stork, 20 O.J. EUR. COMM. (No. L 215) at 20. In GEC/Weir, the Commission determined that because of the high risks involved in the work of the subsidiary, the complementary expertise of the parties, and the urgent need to achieve safe performance in the field, an exemption was justified. GEC/Weir, 20 O.J. EUR. COMM. (No. L. 327) at 33-35.

44. ICI/Montedison, COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH

that a joint venture agreement between two large companies would restrict competition between the parents relating to the product manufactured by the joint venture. Moreover, it would create anti-competitive effects in the related fields in which the parties were potential competitors.[45] Although the Commission indicated that a conditional exemption could be granted, the enterprises withdrew their plans.[46] In *Sopelem/Vickers*,[47] the Commission found a joint venture agreement violative of article 85(1) in its effect on competition between the parties. The agreement would eliminate competition in research and development between the parents and thus, impede their ability to remain independent developers. It would also deprive them of autonomous marketing since one parent would serve as the sole distributor of the product in the United Kingdom and Ireland and the joint venture would be the exclusive distributor in the rest of the Community.[48] Noting strong competition in the field of the joint venture, and the minor share of the market that the parties held,[49] the Commission determined that the restrictive effects of the agreement were counterbalanced by the advantages and granted an exemption.[50] Thus, in developing its policy towards joint venture agreements, the Commission has continually broadened the reach of article 85(1) to prohibit joint venture agreements which restrict competition among the Member

REPORT ON COMPETITION POLICY 117 (1977).

45. The parties agreed to establish a joint subsidiary to produce chemical substances that they both required in the manufacture of their intermediate products. The Commission reasoned that the agreement would restrict competition between the parties since they were both competitors in similar markets and potential competitors in the market for the product of the joint venture. *Id.*

46. The Commission found that the long-term effect of the agreement would increase competition in the Common Market, improve production and technology, and benefit consumers. The parties, however, abandoned the joint venture before the Commission developed specific conditions and obligations for an exemption. *Id.*

47. Sopelem/Vickers, 21 O.J. EUR. COMM. (No. L 707) 47 (1977).

48. The parties both manufactured a wide range of microscopes. They agreed to create a joint venture to coordinate research and development. Pursuant to the agreement they were to combine marketing efforts so that all distribution of their products would be handled jointly. *Id.* at 47-48.

49. The combined overall share of the market held by these parties was 3.5 percent. *Id.* at 49.

50. The Commission determined that the agreement would hasten development and technological progress in the microscope field, improve distribution of microscopes in the Community, and result in lower costs to consumers. *Id.* at 50-51.

States. Prior to the instant decision, however, the Commission has never refused to grant an exemption to a joint venture agreement that it found violative of article 85(1).

III. The Instant Opinion

In the instant proceeding the Commission determined that WASAG/ICI joint venture agreement would have the following anticompetitive results: (1) the parent companies would be precluded from making independent decisions in the joint venture field; (2) the joint venture would control fifty-eight percent of blackpowder sales in the Common Market; (3) ICI, a major purchaser of blackpowder, would fulfill its entire requirements for the product from a single supplier; (4) the parent companies, natural competitors in the field, would cease competing in the joint venture area; (5) heightened cooperation between the companies would discourage competition between them in other fields in which they both dealt; and (6) the British market would be closed to suppliers from other Community States and British customers therefore would be deprived of an opportunity to purchase from other Community suppliers.[51] The Commission determined that because the parties are wealthy and dominant in the Community and the blackpowder market is oligopolistic, the restrictive effects of their agreement would be appreciable.[52] Because the agreement would virtually obviate all competition in the British market, the Commission reasoned that it would not meet the condition stated in article 85(3) that exemption is appropriate only if an agreement does not "eliminate competition in respect to a substantial part of the product."[53] The Commission noted that regardless of this factor, the agreement would not otherwise qualify for exemption because the parties did not prove that the joint venture would offer substantial benefits to the Community.[54] Thus, the Commission found the agreement to appreciably restrain Common Market competition and not warrant exemption because of its elimination of competition in a substantial market. Therefore, the Commission prohibited the parties from implementing their plan.

51. 1 Comm. Mkt. L.R. at 411-16.
52. *Id.* at 416.
53. *Id.* at 417. For full text of article 85(3), *see* note 19 *supra.*
54. *Id.* at 417. For a description of the asserted benefits, *see* note 15 *supra.*

IV. COMMENT

In its first absolute denial of clearance to a joint venture agreement, the Commission took a major step toward clarifying its policy regarding these matters. The finding of an article 85(1) violation is consistent with the Commission's decisions since *SHV/Chevron.* What is distinctive in the instant decision is the Commission's failure to exempt the agreement under article 85(3). The fact that the Commission adopted the decision despite the parties' abandonment of the agreement indicates that it deemed a statement in this area necessary. The agreement's form is similar to that of other joint venture agreements which were previously granted exemptions. Many of those agreements involved competitors holding market positions equally powerful as the position of the parties in the instant case.[55] In past decisions the Commission exempted agreements from article 85(1) in which the joint venture would act as the exclusive supplier of products required by both parents.[56] The ICI/WASAG proposal, however, differs from the agreements in prior cases in its effect. The previous joint venture agreements would have reduced competition in the community, but in all cases the market would have remained open to other competitors. Conversely, the instant agreement would have eliminated *all* competition in the British blackpowder market. In determining this effect to fall within the 85(3) language prohibiting exemptions when the proposed activities would eliminate competition in respect to a substantial proportion of the product, the Commission offered its first interpretation of that language in the article, setting a standard for future cases. Accordingly, the Commission has announced that an agreement which operates to foreclose competition in a large market will not be tolerated. It remains to be seen how this interpretation will be applied in future cases. It should be noted that the WANO agreement is unique in two ways. First, it would obviate all competition in a significant geographic market. Second, the product involved is not of particular importance to modern technology and does not involve expensive advanced technological processes which necessitate cooperation between competitors for technological reasons. The Commission may be more lenient towards agreements which substantially restrict, but do not eliminate competition in a geographic market, and

55. *See, e.g.,* DeLaval/Stork, 20 O.J. EUR. COMM. (No. L. 215) 11 (1977).

56. *See, e.g.,* ICI/Montedison, COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH REPORT ON COMPETITION POLICY 117 (1977).

which involve products important to modern technology. In the instant case the Commission found consideration of the benefits of the ICI/WASAG proposal to be unnecessary. This indicates that an agreement which completely insulates a market from competition will not be allowed to proceed regardless of the advantages it would offer the Common Market.

Celia J. Collins

CONSTITUTIONAL LAW—TEXAS STATUTE'S DENIAL OF FREE EDUCATION TO ILLEGAL ALIENS VIOLATES EQUAL PROTECTION CLAUSE AND IS PREEMPTED BY THE IMMIGRATION AND NATIONALITY ACT

I. FACTS AND HOLDING

Plaintiffs,[1] a group of Mexican illegal alien children residing in Tyler, Texas, sought injunctive and declaratory relief[2] to prevent their exclusion from the public schools in the Tyler Independent School District [TISD]. Defendants, officials of the TISD,[3] alleged that section 21.031 of the Texas Education Code[4] [section 21.031] authorized TISD to adopt a policy[5] permitting only United States citizens and legally documented aliens[6] residing in TISD to attend public schools free of tuition.[7] Plaintiffs alleged that section 21.031, as implemented by the TISD policy, denied them equal protection of the laws[8] and was preempted by the federal Immigra-

1. The action was maintained as a class action on behalf of all undocumented school-aged children of Mexican origin residing within the boundaries of the Tyler Independent School District.

2. A complaint and motion for preliminary injunction were filed on September 6, 1977. On September 9, 1977, the court granted the preliminary injunction. The final hearing was held on December 12 and 13. The attorney general of Texas participated as a defendant. The United States Department of Justice was granted leave to participate as an *amicus curiae.*

3. The Superintendent and members of the Board of Trustees of the Tyler Independent School District.

4. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1976) provides in part:

> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such a person or his parent, guardian or person having lawful control resides within the school district.

5. The TISD policy provides in part:

> The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend school in the Tyler Independent School District by payment of the full tuition fee.

458 F. Supp. 569, 572 (E.D. Tex. 1978).

6. A legally-documented alien is a legally admitted alien who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service. *Id.*

7. The school board policy requires that undocumented alien children pay $1,000 per year to attend public school.

8. U.S. CONST. amend. XIV, § 1.

tion and Nationality Act[9] [Immigration Act]. The United States District Court for the Eastern District of Texas granted an injunction on both grounds.[10] *Held:* A state statute denying free public school education to illegal aliens violates the equal protection clause of the fourteenth amendment and is preempted by the Immigration and Nationality Act. *Doe v. Plyler,* 458 F. Supp. 569 (E.D. Tex. 1978).

II. LEGAL BACKGROUND

Section one of the fourteenth amendment provides that "no state shall deprive *any person* of life, liberty, and property without due process of the law [emphasis added]."[11] In *Mathews v. Diaz,*[12] the Supreme Court noted in dictum that this due process protection extends to illegal aliens. Section one also provides that "no state shall deny to *any person within its jurisdiction* the equal protection of the laws [emphasis added]."[13] In *Bolanos v. Kiley,*[14] the Second Circuit Court of Appeals held that despite the difference in wording between the two fourteenth amendment protections, illegal aliens also are entitled to equal protection of the laws. Courts traditionally perform a two-tiered analysis to determine if a state statute violates the equal protection clause.[15] If the statute threatens a fundamental right[16] or creates a suspect classification

9. 8 U.S.C. § 1182(a)(14) (1976) provides in part:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified and available at the time of application for a visa and for admission into the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will adversely affect the wages and working conditions of workers in the United States similarly employed.

10. The instant court also granted declaratory relief.

11. U.S. CONST. amend. XIV, § 1.

12. 426 U.S. 67 (1976).

13. U.S. CONST. amend. XIV, § 1.

14. 509 F.2d 1023 (2d Cir. 1975).

15. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

16. Fundamental rights are those rights explicitly expressed in the Constitution. *See, e.g.,* Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972). The Supreme Court has also found additional fundamental rights. *See, e.g.,* Roe v.

of individuals,[17] the court will strictly scrutinize the state interest served by the statute and will sustain the statute only if the interest is compelling.[18] Absent these two characteristics, the state law need only be supported by a rational basis.[19] In *San Antonio Independent School District v. Rodriguez*,[20] the Supreme Court held that education was not a fundamental right because it is not among those afforded explicit protection by the Constitution.[21] The Court noted, however, that an absolute deprivation of education would have presented "a far more compelling set of circumstances for judicial assistance."[22] Although the courts have not specifically held that *illegal* aliens are a suspect class, the Supreme Court in *Graham v. Richardson*[23] indicated that *legally admitted* aliens may be a suspect class. In *DeCanas v. Bica*,[24] the Court held a California statute[25] constitutional which prohibited employers from knowingly hiring illegal aliens instead of lawful resident workers. The *DeCanas* Court did not rule on whether illegal aliens are a suspect class because neither party had standing to raise an equal protection argument.[26] Because of the California statute's direct effect upon immigration, the *DeCanas* Court had to determine whether the statute was preempted by federal law.[27] The Court employed a three-part test which required that the statute

Wade, 410 U.S. 113 (1973) (right to privacy); Dunn v. Blumstein, 405 U.S. 336 (1971) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel).

17. A suspect class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 28 (1973).

18. 394 U.S. 618, 638 (1969).

19. 411 U.S. 1, 40 (1973).

20. *Id.*

21. *Id.*

22. *Id.* at 25 n.60.

23. 403 U.S. 365 (1971).

24. 424 U.S. 351 (1976).

25. CAL. LAB. CODE § 2805(a) (West 1971). The statute provides in pertinent part:

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

26. 424 U.S. 351 (1976).

27. 8 U.S.C. § 1101 (1976). The Supreme Court has also recognized the importance of limiting employment in order to limit immigration. *See, e.g.*, Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

must not: (1) impermissibly interfere with the federal government's exclusive power to regulate immigration;[28] (2) operate in a field where federal regulation prohibits the exercise or existence of any state regulatory power;[29] and (3) obstruct the accomplishment and execution of congressional purposes and objectives embodied in the Immigration Act.[30] The Court found the California statute valid according to all three criteria and stated that the statute was consistent with the federal policy to regulate immigration by limiting employment opportunities.[31] No state statute which attempts to regulate immigration by limiting educational opportunities to children has yet been challenged as either a violation of the fourteenth amendment equal protection clause or as preempted by federal law.

III. THE INSTANT OPINION

In the instant case, the district court held that section 21.031 violated the plaintiff's right to equal protection of the laws and served no rational state interest.[32] Despite the differing language of each constitutional privilege conferred by section one of the fourteenth amendment, the court found that illegal aliens should receive both due process and equal protection privileges.[33] It noted that the Texas statute, as implemented by the TISD policy, created a distinct class of poor illegal alien children who were deprived of all education.[34] The court limited the *Rodriguez* conclusion, that education is not a fundamental right, to the kind of relative deprivation of education challenged in that particular case.[35] It noted that *Rodriguez* conspicuously did not foreclose the use of strict judicial scrutiny in cases where there is an absolute

28. 424 U.S. 351, 354, 356 (1976).

29. *Id.* at 356.

30. The federal purpose and objective is the exclusion of illegal aliens. This differs from the federal policy, embodied in the Immigration Act, to accomplish this purpose by limiting United States employment opportunities of illegal aliens.

31. 424 U.S. 351, 365 (1976).

32. 458 F. Supp. 569, 585, 589 (1978).

33. *Id.* at 579.

34. The court briefly mentioned that the statute and TISD policy also discriminated on the basis of wealth since the illegal alien children could attend public school after payment of a tuition fee of $1,000 per year. The court concluded that this discrimination should heighten strict judicial scrutiny. *Id.* at 581.

35. In *Rodriquez,* the state statute allegedly deprived the plaintiff of an education equal to that received by students in property rich communities. However, the statute did not prevent children from attending school altogether. *Id.* at 580.

deprivation of educational opportunities.[36] Section 21.031 could also be subject to strict scrutiny, according to the court, because illegal aliens might be considered a suspect class.[37] Although no previous court had designated illegal aliens as a suspect class, the instant court noted that such a classification would be appropriate if a state acted independently of the policy of the Immigration Act[38] to achieve the federal exclusionary purpose by condoning the immigration of illegal aliens and then subjecting them to discriminatory laws.[39]

The court concluded that the Texas statute was inconsistent with the Immigration Act's policy because section 21.031 restricted educational opportunities of illegal alien children rather than limiting employment opportunities of their parents.[40] It noted that *DeCanas* had been consistent with this policy since the California statute limited the employment opportunities of adult illegal aliens by penalizing their employers.[41] The instant court concluded that section 21.031 of the Texas Education Code, as implemented by the TISD policy, was an ineffectual attempt by the state legislature to exclude illegal aliens and that no rational basis[42] exists to sustain it against an equal protection challenge.

IV. COMMENT

The instant court subtly disguised the rationale of its holding with an extensive discussion of new constitutional protections for illegal aliens. The Texas statute may in fact have a rational basis and may not be invalidated by a proper application of the *DeCanas* preemption test. The court's application of fourteenth amendment equal protection to illegal aliens reflects a recent tendency of lower courts to extend rights to this group.[43] The instant decision builds

36. *Id.* at 580-81.

37. *Id.* at 583.

38. According to the instant court, the Immigration Act instructed that the federal purpose to eliminate illegal immigration be carried out by reducing employment opportunities in the United States for illegal aliens. *Id.* at 583, 591.

39. *Id.* at 583.

40. *Id.* at 588.

41. *Id.* at 587-88.

42. The court struck down defendant's argument that the statute is supported by a rational state interest, namely, preserving state revenues to educate U.S. citizens and legally admitted aliens who reside in Texas because illegal alien children would require special educational aid. *Id.* at 589.

43. *See* Holley v. Lavine, 529 F.2d 1294 (2d Cir.), *cert. denied,* 426 U.S. 954

upon the Supreme Court's ruling in *Mathews,*[44] which extended fourteenth amendment due process protection to illegal aliens. By invalidating the Texas statute, the court also reached two unprecedented findings. First, despite the *Rodriguez* holding that education is not a fundamental right, the instant court indicated that a state statute which deprives a child of all education requires strict judicial scrutiny justification by a compelling state interest.[45] Second, the court noted that because illegal aliens may be considered a suspect class, the state statute could therefore be strictly scrutinized.[46] This progresses beyond the Court's decision in *Graham,*[47] which asserted that aliens who are legally admitted may be a suspect class. This extensive constitutional analysis established the court's prerogative to strictly scrutinize and then strike down the statute for lack of a compelling state interest. Instead, the instant court invalidated the statute for lack of a rational basis. Such a rational basis may, in fact, exist. The statute, for example, may enable Texas to conserve revenues otherwise required both to educate an excessive number of students and to satisfy the special educational needs of alien children.[48] Furthermore, the statute may discourage illegal immigration by not guaranteeing free public school education to the children of undocumented aliens. Also, in determining the issue of preemption, the court, mistakenly, did not explicitly apply all three parts of the *DeCanas* test and erroneously based its holding on the statute's failure to meet the third part of the test. The court could have found that section 21.031 met the first two parts of this test because the statute's aim was to protect the educational opportunities of the state's legal residents and not to directly attempt to regulate immigration.[49] The court correctly recognized that section 21.031, unlike the *DeCanas* stat-

(1976); Bolanos v. Kiley, 509 F.2d 1023 (2d Cir. 1975); United States v. Barbera, 514 F.2d 294 (2d Cir. 1975).

44. 426 U.S. at 77 (1976).

45. This approach differs from Justice Marshall's sliding scale of rights approach employed in *Rodriquez.* In that case, Marshall determined that certain rights should be given stricter judicial scrutiny than other rights. In the instant case, the court accords fundamental right status and strict judicial scrutiny to an absolute deprivation of education while recognizing that a relative deprivation of education would not receive such scrutiny.

46. 458 F. Supp. at 583.

47. 403 U.S. at 365 (1971).

48. 458 F. Supp. at 575-76.

49. *Id.* at 585.

ute, did not embody the specific exclusionary policy[50] of limiting United States employment opportunities for illegal aliens.[51] Nevertheless, the statute may satisfy the third part of the test, and its absence may even impair the federal government's general purpose to exclude illegal aliens from the states. Thus, the statute may not only have a rational basis, but also may satisfy all three parts of the *DeCanas* preemption test. A successful challenge to invalidate the Texas statute, therefore, may necessarily depend upon the unprecedented constitutional findings embodied in the instant opinion. Although the court may have been overly concerned with furnishing free education to all children, whether United States citizens or illegal aliens, the instant decision provides strong justification for strict judicial scrutiny of similar state statutes.[52]

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50. 8 U.S.C. § 1101 (1976). *See* note 27 *supra*.

51. 458 F. Supp. at 584.

52. After the instant decision the Texas Court of Appeals in Hernandez v. Houston Independent School District, 558 S.W.2d 121 (Tex. Civ. App.-Austin 1977 writ ref'd n.r.e.), dismissed a challenge concerning the constitutionality of section 21.031. The defendants in the instant case did not argue that the *Hernandez* decision was binding on the instant court. 458 F. Supp. at 574.

SOVEREIGN IMMUNITY—FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976—"DIRECT EFFECTS" UNDER § 1605(A)2 REQUIRES MINIMUM CONTACTS

I. FACTS AND HOLDING

Plaintiffs, New England Petroleum Corp. (Nepco), a New York corporation, and its assignee,[1] seek damages for an alleged breach of contract to supply petroleum products. Plaintiff's subsidiaries, Grand Bahama Petroleum Co. (Petco) and Antco Shipping Co. (Antco)[2] entered into a series of contracts with the Libyan National Oil Corporation (N.O.C.) in 1973 following nationalization of the Libyan oil fields.[3] Libya imposed an embargo on oil to the United States and the Bahamas as a result of the Yom Kippur war of October, 1973. At the invitation of N.O.C., Petco submitted bids for new contracts which were finalized in 1974.[4] Petco accepted delivery under the new contracts through 1975 and then failed to make payment. N.O.C. sought a winding up of Petco's affairs by petition in the Bahamas. In April 1977, Nepco filed suit in the New York Supreme Court, which was subsequently removed to United States District Court.[5] The claims against N.O.C., totalling $1.6 billion, alleged breach of the 1973 contracts,[6] duress in negotiating the 1974 contracts, and frustration of the contracts in which Nepco was allegedly a known beneficiary. Nepco also charged Libya with deliberately inducing the breaches by N.O.C.[7] In the United States

1. Nepco's alleged assignee is Edward G. Carey.

2. Both Petco and Antco are Bahamian corporations.

3. Petco was seeking oil for Nepco's United States consumers. The original contracts were between Petco and a United States oil concession which held fields in Libya. On September 1, 1973, Libya nationalized 51% of its oil concessions and the United States concern immediately abrogated its contract with Petco. N.O.C. has been formed in 1970 as a wholly government-owned entity empowered to control the Libyan oil industry. The two contracts Petco entered into with N.O.C. called for per barrel prices of approximately $5, both higher than the prices obtained from the United States oil concession. By February, 1974, Libya had nationalized its entire oil industry and had transferred control to N.O.C.

4. The final contract specified a price of $16.00 per barrel for the first quarter of 1974, with provisions for later adjustments.

5. Removal was accomplished pursuant to the Foreign Sovereign Immunities Act of 1976, § 6, 28 U.S.C. § 1441(d) (1976).

6. Nepco charged that performance of the 1974 contract had been conditioned upon performance of the 1973 contracts, which N.O.C. had failed to perform properly.

7. Nepco specifically alleged the following claims: (1) and (2) breach by Libya and N.O.C. of the 1973 contracts; (3) duress in negotiating the 1974 contracts;

District Court for the Southern District of New York, *dismissed. Held:* A foreign state is not amenable to suit in the United States when its activities have no "direct effects" within United States boundaries and these "direct effects" must be interpreted in light of minimum contacts. *Carey v. National Oil Corporation,* 453 F. Supp. 1097 (S.D.N.Y. 1978).

II. LEGAL BACKGROUND

The Foreign Sovereign Immunities Act of 1976[8] was intended to remedy problems in United States immunity law in addition to codifying its essential tenets. The Act reaffirms the restrictive doctrine of sovereign immunity[9] and vests exclusive power in the judicial branch to decide whether such immunity should be granted.[10] The Act is essentially divided into two components. The first, 28 U.S.C. § 1330, creates a federal long-arm statute allowing *in personam* jurisdiction over foreign states when the necessary con-

(4) frustration of the contracts by Libya and N.O.C. although Nepco was allegedly a known beneficiary; (6) and (7) deliberate inducement by Libya of N.O.C.'s breach of contract; (8) deliberate inducement by Libya and N.O.C. of the entire series of circumstances leading to the breach.

Claim (5) dealt with breach by Antco of two charter contracts with the Libyan Maritime Transport Co. This claim was based and decided upon the same issues as the oil contracts.

8. 28 U.S.C. § 1602 *et seq.* (1976). The legislative history consists of the identical text of the Senate and House reports that were issued at the time of the Act's passage. H.R. REP. No. 94-1487, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604 (hereinafter cited as H.R. 1487).

9. 28 U.S.C. § 1605 (1976); *see also* H.R. 1487, *supra* n.8, at 7. The restrictive theory of immunity was adopted as policy by the State Department in the "Tate Letter" of 1952. 26 DEP'T STATE BULL. 984. Sovereign immunity as originally adopted in this country upheld the absolute independence of sovereigns as part of the law of nations. The Schooner Exchange v. McFadden, 7 U.S. (3 Cranch) 116 (1812). The courts adhered to this absolute doctrine and gradually established the principle that the courts would uphold a plea for immunity by the State Department, based on the executive control of foreign policy. This principle culminated in Mexico v. Hoffman, 324 U.S. 30 (1945), and Ex Parte Peru, 318 U.S. 578 (1943), in which the Supreme Court refused to question a grant of immunity by the State Department. Changes in international commercial and legal principles led the government, through the Tate Letter, to adopt the restrictive principle of immunity, thereby granting immunity only for public acts of the sovereign, not for private or commercial acts.

10. H.R. 1487, *supra* n.8, at 8, 9. The purpose was to remedy situations where the foreign state could determine which immunity claims to take to the State Department, and which to leave to the courts. It was also intended to alleviate cases when the foreign state could exert diplomatic pressure on the State Department, making uniform application of the policy difficult. *Id.*

tacts with the United States exist.[11] The second, 28 U.S.C. § 1602 *et seq.*, grants a blanket immunity to foreign states[12] subject to exceptions dealing with private or commercial activities. The long-arm portion of the statute grants subject matter jurisdiction to the courts based on acts of the foreign state falling within one of the exceptions to immunity described in 28 U.S.C. §§ 1605-1607. The section then grants personal jurisdiction to the courts based on the existence of minimum contacts between the foreign state and the United States.[13] The exceptions to immunity most importantly deal with the private or commercial activities of foreign states. The section which excepts immunity for commercial activities, 28 U.S.C. 1605(a)(2), allows, in the first two clauses, jurisdiction over acts committed by a foreign state either wholly or partially within the United States. Clause three gives jurisdiction over acts occurring entirely outside of the territorial United States when there is a direct effect within this country.[14] This third clause adds an impor-

11. 28 U.S.C. § 1330 (1976) provides in relevant part:

> (a) The district courts shall have original jurisdiction . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for releif over which the district courts have jurisdiction under subsection (a) . . . .

12. 28 U.S.C. § 1604 (1976) provides in relevant part that "[s]ubject to existing international agreements to which the United States is a party . . . a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

13. The legislative history describes the phrase "minimum contacts" as embodying the requirements of minimum jurisdictional contacts and adequate notice, citing International Shoe Co. v. Washington, 326 U.S. 310 (1945) (jurisdiction found over a company where there was some presence in the state including a continuous activity that sought to secure the benefits, protection and privileges of the laws of that state) and McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (jurisdiction found over a Texas company that had no personal presence in California but had mailed policy to customer and collected premiums). H.R. 1487, *supra* note 8, at 13.

14. 28 U.S.C. § 1605(a)(2) (1976) provides that a foreign state shall not be immune from jurisdiction in the courts of the United States in any case—

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

tant additional consideration to obtaining jurisdiction. While the first two clauses deal with acts inside of the United States and therefore clearly lend themselves to analysis based on minimum contacts, clause three requires that the activity of the foreign state be interpreted in terms of its direct effect within this country. "Direct effect," according to the legislative history, should be interpreted in a manner consistent with RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 (1965).[15] The degree of contact required under the RESTATEMENT is indicated in Comment f. to § 18 and involves "more than a mere causal relationship: the effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside of the territory."[16] This language, while clearly requiring an effect to be substantial and direct, falls short of requiring minimum contacts with the forum. The question thus becomes whether clause three is to be interpreted in terms of direct effect alone, or in conjunction with minimum contacts, and further, what effects are sufficently direct to allow jurisdiction. The statutory language by itself would seem to indicate a direct effects test alone. There is evidence, however, that Congress intended at least some contact with the United States. During hearings for the Act it was emphasized "that the long-arm feature of the bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small 'international court of claims.'"[17] The legislative history itself notes that "[s]ignificantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States. . . ."[18] In addition, the RESTATEMENT

15. H.R. 1487, *supra* note 8, at 19. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 provides in relevant part that a state has jurisdiction if—

> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 (1965).

16. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18, Comment f. (1965).

17. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. 31 (1976) (statement of Bruno A. Ristan).

18. H.R. 1487, *supra* note 8, at 13.

includes trademark infringement as an example of direct effect and infers that the phrase requires some contact with the forum.[19] Thus, according to the Act, essentially two steps are required to obtain jurisdiction over a foreign state. First, the activity must qualify as an exception to immunity. This would involve, in the case of section 1605, first determining whether the act constitutes a commercial activity, then next determining whether it either occurred or created a direct effect within the United States. The court must then establish personal jurisdiction through application of minimum contacts theory. While satisfying the criteria of an act within the United States would also satisfy the requirements of minimum contacts, the answer is not clear in dealing with the direct effect clause. An additional problem is that the courts have been inconsistent in their analyses in the few cases to arise since the Act went into force. At least one case since the Act was passed failed to find a sufficient contact between a corporation located in Bermuda, owned by a United States company, and a Yugoslavian company.[20] A recent district court decision, *Yessenin-Volpin v. Novosti Press Agency,*[21] avoided consideration of the direct effects issue but indicated that specific contacts will be required to obtain jurisdiction. In that case, plaintiff sued the Soviet news agency Novosti and its press arm Tass in libel for letters published outside of the United States but sent within United States boundaries by means outside of the control of Novosti. The court quickly disposed of the claims based on the first two clauses of section 1605(a)(2) since there was no act, either whole or partial, within the United States. The court, however, used a novel approach when it addressed the third clause claim. According to the court in *Yessenin-Volpin,* an entity that conducts commercial activity may at times take action which is really governmental in nature and thus subject to immunity.[22] The court concluded that the letters published by Novosti had to be regarded as "official commentary of the Soviet government" and the plaintiff would not be allowed to reach that commentary through the Novosti press

19. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18, Reporters' Note 4 at 56 (1965).

20. Edlow Int'l v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827 (D.D.C. 1977). In *Edlow* a broker in the United States arranged a sale of uranium but billed Nuklearna Elektrarna Krsko through its Bermuda affiliate. The court found common ownership between the two companies unpersuasive in shifting jurisdiction to the United States.

21. 443 F. Supp. 849 (S.D.N.Y. 1978).

22. *Id.* at 855.

agency.[23] Why the court waited until it reached clause three to raise that point is not clear. It is at once apparent that a determination that no commercial activity occurred is dispositive of all possible claims under section 1605. Thus the limited case law since the Act was passed has been unable to delineate a clear strategy in dealing with clause three lawsuits. The court in *Edlow*, while addressing the clause three question in terms of common ownership, really disposed of the case on an entirely different issue.[24] The court in *Novosti* dealt with the question by finding no commercial activity and no contacts, but sidestepped the question of direct effects. Commentators on the Act have shown a similar diversity of approach. Some insist on minimum contacts for all actions,[25] while others have argued that the clause applies more to expropriation and antitrust violations involving American shareholders and any effect on them is sufficient.[26] The legislative history itself, while charging the entire Act with adherence to minimum contact theory, also states that clause three must be interpreted in view of direct effects.[27] It is in light of this confusion over the interpretation of clause three that the instant case must be considered.

III. THE INSTANT OPINION

The instant court noted that N.O.C. was clearly a foreign state as contemplated by the Act[28] and held that none of the exceptions to immunity applied.[29] The court pointed out that the only exception with possible application was section 1605(a)(2), clause three, since there was no direct act in the United States.[30] Next, the court observed that the legislative history mandated the application of minimum contact theory.[31] The court then noted that immediately

23. *Id.* at 856.

24. 441 F. Supp. at 832.

25. Delaume, *Sovereign Immunity in America: A Bicentennial Accomplishment*, 8 J. MAR. L. & COM. 349, 356 (1977); *see also* Note, *Sovereign Immunity - Limits of Judicial Control*, 18 HARV. INT'L L.J. 429, 439-40 (1977).

26. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 58, 59 (1978). Von Mehren evaluates the clause in terms of expropriation cases in the discussion of direct effects.

27. H.R. 1487, *supra* note 8, at 13.

28. 28 U.S.C. § 1603 (1976) defines a foreign state in part as an "agency or instrumentality of a foreign state" which includes a separate legal person, a majority of whose ownership interest is owned by a foreign state, and which is neither a United States citizen nor a creation of a third nation.

29. Carey v. National Oil Corp., 453 F. Supp. 1097, 1101 (S.D.N.Y. 1978).

30. *Id.*

31. *Id.*

prior to and during the Yom Kippur war, Libya sought to reduce its contacts with the United States. The court concluded that even if Libya were aware that the Bahamian corporations were selling oil to the United States, and even if the embargo were designed to directly effect the United States, the commercial dealings had been outside of any of the protections and privileges of the United States and thus were lacking in any minimum contacts.[32] Having thus disposed of the breach claims, the court held that the claims that Libya had deliberately induced N.O.C.'s breach must be dismissed as clearly addressing a public, political act of the sovereign.[33] The court observed that Libya's oil policy of the period was clearly aimed at punishing undesirable conduct.[34] The court briefly outlined the history of sovereign immunity as support for its conclusion that "this was not the kind of act to which the exceptions in 28 U.S.C. § 1605 were meant to apply."[35] Finally, the court dismissed the last omnibus claim which attempted "to hold both Libya and N.O.C. responsible for the entire series of events described . . . from 1968 to the present."[36] The court concluded that this claim essentially turned on the nationalization of the oil industry in Libya and rejected the plea that the court question what it described as a "quintessentially sovereign act."[37]

IV. COMMENT

Considering the potential for uncertainty which section 1605(a)(2) of the Act contains, it is unfortunate that the court in *Carey* did not expansively or clearly explain its rationale in reaching what appears to be a correct result. The rationale the court followed has already been echoed by the district court of the District of Columbia in *Upton v. Empire of Iran,*[38] which concerned the death of two Americans at the airport in Tehran, Iran, and the subsequent suit for damages against the Iranian state-owned airline. That court, citing *Carey,* found a lack of minimum contacts

32. *Id.* (citing Hanson v. Denckla, 357 U.S. 235 (1953)).
33. *Id.* at 1102.
34. *Id.*
35. *Id.* at 1102.
36. *Id.* The court also noted that even if Libya's actions were not viewed as sovereign in nature, they constituted at most a tortious interference with contract rights, a claim specifically excluded from the exceptions of the Act. 28 U.S.C. § 1605(a)(5)(B) (1976).
37. 453 F. Supp. at 1102.
38. 459 F. Supp. 264 (D.D.C. 1978).

with the United States and therefore declined to except Iran from immunity.[39] The *Upton* court, however, further considered the question of "direct effects" and concluded that the effect within the United States of the death of two of its citizens abroad was indirect and thus supported the court's conclusion that immunity should not be lifted.[40] The court in *Carey* considered only briefly and indirectly the question of direct effect[41] and thus missed an opportunity to clarify the uncertainty surrounding that issue. Considering the legislative mandate that the clause be interpreted consistently with the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, and considering the detail and clarity of the discussion in the RESTATEMENT, the omission of the *Carey* court becomes glaring indeed. In practical terms, however, the court reached a correct conclusion. A court would be reluctant to consider holding Libya and its oil agency responsible in the United States for money damages resulting from the Arab oil embargo of 1973. The court alluded to this when it held that the entire sequence of events indicated a quintessentially sovereign act, more public and political than private and commercial. In light of the holding in *Novosti* that agencies engaged in commercial acts may also engage in public acts immune to challenge, the instant case might have been disposed of on these grounds alone. By delving half-heartedly into the statutory language, the court appears to have been seeking to rationalize a clear holding rather than sketch in logical, sequential steps the analysis used in reaching that decision. From *Carey* and *Upton* it can be deduced that in some circumstances this section of the Act does not lend itself to clear analysis by statutory tests, but rather must be interpreted broadly. In addition to contacts and effect, the courts also seem willing to consider the practical effects of what the plaintiff may be asking the court to do and whether the court should properly be involved. In this respect the Congress appears to have been successful in insuring that the courts are not turned into "small international courts of claims."

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39. *Id.* at 266.
40. *Id.* at 266.
41. 453 F. Supp. at 1101.