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Recent Decisions

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RECENT DECISIONS

ANTITRUST—IMPORT RESTRICTIONS—IMPORT BAN ORDERED AS EQUITABLE RELIEF FOR VIOLATION OF SECTION 7 OF THE CLAYTON ACT MUST NOT DISCRIMINATE AGAINST FOREIGN PRODUCERS OR REDUCE COMPETITION

In September 1969 Volkswagen of America, Inc. (VW), a wholly owned subsidiary of a foreign corporation[1] and an automobile importer,[2] acquired as a wholly owned subsidiary an independent manufacturer of automobile air conditioners[3] and reorganized it as Volkswagen Products, Inc. (VW Products). VW Products rapidly became the primary supplier of air conditioning equipment to Volkswagen Pacific, Inc. (VW Pacific), an independently owned distributor of Volkswagens and other automobiles,[4] and preempted the market position of Calnetics Corporation (Calnetics), another independent supplier.[5] In September 1970 Calnetics instituted an action against VW, VW Products, and VW Pacific, claiming that the acquisition operated as an illegal vertical restraint on trade in

1. Volkswagen Werk A.G., a German corporation, which manufactures Volkswagen automobiles.

2. VW is a New Jersey corporation which imports Volkswagen, Audi, and Porsche automobiles into the United States for sale through distributorships set up regionally throughout the United States. Porsche motor cars are manufactured by Dr. Ing. h.c. F. Porsche KG, a German corporation.

3. Delanair Engineering Co., Inc., engaged in manufacturing air conditioning units for foreign automobiles, was a Texas corporation and a subsidiary of Delaney-Galley, a British company.

4. VW Pacific, a California corporation, also distributed Porsche and Audi automobiles in a sales region comprising Southern California, Southern Nevada, Arizona, and Hawaii. In 1973, VW Pacific abandoned its franchise, and VW now sells directly to dealers in VW Pacific's former franchise area.

5. Calnetics is a California corporation that manufactures and sells automobile air conditioners, sheet metal products, tool and part machinery, and plastic products. Calnetics supplied VW Pacific through Meier-Line, Inc., its division and wholly owned subsidiary. Although added as an additional plaintiff in Calnetics's complaint in the instant case, for convenience the court attributes all the actions of Meier-Line, Inc., to Calnetics throughout the opinion. Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 678, n. 1 (1976).

6. Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1970), respectively prohibit monopolization in restraint of trade and provide for criminal sanctions. Section 7 of the Clayton Act provides: "No corporation engaged in commerce shall acquire . . . the assets of another corporation engaged also in commerce, where . . . the effect of such acquisition may be to substantially lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1970).

violation of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act.[6] VW and VW Products counterclaimed.[7] In separate proceedings on Calnetics's section 7 claim,[8] the United States District Court for the Central District of California first ruled on the damages issue and other claims[9] and then considered further evidence on Calnetics's claim for equitable relief.[10] In June 1972 the court held that VW's acquisition of VW Products violated section 7 and asked the parties to present plans for relief.[11] In January 1973 the court ordered VW's divestiture of VW Products, enjoined VW and its wholly owned subsidiaries for a seven year period from importing into the United States Volkswagen, Audi, and Porsche automobiles with factory-installed air conditioning, and restricted VW's options in procuring air conditioning equipment in the United States.[12] The parties affected by the import ban (and the government of the Federal Republic of Germany through a memorandum to the State Department) had protested that the import restrictions would violate provisions of the German-American Treaty of 1954[13] and the General Agreement on Tariffs and Trade

7. VW and VW Products alleged that Calnetics entered into a secret agreement in violation of sections 1 and 2 of the Sherman Act. In 1968, Calnetics allegedly had agreed with VW Pacific's service manager to pay the latter 3% of gross proceeds from any sales of air conditioners to VW Pacific as compensation for sales to VW Pacific that he induced. Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 623, 625 (C.D. Calif. 1972).

8. During pre-trial proceedings, the court ordered the section 7 claims to be tried separately from, and prior to, the Sherman Act claims.

9. On February 28, 1972, the court granted VW Pacific's motion for summary judgment on all claims against it and granted Calnetics's motion for summary judgment on the Sherman Act counterclaims against it. After the conclusion of Calnetics's case before a jury, the court directed a verdict in favor of VW and VW Products on the issue of damages.

10. 532 F.2d 674, 680 (1976).

11. 348 F. Supp. 606 (1972). The court later granted summary judgment in favor of VW and VW Products on Calnetics's Sherman Act claims. 348 F. Supp. 623 (1972).

12. To restrict VW's ability to provide for its air conditioning needs outside of the restored market, the court also ordered a ten year ban on VW's domestic production of air conditioning equipment and prohibited VW from purchasing more than 50% of its equipment needs from the divested company. In addition, VW and VW Products were ordered to pay Calnetics's attorney fees and court costs. Calnetics Corp. v. Volkswagen of America, Inc., 353 F. Supp. 1219 (9th Cir. 1973); *see* 7 VAND. J. TRANSNAT'L L. 203 (1973).

13. Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, [1956] 7 U.S.T. 1839, T.I.A.S. No. 3593. Article XVI(1) provides: "Products of either Party shall be accorded, within the territo-

(GATT)[14] prohibiting actions that discriminate against German trade.[15] On appeal to the United States Court of Appeals for the Ninth Circuit, *held,* reversed in part, affirmed in part, and remanded for jury trial proceedings. Because the dispositions and findings of the lower court are inadequate, and because the import ban discriminates against foreign automobile manufacturers, the need for imposing import restrictions must be reexamined in light of their anticompetitive effects on domestic sales by foreign manufacturers and United States treaty obligations. *Calnetics Corp. v. Volkswagen of America, Inc.,* 532 F.2d 674 (9th Cir. 1976), *cert. denied,* ____ U.S. ____, 97 S. Ct. 355 (1976).

The primary objective of antitrust laws is to preserve the free enterprise system by guaranteeing strong competition as a rule of

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ries of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."

14. General Agreement on Tariffs and Trade, *done,* Oct. 30, 1947, 61 Stat. (5) and (6), T.I.A.S. No. 1700, 55 U.N.T.S. 187, Article III amended by Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade of Oct. 30, 1947, *signed,* Sept. 14, 1948, 62 Stat. 3679, T.I.A.S. No. 1890, 62 U.N.T.S. 80, provides, in pertinent part:

Article I—GENERAL MOST-FAVORED-NATION TREATMENT

1. With respect to the customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 1 and 2 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. . . .

Article III—NATIONAL TREATMENT ON INTERNAL TAXATION AND REGULATION . . . .

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

. . . .

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

. . . .

15. The text of the German government's memorandum to the State Department may be found at *Calnetics Corp. v. Volkswagen of America Inc.,* 353 F. Supp. 1219, 1225 (C.D. Calif. 1973).

trade.[16] Consequently, section 7 of the Clayton Act seeks to eliminate vertical restraint of trade occurring through any acquisition of corporate assets that forms a combination between a producer and a supplier.[17] Section 7 is violated when it is likely that competition may be foreclosed in a substantial share of a market that is itself substantial.[18] Proof of a section 7 violation requires a showing of an acquisition's anticompetitive effects in a market proven to be within "any line of commerce in any section of the country."[19] Private parties may seek relief under section 7, but certain factors limit success in private suits. Although the Clayton Act possibly provides for damages for private parties[20] and certainly provides injunctive relief,[21] no court has awarded damages in a private section 7 suit,[22] and all are reluctant to employ their full equitable power for private litigants. To win injunctive relief, a private party must prove with a fair degree of certainty actual injury and show a causal connection between the antitrust violation and the in-

16. Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 262 (1972).

17. United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

18. 353 U.S. at 595.

19. Clayton Act § 7, 15 U.S.C. § 18 (1970). A market is defined through the application of the "relevant product market test," whereby the outer boundaries of a broad market are determined by the interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Identifiable submarkets may exist within the broad market. Brown Shoe Co., Inc. v. United States, 370 U.S. 295, 325-26 (1962). The role of cross-elasticity of supply or "production flexibility" in section 7 enforcement remains unsettled. SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 68 (1975) [hereinafter cited as ANTITRUST LAW DEVELOPMENTS]. Anticompetitive effects can be expected to occur when an acquisition tends to bar entry into either the supplier's or producer's market or to disadvantage existing firms in the market. W. FUGATE, FOREIGN COMMERCE AND ANTITRUST LAWS 340 (2d ed. 1973) [hereinafter cited as FUGATE].

20. In addition to the instant decision several courts have suggested that treble-damage actions are possible under section 7. *See* Gottesman v. General Motors Corp., 414 F.2d 956, 961 (2d Cir. 1969), *on remand,* 310 F. Supp. 1257 (S.D.N.Y. 1970), *aff'd,* 436 F.2d 1205 (2d Cir.), *cert. denied,* 403 U.S. 911 (1971). Although there is a split of authority in federal courts, the Supreme Court has not ruled on the question. ANTITRUST LAW DEVELOPMENTS 289, n.238.

21. The Clayton Act § 16, 15 U.S.C. § 26 (1970) provides, in pertinent part: "any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States . . . against threatened loss or damage by a violation of the antitrust laws. . . ." Courts recognize that their injunctive power in antitrust cases is derived from statute and not from their power to do equity. ANTITRUST LAW DEVELOPMENTS 292.

22. ANTITRUST LAW DEVELOPMENTS 288.

jury.[23] Because private interests do not necessarily parallel public interests, equitable relief fashioned in antitrust actions must be conditioned on public need.[24] Consequently, when great public injury has been revealed through private antitrust actions, courts have not been reluctant to grant drastic relief.[25] Section 7 applies to foreign commerce when both the acquired and the acquiring corporation are engaged in commerce "among the several States and with foreign nations."[26] Thus it has been held, in *United States v. Aluminum, Ltd.*,[27] that section 7 applies to the acquisition of a domestic corporation by a foreign firm. In that case, the government alleged that a Canadian aluminum producer's acquisition of a domestic aluminum fabricating firm through the Canadian firm's United States subsidiary violated section 7; the consent decree provided for the sale of the acquired facilities.[28] Although foreign commerce is not immune to antitrust laws, foreign trade policies may operate to modify antitrust judgments. In *United States v. Timken Roller Bearing Co.*,[29] domestic and foreign companies were found to have conspired in a cartel arrangement, and divestiture was affirmed as an appropriate remedy for the restoration of competition. Justice Frankfurter's dissent, however, proffered the first suggestion from the Supreme Court that injunctive relief could be modified given the "special circumstances" of foreign trade.[30] Since that decision, some courts have modified equitable relief in the interest of foreign trade. For example, in *United States v. General Electric Co.*,[31] appropriate relief was modified to

23. Simpson v. Union Oil Co., 311 F.2d 764, 767 (9th Cir. 1963), *rev'd on other grounds*, 377 U.S. 13 (1964).

24. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131 (1969). To demonstrate the demands of public need, an injunctive order must be accompanied by specific findings of fact as required by Rule 52(a) of the Federal Rules of Civil Procedure. Alpha Distributing Co. v. Jack Daniels Distillery, 454 F.2d 442, 453 (9th Cir. 1972).

25. Schrader v. National Screen Service Corp., 1955 Trade Cas. ¶ 68,217 at 71,008 (E.D.Pa. 1955); Fanchon and Marco, Inc. v. Paramount Pictures, Inc., 1953 Trade Cas. ¶ 67,452 at 68,281 (2d Cir. 1973).

26. Clayton Act § 1, 15 U.S.C. § 12 (1970). The Supreme Court has suggested that if an acquisition has a substantial impact on United States commerce, the jurisdictional clause of the Clayton Act will be liberally interpreted. United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) (dicta); FUGATE 335.

27. 268 F. Supp. 758 (D.N.J. 1966), 1967 Trade Cas. ¶ 71,895 (consent decree).

28. *Id.*

29. 341 U.S. 593 (1951), *modifying and aff'g*, 83 F. Supp. 284 (N.D. Ohio 1949).

30. 341 U.S. at 605.

31. 115 F. Supp. 835 (D.N.J. 1953).

exclude a Dutch corporation from a portion of the decree that had provoked a protest from the Dutch government and that may have conflicted with local law.[32] In *United States v. The Watchmakers of Switzerland Information Center, Inc.*,[33] the court found that an international cartel had unreasonably restricted United States imports and exports. In response to objections by the Swiss government and at the instance at the State Department, the Justice Department held unprecedented negotiations with the Swiss government and the defendants so that the final judgment might be amended.[34] The court modified the original order and declared that implementation of the illegal restrictive agreement was no longer possible, that Switzerland had instituted precautions against the violation's recurrence, and that a modification of the final order would be advantageous to United States foreign policy.[35] However, given the courts' awareness of foreign trade complications, provisions of an antitrust order will be fashioned to fit the needs of the case with the intent of devising the most effective remedy possible.[36] Consequently, courts have not hesitated to enjoin domestic corporations from performing contracts with foreign parties, even to the extent of halting imports and exports.[37] In addition to affecting the type of relief available in antitrust cases, the demands of foreign commerce have given rise to certain exceptions to the application of antitrust laws. United States antitrust laws do not reach business practices undertaken by a sovereign nation,[38] corporate acts mandated by foreign governments,[39] and business ar-

32. The Netherlands has refused to comply with United States antitrust laws and has declined to incorporate the restrictive business practices clause in bilateral agreements with the United States. Haight, *The Restrictive Business Practices Clause in U.S. Treaties: An Antitrust Tranquilizer for International Trade*, 70 YALE L.J. 240, 243-44 (1960) [hereinafter cited as Haight].

33. 1965 Trade Cas. ¶ 71,352 at 80,490 (S.D.N.Y. 1965), *modifying*, Civil No. 96-170 (S.D.N.Y. 1964).

34. FUGATE 444-45.

35. *See* note 33 *supra.*

36. United States v. National Lead Co., 332 U.S. 319, 334 (1945); Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972).

37. United States v. United Engineering and Foundry Co., 1952-1953 Trade Cas. ¶ 67,378 at 67,973 (W.D. Pa. 1952); Zenith Radio Corp. v. Hazeltine, 395 U.S. 100 (1969).

38. "A state is immune from the exercise by another state of jurisdiction to enforce rules of law" RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW § 65 (1965). Courts will tend to construct sovereign immunity narrowly and will defer to State Department policy, which also declines to apply the doctrine expansively. FUGATE 111-14.

39. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). However,

rangements specifically exempted by statute.[40] The last exemption may include exceptions provided by treaties, which are construed *in pari materia* with congressional acts.[41] Usually, treaty rights offer no protection against antitrust enforcement.[42] In addition, most United States treaties with friendly foreign nations include a "restrictive business practices" clause granting sovereign parties full power to invoke antitrust legislation.[43] In dealing with antitrust violations, courts generally must analyze the exigencies of foreign commerce in view of the statutory requirements for a competitive trade system and attempt to satisfy the needs of both.

In the instant decision, the court declared that the district court's summary dispositions of the damages claims were erroneous, thereby requiring a new trial on all claims and a suspension of all equitable relief granted. In reviewing the summary dispositions of the district court, the court noted that the movant's burden of proof is heavier in antitrust cases. This policy stems from the recognition of the inherent difficulty of proving an antitrust violation.[44] In reviewing the dispositions that determined whether VW Pacific was involved in the alleged conspiracy,[45] whether the

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mere authorization by a foreign government to engage in restrictive trade practices is inadequate as a defense. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962).

40. The primary statutory exemption to the United States antitrust laws is the Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-65 (1970). *See* FUGATE 223-54.

41. U.S. CONST. art. VI, cl. 2; Calnetics Corp. v. Volkswagen of America, Inc., 353 F. Supp. 1219, 1224 (C.D. Calif. 1973).

42. *See*, United States v. R.P. Oldham Co., 152 F.Supp. 818 (N.D. Cal. 1957). In an action charging an importer and a United States subsidiary of a Japanese corporation with conspiracy to restrain importation, the defendants moved to dismiss the action citing the United States-Japanese treaty. The court held that a domestic corporation had no standing to invoke treaty provisions for an exclusive remedy for antitrust violations.

43. *See*, Haight 242; FUGATE 375-76.

44. 532 F.2d at 683-84:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot . . . It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

45. In addition to finding sufficient evidence for jury consideration of this issue, the court held that VW Pacific's argument that it had participated involun-

acquisition of VW Products was a result of an independent business judgment or conspiratorial intent, and whether Calnetics sustained calculable damages as a result of the alleged conspiracy, the court held that there was sufficient evidence to try those issues before a jury and reversed the summary dispositions.[46] In rejecting the summary procedures taken by the district court, the instant court ordered jury proceedings on Calnetics' section 7 claims.[47] Since VW, VW Products, and VW Pacific had a right to a jury trial on the remanded issues stemming from Calnetics's original demand for a jury trial,[48] and since the district court had held that the original defendants had violated section 7 and had ordered injunctive relief, the instant court found that the decision granting equitable relief must be vacated in order to preserve a fair jury trial for all parties.[49] Although the instant court vacated the order for equitable relief, observing that it therefore need not consider the merits of the challenges to that order, the court commented "in the interest of judicial economy" on the equitable relief granted should the district court proceed to reconsider the injunctive remedies.[50] The court observed that in fashioning equitable relief the district court failed to consider the cross-elasticity[51] of production facilities or capacity in defining the product market and erred in failing to analyze the anticompetitive effect of the acquisition. The court then declared that divestiture is not available as relief to private parties in antitrust cases.[52] Since the other measures of equitable

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tarily in the conspiracy was not a valid defense. 532 F.2d at 682.

46. The court also held that VW's counterclaim against Calnetics alleging commercial bribery in violation of the Sherman Act was insufficient and warranted a summary judgment in favor of Calnetics. The court further held that because VW Products could allege damages flowing from the secret agreement arranged by Calnetics, the summary judgment against VW Products' counterclaim should be reversed and the claims remanded for trial. 532 F.2d at 686-88.

47. The court also reversed the summary judgment in favor of VW and VW Products on Calnetics' Sherman Act claims, holding that Calnetics' sales resulting from its illegal agreement with VW Pacific were admissible for proving damages. 532 F.2d at 688.

48. *See* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.39 1, at 312; ¶ 38.45 (2d ed. 1948, *as amended* 1975).

49. The court stated that the right to a jury trial must not be infringed by a determination of equitable claims prior to the legal claims joined in the action. Otherwise, the prior determination of equitable claims could trigger a collateral estoppel or *res judicata* effect on the claims for damages. 532 F.2d at 690. *See* Ross v. Bernhard, 396 U.S. 531, 537 (1970).

50. 532 F.2d at 691.

51. *See* note 19 *supra.*

52. The Ninth Circuit declared that divestiture was unavailable as a remedy

relief[53] were designed to supplement the order to divest, the court found them inappropriate as future remedies. In evaluating the import ban on foreign automobiles distributed by VW and equipped with factory-installed air conditioning, the court criticized the remedy in terms of its anticompetitive effects, its impact on foreign relations, and its bearing on corporations not party to the action. Because the import ban was premised on a limited market concept, the court declared that the ban had an anticompetitive effect on the sale of automobiles by closing the market to foreign manufacturers of automobiles with factory-installed air conditioners. Additionally, because the import restrictions dealt primarily with competition within the submarket of domestic automobile air conditioning equipment, the court found that the ban had a short-term anticompetitive effect on the automobile air conditioning trade by barring foreign manufacturers as market entrants and thus eliminating consequential downward price pressure. The court stated that such anticompetitive effects must be considered when fashioning injunctive relief. The instant court further discovered that the import ban was discriminatory because it imposed restrictions on German automobile manufacturers that were not applicable to the domestic automobile industry. But the court agreed with the district court's declaration that the restrictive business practice clauses of the German-American Treaty of 1954 and GATT permitted United States courts to enforce sanctions against foreign violators of antitrust laws. However, since the treaties were relevant to the determination to impose an import

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in private antitrust suits in *International Telephone and Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975). The unavailability of divestiture to private parties under § 16 of the Clayton Act is an issue before the United States Supreme Court. NBO Industries Treadway Companies, Inc. v. Brunswick, Corp., 1975-2 Trade Cas. ¶ 60,479 at 67,116 (3d Cir. 1975) *petition for cert. filed,* 44 U.S.L.W. 3345 (U.S. Nov. 26, 1975) (75-770).

53. Because divestiture is unavailable to Calnetics as a remedy, the proper measure of the need for relief is the threat of prospective injury to Calnetics. 532 F.2d at 692. Since the ten year ban on the domestic manufacture of automobile air conditioners was designed to supplement divestiture, the court found that it is not a preferable form of relief. 532 F.2d at 694. The court declared that the purchase restriction enjoining VW from satisfying more than 50% of its air conditioning equipment needs from trade with the divested firm should not be imposed since it stifles competition and creates a regulated industry. *Id.* In addition to these advisory holdings, the court reversed the district court's decision awarding attorney's fees and trial costs to Calnetics and preventing VW Pacific from counterclaiming against Calnetics on alleged damages stemming from the secret agreement. 532 F.2d at 694-96.

ban through both the restrictive business practices and trade discrimination clauses, the court declared that a proper evaluation of the necessity for an import ban requires a justification of the ban under the germaine treaty clauses. Since the import ban on VW barred its importation of Porsche automobiles, the court stated that basic fairness demands that future proceedings on the ban provide Porsche, an independent German corporation, the opportunity to be heard. The court urged that any reconsideration of imposing an import ban on VW should specifically investigate the applicability of relevant treaties, the unavailability of divestiture as a remedy, and the anticompetitive effect of the ban on the sale of automobiles and of automobile air conditioning equipment.

In its evaluation of the import ban, the instant court was foresighted in establishing clear guidelines for reassessing the restrictions. Its opinion provides an excellent insight on how courts will determine equitable relief when a section 7 violation affects foreign commerce. The court suggests that restoring competition in the market has greater value than providing relief for the alleged injury to Calnetics or preserving foreign trade relations. However, in recommending that the district court reevaluate the treaty implications of the import ban, the court confirmed the view that trade policy considerations can have a vital role in determining proper relief when foreign commerce is affected.[54] The court's sensitivity to foreign commerce is apparent in its recommendation that the relevant market and the anticompetitive repercussions of relief be viewed on an international level and that other foreign producers be afforded an opportunity to be heard when their interests are at stake. Should the district court adhere to the guidelines set by the instant court when it reconsiders the import restrictions as relief, the result will most likely be in accord with antitrust objectives and the interests of foreign trade. In keeping with the instant court's suggestion that import restrictions are extreme antitrust remedies, the district court would do well to exhaust all alternative remedies before shaping relief with adverse effects on automobile imports. Yet while the instant decision reaffirms the unavailability of divestiture to private plaintiffs, the court paradoxically does not disavow the use of import bans to restore competition in a monopolized market. Consequently, the instant decision illustrates the element of uncertainty in foreign trade stemming from the interaction of international business operations and judicial enforcement

54. FUGATE 416-18.

of antitrust laws. Indicating official sensitivity to the potential conflict between antitrust enforcement and international trade policy, cooperative arrangements for dealing with restrictive business practices have been promulgated by the Justice Department,[55] the Organization for Economic Cooperation and Development (OECD),[56] and the contracting parties of GATT.[57] International consultation between governments on antitrust cases has alleviated otherwise counter-productive tension.[58] In a move to formalize exchanges of information on antitrust litigation, the Federal Republic of Germany and the United States are ratifying an executive agreement for mutual cooperation in this field.[59] Notwithstanding these developments, the Justice Department's decision to prosecute under section 7 remains a process of weighing the possibility of an anticompetitive effect against the substantiality

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55. In view of problems of comity with foreign nations and of national security, the United States Justice Department consults with the State Department, the Defense Department, and other relevant agencies on potential actions which would affect relations with other governments. Report of the Attorney General's National Committee to Study the Antitrust Laws 97 (1955). In 1962 the Justice Department organized the Foreign Commerce section of the Antitrust Division to coordinate cases and investigations involving foreign trade and to communicate with appropriate agencies, particularly with the Office of Business Protection of the State Department, the Commerce Department, and the Federal Trade Commission. ANTITRUST LAW DEVELOPMENTS 379.

56. The Restrictive Business Practices Committee is the primary organ of the OECD devoted to achieving international antitrust cooperation. In 1967 the Council of the OECD adopted the Committee's resolution calling for mutual notification of national legislation governing restrictive business practices, coordination in enforcing current laws, and exchanges of information, where legally and politically practical, on anticompetitive and monopolistic practices. FUGATE 463.

57. In 1961 the Contracting Parties of GATT adopted a resolution drafted by a group of experts recommending that consultation on restrictive business practices be promoted. J. JACKSON, WORLD TRADE AND THE LAW OF GATT 526 (1969).

58. *See,* United States v. Watchmakers of Switzerland Information Center, Inc., 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *judgment modified,* 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965). *See also* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 372 (2d ed. 1970); Haight 240 *et seq.*

59. At this writing, formal implementation is delayed pending ratification of the Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices by the German Bundestag. The accord calls for the two governments to share information on antitrust litigation and developments that "have a substantial effect on . . . international trade . . . ." BNA ANTITRUST & TRADE REG. REP. No. 772 at A-2, D-1 (July 13, 1976). The accord is similar to an oral agreement between the United States and Canada yet no further bilateral accords are immediately foreseen, BNA ANTITRUST & TRADI REG. REP. No. 771 at A-9 (July 6, 1976).

of the violation.[60] Hence, the unpredictability of government enforcement and severe penalties set by antitrust laws combine to deter corporations from engaging in international ventures that may be legal and beneficial.[61] This restraining effect on commerce is even more evident given the impact of private antitrust suits.[62] Businesses and sovereignties involved in international trade are equally exposed to the pitfalls of a private antitrust action but do not have the benefit of consultation or other arrangements designed to ease friction in the wake of government cases. Despite the instant court's helpful guidelines, which recommend that equitable relief in antitrust cases be based on a realistic market definition and a comprehensive appraisal of the foreign trade implications, the possibility of harsh injunctive remedies in private actions will continue to inhibit international commercial growth.

John J. Curry, Jr.

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60. *Compare* Rosenthal, *Imports on Section 7 of the Clayton Act,* 60 CORNELL L. REV. 600 (1975) *with* Graham & Hermann, *Section 7 of the Clayton Act and Mergers Involving Foreign Interests,* 23 STAN. L. REV. 205, 234 (1971).

61. J. BEHRMAN, CONFLICTING CONSTRAINTS ON THE MULTINATIONAL ENTERPRISE: POTENTIAL FOR RESOLUTION 14 (1974).

62. The Antitrust Section of the American Bar Association has discussed the punitive effects of the "private attorney general" concept in private antitrust cases as well as limited opportunities for influencing decisions for equitable relief in such cases. 43 ANTITRUST L.J. 180-82 (1974).

EUROPEAN COMMUNITIES—RESTRICTIVE TRADE PRACTICES —PATENT LICENSING AGREEMENTS THAT RESTRICT COMPETITION BETWEEN MEMBER STATES WITHOUT IMPROVING PRODUCTION OR DISTRIBUTION OR PROMOTING TECHNICAL OR ECONOMIC PROGRESS VIOLATE ARTICLE 85

In 1951, Beyrard, a French inventor, licensed the Association des Ouvriers en Instruments de Précision (AOIP), a Paris manufacturer, to exploit his patents[1] in the production and sale of variable resistor electrical devices.[2] The licensee, AOIP, was given monopoly selling and manufacturing rights in France, but was prohibited from exporting to any country where the licensor had granted another license or had assigned the patent rights to a third party. The parties agreed to refrain from competing against one another in all the fields covered by the agreement. AOIP also promised to refrain from challenging the validity of the patents. Royalty payments[3] extended for the twenty-year life of the 1951 patents. The development of any subsequent improvement patent automatically extended the payments until the expiration of the new patent. Under a separate clause AOIP agreed to make extended royalty payments even if it relied solely upon its own research and development or that of a third party in designing and marketing the improved electrical devices. Plaintiff, AOIP, ceased royalty payments in 1971 and sued for an interlocutory order establishing that the 1951 agreement was anti-competitive and prohibited by article 85 (1) of the Treaty of Rome.[4] Defendant Beyrard maintained that the Community rules on competition should not apply when the agreement is concluded between two parties in a single Member State. Defendant argued that the royalty payments should continue until the expiration of the most recent patent improvement in 1989. The lower court dismissed AOIP's application on the ground that AOIP had impliedly recognized the validity of the 1969 improvement

1. Of eleven patents granted, only Patent No. 1,088,565, dated August 7, 1951, and entitled "Liquid resistor electrical device" has actually been exploited by AOIP.

2. AOIP held an estimated 6.98% share of the French market for electrical devices and accounted for 17.93% of French exports to other EEC Countries.

3. Payments were calculated by reference to the licensee's net turnover in respect of any equipment which contained any of the electrical devices.

4. Treaty Establishing the European Economic Community (EEC), March 25, 1957. The authoritative English text of the treaty may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (Office of Official Publications of the European Communities, 1973). An unofficial English text may be found in 298 U.N.T.S. 3 (1958).

patent when it obtained Beyrard's agreement to the assignment of half of the rights attaching to patents in other countries which were derived from the French patent of 1969.[5] The Paris Court of Appeal upheld the order. The Commission of European Communities, *held,* reversed.[6] When a patent licensing agreement unduly restricts competition by forbidding other licenses, prohibiting exports, denying patent revocation action by the licensee, permitting indefinite licensing extension, disallowing competition between the parties, and requiring the licensee to pay royalties on its own research efforts, the agreement violates article 85(1) and is null and void under article 85(2) unless the agreement as a whole improves the production or distribution of goods or promotes technical or economic progress. *Association des Ouvriers en Instruments de Précision/Beyrard Decision* [1976] J.O. L6/8, 2 CCH COMM. MKT. REP. ¶ 9801, 17 Comm. Mkt. L.R. D14 (1976).

Article 85(1)[7] prohibits and renders unenforceable[8] agreements which are liable to affect trade between the Member States and which are designed[9] to or result in the prevention, restriction or

5. Decided by interlocutory order of the Tribunal de Grande Instance, Paris, on October 19, 1971.

6. Under article 3 of the Treaty of Rome a firm which violates article 85(1) may be ordered to end the infringement through a decision of the Commmission. Articles 11-14 and Council Regulation No. 17/62 grant the Commission broad powers of investigation in its enforcement of the antitrust provisions.

7. Article 85(1) provides:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;
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> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
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> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

8. Article 85(2) provides: "2. Any agreements or decisions prohibited pursuant to this article shall be automatically void."

9. The prohibited agreement need not actually affect trade between Member States if the purpose of the agreement is to prevent, restrict or distort competition. Establissements Consten and Grundig-Verkaufs-GmbH v. Commission, 12

distortion of competition within the Common Market. Under article 85(1) an agreement must be examined in both its legal and economic context[10] to determine whether it is capable of affecting trade between the Member States by partitioning the market in certain products between the states.[11] Unlawful agreements under article 85(1) may, however, obtain antitrust exemption under article 85(3).[12] The exemption pertains to situations in which the beneficial aspects of the agreement predominate over the harmful effects engendered by the restraint on competition.[13] In *Davidson Rubber Company*[14] the Commission held that a no-

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Recueil de la Jurisprudence de la Cour (Cour de Justice de la Communauté Européenne) 429 [hereinafter cited as Recueil], 2 CCH COMM. MKT. REP. ¶ 8046, at 7652, 5 Comm. Mkt. L.R. 473 (1966).

10. S.A. Brasserie de Haecht v. Consorts Wilkin-Janssen, 13 Recueil 525, 2 CCH COMM. MKT. REP. ¶ 8053, at 7804, 7 Comm. Mkt. L.R. 40 (1967). The Court of Justice of the EEC has defined the economic considerations as including the nature and quantity of the products dealt with in the agreement, the position of each of the contracting parties in the relevant market and the importance of that position, the isolated nature of the agreement in question or, alternatively, the position of the agreement within a group of agreements and any possibilities for competition in the same products left open by means of re-exportation or parallel importation. Société Technique Minière v. Maschinenbau Ulm GmbH, 12 Recueil 337, 2 CCH COMM. MKT. REP. ¶ 8047, at 7696, 5 Comm. Mkt. L.R. 375, 376 (1966). That the economic and legal effects of the agreement are the decisive factors in deciding whether the agreement is prohibited by articles 85(1) has been called the "market effect criterion." B. CAWTHRA, INDUSTRIAL PROPERTY RIGHTS IN THE EEC 39, 40 (1973). *See also,* Callman, *The Law of Unfair Competition in the Member States of the European Economic Community,* 7 INT'L LAW 855, 864 (1973).

11. Société Technique Minière v. Maschinenbau Ulm GmbH, 12 Recueil 337, 2 CCH COMM. MKT. REP. ¶ 8047, at 7696, 5 Comm. Mkt. L.R. 375 (1966).

12. Article 85(3) provides:

> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
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> —any agreement or category of agreements between undertakings;
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> —any decision or category of decisions by associations of undertakings;
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> —any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
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> (a) impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives;
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> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

13. Établissements Consten and Grundig-Verkaufs-GmbH v. Commission, 12 Recueil 429, 2 CCH COMM. MKT. REP. ¶ 8046, at 7655, 5 Comm. Mkt. L.R. 478 (1966).

14. Davidson Rubber Company Decision, [1972] Official Journal of the Euro-

challenge clause fell within the prohibition of article 85(1) as a restriction on the competitive capacity of the licensees, and did not qualify for a dispensatory declaration under article 85(3).[15] Export prohibition clauses have likewise met with disfavor,[16] although they should not be regarded as prohibited per se.[17] The validity of an export prohibition clause may in part depend on whether there is a parallel patent in the prohibited territory.[18] Exclusive licensing agreements[19] were seemingly exempted from the scope

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pean Communities L143/31 [hereinafter cited as J.O.], CCH COMM. MKT. REP. ¶ 9512, 11 Comm. Mkt. L.R. D52 (1972).

15. At the request of the Commission the parties deleted this clause subsequent to notification. Likewise in the *Burroughs AG and Geha-Werke GmbH Decision* the parties to the agreement deleted a no-challenge clause upon the Commission's request. [1972] J.O. L13/53, CCH COMM. MKT. REP. ¶ 9486, 11 Comm. Mkt. L.R. D72 (1972). In the *Raymond-Nagoya and Company Decision,* however, the Commission permitted a no-challenge clause because it would not affect competition in the Common Market and its removal would only have improved the position of competitors in the Far East. [1972] J.O. L143/39, CCH COMM. MKT. REP. ¶ 9153, 11 Comm. Mkt. L.R. D45 (1972).

16. Établissements Consten and Grundig-Verkaufs-GmbH v. Commission, 12 Recueil 519, 520, 2 CCH COMM. MKT. REP. ¶ 8046, at 7653, 5 Comm. Mkt. L.R. 473 (1966).

17. As far back as 1962, the Court of Justice stated that "since the context in which the export prohibition clause appears is not known to the court, it is unable to decide whether this clause comes within the provisions of article 85(1)." De Geus v. Robert Bosch et al., 8 Recueil 109, 2 CCH COMM. MKT. REP. ¶ 8003, at 7139, 1 Comm. Mkt. L.R. 29 (1962).

18. Patent licensing agreements can give rise to three types of territorial restrictions. First, the licensee may be prohibited from selling directly into a market outside his territory where there is a parallel patent which is being exploited or second, where there is a parallel patent which has not been exploited or third, where there is no parallel patent. Cawthra has suggested that the first type is clearly permissible while the third is impermissible. The second might be permissible if the licensor was delaying exploitation as part of his marketing plan. If, however, the delay was deliberate in order to keep out competitors then it might be impermissible. Cawthra, *Licensing Patents,* 124 NEW L.J. 116, 117 (1974) [hereinafter cited as Cawthra]. It should also be noted that the territorial restriction should apply only to the licensee and not to his customers. The exclusive right granted to the licensee should be a right of first sale: the licensor should not be able to prohibit the customers of the licensee from selling outside his territory. This principle is known as "the doctrine of the exhaustion of property rights." Deutsche Grammophon Gesellschaft bmH v. Metro-SB-Grossmärkte GmbH, 17 Recueil 487, 2 CCH COMM. MKT. REP. ¶ 8106, at 7192, 10 Comm. Mkt. L.R. 657, 658 (1971). By paragraph 67 of the *First Report on Competition Policy* the Commission has made it clear that it regards the Deutsche Grammophon holding as equally valid for patents. Cawthra, at 116.

19. The *Notice* exempts non-restricted exclusive licensing agreements in which the licensor undertakes not to authorize any other person to utilize the

of article 85(1) by the Commission's *Official Notice on Patent Licensing Agreements*.[20] The Commission felt that such exclusive agreements were unlikely to affect trade between the Member States.[21] In *Davidson Rubber Company* the Commission retreated from this broad stance and held that an exclusivity clause was not excluded from the scope of the prohibition of article 85(1),[22] although it did qualify for exemption under article 85(3).[23] *Davidson* thus appears to state that exclusive manufacturing licenses are acceptable while exclusive selling licenses are not.[24] The Commission has upheld improvements clauses when the obligation is nonexclusive and each licensee retains the right to license third parties.[25] The Court of Justice of the EEC has held that non-

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invention himself. Wertheimer, *Licensing Agreements under EEC Antitrust Law*, in COMMERCIAL AGENCY AND DISTRIBUTION IN THE E.E.C. 123 (W. Gerven and F. Lukoff eds. 1970) [hereinafter cited as Wertheimer].

20. [1962] J.O. 139/2922, CCH COMM. MKT. REP. ¶ 2698. The *Notice* states in part that:

"The following clauses appearing in patent licensing agreements do not fall under the prohibition laid down by article 85, paragraph 1, of the Treaty:

A. Obligations imposed on the licensee, the purpose of which is:

1. The limitation of the methods of exploitation of the invention provided for in the patent rights (manufacture, use, distribution) to certain persons."

21. Wertheimer, *supra* note 19, at 123. The Commission also felt that the licensor's undertaking not to utilize the patented invention himself so closely approaches an assignment of rights that it should not be objectionable.

22. [1972] J.O. L143/31, CCH COMM. MKT. REP. ¶ 9512, 11 Comm. Mkt. L.R. D52 (1972). *Accord,* Burroughs AG and Geha-Werke GmbH Decision, [1972] J.O. L13/53, CCH COMM. MKT. REP. ¶ 9486, 11 Comm. Mkt. L.R. D72 (1972).

23. In *Davidson* the Commission felt that the restriction on competition caused by the exclusivity clause was sufficiently mitigated by a clause permitting the free sale of the licensed products throughout the Common Market to fit within the exemption of article 85(3). [1972] J.O. L143/31, CCH COMM. MKT. REP. ¶ 9512, 11 Comm. Mkt. L.R. D52 (1972). Likewise, a clause in a patent licensing agreement whereby the licensor grants the licensee exclusive manufacturing rights within a specified portion of the Common Market may qualify for article 85(3) exemption. Kabelmetal-Luchaire Decision, [1975] J.O. L222/34, CCH COMM. MKT. REP. ¶ 9761, 16 Comm. Mkt. L.R. D40 (1975). This is particularly the case when the exclusivity provides a stimulus for the licensee to penetrate a territorial, or product, market which has not yet been exploited by the licensor. Bronbemaling/Heidemaatschappij Decision, [1975] J.O. L249/27, CCH COMM. MKT. REP. ¶ 9776, 16 Comm. Mkt. L.R. D67 (1975).

24. Cawthra, *supra* note 18, at 116. Alternatively the *Davidson* decision seems to be authority for the proposition that an exclusive manufacturing license is acceptable provided it is accompanied by a non-exclusive selling license. Cawthra has suggested this distinction may be incorrect both in theory and in practice.

25. Raymond-Nagoya Decision, [1972] J.O. L143/39, CCH COMM. MKT. REP. ¶ 9513, 11 Comm. Mkt. L.R. D45 (1972). The Commission required Raymond to

competition clauses violate article 85(1).[26] The validity of extension clauses in patent licensing agreements had not been considered before the instant decision.[27]

The Commission found that Beyrard and AOIP were undertakings within the meaning of article 85.[28] The patent licensing agreement was also held to be an agreement within the meaning of article 85.[29] Due to AOIP's sizable exports of electrical devices to other Common Market countries the Commission held that the agreement affected trade between the Member States.[30] Trade was also found to be affected because AOIP's exclusive rights in France prevented other firms (both foreign and French) from entering the French market.[31] Before addressing the relevancy of article 85(1) the Commission decided that the licensor could not invoke the *Official Notice on Patent Licensing Agreements* to defend the agreement.[32] The Commission then decided that when taken together the six clauses constituted an infringement on competition and the agreement was therefore prohibited by article 85(1). The Commission found that the exclusivity clause individually restricted competition because the licensor gave up for the duration of the agreement the power to grant licenses to other firms for the

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alter its improvements clause in the original agreement; in the reworded version Nagoya was obliged to grant Raymond only a non-exclusive license concerning the improvements. 11 Comm. Mkt. L.R. D45. For a discussion of the Commission's actions regarding patents see Note, *Protection of Industrial Property Rights in the EEC*, 8 VAND. J. TRANSNAT'L L. 708 (1975).

26. The Court of Justice has also suggested that non-competition clauses between the parties to an agreement and third parties may violate article 85(1) because the parties could through such an agreement, by preventing or restricting the competition of third parties in a product, attempt to create or guarantee for themselves an unjustified advantage to the detriment of consumers and users. Italy v. EEC Council and EEC Commission, 12 Recueil 563, 2 CCH COMM. MKT. REP. ¶ 8048, at 7719 (1966).

27. This may be due to the fact that the Commission and Court of Justice have considered relatively few patent licensing agreement cases.

28. [1976] J.O. L6/12, 2 CCH COMM. MKT. REP. ¶ 9801, at 9796, 17 Comm. Mkt. L.R. D22 (1976).

29. *Id.*

30. [1976] J.O. L6/13-14, 2 CCH COMM. MKT. REP. ¶ 9801, at 9798, 17 Comm. Mkt. L.R. D25 (1976).

31. *Id.*

32. The Commission held that the licensor could not invoke the *Notice* to defeat the validity of the licensing agreement because the latter contained restrictions (particularly the no-challenge, non-competition, extension and improvements clauses) which are not regarded by the *Notice* as compatible with article 85(1). [1976] J.O. L6/13, 2 CCH COMM. MKT. REP. ¶ 9801, at 9798, 17 Comm. Mkt. L.R. D22.

same territory.[33] The export prohibition clause was found to restrict competition because it protected one licensee against the competition of another licensee or assignee.[34] The no-challenge clause was held to be anti-competitive because it deprived the licensee of the possibility of cancelling its obligation through an action for patent revocation.[35] The extension clause which permitted the licensor to unilaterally and indefinitely extend the duration of the agreement was adjudged to restrict competition because it obliged the licensee to pay royalties on unexpired or unused patents and thus burdened manufacturing costs without any economic justification.[36] The noncompetition clause also was held to constitute a restriction on competition.[37] The improvements clause obligating the licensee to pay royalties on its own research and development was found to restrict competition because payments would be required even if the improvements patents were not exploited.[38] The improvements clause was also deemed to be anti-competitive because it discouraged the licensee from engaging in its own research and development.[39] The Commission held that the no-challenge, extension, noncompetition and improvements clauses did not qualify for exemption under article 85(3) because they did not improve production or distribution, or promote technical or economic progress.[40] The Commission did not pass on the possible exemption of the exclusivity and export prohibition clauses under article 85(3).[41] Instead, it held that when all six clauses are combined in a single patent licensing agreement the latter is prohibited under article 85(1) and is not exempted by article 85(3) because the net effect of the agreement is to unduly restrict competition and hinder both technical and economic prog-

33. *Id.*

34. [1976] J.O. L6/12, 2 CCH COMM. MKT. REP. ¶ 9801, at 9797, 17 Comm. Mkt. L.R. D22, 23.

35. *Id.*

36. [1976] J.O. L6/13, 2 CCH COMM. MKT. REP. ¶ 9801, at 9797, 17 Comm. Mkt. L.R. D23.

37. [1976] J.O. L6/13, 2 CCH COMM. MKT. REP. ¶ 9801, at 9798, 17 Comm. Mkt. L.R. D24.

38. *Id.*

39. *Id.*

40. [1976] J.O. L6/14, 2 CCH COMM. MKT. REP. ¶ 9801, at 9799, 17 Comm. Mkt. L.R. D26. The non-competition clause also removed the commercial incentive for the two parties to conduct research in fields parallel to those of the licensed patents, while the improvements clause reduced the incentive to find better technical solutions which were not covered by the licensor's patents.

41. *Id.*

ress without any improvement in the production or distribution of goods.[42]

The decision has broad significance since it marks the first time the Commission has struck down a patent licensing agreement in its entirety as violative of article 85(1). By voiding the entire agreement the Commission leaves open the issue of whether a patent licensing agreement containing only some of the six clauses would be upheld.[43] The Commission will clearly be reluctant to grant article 85(3) exemption to agreements containing no-challenge, noncompetition, extension and improvements clauses.[44] However, agreements containing only exclusivity and export prohibition clauses may well be permitted.[45] The decision reaffirms the proposition that the *Official Notice on Patent Licensing Agreements* no longer exempts exclusivity clauses from the scope of article 85(1).[46] By holding the *Notice* inapplicable the Commission suggests that it may be reluctant to declare any similar block exemptions in the foreseeable future.[47] The Commission will seemingly emphasize the flexibility of article 85(3) in differentiating between permissible and impermissible patent licensing agreements.[48] An *ad hoc* approach founded on an economic analysis

42. *Id.*

43. The agreement may be severed and any offending portions removed. If the remaining portion constitutes an operative agreement it will be upheld by the Commission. Davidson Rubber Company Decision, [1972] J.O. L143/31, CCH COMM. MKT. REP. ¶ 9512, 11 Comm. Mkt. L.R. D52 (1972).

44. However, since article 85(1) is based on an economic evaluation of the effects of an agreement, it should not be interpreted as setting up any prejudgment whatever with regard to a specific category of agreements identifiable from its legal nature. Société Technique Minière v. Maschinenbau Ulm GmbH, 12 Recueil 337, 2 CCH COMM. MKT. REP. ¶ 8047, at 7695, 5 Comm. Mkt. L.R. 374 (1966).

45. *See, e.g.*, Davidson Rubber Company Decision, [1972] J.O. L143/31, CCH COMM. MKT. REP. ¶ 9519, 11 Comm. Mkt. L.R. D52 (1972).

46. According to Wertheimer, the inference seems warranted that the position of the Commission with regard to exclusive sales licensing agreements has undergone a change since December 1962. Wertheimer, *supra* note 19, at 124. Cawthra goes so far as to state that the *Notice* has no legal significance and no longer fully represents the thinking of the Commission on patent licensing agreements. Cawthra, *supra* note 18, at 117.

47. Instead the Commission will probably continue to publish new decisions on individual license agreements notified to it. *See* Cawthra, *supra* note 18, at 117.

48. *See* Wertheimer, *supra* note 19, at 139. Wertheimer suggests that the Commission can use this flexibility to eliminate and dispose of those cases which it considers as unimportant, the so called "*de minimis* cases."

probably permits the greatest realization of the EEC's fundamental goal, the integration of nine national communities into a single free Community economy.[49] Such flexibility, however, can only be achieved at the expense of business enterprises, patent holders, and inventors who must now regard present and future patent licensing agreements with caution.

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49. Deutsche Grammophon Gesselschaft mbH v. Metro-SB-Grossmärkte, 17 Recueil 487, 2 CCH COMM. MKT. REP. ¶ 8106, at 7192, 10 Comm. Mkt. L.R. 657 (1971).

IMMIGRATION—A STATE MAY PROHIBIT THE EMPLOYMENT OF ILLEGAL ALIENS

Petitioners, immigrant migrant farm workers,[1] brought suit in California Superior Court pursuant to California Labor Code § 2805(c)[2] against respondent farm labor contractors[3] for damages[4] and a permanent injunction[5] against respondents' willful employment of aliens not entitled to lawful residence in the United States in violation of section 2805(a).[6] The complaint alleged that respon-

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1. The individual plaintiffs were Leonor Alberti De Canas, Miguel Canas, and others. De Canas v. Bica, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974).

2. The complete text of CAL. LABOR CODE § 2805 (West Supp. 1976) reads as follows:

> (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.
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> (b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense.
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> (c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a).

3. Defendants were Anthony G. Bica, Juan Silva, and others.

4. In the California courts, plaintiffs claimed damages due to defendants' tortious interference with their right to pursue a livelihood. 40 Cal. App. 3d 976, 978. The United States Supreme Court opinion does not mention a claim for damages, but states that the petitioners sought reinstatement. De Canas v. Bica, 96 S. Ct. 933, 935 (1976).

5. Plaintiffs asserted that the violation of § 2805 constituted an act of unfair competition which could be enjoined pursuant to CAL. CIVIL CODE § 3369 (West 1970) which provides in part:

> (1) Neither specific nor preventive relief can be granted to enforce a penalty . . . except in a case of nuisance or unfair competition. (2) Any person performing . . . an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. (3) As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice . . . .

6. On its face, § 2805 conflicts with federal law by prohibiting the employment of aliens who, although not entitled to lawful residence in the United States, are entitled to work in the United States under pertinent federal laws. The term "alien entitled to lawful residence in the United States" is defined in California Administrative Code, Title 8, part 1, ch.8, art. 1, § 16209 (1972), as "any noncitizen of the United States who is in possession of a Form I-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorizes him to work." The complete regulation is quoted in full in *Dolores Canning Co. v. Howard,* 40 Cal. App. 3d 673, 677, n.3, 115 Cal. Rptr. 435, 436, n.3 (1974). This regulation also sets standards both for employer inquiry into applicants' immigration status and for violation of § 2805. In deciding *De Canas,* neither California court cited this regulation,

dents had refused petitioners continued employment due to a surplus of labor as a result of respondents' knowing employment of illegal aliens. Both sides agreed that the constitutionality of section 2805 is controlling of the issues presented.[7] The trial court sustained respondents' demurrer without leave to amend and entered a judgment of dismissal,[8] holding section 2805 unconstitutional as encroaching upon and interferring with Congress' comprehensive scheme enacted pursuant to its exclusive power over immigration.[9] The Court of Appeals affirmed.[10] The California Supreme Court denied review. The United States Supreme Court granted certiorari[11] and *held,* reversed and remanded. A state statute which prohibits an employer from knowingly employing an alien who is not permitted to work in the United States under pertinent federal laws and regulations, if such employment would have an adverse effect on lawful resident workers, is not unconstitutional either as a regulation of immigration or because it is preempted under the supremacy clause of the Constitution by the Immigration and Nationality Act.[12] *De Canas v. Bica,* 96 S. Ct. 933 (1976).

The authority to formulate immigration policy is a federal power,[13] which has been recognized as exclusive by the United

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which was issued for the purpose of giving limited construction to the term "alien entitled to lawful residence in the United States," and to the other provisions of § 2805. For clarity, this paper uses the term "illegal alien," rather than "alien who is not entitled to lawful residence in the United States," to mean an alien not entitled to work in the United States by the Immigration and Naturalization Service or any other federal authority.

7. 40 Cal. App. 3d at 978.

8. Superior Court of Santa Barbara Co., No. SM 11789, Marion A. Smith, Judge.

9. The Immigration and Nationality Act, § 101 *et seq.*, 8 U.S.C. § 1101 *et seq.* [hereinafter cited as INA].

10. California Court of Appeals, Second Appellate District, De Canas v. Bica, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974). This court took the additional view that congressional failure to add sanctions on employers to its control mechanisms within the INA was intentional, and, therefore, the California statute, either in its provision for criminal penalities or in its application in providing a basis for injunctive relief or damages, is in conflict with the national law and policy.

11. 422 U.S. 1040 (1975).

12. The Supreme Court left the construction of § 2805 for the California court on remand. In its opinion, the Court, in referring to "illegal aliens," assumed "that the prohibition of § 2805(a) only applies to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations." 96 S. Ct. at 935, n.2.

13. "The Congress shall have Power to . . . regulate Commerce with foreign

States Supreme Court.[14] A state may not infringe upon Congress' delegated power to determine, by regulating or controlling immigration,[15] who should or should not be admitted into the United States or the conditions under which a legal entrant may remain. However, there is a narrow, recognized area of authority in which a state may "make such regulations regarding the immigration of aliens as are reasonably necessary to promote the health, safety, morals, and welfare of those within its jurisdiction."[16] State laws affecting aliens may also be invalidated on a second constitutional ground—preemption under the supremacy clause of the United States Constitution.[17] A state may not interfere with the immigration scheme devised by Congress,[18] now contained in the Immigra-

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Nations, and . . . [T]o establish a uniform Rule of Naturalization, ..." U.S. CONST. art. I, § 8.

> The Power of Congress to control immigration stems from the sovereign authority of the United States as a nation and from the constitutional power of Congress to regulate commerce with foreign nations . . . . It has been settled by repeated decision, that Congress has the power to exclude any and all aliens from the United States, to prescribe the terms and conditions on which they may come in or on which they remain after having been admitted, to establish the regulations for deporting such aliens as have entered in violation of law, . . . and to commit the enforcing of such laws and regulations to executive officers.

U.S. Code Cong. & Ad. News 2:1653-54 (82d Cong., 2d Sess., 1952).

14. Henderson v. Mayor of New York, 92 U.S. 259 (1876) (state tax on all aliens, to be paid by steamship companies which brought them in held unconstitutional).

15. Chy Lung v. Freeman, 92 U.S. 275 (1876) (California statute requiring shipowner to give bond for certain classes of foreigners landing in California "invades the right of Congress to regulate commerce with foreign nations and is therefore void.")

16. 3 AM. JUR. 2d *Aliens and Citizens* § 51 (1962). Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1901) (state statute authorizing board of health to prohibit any healthy person including an alien from coming into an area of the state infected with any contagious disease held valid); State v. Brandhorst, 156 Mo. 457, 56 S.W. 1094 (1900) (state judgment naturalizing minor not subject to collateral attack).

17. U.S. CONST. art. VI, § 2 provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

18. Graham v. Richardson, 403 U.S. 365 (1971) (state's denial of welfare benefits to aliens interfered with the federal immigration process); Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1972) (state depriving alien of the right to work places a burden on aliens which Congress did not anticipate, thereby interfering with the exclusive right of federal government to regulate immigration and natu-

tion and Nationality Act of 1952.[19] *Hines v. Davidowitz,*[20] an early authoritative case providing a test to determine whether state law conflicts with federal law so as to be preempted, stated the issue to be: "Whether, under the circumstances of [the] particular case [the state's] law stands as an obstacle to the full purposes and objectives of Congress."[21] In *Hines,* the Court ruled unconstitutional the Pennsylvania alien registration acts as preempted by the Federal Alien Registration Act of 1940. After closely scrutinizing the federal legislative history, the Court reasoned that Congress intended to create one uniform national registration system for aliens within the United States and to foreclose state action in this field.[22] A similar conclusion was reached by the Court in *Pennsylvania v. Nelson,*[23] when it held that the Pennsylvania Sedition Act was preempted by federal anti-subversive legislation which, taken as a whole, evinced the intention of Congress to occupy the field. In both *Hines* and *Nelson,* the Court emphasized the national importance and the pervasiveness of the federal schemes in the specific fields that the states were attempting to regulate.[24] Recent cases have highlighted two crucial factors for determining whether state legislation is preempted by federal supervision: (1) a clear manifestation of congressional intention to oust the exercise of state power;[25] and (2) actual conflict in the operation of the regulations.[26] In *New York State Dept. of Social Services v. Dublino,* the Court refused to declare the state law preempted without substantial evidence of congressional preemptive design, and stated that preemption is not to be inferred merely

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ralization). Both of these opinions also invalidated the state statutes on equal protection grounds.

19. INA, § 101.

20. 312 U.S. 52 (1941).

21. 312 U.S. at 67.

22. *Id.* at 74.

23. 350 U.S. 497 (1955).

24. 350 U.S. at 502; 312 U.S. at 66.

25. New York Dep't of Social Services v. Dublino, 413 U.S. 405, 413 (1973) (state authority, to require individuals to accept employment as a condition for receiving federally funded aid to families with dependent children, not preempted by the Social Security Act).

26. "The test of whether both federal and state regulation may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

from the comprehensive character of the federal legislation.[27] In *Florida Lime & Avocado Growers v. Paul*, the Court cited the test laid out in *Hines*[28] and held that federal marketing orders setting a maturity test for Florida avocados did not displace a California statute setting a different test for avocados entering that state. In *Florida Lime,* the Court laid out the principle that: "federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained."[29] The opinions of both *Florida Lime* and *Dublino* focused attention on state authority over and interest in, respectively, the readying of foodstuffs for market and the allocation of aid to families with dependent children, and declared the state objectives to be meritorious and the subject matter suitable for local regulation.[30] Congress has not enacted immigration laws controlling the employment of illegal aliens,[31] although a bill has been introduced in Congress to provide a penalty for knowingly hiring an alien not lawfully admitted for permanent residence unless the employment of such alien is authorized by the Attorney General.[32]

In the instant case, the Supreme Court found that California Labor Code § 2805 represents a valid exercise of the state police power. The Court affirmed the exclusivity of federal power over immigration, but found an absence of congressional action on the subject of the employment of illegal aliens. The Court ruled that California's regulation of employment by imposing sanctions on state employers who hire illegal aliens, even if there is some purely

27. 413 U.S. at 415.

28. 373 U.S. at 141.

29. 373 U.S. at 142.

30. 413 U.S. at 413; 373 U.S. at 144-46.

31. A proviso to 8 U.S.C. § 1324 states that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring [of illegal aliens]," which is a felony under the INA. In another area of legislation, Congress has criminalized the knowing employment of illegal aliens by farm labor contractors. 7 U.S.C. § 2041 *et seq.*

32. H.R. 982, to amend 8 U.S.C. § 1324(a), is the initial legislation. In House Report 94-506, to accompany H.R. 8713, the clean version of the bill, the Committee on the Judiciary recommends passage of this bill which would establish a three step procedure for imposing sanctions on employers who hire illegal aliens. The report outlines the serious adverse impact that the employment of illegal aliens has on United States labor and economy. H.R. REP. No. 506, 94th Cong., 1st Sess. (1975).

speculative and indirect impact on immigration,[33] is not constitutionally proscribed. Regarding the issue of preemption, the Court employed the test adopted in *Florida Lime*,[34] and concluded that persuasive reasons did not exist which foreclosed California's regulatory power over the employment of illegal aliens. The bulk of Justice Brennan's opinion clarified the decision on the preemption issue. The Court emphasized that a state has broad authority to protect its workers from unemployment, depressed wage scales, and working conditions.[35] Accordingly, the Court extended this authority to the prohibition of knowing employment of illegal aliens.[36] The Court found that section 2805 of the California Labor Code deals with a legitimate state interest in a way which is consistent with the Immigration and Nationality Act and other pertinent federal laws. The Court ruled that the Immigration and Nationality Act was not intended to oust state regulation of the employment of illegal aliens.[37] Employment of illegal aliens was not considered by the Court to be an integral part of the federal regulation of immigration, but merely a peripheral concern of the Immigration and Nationality Act not warranting preemption of the state's police power. The Court's decision was further based on persuasive evidence of congressional intent to allow states to regulate the employment of illegal aliens in a manner consistent with the federal scheme.[38] In reversing the California Court of Appeals' decision, the Court concluded that Congress had not completely barred state authority to regulate the employment of illegal aliens. Because construction of section 2805 was properly left for the California court to decide on remand, the Court did not determine whether section 2805 was unconstitutional because it conflicts with or burdens federal law concerning immigration.[39]

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33. 96 S. Ct. at 936.

34. 373 U.S. 132 (1963).

35. The Court referred to traditional state authority to control the employment relationship and the state's interest in fair employment practices. Further, the Court recognized that extensive local employment of illegal aliens has various harmful effects on local employment. 96 S. Ct. at 937.

36. This applies when an "illegal alien" is defined according to note 6 *supra*.

37. This is based on the finding of no "specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." 96 S. Ct. at 937-38.

38. This evidence consists of a provision in 7 U.S.C. § 2041, § 2051, which sanctions appropriate state laws consistent with § 2044(b) and § 2045, which regulate the employment of illegal aliens by farm labor contractors.

39. This issue is the second crucial factor in deciding preemption cases (out-

By disregarding infirmities in the California law that would lead to a finding of preemption on remand, the *De Canas* Court strongly suggests that section 2805 is constitutional.[40] Undoubtedly, section 2805 could have been easily invalidated.[41] The Court relied principally on *Florida Lime's* ruling requiring an explicit demonstration that the state's police power is preempted by exclusive federal authority[42] to give those states whose economies are suffering from the employment practice of hiring illegal aliens[43] a mandate to enact appropriate legislation. Congress has recognized state frustration caused by the inability of the Immigration and Nationalization Service to keep illegal aliens out of the United States, and by its own failure to include in the Immigration and Nationality Act criminal sanctions against employers of illegal aliens.[44] At the same time, political and administrative considerations have hampered the enactment of effective federal legislation.[45] A recent law review article details a strong appeal

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lined in paragraph 2 above). The Court closed with the observation that, on its face, § 2805(a) (by prohibiting "the employment of aliens who, although not entitled to lawful residence in the United States, may under federal law be permitted to work here." 96 S. Ct. at 940) unconstitutionally conflicts with federal law. A remedial construction is given by the California Administrative Regulations. *See* note 6 *supra.* Other possible interferences with federal supervision of immigration are outlined by the Court. *See* 96 S. Ct. at 938, n.6 (possible burden imposed on legally employable aliens by § 2805).

40. Assuming the statute is construed in light of the Administrative Regulations. *See* note 6 *supra.*

41. The proviso to 8 U.S.C. § 1324 (*see* note 31 *supra*) could have been read as immunizing the employment of illegal aliens, or the existence of pending litigation could have been viewed as congressional intent to occupy the field (*see* note 32 *supra*). Nevertheless, the Court drew the inference that Congress presently believes that the problem created by employment of illegal aliens does not require uniform national rules and is appropriately addressed by the states as a local matters. 96 S. Ct. at 939, n. 9.

42. 373 U.S. at 142.

43. The number of illegal aliens in the United States was estimated in 1975 to be between 4 to 12 million. American employers exploit this source of labor because illegal aliens, "by virtue of their precarious status must work harder, longer, and often for less pay." H.R. REP. No. 506, 94th Cong., 1st Sess. 5 (1975). The problem of illegal alien employment is particularly acute in the Southwest because 99% of the illegal entries made into the United States in 1975 were across the Mexican border. 1975 IMM. & NAT. SER. ANN. REP. 13.

44. H.R. REP. No. 506, 94th Cong., 1st Sess. 7 (1975).

45. These considerations are brought out fully in the Hearings. *Hearings on H.R. 982 Before a Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975). Contested issues surrounding H.R. 982 and related bills (*see* note 32 *supra*) include the

for state regulation of the employment of illegal aliens by proposing a new draft of California Labor Code § 2805.[46] The author argues that section 2805, if amended as he suggests,[47] would assist, not conflict with, existing federal statutes. Clearly, state legislation such as section 2805 complements the Immigration and Nationality Act and related federal law.[48] The Court's decision in the instant case meets a definite need with a rational alternative. States may regulate the employment of illegal aliens according to local requirements until such time as Congress decides to act in this area.[49]

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extent of jurisdiction to be given the Attorney General under the proposed law, whether amnesty should be granted to illegal aliens who have been in the United States over a certain number of years, and the extent of the burden which will be placed on employers by the new law.

46. Note, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach*, 46 S. CAL. L. REV. 565 (1973). The article was prompted by the holding in *Dolores Canning Co. v. Howard*, *supra* note 6, declaring § 2805 unconstitutional as preempted by federal law and void for vagueness.

47. This proposed act prohibits the employment of aliens "not entitled to work in the United States," specifically defines this term, and provides for the establishment of rules and regulations in furtherance of § 2805.

48. Through its penalty provisions, which removes the economic incentive for employers to hire illegal aliens, § 2805 reduces the work opportunity which attracts illegal aliens to the United States.

49. Under the holdings of *Hines* and *Nelson*, if Congress enacted sanctions for the knowing employment of illegal aliens, the California and similar statutes would be preempted.

JURISDICTION—CONTINENTAL SHELF—ABANDONED VESSEL SALVAGED FROM THE SURFACE OF THE UNITED STATES CONTINENTAL SHELF BEYOND TERRITORIAL WATERS IS NOT UNDER JURISDICTION OF UNITED STATES GOVERNMENT

Treasure Salvors, Inc. (Salvors), a Florida corporation, brought an action[1] for possession and confirmation of title to an abandoned vessel[2] it had salvaged[3] from the surface of the Continental Shelf[4] outside territorial waters.[5] Salvors' claim relied on principles of admiralty law, which place sole ownership of abandoned vessels in their salvager. The United States intervened to claim title[6] through sovereign prerogative, an English common law principle placing sole ownership of abandoned vessels recovered by its citizens in the sovereign. The government argued in the alternative that even if United States common law has not adopted the princi-

1. Armada Research Corporation appeared with Treasure Salvors as co-plaintiff.

2. This vessel is believed to be the *Nuestra de Atocha*, which sank in or about the year 1622, while en route from the Spanish Indies to Spain.

3. According to Salvors' brief for the appeal of this case to the Fifth Circuit Court of Appeals, it has spent six years searching for the wreck site and five years and $2 million recovering a number of objects thought to have been aboard the *Atocha*, *see* note 2 *supra*. In addition, four people participating in the salvage lost their lives. Much of the ship and its cargo remain on the ocean floor.

4. Geographically, "Continental Shelf" refers to a gentle slope that extends from the continents seaward to a point where the submerged land descends much more steeply towards the ocean floor. It is estimated that Continental Shelves account for 9.7 million square statute miles. Finlay & McKnight, *Law of the Sea: Its Impact on the International Energy Crisis*, 6 LAW & POLICY IN INT'L BUS. 639, 652 (1974).

5. The wreck site is centered approximately ten nautical miles west of the Marquesas Keys.

6. Wreck site, *see* note 5 *supra*, was until recently claimed to be within Florida's jurisdiction. According to a statement in the intervenor's appellate brief to the Fifth Circuit that was uncontroverted by the plaintiff's appellate briefs, plaintiffs had entered into a contract with the State of Florida to recover objects from the *Atocha* wreck site under which their work had been supervised by state agents for five years. The contract called for a division of the find, 75% to Salvors and 25% to the State. However, on March 17, 1975, the United States Supreme Court upheld the findings of its special master in *United States v. Florida*, concluding that the submerged lands on the Continental Shelf, which include the *Atocha* wreck, were beyond Florida jurisdiction. United States v. Florida, No. 52 Orig. (S.C. March 17, 1975). Consequently, Salvors filed this action to establish its sole right to the *Atocha*, her tackle, apparel, cargo, and armament. On September 11, 1975, the Justice Department intervened as defendant in response to requests by the State of Florida and the Department of the Interior.

ple of sovereign prerogative, Congress specifically asserted this prerogative through the Antiquities Act,[7] which authorizes certain cabinet members to issue permits to persons examining ruins and excavations on government lands, and the Abandoned Properties Act,[8] which grants power over abandoned property to the Administrator of General Services.[9] In addition, the government contended that the Outer Continental Shelf Land Act declared jurisdiction, control, and power of disposition[10] over the subsoil and seabed of the Outer Continental Shelf[11] bringing the shipwreck site and Salvors' actions there under United States jurisdiction and, consequently, under the specific provisions of the Antiquities Act. Salvors argued that the Geneva Convention on the Continental Shelf[12]

7. 16 U.S.C. § 432 (1906). Under the Antiquities Act, the Secretaries of Interior, Agriculture and the Navy may issue permits for "the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions . . . ."

8. 16 U.S.C. § 310 (1965). In part, this act reads:

> The Administrator of General Services is authorized to make such . . . provisions as he may deem for the interest of the Government, for the preparation, sale, or collection of any property, or proceeds thereof, which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States, and which ought to come to the United States . . . .

9. The government also asserted that procedures set up by the federal government for protection of antiquities enacted sovereign prerogative. Among those procedures were permits issued under the Antiquities Act, particularly those issued to the states of Florida and North Carolina permitting them to search for the remains of historical vessels on the Outer Continental Shelf; the Historic Sites Act of 1935, 16 U.S.C. § 462 (1935), authorizing the Secretary of Interior to preserve important historic properties; and Executive Order 11593, in which President Nixon commanded executive agencies to initiate measures for the preservation of archaeologically significant objects.

10. Congressional declaration of policy, jurisdiction, and construction for the Outer Continental Shelf Land Act, 43 U.S.C. § 1332 (1953) provides:

> (a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.
>
> (b) This subchapter shall be construed in such a manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

11. "Outer Continental Shelf" generally refers to the area of the Continental Shelf seaward of territorial waters. For definitions of "Continental Shelf" see note 4 *supra* and note 48 *infra*.

12. Convention on the Continental Shelf, done April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578 (effective June 10, 1964). Relevant portions of the treaty read as follows:

excluded abandoned ships on the seabed of the Continental Shelf from assertions of national sovereignty. On Salvors' motion for summary judgment, the United States District Court for the Southern District of Florida, *held,* for plaintiff Salvors for the following reasons: an abandoned vessel salvaged from the surface of the Continental Shelf outside United States territorial waters by a United States citizen belongs to the salvager, since neither the common law nor legislation established sovereign prerogative over abandoned vessels; the Outer Continental Shelf Lands Act applies only to minerals in and under the Outer Continental Shelf; and the Geneva Convention on the Continental Shelf nullifies assertions of national jurisdiction over the Outer Continental Shelf, except as to those exploiting natural resources. *Treasure Salvors, Inc. v. Abandoned Sailing Vessel,* 408 F. Supp. 907 (S.D. Fla. 1976), *appeal docketed,* No. 762151 (5th Cir. 1976).

In 1275 the Statute of Westminster[13] and an act[14] passed in 1324 firmly established English sovereign prerogative[15] over wrecks,[16]

Article 2

1. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

. . . .

Article 3

The rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

. . . .

Article 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing, or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

. . . .

13. Statute of Westminister, 3 Edw. 1, c.4 (1275), which reads: ". . . where a man, a Dog, or a Cat escape quick out of the Ship, that such Ship nor Barge, . . . shall be adjudged Wreck: (2) but the Goods shall be saved and kept by View of the Sherriff, . . . so that if any sue for those Goods, and after prove that they were his, . . . within a Year and a Day, they shall be restored to him without Delay; and if not, they shall remain to the King, . . ."

14. 17 Edw. 2, c.11 (1324) [hereinafter cited as Statute of 1324]. This act proclaims that: ". . . the King shall have Wreck of the Sea throughout the Realm, (2) Whales and great Sturgeons taken in the Sea or elsewhere within the Realm, (3) except in certain Places provided by the King."

15. Under common law prior to the Statutes of Westminster and 1324, wrecks, see note 16 *supra,* belonged to the King even if the true owner survived. These later laws allowed the true owner to recover his property. 1 T. COOLEY,

although some authorities believe it had already been accepted by the common law.[17] A later case extended sovereign prerogative to flotsam, jetsam, and ligan,[18] and the court in *In Re The Aquila*[19] in 1798 applied sovereign prerogative to anything found derelict at sea. This prerogative probably developed as a revenue measure and as an effort to prevent mistreatment of shipwrecked voyagers and property by placing them under the protection of the crown.[20] Reaffirmed by later cases[21] and statutes,[22] sovereign prerogative has survived in England.[23] Viewing these English statutes on sovereign prerogative as affirmations of the common law, some recent United States decisions[24] adopted sovereign prerogative as part of

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BLACKSTONE'S COMMENTARIES 290 (2d ed. 1878).

16. A wreck under English common law was goods, cargo and the like thrown upon the shore from a ship lost at sea. *Id.*, 292.

17. Fee, *Abandoned Property: Title to Treasures in Florida's Territorial Waters*, 21 U. FLA. L. REV. 360, 361 (1969).

18. *The Constables Case*, a trespass action by the heirs of a grantee of sovereign rights on his manor and fee to recover wreck and flotsam wrongfully taken by another extended the King's prerogative to flotsam (property still awash at sea), jetsam (sunken goods thrown overboard to save ship) and ligan (sunken goods tied to buoy or cork in order to facilitate recovery). 77 Eng. Rep. 218, 223 (K.B. 1601).

19. *In re The Aquila*, 165 Eng. Rep. 87 (Adm. 1798) (Swedish ship and cargo found derelict at sea: if owner did not claim, ownership to pass to sovereign, not salvager).

20. See 1 T. COOLEY, *supra* note 15 at 290; *supra* note 17 at 99.

21. The King v. Forty-nine Casks of Brandy, 166 Eng. Rep. 414 (Adm. 1836) (holder of a grant of lordship of manor, including a grant of the shore, awarded the nine of forty-nine kegs of brandy that touched the shore; the rest passed to the sovereign as derelict of the seas); The King v. Property Derelict, 166 Eng. Rep. 136 (Adm. 1836) (gold coins and watches taken from a vessel found derelict at sea passed to sovereign).

22. Merchants Shipping Act of United Kingdom, 57 458 Vict., c.60, § 525 (1894).

23. R. COLINVAUX, CARRIAGE OF GOODS BY THE SEA 58 (9th ed. 1952).

24. Platboro Limited, Inc. v. Unidentified Remains of a Vessel, 371 F. Supp. 356 (S.D. Texas 1973) (court held that common law adopted by Texas and United States included sovereign prerogative over Spanish galleon sunk by hurricane in Texas territorial waters); Gardner v. Ninety-Nine Gold Coins, 111 F. 552 (D. Mass. 1899) (ownership of personal belongings of Atlantic shipwreck victim awarded to public administrator, instead of salvager because decedent's estate could locate property easier if held by government than if by private party); North Carolina v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968), *cert. denied*, 355 U.S. 881 (1968) (relying on *State v. Massachusetts, infra*, the court found sovereign prerogative a part of English common law, and, consequently, North Carolina common law; the court therefore enjoined salvage operation on Confederate blockade runners sunk in North Carolina coastal waters);

the English common law transferred to the United States. Some earlier cases[25] had refused to adopt the prerogative stating, for a variety of reasons,[26] that sovereign prerogative was not properly part of United States common law. The earlier cases most often followed the lead of the court in *Russell v. Forty Bales of Cotton,*[27] which held that a specific statutory provision was necessary to enact sovereign prerogative and found that there was no such statute. The court in *United States v. Tyndale*[28] subsequently broadened this requirement, finding that either a statute or settled gov-

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Florida v. Massachusetts Co., 95 So.2d 902 (1956) (court decided that Florida's adoption of English common law included sovereign prerogative and enjoined salvage operation on old destroyer sunk in Gulf of Mexico in Florida territorial waters) *supra* notes 13, 14.

25. United States v. Tyndale, 116 F. 820 (1st Cir. 1902) (money found on body floating on the high seas awarded to finders despite federal claim of sovereign prerogative); In Re Moneys in Registry, 170 F. 470 (E.D. Pa. 1909) (relying on prior authority, especially *Russell v. Forty Bales, infra,* court awarded to salvager the twenty bales of cotton he had picked out of the ocean about thirty miles from Key West); Murphy v. Dunham, 38 F. 503 (E.D. Mich. 1889) (court found that Illinois did not own a load of coal sunk with schooner in Lake Michigan because English common law did not specifically apply to abandoned property on the bottom of a sea and because no state statute authorized Illinois' claim); Russell v. Forty Bales of Cotton, 21 F. Cas. 42 (No. 12,154) (where forty bales of cotton found derelict on the high seas, federal government denied remainder after salvage award to finders); Thompson v. United States, 62 Ct. Cl. 516 (1926) (unsuccessful attempt by United States Navy to assert sovereign prerogative over German freighter sunk in Mississippi River and abandoned).

26. These reasons include: (1) the severe English rule awarding wrecks to the sovereign despite claims of the original owner did not become part of American common law, see note 15 *supra*; (2) the common law of the American *colonies* was adopted by the United States, and this body of law did not include sovereign prerogative; (3) English sovereign prerogative did not evolve until after the Declaration of Independence and, therefore, was not a part of United States common law; (4) at common law the Statute of Westminster only applied to wrecks, *see* note 16 *supra,* and not to derelict property at sea. Lipska, *Abandoned Property at Sea: Who Owns the Salvage "Finds",* 12 WM. & MARY L. REV. 97, 103 (1970).

27. 21 F. Cas. 42 (No. 12,154) (S.D. Fla. 1872). The exact wording of the Russell requirement was "positive enactment or regulation." 21 F. Cas. at 50.

28. 116 F. 820 (1st Cir. 1902). *Tyndale* required an enactment by Congress or a settled government practice, since, according to the court, in England this prerogative had been ordered by the King as a royal revenue. Courts cannot, by themselves, declare such a royal prerogative. *Tyndale's* rationale further distinguished United States common law from English common law by pointing to a statute in the Massachusetts colony altering English sovereign prerogative as proof that North American colonial policy differed from the severe aspects of English common law, and that, therefore, English law on sovereign prerogative did not transfer to the United States. *See* note 15 *supra.*

ernment practice could establish sovereign prerogative. Later, in *Thompson v. United States*, the court cited *Tyndale* in rejecting sovereign prerogative, while stating that only a United States statute could enact sovereign prerogative over abandoned property.[29] Some legislation, such as the Abandoned Properties Act of 1870, which was a response to the problem of Civil War debris cluttering battlefields and harbors, did deal with abandoned property.[30] The Act gave the Secretary of the Treasury power to make provisions for the care of any interests of the Confederate States of America still held by individuals or local governments in addition to abandoned property within United States jurisdiction that "ought to come to the United States."[31] The leading and perhaps only interpretation of the Act, *Russell v. Forty Bales of Cotton,* considered post-war conditions and the Act's specific references to Confederate interests in limiting application of the phrase "ought to come to the United States" to abandoned property that originally belonged to the United States Government or the Confederacy, or was engaged in violating the Union blockade.[32] A 1965 amendment, not judicially interpreted until the instant case, removed specific mention of the Confederate States and placed the Administrator of General Services instead of the Secretary of the Treasury in charge of abandoned property that "ought to come to the United States."[33] Another statute concerning ownerless property, the Antiquities Act of 1906,[34] gave the Secretaries of Interior, Agriculture, and the Army the authority to issue permits to those seeking to examine ruins and excavations on lands under their jurisdictions and provided punishment for appropriating such antiquities from land owned and controlled by the United States without a permit.[35] Reacting to concern over destruction of historic relics, particularly American Indian relics of the West,[36] the Act also directed that

29. 62 Ct. Cl. 516, 524 (1926). *Thompson* held that "Congress could undoubtedly provide that the proceeds of derelicts and abandoned vessels in the navigable waters of the United States be paid into the treasury; but no such law has been passed, and until it is the principles of natural law ("finders keepers") must prevail."

30. No. 75, 16 Stat. 380.

31. *Id.*

32. 21 F. Cas. 42 (No. 12,154) (S.D. Fla. 1872).

33. 40 U.S.C. § 310 (1965).

34. 16 U.S.C. § 432 (1906).

35. In its trial brief, the government maintained that the words "owned and controlled" demanded an interpretation of the scope of the Antiquities Act expansive enough to include submerged land.

36. 40 CONG. REC. 7888 (1906). Floor debate in the House before passage of

permits be issued to recognized scientific or educational institutions that would increase knowledge of these antiquities and public access to them.[37] Lack of judicial interpretation of the Act's phrase "owned and controlled by the United States," however, leaves its scope largely undetermined. The scope of Congress' 1953 declaration of policy on the Outer Continental Shelf,[38] which put the subsoil and seabed of the Outer Continental Shelf under United States jurisdiction, power and control, also remains uncertain. On September 28, 1945, President Truman foreshadowed Congress' concern over the Outer Continental Shelf by proclaiming the natural resources of the subsoil and seabed as appertaining to the United States.[39] Legislative history shows that Congress, like President Truman, was motivated by concern for the national economy and defense, particularly fearing the paralysis of resource development caused by litigation between states and the federal government over control of the resources of the seabed.[40] Indeed, a congressional declaration of policy accompanied the Outer Continental Shelf Lands Act, a bill consisting almost exclusively of specific measures to exploit the natural resources of the Continental Shelf.[41] This policy declaration provides that the Outer Continental Shelf Lands Act be construed so as not to affect the character of the high seas above the Outer Continental Shelf or the fishing and navigation of these waters.[42] On the other hand, language of the declaration and the rest of the Shelf Lands Act does not specifically restrict United States jurisdiction to natural resources in the Outer Continental Shelf, as did the Truman Proclamation. The Senate's Report on the Shelf Lands Bill stated that it carried the

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the Antiquities Act emphasized the bill's effect on relics and cave dwellings of the American West.

37. 16 U.S.C. § 432 (1906).

38. 43 U.S.C. § 1332 (1953).

39. Truman Proclamation of Sept. 28, 1945, No. 2667, 10 Fed. Reg. 12303, 59 Stat. 884. The President proclaimed that "the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States appertaining to the United States . . . ."

40. U.S. Code Cong. & Adm. News. 83rd Cong., 1st Sess. 1386 (1953). The House Report stated that "the strategic importance of oil to our economy and our defense efforts demand immediate action to alleviate a growing menance to national welfare." It continued, "The interminable litigation over these areas involving State and Federal Government as well as individual applicants has added nothing but confusion and controversy . . . ."

41. 43 U.S.C. §§ 1331-1443 (1953).

42. 43 U.S.C. § 1332 (1953).

Truman Proclamation's limited control "a necessary step forward and extend[ed] the jurisdiction and control of the United States to the seabed and subsoil themselves."[43] Before passage of the Outer Continental Shelf Lands Act, the Tidelands Cases between states and the federal government had held that federal rights to natural resources in the Continental Shelf were paramount to the rights of the states.[44] Although the states sought rights only over resources out to the three mile limit, the Court's decree in the last Tidelands Case, *United States v. Texas*, defined the United States paramount rights and powers over "lands, minerals and other things" as extending from the inland waters to the outer edge of the Continental Shelf.[45] The Court recognized that future disputes might concern some other substance or the bed of the ocean itself and concluded that when any property lay seaward of the low water mark "its use, disposition, management, and control involve[d] national interests and national responsibilities."[46] A recent case handed down after enactment of the Outer Continental Shelf Lands Act, *United States v. Maine*, reaffirmed the Tidelands Cases, stating that the Outer Continental Shelf Lands Act merely proceeded from the premises established in the earlier Tidelands Cases: that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty."[47] An international assignment of jurisdiction over the Continental Shelf, the Geneva Convention on the Continental Shelf, signed by

43. S. Rep. No. 411, 83rd Cong., 1st Sess. 7 (1953). The Senate Report makes it clear that the purpose of this added control is to claim resources on the Shelf. Because the House version of the Outer Continental Shelf Lands Act became law, however, references to the Senate Report may be unconvincing.

44. United States v. Texas, 339 U.S. 707 (1950) (dispute between United States and Texas over rights to natural resources under Gulf of Mexico beyond low water mark on coast of Texas and outside inland waters); United States v. Louisiana, 339 U.S. 699 (1950) (dispute between United States and Louisiana over rights to natural resources in area under Gulf of Mexico beyond low water mark on coast of Louisiana and outside inland waters); United States v. California, 322 U.S. 19 (1947), *rev'd per curiam*, 322 U.S. 804 (1947) (dispute between United States and California over rights to natural resources in submerged land off of California coast between low water mark and three mile limit).

45. 339 U.S. 707 (1950).

46. *Id.* at 719.

47. United States v. Maine, 420 U.S. 515 (1975) (United States opposed by thirteen Atlantic Coast states in its claim of paramount power over the seabed and subsoil underlying the Atlantic Ocean more than three miles seaward of the low water mark and the outer limits of inland coastal waters, extending to the outer edge of the Continental Shelf). Comment, 15 VA. J. INT'L L. 1009 (1975).

the United States, granted exclusive jurisdiction to coastal nations "over the continental shelf[48] . . . for the purpose of exploring it and exploiting its natural resources."[49] Constituting strong but not binding authority, the International Law Commission's comments to the Convention stated that "it is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes . . . lying on the seabed or covered by sand of the subsoil,"[50] but apply only for the purpose of exploiting resources. To the extent that a self-executing treaty like this one conflicts with a prior act of Congress, such as the Outer Continental Shelf Lands Act, the treaty provisions control.[51]

The court began its analysis in the instant case by accepting precedent holding that, in the absence of specific legislative manifestations of intent to invoke sovereign prerogative, the salvager retains ownership of abandoned property. The United States does not possess sovereign rights over abandoned property found by its citizens, according to the court, since the Abandoned Properties and Antiquities Acts do not constitute such specific manifestations. Expressing fear of possible international controversy, the court pointed to language in the declaration of policy of the Outer Continental Shelf Lands Act explicitly preserving the international character of the water above the Shelf and limiting its application to resources in and under the Continental Shelf. Since, accordingly, the federal government had no jurisdiction over the Outer Continental Shelf beyond the natural resources, the court held that the Abandoned Properties Act, which applies to lands owned or controlled by the United States Government, and the Antiquities Act,[52] which covers property within United States ju-

48. The 1958 Geneva Convention on the Continental Shelf defines Continental Shelf as the "seabed and subsoil of the subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas . . . ." Convention on the Continental Shelf, *done* April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578 (Effective June 10, 1964). Under this definition the seaward boundary of the Continental Shelf depends, to some extent, on the technology of resource extraction. For a geographical definition of the Continental Shelf *see* note 4 *supra.*

49. Convention on the Continental Shelf, *done* April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578 (effective June 10, 1964).

50. *Report by the International Law Commission to the General Assembly,* [1956] 2 Y.B. INT'L L. COMM'N 104, U.N. Doc. A/3159 (1956).

51. Cook v. United States, 288 U.S. 102 (1932); Thomas v. Gay, 169 U.S. 264 (1897).

52. Although the criminal provisions of the Antiquities Act, 16 U.S.C. § 433

risdiction, cannot assert sovereign prerogative over ships wrecked on the surface of the Outer Continental Shelf. Furthermore, the court rejected enactment of sovereign prerogative under the Abandoned Properties Act by accepting the pre-amendment[53] limitation of the Act's language, "ought to come to the United States," to Civil War debris. The court then posited that the jurisdictional provision of the Outer Continental Shelf Lands Act, which it had held was limited to natural resource rights in and under the Outer Continental Shelf, did not apply the regulatory provisions of the Antiquities and Abandoned Properties Acts to the Outer Continental Shelf, since these acts depend on United States jurisdiction, ownership and control over the land or property. Even if the Outer Continental Shelf Lands Act granted jurisdiction over objects on the seabed, the court continued, the Geneva Convention on the Continental Shelf, signed after the passage of the Act, superseded this grant and restricted sovereign rights over the Continental Shelf to exploitation of natural resources. Here the court relied heavily on the International Law Commission's comments to the Convention specifically excluding ships wrecked on the surface of the Continental Shelf seabed from sovereign rights.[54] The court thus held that sovereign prerogative has not been adopted or enacted into United States law and that the Outer Continental Shelf Lands Act does not apply this doctrine or the Abandoned Properties and Antiquities Acts to the plaintiff. Regardless, such an application, according to the court, is barred by the Geneva Convention on the Continental Shelf.

The effects of the instant opinion center on the respective roles of private and public control over antiquities on the surface of the Outer Continental Shelf. The public certainly possesses a legitimate interest in antiquities on the Outer Shelf, particularly those connected with its national heritage. Promotion of general public knowledge and interest in its heritage should be a major goal of such archaeological research.[55] Public agencies may be able to

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were not directly at issue in the instant case, the court mentions that in *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974), these provisions were held void for vagueness. In *Diaz*, a prosecution for appropriating a new American Indian ceremonial mask from a cave, the Ninth Circuit found the term "antiquities" too vague when applied to objects regardless of their age.

53. Russell v. Forty Bales of Cotton, 21 F. Cas. 42 (No. 12,154) (S.D. Fla. 1872).

54. Note 50 *supra.*

55. Justifications given for past governmental restrictions of scientific research in waters under national jurisdiction—that such research may give private

broaden public knowledge by increasing tourism through display of these antiquities, and by fostering cultural exchange through use of the artifacts in barter.[56] Yet instances of private waste and exploitation of artifacts have raised fears that private enterprise is antipathetic to these goals.[57] On the other hand, the government by itself may not be willing or able to allocate the resources necessary for exploration for objects of solely historical value, while prospects for profit may supply impetus for such allocation by private parties. Although there have been instances of private destruction, most private archaeological concerns use great care in handling antiquities and allow occasional public access to them.[58] Strict governmental controls over such private parties may make traffic in illicitly recovered artifacts profitable for less conscientious salvagers. For instance, a strict Florida statute governing antiquities within its jurisdiction drove souvenir hunters underground and created a black market in artifacts,[59] thereby reducing public access. Therefore, in order to stimulate archaeological research on the Outer Continental Shelf and provide public access to antiquities recovered, public control must preserve private profit and altruistic motives by allowing private operators a substantial share of the artifacts they recover. The licensing scheme in the Antiquities Act may permit this accomodation through contracts or lease arrangements with private salvagers similar to those negotiated by states concerning inland and territorial waters. Under the Antiquities Act the Departments of Interior, Agriculture or the Navy could determine particular contract provisions as prerequisites to issuing permits. However, even if a higher court finds enactment of sovereign prerogative and construes the Outer Continental Shelf Lands Act broadly to include abandoned vessels and, therefore, to permit such contracts under the Antiquities Act, the instant court's interpretation of the Convention on the Continental Shelf to preclude such an exercise of jurisdiction over the Shelf appears inescapable. Consequently, such a government scheme

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parties special advantages in exploitation of resources and that unregulated research may compromise national security and damage the environment—may also be voiced against private freedom to salvage from the surface of the Outer Continental Shelf. *See* Shore, *Marine Archaeology and International Law: Background and Some Suggestions*, 9 SAN DIEGO L. REV. 668, 673 (1972) [hereinafter cited as Shore].

56. *See* Shore, at 693.

57. *Id.*

58. Shore, at 690.

59. Barada, *CEDAM International*, 3 OCEANS No. 4, at 9, 17.

would at most be effective on the Outer Continental Shelf against United States citizens. Then resourceful salvagers could simply avoid United States jurisdiction by avoiding United States citizenship. Therefore, while the government's arguments present a practicable vehicle for the accomodation of public and private interests, the Geneva Convention on the Continental Shelf fatally limits its application. Through its interpretation of the Geneva Convention, the court in the instant case reasonably rejects the government's attempt to provide substantial protection of the public interest in antiquities on the Outer Continental Shelf, reserving such protection to specific congressional legislation. To assert substantial government control over antiquities on the Outer Continental Shelf, federal legislation must specifically repudiate the Convention provisions prohibiting this exercise of jurisdiction.[60] While Congress may be reluctant to weaken the Geneva accord, the realization that other nations have expanded their jurisdictions despite it,[61] and that such legislation would not strike at the heart of the Convention, may overcome this reluctance. Alternatively, the United States could alter its jurisdiction by agreement in another Law of the Sea Conference; that, however, appears unlikely in view of the current stalemate in Conference negotiations.

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60. Frost v. Wenie, 157 U.S. 46 (1895); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491 (1883).

61. Many countries, including parties to the Geneva Convention on the Continental Shelf, have extended their territorial waters, fishery zones, and national jurisdiction beyond the limits allowed by the Convention. Anand, *Limits of National Jurisdiction in the Sea-Bed*, 29 INDIA QUARTERLY 79, 96 (1973).