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Recent Decisions

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RECENT DECISIONS

ADMIRALTY—NON-LIEN MARITIME CLAIM—SALVOR WAIVED SALVAGE LIEN BY SEIZING VESSEL PRIOR TO EXPIRATION OF AGREED PAYMENT PERIOD BUT SALVAGE CLAIM COULD BE SATISFIED FROM REMNANTS AND SURPLUS

Plaintiff salvor contracted to salvage defendant owner's capsized drill barge on a no-cure no-pay basis.[1] After work commenced, the parties agreed that payment would be deferred until insurance proceeds were received, but not longer than twelve months.[2] The salvage operation was completed successfully within two weeks. Approximately two weeks thereafter plaintiff salvor, asserting a maritime lien,[3] seized the vessel. Intervenors filed in rem claims and the vessel was subsequently sold; the proceeds were deposited in the registry of the court. The District Court held that any lien, which the salvor might have had, was lost when he failed to abide by his agreement with defendant owner and ruled that the remnants and surplus, remaining after the maritime liens were satisfied, was to be returned to the owner. On appeal to the Fifth Circuit Court of Appeals, *held*, affirmed in part, reversed in part. The holder of a general maritime lien who has lost his lien status still has such an interest in the proceeds in the registry of the court that he may be permitted to participate in the distribution of remnants and surplus ahead of the owner. *Veverica v. Drill Barge Buccaneer No. 7*, 488 F.2d 880 (5th Cir. 1974).

There are basically two types of non-lien maritime claimants: (1) holders of maritime liens and state-created liens[4] who have lost

1. "No-cure no-pay" is the most common of salvage contracts. It provides that the owner promises to pay the salvor only upon completion of the work and services contracted. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 477-478 (1957) [hereinafter cited as GILMORE & BLACK].

2. "A suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered . . . ." Salvage Act of 1912 §4, 46 U.S.C. §730 (1970). An agreement to delay payment beyond two years would have been inconsistent with the salvage lien and would have resulted in loss of the lien.

3. 46 U.S.C. §953 (1970) defines "preferred maritime lien" as embracing claims "for salvage, including contract salvage."

4. State-created liens have lapsed into relative insignificance since passage of

their lien status through waiver, laches, improper conduct, or failure to comply with statutory provisions;[5] and (2) holders of maritime claims which are without lien status.[6] The latter category originally included claimants for master's wages, ship construction, mortgages, wrongful death, accounting, partition, unpaid insurance premiums, and executory contracts. By statute, a number of these claims have been converted into maritime liens.[7] Generally, the English admiralty courts in the eighteenth and nineteenth centuries did not allow distribution of remnants and surplus to

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the Federal Maritime Lien Act of 1910, 46 U.S.C. §§971-75 (1970), which converted the majority of such liens into general maritime liens. Specifically, § 975 states: "This chapter shall supersede the provisions of all State statutes conferring liens on vessels, insofar as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries." For a discussion of the home port doctrine, state-created liens, and the Federal Maritime Lien Act, see GILMORE & BLACK 526-68.

5. For loss of maritime liens, see GILMORE & BLACK 624-54.

6. Gilmore and Black divide such claims into four categories: "*First*, maritime claims, which depend on a state statute for lien status and through failure to comply with the statutory requirements have failed to achieve such status or have lost it for failure to enforce the lien within the statutory period. *Second*, maritime claims which are not given lien status either by maritime law or state statute (such as the claim of a master for wages). *Third*, maritime claims which fail to qualify as liens because they arise from breach of an executory contract . . . . *Fourth*, claims of seamen under the Jones Act, which gives only a right *in personam* and not *in rem*." GILMORE & BLACK 647 (footnotes omitted). The statutorily created remedy of the Jones Act, 46 U.S.C. §688 (1970), was held to create only an *in personam* right of action in *Plamals v. The Pinar Del Rio*, 277 U.S. 151 (1928). Note that consideration is not given to the type of claim involved in the instant case, namely, that of a general maritime claim which has lost its lien status.

7. Congress gave maritime lien status to mortgages through the Ship Mortgage Act of 1920, 46 U.S.C. §§911-84 (1970). The Vessel Sales and Mortgage Recording Act of 1850, ch. 27, §1, 9 Stat. 440 (repealed 1920), provided for federal recordation of mortgages but was never held to create a maritime lien for such recorded mortgages.

Claims for master's wages achieved lien status in 1968. "The master of a vessel documented, registered, enrolled, or licensed under the laws of the United States shall have the same lien for his wages against such vessel and the same priority as any other seaman serving on such vessel." 46 U.S.C. §606 (1970). Masters of English vessels acquired lien status for their wage claims much earlier through the Merchant Shipping Act, 57 & 58 Vict. 390, c. 60, §167 (1894).

Wrongful death actions attained lien stature by two routes. The Death on the

holders of non-lien maritime claims,[8] although their reluctance may have arisen more from the issuance of writs of prohibition by the common law courts than from a hidebound view of admiralty powers.[9] In fact, the English admiralty courts were able to carve out an exception allowing materialmen to participate in the distribution of proceeds when unopposed by the vessel owner.[10] In the United States, the admiralty courts early broke with English admiralty practice when it was not readily adaptable.[11] Thus, the majority of early lower court decisions allowed non-lien maritime claimants to take from remnants and surplus ahead of the owner.[12] The United States Supreme Court, however, has been indecisive on the issue, and this indecision has been reflected in many lower court holdings. Hence, the Supreme Court, through Justice Story, favored allowing admiralty courts to distribute proceeds in the registry of the court to those who had a provable claim, even when such claim could not have been the basis of an original suit in

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High Seas Act, 46 U.S.C. §§761-68 (1970), provided a statutory remedy for death "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State." 46 U.S.C. §761. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), judicially created a remedy for wrongful death within one marine league from shore.

8. *E.g.*, The Neptune, 12 Eng. Rep. 584 (P.C. 1835) (materialmen not permitted to share in remnants and surplus of vessel libelled for seamen's wages); The Maitland, 166 Eng. Rep. 236 (Adm. 1829) (distribution of remnants and surplus to materialmen not allowed when opposed by owner of vessel).

9. *See* The Favorite, 165 Eng. Rep. 299 (Adm. 1799) (claim for master's wages disallowed because writ of prohibition had been issued in similar case). For a discussion of the conflict between admiralty and common law courts in England see D. ROBERTSON, ADMIRALTY AND FEDERALISM 28-64 (1970).

10. The John, 165 Eng. Rep. 466 (Adm. 1801) (materialmen allowed to take from remnants and surplus when foreign shipowner involved).

11. D. ROBERTSON, ADMIRALTY AND FEDERALISM 104-22 (1970).

12. *E.g.*, Remnants in Court, 20 F. Cas. 529 (No. 11,697) (S.D.N.Y. 1846)(claim of remnants by mortgagee); Harper v. New Brig, 11 F. Cas. 577 (No. 6090)(E.D. Penn. 1835)(distribution to persons advancing money for construction of vessel allowed although such persons did not qualify for state-created lien); The Stephen Allen, 22 F. Cas. 1250 (No. 13,361)(S.D.N.Y. 1830) (claim by local materialman whose state-created lien was lost through laches and by master for wages); The Mary Anne, 16 F. Cas. 953 (No. 9195)(D. Me. 1826)(claim by creditor who attached vessel prior to seizure in admiralty); Zane v. The President, 30 F. Cas. 909 (No. 18,201)(C.C.E.D. Penn. 1824)(materialman's lien lost by giving credit to owner). *Contra*, Gardner v. The New Jersey, 9 F. Cas. 1192 (No. 5233)(D. Penn. 1806) (claims by master and ship's physician for wages and by shipwrights and materialmen with state-created liens).

admiralty.[13] Moreover, the Supreme Court in a later case stated that an insurer has an equitable claim to proceeds and may intervene in an admiralty suit to the extent of the claim paid.[14] Additionally, in *Schuchardt v. Babbidge*,[15] the Court noted that distribution of proceeds to a mortgagee was authorized. The high court's next involvement with non-lien maritime claims was in the *Lottawanna* cases,[16] concerning a mortgagee and domestic materialmen with unperfected state-created liens. In the first appeal, relying for the most part on English authority, the Court held that only claims supported by liens could participate in the distribution of proceeds; the remnants and surplus were to be returned to the owner.[17] In the second appeal, one year later, the Court changed its position and directed remnants and surplus to be paid to the mortgagee.[18] The Court observed that a proper claim by the home port materialmen, who had failed to perfect their state-created liens, would have been allowed, but no proceeds remained after payment of the mortgage.[19] *The Edith*[20] represents the Supreme

13. Andrews v. Wall, 44 U.S. (3 How.) 567 (1845) (distribution authorized to partner in agreement of consortship in business of wrecking). While sitting in circuit many years earlier, Justice Story had decided two similar cases. In the first, he held that a wharfinger who had made an express personal contract with the shipowner waived his general maritime lien, but that this did not necessarily preclude the admiralty court from adjudicating the claim. *Ex parte* Lewis, 15 F. Cas. 451 (No. 8310) (C.C.D. Mass. 1815). In the second case, he held that a factor who had advanced money for a voyage had an equitable, though not a legal, lien on the proceeds of the cargo. The Packet, 18 F. Cas. 969 (No. 10,655) (C.C.D. Mass. 1824).

14. The Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854) (insurer of schooner run down and sunk by Monticello held to have equitable right of subrogation, but suit may still be brought by owner of schooner).

15. 60 U.S. (19 How.) 239 (1856) (libel by mortgagee held improper since proceeds in registry of court; mortgagee should have appeared as claimant or filed petition for distributive share).

16. The Lottawanna, 88 U.S. (21 Wall.) 558 (1874); The Lottawanna, 87 U.S. (20 Wall.) 201 (1873). Both appeals involved the same facts: claims by a mortgagee and domestic materialmen with unperfected state-created liens.

17. 87 U.S. (20 Wall.) at 222-24.

18. 88 U.S. (21 Wall.) at 583.

19. "The court has power to distribute surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated." 88 U.S. (21 Wall.) at 582.

20. 94 U.S. 518 (1876) (claim for remnants and surplus by domestic materialman whose state-created lien had been lost through laches).

Court's next venture into non-lien maritime claims. Citing no previous authority, the Court commented that an admiralty court "can marshal the fund only between lien-holders and owners."[21] The case concerned a claimant who had lost his state-created lien, but the Court conveniently ignored the fact that its ruling silently sanctioned the lower court distribution of proceeds to a mortgagee with no martime lien, and, thus, consumed all remnants and surplus and rendered further discussion moot. Nevertheless, the Supreme Court, holding only that a mortgagee's priority was lower than that of a claimant with a state-created lien for repairs and supplies, expressly sanctioned payments to a mortgagee in a subsequent case.[22] Moreover, in *The Hamilton*,[23] the Court held: "[A]ll claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not."[24] The principle was reaffirmed twenty years later without reference to any specific claim when the Court referred to the admiralty court's broad equity powers in a limitation of liability proceeding. The Court held:

> It [the limitation proceeding] looks to a complete and just disposition of a many cornered controversy [; specifically,] [t]he jurisdiction of the admiralty court attaches *in rem* and *in personam* by reason of the custody of the *res* put by the petitioner into its hands. The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by apportionment of the *res* and by judgement *in personam* against the owners, so far as the court may decree.[25]

In particular, the Fifth Circuit, which has addressed itself to non-lien maritime claims only three times previously, has allowed distribution to such claimants on each occasion.[26] Furthermore, al-

21. 94 U.S. at 523.

22. The J. E. Rumbell, 148 U.S. 1 (1893).

23. 207 U.S. 398 (1907) (limitation of liability proceeding concerning collision between vessels belonging to corporations of State of Delaware).

24. 207 U.S. at 406.

25. Hartford Accident & Indem. Co. v. Southern Pacific Co., 273 U.S. 207, 216-17 (1927) (suit by shipowner to limit liability from negligent management of vessel to value of vessel and pending freight).

26. Clifford v. Merritt-Chapman & Scott Corp., 57 F.2d 1021 (5th Cir. 1932) (warehouseman with common law possessory lien allowed to participate in distribution of proceeds); Hartford Accident & Indem. Co. v. Southern Pacific Co., 3

though the issue of status of non-lien maritime claimants does not arise often, no case decided in this century has been found that absolutely denies the right of such claimants to participate in the distribution of remnants and surplus.[27]

In the instant case, the court determined that plaintiff salvor originally had a maritime lien based on the salvage contract, but had lost the lien due to his failure to abide by the agreement to defer demand for payment.[28] Deciding that plaintiff retained a non-lien maritime claim, the court reviewed the history of such claims generally.[29] Much support for the claim was found in the second *Lottawanna* appeal,[30] as well as in several early admiralty court decisions.[31] The broad equity powers of the admiralty court were also relied upon.[32] Contrary decisions were analyzed and most

F.2d 923 (5th Cir. 1925), *aff'd*, 273 U.S. 207 (1927); The Astoria, 281 F. 618 (5th Cir. 1922) (party furnishing food to crew and party making advances for repairs and supplies, though not lienors, held entitled to remnants and surplus).

27. Two cases did deny participation to certain non-lien maritime claimants while allowing others to take from remnants and surplus: *Nolte v. Hudson Nav. Co.*, 297 F. 758 (2d Cir. 1924) (materialman whose lien was lost through laches relegated to status of general creditor and denied participation in proceeds, but distribution to mortgagee authorized); and *The Atlantic City*, 220 F. 281 (3d Cir. 1915) (distribution denied for written shipbuilding contract when builder failed to comply with state statute creating lien, but distribution allowed for subsequent oral contracts and for first and second mortgages).

28. The court stated: "We are unwilling to open the extraordinary and costly in rem remedy to those who have so little regard for their own agreements and the reasonable expectations of others." 488 F.2d at 884.

29. 488 F.2d at 884-86.

30. 88 U.S. (21 Wall.) 558 (1874).

31. Zane v. The President, 30 F. Cas. 909 (No. 18,201) (C.C.E.D. Penn. 1824); The Boston, 3 F. Cas. 918 (No. 1669) (S.D.N.Y. 1832) (holder of repairman's lien lost through laches allowed to take from remnants and surplus except when owner is domestic); The Stephen Allen, 22 F. Cas. 1250 (No. 13,361) (S.D.N.Y. 1830).

32. The court cited *Cates v. United States*, 451 F.2d 411 (5th Cir. 1971), which quoted two earlier cases: " 'A court of admiralty is, as to all matters falling within its jurisdiction, a court of equity. Its hands are not tied up by rigid and technical rules of the common law, but it administers justice upon the large and liberal principles of courts which exercise a general equity jurisdiction.' The David Pratt, F. Case No. 3597 (D.C. Maine 1839). . . . 'The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels.' [Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 303 F.2d 692, 699 (5th Cir. 1962)]." 451 F.2d at

were distinguished as concerning claims that would not give rise to a maritime claim in any case.[33] The theory of *The Edith*,[34] that only lien claimants could share in the proceeds, was rejected as being poorly considered, against the weight of authority, and generally ignored in subsequent decisions.[35] The court also distinguished *The Edith* as concerning a state-created lien rather than a general maritime lien, as involved here. Thus the court held on very narrow grounds that a salvor who has lost his maritime lien may take remnants and surplus ahead of the owner rather than being relegated to the status of a general creditor.[36]

This opinion represents the first real analysis of the status of non-lien maritime claimants since the second *Lottawanna* appeal one hundred years previously. Although the court took care to base its decision on narrow grounds, it left little doubt as to what its position would be on future cases involving non-lien maritime claims. The instant case, coming from a leading admiralty jurisdiction—the Fifth Circuit—sheds new light on a neglected area of admiralty law[37] and, while not setting a new course through the murky waters of maritime claims, draws together the myriad authorities and synthesizes the applicable rule of law. While it is not expected that there will be vast numbers of cases involving the issue of non-lien maritime claims, it is only through a recognition

414. On equity powers of admiralty courts generally, see H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 363-67 (2d ed. 1969).

33. The Atlantic City, 220 F. 281 (3d Cir. 1915); The Lydia A. Harvey, 84 F. 1000 (D. Mass. 1898) (claim of insurer who salvaged vessel in his own interest denied); The Willamette Valley, 76 F. 838 (N.D. Cal. 1896) (various non-lien maritime claims and non-maritime claims rejected when proceeds of vessel would be returned to state court jurisdiction for ranking of claims other than maritime liens).

34. 94 U.S. 518 (1876).

35. Cited as a representative decision is *The Astoria*, 281 F. 618 (5th Cir. 1922). Also referred to is the commentary on *The Edith* in GILMORE & BLACK 647-49.

36. The court stated: "We think that he [the salvor] retained an interest in the vessel which an admiralty court can protect, and that his claim is such that it should not be subjected to the uncertainties of non-maritime remedies against the owner, or worse yet, to the possibility that it be ranked by a non-maritime court against the claims of other creditors." 488 F.2d at 885.

37. At a recent symposium on maritime liens, no consideration was given to non-lien maritime claims. *Symposium on Maritime Liens and Securities*, 47 TUL. L. REV. 489-805 (1973).

and full understanding by the courts, and the bar, of the equity powers of admiralty that complete justice can be done. In essence, the result of this decision is to reemphasize that the non-lien maritime claimant must not be neglected, but should be accorded the traditional rights and remedies that all maritime claimants expect and deserve. Consequently, admiralty courts may be more willing in the future to take note of possible loss of lien status through waiver, laches, etc., and, thus, lower the priority of a particular claimant without necessarily ousting him from participation in the distribution of proceeds. It can be safely assumed that admiralty courts in the past, not familiar with the option of lowering a lienor's priority to that of a non-lien claimant, have overlooked possible cases of waiver, laches, etc., rather than dismiss the claim. By bringing to light the alternative of lowering an erring claimant's priority, this decision will allow admiralty courts to achieve more fully the aim expressed by Justice Bradley in 1874: "[I]t is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the same."[38]

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38. The Lottawanna, 88 U.S. (21 Wall.) 558, 582 (1874).

* The opinions expressed herein are those of the author and do not necessarily reflect those of the United States Coast Guard.

COMPTROLLER GENERAL — ATTORNEY GENERAL'S OPINION BINDING ON COMPTROLLER GENERAL IN EXIMBANK CREDIT EXTENSIONS TO COMMUNIST COUNTRIES

On October 18, 1972, the United States and the Soviet Union completed agreements creating a new legal framework for their commercial relations.[1] In addition, they entered into an agreement making EXIMBANK credits and guaranties available to the Soviet Union.[2] This extension of credits was made possible by a Presidential determination, pursuant to section 2(b)(2) of the Export-Import Bank Act of 1945,[3] that such action is in the national interest.[4] In early 1974 Senator Richard S. Schweiker (R. Pa.) became concerned with a pending 49.5 million dollar EXIMBANK direct loan for the Yakutsk energy development project in Eastern Siberia, in the absence of a specific Presidential determination that extending credits *for that particular project* was in the national interest.[5] Moreover, it was expected that the Soviet Union would

1. Agreement with the Union of Soviet Socialist Republics Regarding Trade, 67 DEP'T STATE BULL. 595 (1972).

2. Under this Agreement relations with the EXIMBANK will be handled by the Soviet Bank for Foreign Trade (*Vneshtorgbank*). The *Vneshtorgbank* will be authorized to receive and repay credits, and to submit applications for commitments from the EXIMBANK. The Soviet Government also agreed to guarantee the repayment of credits extended or guaranteed by the EXIMBANK. *Id.* at 593.

3. Export-Import Bank Act of 1945, 12 U.S.C. §635 (b)(2) (1970) [hereinafter cited as section 2(b)(2)], provides: "The Bank in the exercise of its functions shall not guarantee, insure, or extend credit, or participate in any extension of credit — (A) in connection with the purchase or lease of any product by a Communist country (as defined in section 2370(f) of Title 22), or agency or national thereof, or (B) in connection with the purchase or lease of any product by any other foreign country, or agency, or national thereof, if the product to be purchased or leased by such other country, agency, or national is, to the knowledge of the Bank, principally for use in, or sale to, a Communist country (as so defined), except that the prohibitions contained in this paragraph shall not apply *in the case of any transaction which the President determines would be in the national interest if he reports that determination to the Senate and House of Representatives within thirty days after making the same.*" (Emphasis added).

4. The President made the determination to extend EXIMBANK credits to the Soviet Union on October 18,1972. 37 Fed. Reg. 22573 (Oct. 20, 1972).

5. Previous EXIMBANK practice in granting credits to Yugoslavia had proceeded on the assumption that numerous similar transactions may be authorized by one determination of national interest and one report to Congress. ___OP. ATT'Y GEN. ___ (March 21, 1974).

seek additional EXIMBANK credits to finance the 7.6 billion dollar North Star energy development project in Western Siberia. Equally disturbing to the Senator was that the President's 1975 budget contained only 1.5 billion dollars for direct energy research in the United States. Thus, Senator Schweiker, in light of the current United States energy crisis and the potential balance of payments problem caused by the outflow of American dollars, requested a ruling from the Comptroller General on the legality of the President's action. The Comptroller decided that each individual EXIMBANK transaction involving Communist countries required a separate finding by the President that it was in the national interest.[6] The EXIMBANK's general counsel, however, reached the opposite conclusion.[7] On request of the President, the Attorney General purported to resolve this dispute by superseding the Comptroller's opinion.[8] The Attorney General determined that the President may make a blanket determination that the national interest requires EXIMBANK transactions with a Communist country and need not scrutinize each individual transaction.[9] ___ COMP. GEN. ___ (March 21, 1974); ___ OP. ATT'Y GEN. ___ (March 8, 1974).

The extensive United States World War II export controls were re-enacted yearly[10] until passage of the Export Control Act of

6. ___ COMP. GEN. ___ (March 8, 1974).

7. On March 11, 1974, the EXIMBANK had suspended further credits to Poland, Rumania, the Soviet Union, and Yugoslavia pending the outcome of the study of the legal effect of the Comptroller's opinion. 13 INT'L LEGAL MATERIALS 615 (1974).

8. ___ OP. ATT'Y GEN. ___ (March 21, 1974). Because of the significant role that the EXIMBANK has in trade dealings with the Soviet Union and certain European countries and because of the importance this nation attaches to honoring its international commitments, the Attorney General deemed it appropriate to resolve this conflict. *See* 42 OP. ATT'Y GEN. No. 28, at 5 (1968).

9. ___ OP. ATT'Y GEN. ___ (March 21, 1974). After the Attorney General determined that the President and the EXIMBANK could act on a country-by-country basis, the EXIMBANK resumed its normal processing of credits to Poland, Rumania, the Soviet Union, and Yugoslavia on March 22, 1974.

10. Act of July 2, 1940, ch. 508, § 6, 54 Stat. 714 (1940), *as amended*; Act of June 30, 1945, ch. 205, 59 Stat. 270 (1945); Act of May 23, 1946, ch. 269, 60 Stat. 215 (1946); Act of June 30, 1947, ch. 184, 61 Stat. 214 (1947); Act of July 15, 1947, ch. 248, § 4, 61 Stat. 323 (1947); Act of Dec. 30, 1947, ch. 526, § 3, 61 Stat. 946 (1947).

1949.[11] This Act became the basis for postwar control of exports and remained in force until it was replaced by the Export Administration Act of 1969.[12] From 1968 until August 1971, this statute prohibited extending credits to a country whose government supplied goods or assistance to a country engaged in armed conflict with United States armed forces.[13] Further, this prohibition was not subject to reversal by a Presidential determination of national interest. Congressional repeal of this provision in August 1971,[14] revived the previous congressional authority for EXIMBANK participation in transactions involving Communist countries,[15] pursuant to a Presidential finding of national interest.[16] Since enactment of the 1964 Appropriation Act, the President has consistently followed the practice of making one determination of national interest that authorized many transactions with Communist countries rather than making separate determinations for each individual transaction.[17] However, Congress was promptly notified by the EXIMBANK of each separate transaction so that the notice function of section 2(b)(2) was preserved.[18] In addition to the restrictions imposed upon the EXIMBANK, extension of credit in East-

11. Ch. 11, 63 Stat. 7.

12. 50 U.S.C. §§ 2401-13 (Supp. II 1974). Essentially, under both the Export Control Act and the Export Administration Act, every export of goods or technical data from the United States to any country of the world (except Canada) requires an export license. Under this Act export control is to be used: (1) to protect the national security; (2) to further American foreign policy and fulfill America's international responsibilities; and (3) to protect the domestic economy from shortages and from the inflationary impact of abnormal demand. 50 U.S.C. § 2402 (2) (Supp. II 1974).

13. Because of the Vietnam War, this prohibition extended to all Communist countries except Yugoslavia.

14. Export Expansion Finance Act of 1971, 12 U.S.C. § 635(b)(3) (Supp. I 1972), *amending,* Export-Import Bank Act of 1945, 12 U.S.C. § 635(b)(3) (Supp. I 1972). The new measure replaced the provision that previously prohibited EXIMBANK participation in exports to a country engaged in armed conflict with United States armed forces.

15. Section 2(b)(2).

16. Presidential determinations under the new provision were made for Rumania in November 1971, for the Soviet Union in October 1972, and for Poland in November 1972. Hoya, *The Changing U.S. Regulation of East-West Trade,* 12 COLUM. J. TRANSNAT'L L. 1, 12 (1973)[hereinafter cited as Hoya].

17. ___ OP. ATT'Y GEN. ___ (March 21, 1974).

18. ___ OP. ATT'Y GEN. ___ (March 21, 1974). See note 40 *infra.*

West trade by private parties in the United States is also subject to restraints.[19] Taken together, these measures have constituted a severe impediment to United States participation in East-West trade,[20] by uniquely handicapping United States exporters that seek markets in Eastern Europe and by becoming an obstacle to *detente*.[21] In passing upon the legality of the EXIMBANK's credit extensions to the Soviet Union, the GAO was exercising its statutory authority to investigate all matters relating to the receipt, disbursement, and application of public funds.[22] Congress, which regards the GAO as part of the legislative branch,[23] gave the GAO investigative and reporting powers,[24] which are somewhat similar

19. The Johnson Debt Default Act prohibits private individuals and firms in the United States from making, purchasing or selling "the bonds, securities, or other obligations of any foreign government . . . in default . . . [on] obligations . . . to the United States." 18 U.S.C. § 955 (1970).

20. Since Communist countries are chronically short of hard currency, much of the growing export business done with Western Europe and Japan requires the extension of credit to the buyer. Moreover, these Communist countries are increasing their purchases of major capital equipment. Consequently, Western Europe and Japan, on the basis of credit terms, have competed vigorously for this trade and effectively excluded United States business. Hoya, at 14.

21. U.S. NEWS & WORLD REP., Jan. 7, 1974, at 64.

22. *See* The Budget and Accounting Act of 1921, 31 U.S.C. § 1 *et seq.* (1970). This statute created two principal organs for establishing fiscal control in the Government. The first of these was the Bureau of the Budget, an Executive Agency. The second was the General Accounting Office, headed by the Comptroller General, and responsible solely to the Congress.

23. It seems clear from the Act's legislative history that it was the general intention of Congress to establish the GAO as an agency independent of the Executive Branch through which it might ascertain whether public funds were being expended in accordance with appropriations. Moreover, it was anticipated that the GAO would inform Congress and its committees regarding the expenditure of public funds, and criticize extravagance, duplication, and inefficiency in the executive departments. *See* MANSFIELD, THE COMPTROLLER GENERAL (1939).

24. The issue of fixing responsibility for auditing has brewed for decades. President Wilson, in 1920, vetoed legislation that would have established a federal budget system because he opposed the creation of an auditing office answerable to the Congress rather than the President. Nevertheless, the GAO was established in 1921 as an arm of Congress. It was felt that a budget unit should be created outside the executive branch to provide objective assessments of expenditures. Today this dispute continues, particularly with reference to the GAO's responsibility for auditing program results as distinguished from auditing for financial honesty. R. LEE & R. JOHNSON, PUBLIC BUDGETING SYSTEMS 94 (1973).

to those of a congressional committee.[25] The Comptroller reports his findings to the President and to the Congress and recommends any legislation that he thinks necessary to improve the fiscal management of the Government.[26] In performing these broad functions, the Comptroller was granted independence that is unique in the Government;[27] he is required to exercise his functions "without direction from any other officer."[28] In exercising his statutory function to "settle and adjust" public accounts and all claims by or against the Government,[29] the Comptroller decides many substantive legal questions involving the propriety of expenditures.[30] A disallowance by the Comptroller of any particular item in an account is final and conclusive upon the Executive Branch.[31] The Comptroller may consider the views of the Attorney General in making his decision, but he refuses to be bound by such views and will disregard them when they conflict with his.[32] Similarly, the Comptroller has refused to be bound by precedents of the Court of Claims and other inferior federal courts, although he accepts the finality of a Supreme Court decision.[33] It is clear from the manner

25. The Comptroller makes special investigations and reports as ordered by either House of Congress, or by any congressional committee having jurisdiction over revenue, appropriations, or expenditures. He also reports to Congress every expenditure or contract made by any department that is in violation of law. Finally, he must report to the Congress on the adequacy of the fiscal administration in the executive departments. 31 U.S.C. § 53 (1970).

26. 31 U.S.C. § 53 (1970).

27. The Comptroller, once appointed by the President and confirmed by the Senate, may not be removed during his fifteen year term of office except by joint resolution of Congress for specified reasons or by impeachment. 31 U.S.C. § 43 (Supp. I 1972).

28. 31 U.S.C. § 44 (1970).

29. 31 U.S.C. § 71 (1970).

30. 34 COMP. GEN. 158 (1954); 31 COMP GEN. 81 (1951); 22 COMP. GEN. 265 (1942). An account of every expenditure made by a department or agency, except for those agencies and expenditures specifically exempted by statute, must be sent to the GAO for approval and settlement. If the Comptroller determines that the expenditure was not in accordance with law, he will disallow the payment and the agency will then be requested to recover it administratively or to refer the matter to the Attorney General for collection by judicial proceedings. 34 COMP. GEN. 148 (1954); 33 COMP. GEN. 669 (1954).

31. 31 U.S.C. §§ 44, 74 (1970).

32. 25 COMP. GEN. 377, 381 (1945); 14 COMP. GEN. 648 (1935); 2 COMP. GEN. 784 (1923).

33. 14 COMP. GEN. 648 (1935).

in which Congress established the office of the Comptroller that it intended his opinion to be final and binding upon all, including the Attorney General, in all matters involving disbursements and appropriations.[34] Indeed, in 1923, the Comptroller declared that he "may not accept the opinion of any official, inclusive of the Attorney General, as controlling of [his] duty under the law."[35] In addition, the Comptroller maintains that the right and duty of the accounting officers to disallow payments made in direct contravention of decisions by the Comptroller is not a question that may properly be determined by any court.[36] These positions are supported by the Constitution's express reservation to the legislative department, as opposed to both the executive and judicial departments, of control over all moneys in the Treasury of the United States.[37] The Comptroller has relied on these impressive powers in attempting to exercise control ever the EXIMBANK.[38] Considering the legislative history of section 2(b)(2),[39] the Comptroller found that the Appropriation Act, as originally enacted in 1964, had represented a compromise.[40] Some congressmen had supported

34. 31 U.S.C. §§ 44, 74 (1970).

35. 2 COMP. GEN. 784, 787 (1923).

36. 3 COMP GEN. 545, 548 (1924).

37. U.S. CONST. art. I, § 9, cl. 7.

38. 31 U.S.C. § 71 (1970).

39. Section 2(b)(2).

40. Senator Mundt commented, "The compromise language . . . contains the same specific prohibition against extension and guarantees of credit to the Communist countries . . . but it provides an escape clause to be used by the President . . . only . . . when he himself finds in the case of each proposed credit transaction that he believes it to be in the national interest . . . . I am confident there are many in Congress and throughout the country . . . who will want to scrutinize each such transaction. . . ." 109 CONG. REC. 25619 (1963).

During House consideration of the conference report, Mr. Passman observed, "The so-called Mundt amendment . . . requires two things . . . : The President must determine that financing such assistance by the Export-Import Bank is necessary, and the President must report such determination . . . . If, for example, there are 20 such determinations, the President will report 20 different times . . ." *Id.* at 25416-17.

In response to an observation that the President had already determined that sales of wheat and other agricultural products to the Soviet Union were in the national interest, Mr. Rhodes stated, "Of course, the gentleman realizes that a new determination has to be made with each transaction under the terms of this amendment?" *Id.* at 25418.

a complete prohibition against EXIMBANK participation in any transactions involving Communist countries, while others had insisted upon according the President exclusive discretion. The Comptroller determined that the legislative history indicated that the language of section 2(b)(2) requires a specific Presidential determination for each transaction to be approved.[41] Therefore, no further EXIMBANK credit could be extended to Communist countries until such a determination was made and reported to Congress. Pursuant to this opinion, the EXIMBANK suspended action on credits for Poland, Rumania, the Soviet Union, and Yugoslavia to study and receive advice on the Comptroller's opinion. When the EXIMBANK's general counsel reached an opposite conclusion, the Attorney General[42] purported to resolve the dispute,[43] since the function of advising the President and the heads of the executive departments on questions of law is expressly assigned to the Attorney General by federal statutes.[44] Even though a disbursement may be involved, the Attorney General will render his opinion when the Comptroller requests such action.[45] In addition, when a question involving disbursements is of general importance in other areas, the Attorney General will render an opinion, which he insists should be treated as authoritative by the accounting officers.[46] Ingenious arguments have been advanced in support of the proposition that the Comptroller is a member of the executive branch and must defer to presidential authority.[47] The crux of these arguments is that the principle of separation of powers prevents Congress from appointing an agent endowed with executive

41. ___ COMP. GEN. ___ (March 8, 1974).

42. ___ OP. ATT'Y. GEN. ___ (March 21, 1974).

43. The federal statutes, which establish and regulate the Department of Justice, provide that there shall be an executive department known as the Department of Justice, and an Attorney General, who shall be the head thereof. 28 U.S.C. § 503 (1970). As head of the Department of Justice, the Attorney General has supervisory power over all departmental officers. 28 U.S.C. §§ 504-07 (1970).

44. 28 U.S.C. § 511 (1970).

45. 25 OP. ATT'Y GEN. 301 (1904).

46. *Id.* at 301.

47. *See, e.g.,* Langeluttig, *The Legal Status of the Comptroller General of the United States,* 23 ILL. L. REV. 556, 578-90 (1929). This suggestion has been made by executive officers from the President on down. 115 CONG. REC. 40738 (1969).

responsibilities that cannot be constitutionally exercised by any of its committees.[48]

The Attorney General's opinion focused on the exception that the prohibition against extending credits to Communist countries "shall not apply [according to the statement of Senator Mundt] in the case of any transaction which the President determines would be in the national interest if he reports that determination to the Senate and House of Representatives within thirty days after making the same."[49] Examining the legislative history of the Appropriation Acts, the Attorney General noted that Senator Mundt was not present at the time of the debate on this bill and that his statement indicating that section 2(b)(2) requires a separate determination of national interest and a separate report to Congress for each transaction, was inserted in the record by Senator Hruska.[50] Since Senator Mundt's statement was never actually delivered on the Senate floor, the possibility that Senators who held other views would reply to him was considerably diminished. The Attornery General reasoned, therefore, that Senator Mundt's remarks should not be considered to indicate the common intent of the Congress. The actual Senate debate reveals only that if there were any common purpose, it was that the President be given broad discretion to make determinations as to "when in the national interest it would be proper to extend credit."[51] Thus, the Attorney General concluded that there was no common agreement on the meaning of this legislation in the Senate. The House also seemed to agree only that the provision conferred broad responsibility and flexibility on the President to set policy.[52] Moreover, since the enactment of the 1964 Appropriation Act, the President has followed a consistent practice of making determinations on a country-by-country basis rather than on a transaction-by-

48. *Id.* at 578-90. These separation of powers arguments have advanced the rationale that the Comptroller of the Treasury should have the power of disallowance because he is in the executive branch. If this argument were accepted as conclusive, then this same power in the hands of the Comptroller as an arm of Congress, would be unconstitutional since it would infringe upon executive privilege.

49. Section 2(b)(2).

50. 109 CONG. REC. 25618 (1963). *See* note 40 *supra.*

51. *Id.* at 25626.

52. *Id.* at 25409, 25417, 25419, 25421.

transaction basis. Equally important, the Attorney General noted that Congress was promptly notified by the EXIMBANK of each separate transaction so that the notice function of section 2(b)(2) was preserved. In addition, the Attorney General accorded great weight to the administrative practice of the EXIMBANK, particularly since it represents the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion . . . ."[53] Moreover, during a ten-year period, Congress had repeatedly re-enacted this provision without taking exception to the practice. The Supreme Court has held, under similar circumstances, that Congress can be considered to have approved the practice.[54] Thus, the Attorney General concluded that the President and the EXIMBANK acted lawfully in making determinations on a country-by-country basis and in notifying Congress of each determination and each transaction pursuant to that determination.[55]

The authority of the Executive Branch to conduct foreign affairs stems from specific Constitutional grants and statutory delegations.[56] Moreover, many foreign commerce questions, specifically delegated to Congress by the Constitution,[57] contain foreign affairs overtones. Indeed, the current EXIMBANK question involves such overtones with regard to *detente*. Congressional restrictions on EXIMBANK credits could be a "hurdle to further *detente*" and impair the President's conduct of foreign affairs.[58] Even though Congress has delegated a great deal of its foreign commerce power to the President, in this instance it has retained some authority by requiring a separate Presidential determination on each transaction and by requiring a reporting of that determination to Congress. Once section 2(b)(2) is complied with, the President has all the flexibility needed to conduct foreign affairs. Moreover, Congress in the Budget and Accounting Act of 1921 and in subsequent legislation indicated its belief that the Comptroller is independent

53. Norwegian Nitrogen Co. v. United States, 288 U.S. 298, 315 (1933).

54. Boehm v. Commissioner, 326 U.S. 287, 291-92 (1945); Douglas v. Commissioner, 322 U.S. 275, 281 (1944); Helvering v. Winmill, 305 U.S. 79, 83 (1938).

55. ____ OP. ATT'Y GEN. ____ (March 21, 1974).

56. U.S. CONST. art. II, § 2. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

57. U.S. CONST. art. I, § 8.

58. Wall Street J., Sept. 28, 1973, at 3, col. 1.

of the Executive Branch.[59] The Comptroller has consistently concurred in this view.[60] Currently, this question over the EXIMBANK and Presidential determinations is before the Congress in the form of a renewal of the EXIMBANK's charter.[61] Within this pending legislation Congress has clearly manifested its intent by requiring all such Presidential determinations for Communist countries to be made on a transaction-by-transaction basis, not on a country-by-country formula.[62] Such pending legislative action further buttresses the correctness of the Comptroller's opinion with regard to the EXIMBANK. Thus, it seems that an opinion of the Comptroller should control over that of the Attorney General in matters affecting disbursements and appropriations. To hold otherwise would be to thwart the original purpose of Congress in establishing the Comptroller as an independent auditor.

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59. 31 U.S.C. § 41 (1970).

60. 14 COMP. GEN. 648, 651 (1935).

61. 120 CONG. REC. H 8805, H 8830 (daily ed. Aug. 21, 1974). The major feature of the bill is that it would extend the charter of the EXIMBANK to June 30, 1978. It would provide for an increase in the overall lending authority of the EXIMBANK from $20 billion to $25 billion. Moreover, it would prohibit any loan of more than $50 million to a Communist country unless the EXIMBANK submitted to Congress a statement explaining the proposed transaction at least 30 legislative days prior to the transaction's final approval. *Id.* at H 8806.

62. The new bill would alter the language of Section 2(b)(2), regarding the Presidential determination, to read as follows: "in case of transactions which the President determines would be in the national interest if he reports that determination with respect to a particular country to Congress within thirty days after final approval of the first such transaction." *Id.* at H 8830. Moreover, in order to assure that the Congress will have time to review the policy implications of such proposed transactions and to take such action as it may deem appropriate, the following provision has been included: "(6) No loan made to a Communist country or agent or national thereof in an amount which equals or exceeds $50,000,000 shall be finally approved by the . . . Bank unless the Bank has submitted to the Congress with respect to such loan, a statement explaining the transaction at least thirty legislative days prior to the date of final approval." *Id.* at H 8830.

FOREIGN RELATIONS LAW—ACQUISITION OF CONTROL OF DOMESTIC MULTINATIONAL CORPORATION BY A WHOLLY OWNED FOREIGN GOVERNMENTAL CORPORATION DOES NOT PER SE CREATE AN UNREASONABLE CONFLICT OF INTEREST BETWEEN THE OBJECTIVES OF THE ACQUIRER AND ITS DUTIES TO THE DOMESTIC CORPORATION AND ITS SHAREHOLDERS; NOR IS THE ACQUISITION CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES NOR AGAINST ITS NATIONAL INTEREST

In July 1973, the Canada Development Corporation (CDC), an entity created and wholly owned by the Canadian Government,[1] made a cash tender offer for ten million shares of the common stock outstanding[2] of Texasgulf, Inc., a multinational resource company.[3] Texasgulf, in response, sought a permanent injunction against the consumation of the proposed acquisition of control. Moving for an immediate preliminary injunction to halt the acquisition, plaintiff Texasgulf contended, *inter alia*, that the transaction would create an inherent conflict of interest between CDC's legislatively required pursuit of the nationalistic goals of Canada[4]

1. Canada Development Corporation Act, Nov. 18, 1971, c. 49 (also cited as "Statutes of Canada, 19-20 Elizabeth II, c. 49." in Texasgulf, Inc. v. Canada Development Corp., 366 F. Supp. 374, 383 n.4 (S.D. Tex. 1973).

2. Prior to the tender offer, Canada Development Corporation held 748,000 shares of Texasgulf stock. This quantity is well below the 5% trigger of §13(d) of the Securities and Exchange Act of 1934, 15 U.S.C. §78m(d)(1) (1970). The Act, to protect investors, requires registration with the Securities Exchange Commission if more than 5% of the outstanding common stock will be acquired. The tender offer for 10,000,000 shares would give the defendant 35.37%, effectively a controlling interest, of the plaintiff's 30,385,000 outstanding shares of common stock. 366 F. Supp. 379-83.

3. Texasgulf, Inc., "is a multinational, natural resource company which . . . engages in the production and marketing of metals, potash, sulphur, fertilizer, oil and gas, forest products and various other materials. Among the countries where Texasgulf has substantial assets and operations are the United States, Canada, Australia, and Mexico. Texasgulf's assets exceed $700,000,000; its sales exceed $300,000,000 annually, and it has more than 80,000 shareholders." 366 F. Supp. at 383.

4. The statutory objectives of the Canada Development Corporation are: " '(A) To assist in the creation or development of businesses, resources, properties and industries of Canada; (B) To expand, widen and develop opportunities for Canadians to participate in the economic development of Canada through the application of their skills and capital; (C) To invest in the shares of securities of any corporation owning property or carrying on business related to the economic interests of Canada; and (D) To invest in ventures or enterprises, including the

and the interests of plaintiff and its shareholders. Plaintiff further alleged that its sensitive position in the natural resource field would be compromised by Canadian control, and that this would be contrary to the national interest and public policy of the United States. Arguing that United States law provides an adequate remedy for any potential actions detrimental to the best interests of Texasgulf, defendant-CDC contended that any inherent conflict of interest would be reduced by CDC's selling 90 per cent of its stock to the Canadian public.[5] On plaintiff's motion before the District Court for the Southern District of Texas, *held*, preliminary injunction denied. Absent a showing of special circumstances to the contrary, the acquisition of control of a domestic multinational corporation by a wholly owned foreign governmental corporation does not create an unreasonable, inherent conflict of interest between the objectives of the acquirer and its duties to the domestic corporation and its shareholders; nor is the acquisition contrary to the public policy of the United States nor against its national interest. *Texasgulf, Inc. v. Canada Development Corp.* 366 F. Supp. 374 (S.D. Tex. 1973).

The problem of divided corporate loyalty is common in the growing number of corporate mergers and acquisitions since the participants often have divergent interests. The legal remedies that protect the interests of the acquired corporation and its shareholders are well developed. Such injured parties may obtain judicial relief for violation of their interests when controlling shareholders have failed to discharge their duty of loyalty to other shareholders,[6] when directors have breached their fiduciary duty to the acquired

acquisition of property likely to benefit Canada;' The statute further states that these objects 'shall be carried out in anticipation of profit and in the best interests of the shareholders as a whole.' " 366 F. Supp. at 383-84; Canadian Development Corporation Act §36.

5. *See* Couzin, *The Canada Development Corporation: A Comparative Appraisal*, 17 McGILL L.J. 405 (1971).

6. In *Sinclair Oil Corporation v. Levien*, 280 A.2d 717 (Sup. Ct. Del. 1971), a minority stockholder brought a derivative action against the parent corporation for alleged damage to a subsidiary resulting from dividends paid by the subsidiary and breach of contract between the subsidiary and another subsidiary of the parent corporation. Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (class action of minority stockholder alleging breach of fiduciary duty against holding company and present, or former stockholders of

corporation,[7] or when a parent corporation has engaged in self-dealing that is detrimental to its subsidiary.[8] When a multinational corporation is controlled or acquired by a foreign corporation or an instrumentality of a foreign government, the problem of conflicting loyalties also raises complex questions of international economic policy and national interests. In cases concerning similar questions, however, the courts of the United States regularly render decisions with far-reaching international economic implications. Examples of such decisions may be found in the areas of trademark regulation,[9] securities regulation,[10] and antitrust,[11] which generally require the interpretation or application of legislatively established policies of the United States. In addition, the courts generally defer to the Executive and Legislative branches of the government on matters touching the foreign relations area.[12] Since political and economic questions are so interrelated, few

savings and loan association, who had transferred a control block of shares in the association to the holding company).

7. Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955) (stockholder's derivative action against former dominant stockholder, principal officer, and director to recover alleged personal profits lost in sale of controlling block of shares, which resulted in sacrifice of goodwill and future growth.

8. "Self-dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of and detriment to the minority stockholders of the subsidiary." 280 A.2d at 720.

9. Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (application of Lanham Act, 15 U.S.C. §1501 *et seq.* (1970), to a United States citizen using Bulova's trademark in Mexico).

10. Schoenbaum v. Firstbrook, 268 F. Supp. 385 (S.D.N.Y. 1967) (application of §10(b) of the Securities and Exchange Act of 1934 and Rule 10(b)-5 to a Canadian corporation listed on the American Stock Exchange).

11. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (application of §§1,2 of the Sherman Act, 15 U.S.C. §§1,2 (1970) to United States parent corporation and its Canadian subsidiary); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (application of §1 of the Sherman Act to the United States parent corporation and its foreign subsidiaries).

12. The sovereign immunity doctrine and the act of state doctrine are notable examples of the practice of judicial deference. For a discussion of the basic distribution of powers in the foreign relations area see *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). An excellent summary of judicial deference may be found in L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

issues are more complicated in the area of foreign relations than those containing questions of international economic policy. Therefore, the courts generally leave such questions to the Executive and Legislative branches. In *Timken Roller Bearing Co. v. United States*,[13] the majority saw itself as construing the Sherman Act, 15 U.S.C. §1 *et seq.* (1970). While Justice Frankfurter, on the other hand, seeing the Court as going beyond the congressional mandate of the Sherman Act and effectively establishing international economic policy for the United States, stated that the principle of separation of powers should preclude the courts from establishing political and economic policies.[14] In *Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp.*,[15] the Supreme Court found that the question of Presidential determination and issuance of foreign air transport routes is outside the scope of judicial review. The court reasoned that the judiciary does not have the resources available to the Executive with which to make the complex and far-reaching military, economic and political judgments inherent in such a decision.[16] More recently, the court in *South Puerto Rico Sugar Co. Trading Corp. v. United States*[17] found that action by the Executive in pursuit of United States foreign policy, including economic and commercial objectives, is controlling and beyond judicial review except when Congress has exercised its preemptive power in foreign commerce to the contrary.[18]

Addressing the question of divided corporate loyalties in the instant case, the court compared the CDC's required objective under Canadian law[19] to promote the economic development of Canada with the CDC's business and fiduciary duties to Texasgulf and its non-Canadian shareholders. Notwithstanding its finding of a possible future conflict of interest between these parties,[20] the

13. 341 U.S. 593 (1951).

14. 341 U.S. at 605 (Justice Frankfurter dissenting). Justice Reed, dissenting in *National City Bank of New York v. Republic of China*, 348 U.S. 356, 370-71 (1955), later expressed this view.

15. 333 U.S. 103 (1948).

16. 333 U.S. at 111.

17. 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

18. 334 F.2d at 634. The Constitution specifically grants Congress the power to regulate foreign commerce. U.S. CONST. art. I, §8.

19. *See* note 4 *supra*.

20. 366 F. Supp. at 417.

court observed that such a potential problem is typical among multinational corporations having interlocking directorates.[21] The court reasoned that if the plaintiff's shareholders were injured by such a conflict of interest, adequate legal remedies, already well established in corporate law,[22] would be available to Texasgulf. These remedies would compensate plaintiffs if defendant should fail to discharge its fiduciary duties.[23] Therefore, the court held that plaintiff had failed to show irreparable injury and probable success on the merits necessary to justify a preliminary injunction. The court then identified the broader considerations of public policy and national interest also implicit in this controversy. These considerations, the court recognized, raise the difficult question of the proper United States policy for protecting the national interest from subservience to foreign multinational corporations.[24] The court weighed the obvious political and economic dangers[25] posed by both private and government-controlled foreign multinational investment in the United States against the advantages[26] and the

21. The interlocking directorate is a common occurrence in the modern business world. In practically every case when two separate corporate entities have interlocking directorates the problem of a potential conflict of interest is present.

22. 366 F. Supp. at 418.

23. Remedy for breach of loyalty available to minority shareholders in the subsidiary in *Sinclair* was an accounting to the subsidiary. The parent must also account to subsidiary for amounts gained as a result of self-dealing by parent that is detrimental to subsidiary. In *Ahmanson* shareholders who failed to discharge their duty of loyalty had to give appraisal rights to minority shareholders. *Perlman* ordered an accounting by directors who had breached their fiduciary obligation and restitution by the directors of illegal gains. *See* notes 6-8 *supra*.

24. While noting the complexity of the economic issues, the court's approach to the problem of conflicting corporate loyalties appeared to be influenced by other examples of foreign direct investment in the United States in politically sensitive areas that have not created adverse effects. The ownership of a substantial share of Standard Oil Company of Ohio by British Petroleum, which in turn is almost 50% owned by the government of the United Kingdom, was the principal example. 366 F. Supp. at 418.

25. In light of present American economic difficulties, which have encouraged the growth of foreign investment in the United States, the court emphasized two dangers: (1) the possibility of foreign control of crucial sectors of our economy might place the United States at the mercy of the controlling foreign entity, and (2) the potentially detrimental effect of foreign control of various businesses on the labor force of the United States. 366 F. Supp. at 418-19.

26. The court suggested that perhaps the economic integration resulting from

possible damage to the huge domestic multinationals if the United States should over react. Balancing these considerations, the court concluded that it must leave this complex problem, fraught with economic subtleties and questions of reciprocity, to the Executive and Legislative branches of the government since only these branches have the resources necessary to resolve it.[27] Nevertheless, the court, citing no previous authority for its determination, proceeded to state that *this* particular acquisition of the plaintiff by the defendant was neither contrary to the public policy of the United States nor against its national interest.[28]

The instant court dealt for the first time with the problems of divided corporate loyalties and conflict of interest as they potentially affect United States foreign relations. The recent growth in size and importance of multinational enterprises and foreign direct investment have caused increasing concern[29] in the United States, where the complexity of the problems of foreign direct investment have become more apparent during the past year. [30] The need for decision-making at the executive or legislative level, as opposed to the judicial level, is illustrated by the potentiality of foreign economic retaliation following any United States regulation of foreign-controlled multinational corporations or direct investment. By acknowledging that deferral to the political branches is appropriate in this situation, the court wisely applied the separation of powers doctrine and left the decision to the institutions most directly representative of, and accountable to, the American public, which must ultimately bear the burden of adverse foreign reaction to the economic policies of the United States Government. The opinion contains, however, an internal contradiction. Stating that

international trade conducted by corporations of various nationalities would benefit the world by reducing nationalism. The court also noted that foreign controlled enterprises would make investments aiding the economic growth of the United States and help the balance of trade deficit. 366 F. Supp. at 419.

27. 366 F. Supp. at 419.

28. 366 F. Supp. at 420.

29. *See* D. Vagts, *The Multinational Enterprise: A New Challenge For Transnational Law,* 83 HARV. L. REV. 739 (1970).

30. Legislation to restrict the foreign ownership of the shares of a corporation registered under the Securities and Exchange Act of 1934 is presently pending before Congress. Representative of such legislation is H.R. 8951, 93d Cong., 1st Sess. (1974) (also known as the Dent Bill).

the Executive and Legislative branches are best suited to decide matters bearing on United States foreign policy, the court then proceeds to approve this transaction and decide that it is neither violative of United States public policy nor contrary to its national interest. The case law[31] establishes authority for the court to interpret and apply policy decisions embodied in pertinent statutes; however the court is without the authority or expertise to determine the national interest and appropriate public policy in this area.[32] By finding no conflict with national interest or public policy, the opinion implicitly establishes authority for courts to make the same finding in the future. The courts, ill-equipped to make such findings when faced with a complex international economic question, could use the instant holding as a precedent allowing judicial examination of the effects of similar acts upon our national interests. It would be most unfortunate if the instant case were to be used in the future as authority for a court, in a xenophobic moment, to hold that foreign direct investment in the United States by a foreign-controlled multinational enterprise is contrary to the public policy and national interest of the United States. Such a decision could affront foreign nations and seriously hamper our foreign policy. The court, in the instant case, therefore, would have acted more wisely and consistently with its pronouncement about the separation of powers on this question if it had declined to rule on the question of public policy and national interest posed by this acquisition.[33] National regulation of multinationals and foreign direct investment must bear the hallmark of forebearance in the immediate future, especially so long as the United States has the most to lose through foreign reciprocal action.[34] Neverthe-

31. *See* notes 9-11 *supra*.

32. *See* notes 13, 14 *supra*, and accompanying text.

33. In deciding that this transaction did not violate the public policy or the national interest of the United States, the court effectively repudiated its pronouncement on the separation of powers question. The court found the plaintiff's numerous other allegations to be without merit and by refusing to hear the case the court could have allowed the transaction to be completed without entering this area.

34. Foreign direct investment in the United States stood at $10,800,000,000 at the end of 1968. Wall Street J., Jan. 22, 1974, at 1, col. 6. United States Commerce Department preliminary figures for the year 1971 indicated that investment abroad by United States citizens totaled $180,000,000,000. At the same

less, the potential for some form of foreign direct investment that would be contrary to the national interest is clear.[35] Other nations, while maintaining an open policy toward foreign direct investment, have instituted machinery for the protection of basic national interests in this regard.[36] The United States would be wise to do likewise and provide protection for basic national interests not now covered by statute.[37]

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time those investments were subject to liabilities to foreign citizens of $122,000,000,000 for a net foreign direct investment of $58,000,000,000. ENCYCLOPEDIA BRITANNICA, BOOK OF THE YEAR 1973 768 (1973).

35. Various individuals have expressed concern that foreign controlled entities might exercise control over certain critical industries and raw material sectors of the United States economy. Wall Street J., Jan. 22, 1974, at 1, col. 6.

36. A recent and notable example is Canada's Foreign Investment Review Act, CAN. REV. STAT. c. 132 (1970), *as reprinted in* 12 INT'L LEGAL MATERIALS 1136 (1973).

37. Currently the United States has controls to protect its national interest in at least four areas: ownership of nuclear materials (42 U.S.C. §2133(d) (1970)), radio stations (47 U.S.C. §310(a)(5) (1970)), airlines (49 U.S.C. §1401(b) (1970)), and merchant shipping (46 U.S.C. §808 (1970)).

IMMIGRATION—ALIENS WHO GAIN ENTRY INTO THE UNITED STATES BY FALSELY CLAIMING TO BE UNITED STATES CITIZENS, THEREBY AVOIDING INSPECTION AS ALIENS, ARE NOT SAVED FROM DEPORTATION BY SECTION 241(f) OF THE IMMIGRATION AND NATIONALITY ACT

The Immigration and Naturalization Service, alleging that petitioners[1] were deportable as aliens who had entered the United States without inspection, began deportation proceedings against the petitioners under section 241(a)(2) of the Immigration and Nationality Act.[2] Petitioners contended that deportation was precluded by section 241(f) of the Immigration and Nationality Act,[3] which waives deportation of aliens entering the United States by means of a fraud or misrepresentation, provided, however, the alien is the spouse, parent or child of a United States citizen,[4] and otherwise admissible at the time of entry. The special inquiry officer found section 241(f) to be inapplicable;[5] the Board of Immigration Appeals affirmed the decision of the special inquiry officer and dismissed the appeal. On petition for review,[6] the United States

1. Petitioners, Mr. & Mrs. Robert Reid, were natives and citizens of British Honduras. Mr. Reid entered the United States on November 29, 1968, and Mrs. Reid on January 3, 1969.

2. "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . (2) entered the United States without inspection . . . or is in the United States in violation of this chapter or in violation of any other law of the United States . . . ." Immigration and Nationality Act §241(a), 8 U.S.C. §1251(a) (1970) [hereinafter cited as Immigration and Nationality Act].

3. "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall *not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.*" The Immigration and Nationality Act §241(f) (emphasis added).

4. Mrs. Reid gave birth to two sons, one on November 2, 1969, and the other on April 4, 1971. Under §301(a)(1) of the Immigration and Nationality Act, the sons are native born citizens of the United States.

5. By an order entered on May 8, 1972, the special inquiry officer granted the Reids voluntary departure in lieu of deportation, but directed that if they did not depart voluntarily, they should be deported to British Honduras.

6. Jurisdiction was invoked pursuant to §106 of the Immigration and Nationality Act.

Court of Appeals for the Second Circuit, *held*, petition dismissed. Aliens who gain entry into the United States by falsely claiming to be United States citizens, thereby avoiding inspection as aliens, are not saved from deportation by section 241(f) of the Immigration and Nationality Act. *Reid v. Immigration and Naturalization Service*, 492 F.2d 251 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3185 (U.S. Oct. 15, 1974) (No. 73-1541).

A literal application of 241(f) of the Immigration and Nationality Act would waive deportation of aliens who have United States citizens as close relations *only if* these aliens were also charged with a violation of section 212(a)(19) of the Immigration and Nationality Act.[7] Section 212(a)(19) requires exclusion of all aliens who have procured visas or other documentation or seek to enter the United States by fraud or willful misrepresentation of a material fact. The Supreme Court, however, in *Immigration and Naturalization Service v. Errico*,[8] rejected this strict interpretation as being inconsistent with the history[9] and the humanitarian purpose

7. "Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact . . . ." Immigration and Nationality Act §212(a).

8. 385 U.S. 214 (1966), decided with *Scott v. Immigration and Naturalization Serv.* In *Errico* the alien gained preference status by falsely misrepresenting himself to have specialized experience in repairing foreign automobiles. Deportation proceedings were brought under §211(a)(4) of the Immigration and Nationality Act. In *Scott* the alien gained nonquota status by contracting a marriage by proxy with a United States citizen solely for the purpose of gaining entry into the country. Deportation proceedings were brought against her under §211(a)(3) of the Immigration and Nationality Act.

9. The Supreme Court, considering §241(f) to be essentially a reenactment of §7 of the Immigration and Nationality Act of 1957, Pub.L. 85-316, 71 Stat. 639 (1957), decided that the phrase "otherwise admissible" did not include quota restrictions as a material ground for denying admission since the requirement that a person be "otherwise admissible" under §7 was appended with a requirement that the alien not have committed the misrepresentation for the purpose of evading quota restrictions. 385 U.S. at 222. It should be noted, for the purposes of the instant case, that the same §7 of the Immigration and Nationality Act of 1957 contains an additional requirement under which the alien, besides being "otherwise admissible," must also not have committed the misrepresentation for the purpose of avoiding an investigation of the alien. Therefore, under this portion of

of section 241(f). While *Errico* dealt solely with the quantitative question whether an immigrant from a country whose quota is filled is "otherwise admissible at the time of entry" into the United States, it laid the groundwork for a re-evaluation of the statute by the lower courts, and resulted in more decisions based upon a re-interpretation of section 241(f) consistent with the policies of the Immigration and Nationality Act. To effectuate this expansive interpretation some courts have required the following as prerequisites for the application of section 241(f): (1) that the entry itself be fraudulent;[10] (2) that the alien actually have members of his family who are citizens living in the United States;[11] and (3) relying upon *Errico*,[12] that the charges brought against the alien "result directly" from the fraud or misrepresentation by which the alien secured visas or other documentation, or gained entry into the United States.[13] Once these prerequisites are satisfied, how-

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the *Errico* rationale, an alien who avoids inspection by claiming United States citizenship is "otherwise admissible" for the purposes of §241(f).

10. Haghoosh Baronakian Pirzadian v. Immigration and Naturalization Serv., 472 F.2d 1211 (8th Cir. 1973) (alien overstayed a visa); Monarrez-Monarrez v. Immigration and Naturalization Serv., 472 F.2d 119 (9th Cir. 1972) (surreptitious entry); Khadjenouri v. Immigration and Naturalization Serv., 460 F.2d 461 (9th Cir. 1972) (procured adjustment of alien status by fraud); Castillo-Lopez v. Immigration and Naturalization Serv., 437 F.2d 74 (5th Cir. 1971) (aiding and abetting aliens to enter the United States illegally); Ferrante v. Immigration and Naturalization Serv., 399 F.2d 98 (6th Cir. 1968) (alien overstaying a visa). *See also* Gambino v. Immigration and Naturalization Serv., 419 F.2d 1355 (2d. Cir. 1970) (original entry in 1921 as a stowaway).

11. This is necessary to conform to the policy of keeping the family unit together, as propounded in *Errico*. 385 U.S. at 217. *See, e.g.*, Lai Haw Wong v. Immigration and Naturalization Serv., 474 F.2d 739 (9th Cir. 1973); Chung Wook Myung v. District Dir. of United States Immigration and Naturalization Serv., 468 F.2d 627 (9th Cir. 1972) (*per curiam*); United States v. Palmer, 458 F.2d 663 (9th Cir. 1972).

12. "The Government concedes that such an interpretation would be inconsistent with the manifest purpose of the section, and the administrative authorities have consistently held that §241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought, provided that the alien was 'otherwise admissible at the time of entry.'" 385 U.S. at 217.

13. Cabuco-Flores v. Immigration and Naturalization Serv., 477 F.2d 108 (9th Cir. 1973), *cert. denied* 414 U.S. 841 (1974); Milande v. Immigration and Naturalization Serv., 484 F.2d 774 (7th Cir. 1973). It was noted in *Milande* that, under this rationale, if an alien gained a visa by fraud and was otherwise covered by

ever, one must still deal with the question whether the provision of the Immigration and Nationality Act under which the alien is to be deported has a qualitative basis (dealing with moral, mental, and physical fitness) or whether, as in *Errico*, it is merely a quantitative basis (dealing with quota limitations).[14] Under this rationale, if the alien is determined to be qualitatively "unfit" for entry into the United States, then the policy of rejecting those whose presence and potential activities may harm the interests of the United States takes precedence over the humanitarian purpose of section 241(f), and the alien must be deported. Accordingly, for purposes of section 241(f) application, the courts have held that aliens were not "otherwise admissible" due to qualitative shortcomings when the alien has avoided the draft,[15] has been previously deported and reentered the United States without obtaining the consent of the Attorney General,[16] or convicted of a crime

§241(f), the Immigration and Naturalization Service could wait until the alien's visa expired to charge him with that violation, and thus circumvent the provisions of §241(f). 484 F.2d at 776.

14. This rationale was set forth in *Godoy v. Rosenberg*, 415 F.2d 1266 (9th Cir. 1969), where the court, relying upon a Board of Immigration Appeals decision, said: "The Board of Immigration Appeals in the Matter of Eng, Interim Decision No. 1897, August 23, 1968, states at page 4 of its opinion that, 'Immigration restrictions fall into two categories: (1) those which put a limit on the number of aliens who shall enter (numerical or quantitative) and (2) those which seek to provide that only the morally, mentally, and physically fit shall enter (qualitative). Numerical control of entering aliens is achieved through the requirement that an immigrant have a visa to enter . . . . Qualitative restrictions provide that no undesirable alien shall receive a visa or be admitted. Undesirable aliens are those physically, mentally or morally disqualified; the subversives; and the violators of criminal, immigration, or narcotics laws (S.Rep. No. 1515, 81st Cong., 2d Sess. 66-71 (1950); Besterman, Commentary on Immigration and Nationality Act, 8 U.S.C.A. pp. 18-34, 51-54 (1953).' " 415 F.2d at 1270-71. In *Godoy* the court held that an alien who had entered the United States under a special immigrant visa, which was procured by a marriage solely for the purpose of gaining entry into the United States, was "otherwise admissible" for the purposes of §241(f).

15. Jolley v. Immigration and Naturalization Serv., 441 F.2d 1245 (5th Cir. 1971); Loos v. Immigration and Naturalization Serv., 407 F.2d 651 (7th Cir. 1969); Velasquez Espinosa v. Immigration and Naturalization Serv., 404 F.2d 544 (9th Cir. 1968). Draft evasion is grounds for exclusion from entry under §212(a)(22) of the Immigration and Nationality Act.

16. Hames-Herrera v. Rosenberg, 463 F.2d 451 (9th Cir. 1972); Vargas v. Immigration and Naturalization Serv., 409 F.2d 335 (5th Cir. 1969). Entry of a previously deported alien into the United States without the prior consent of the

involving moral turpitude.[17] The qualitative-quantitative analysis, however, does not solve the problem of aliens who have entered the United States by falsely representing themselves to be United States citizens. In those situations when an alien enters the country falsely claiming United States citizenship and bypasses the inspection required of all aliens, the Immigration and Naturalization Service contends that they are deprived of the opportunity to determine whether there is a qualitative reason for denial of entry. Nevertheless, the Ninth Circuit, in *Lee Fook Chuey v. Immigration and Naturalization Service*,[18] indicated that when an alien has entered the United States through fraud or misrepresentation during the course of an investigation, the initial inspection is often rendered worthless by the fraud.[19] Thus, in *Lee Fook Chuey* the court held that the humanitarian aspect of section 241(f) outweighed any interest in maintaining the integrity of the immigration processing system.

In the instant case, Judge Mansfield, writing for a divided court, reviewed section 241(f). He rejected the argument that, since the language of the statute limited neither the type of fraud or misrepresentation to be waived, nor the status claimed by the entering alien, a fraudulent claim of citizenship would be covered by its provisions.[20] The majority, drawing upon the legislative history of the Immigration and Nationality Act, stated that although Congress said nothing to manifest an intent to waive the inspection process, Congress assumed that the waiver would apply only tc those who underwent investigation at the time of entry.[21]

Attorney General is grounds for exclusion from entry under §212(a)(17) of the Immigration and Nationality Act.

17. 463 F.2d 451 (9th Cir. 1972). *See also* Gambino v. Immigration and Naturalization Serv., 419 F.2d 1355 (2d Cir. 1970) (conviction for tax fraud). Prior conviction for a crime involving moral turpitude is grounds for exclusion from entry under §212(a)(9) of the Immigration and Nationality Act.

18. 439 F.2d 244 (9th Cir. 1971). Also in *United States v. Osuna-Picos*, 443 F.2d 907 (9th Cir. 1971) *(per curiam)*, a conviction for reentry by an alien after a prior deportation was reversed when the original deportation was rendered invalid by §241(f). Both entries were made under fraudulent claims of citizenship.

19. 439 F.2d 244, 250 (1971).

20. Judge Mansfield felt that if the statute was read literally on the issue of the type of fraud that would come under §241(f), it would expand the section beyond the original intentions of Congress. 492 F.2d at 254.

21. To prove this point, Judge Mansfield referred to the mandatory directions

Examining petitioners' concession that they must bear the burden of proving themselves "otherwise admissible at the time of entry,"[22] the court stated that many of the qualitative characteristics, which must be considered by the appropriate officer in ruling upon an alien's application, can only be determined at the time of entry.[23] Thus, petitioner could not possibly sustain the burden. Judge Mansfield then rejected the argument that humanitarian interests in family unity outweigh the concern for the integrity of the immigration law enforcement system. He also stated that other sections of the Immigration and Nationality Act, authorizing discretionary action by the Attorney General to relieve hardship,[24] would be rendered superfluous by such a decision. Moreover, the majority attacked *Lee Fook Chuey* as giving incorrect weight to the purpose of section 241(f) and to the role played by the screening process in making the determination of who is "otherwise admissible." Relying upon *Buffalino v. Immigration and Naturalization Service*,[25] the court distinguished *Errico* on the grounds that the latter decision involved circumvention of the quota system, and not destruction of the primary purpose of the Immigration and Nationality Act—alien inspection.[26] Therefore, the court held that aliens who gain entry into the United States by falsely claiming to

given to the Immigration and Naturalization Service by Congress, requiring agents to inspect aliens entering the United States. See §235(a) of the Immigration and Nationality Act: "All aliens arriving at ports of the United States shall be examined by one or more immigration officers . . . ." It should be noted in this regard, however, that §235 refers to the powers of the immigration officers rather than to the standards of admission for aliens. *See also* H.R. REP. No. 1199, 85th Cong., 1st Sess. (1957); H.R. REP. No. 1086, 87th Cong., 1st Sess. (1961).

22. Judge Mulligan, dissenting, would require the Immigration and Naturalization Service to prove grounds by which admission should be denied. 492 F.2d at 260, 264.

23. One example noted by the court is the determination an agent must make as to whether an alien is likely to become a public charge if admitted into the United States; likelihood of an alien becoming a public charge is grounds for exclusion under §212(a)(15) of the Immigration and Nationality Act.

24. *See, e.g.*, §§212(e), 212(h) & 244 of the Immigration and Nationality Act (noted by the court, 492 F.2d at 258).

25. 473 F.2d 728 (3d Cir.), *cert. denied*, 412 U.S. 928 (1973). In *Buffalino* the alien was refused relief under §241(f), on the following grounds: (1) fraudulent entry into the United States on two occasions, (2) failure to establish good moral character, and (3) lying under oath and other false testimony. 473 F.2d at 730.

26. 492 F.2d at 259.

be United States citizens, thereby avoiding inspection as aliens, are not saved from deportation by section 241(f) of the Immigration and Nationality Act.

Judge Mulligan, dissenting, stressed that there was no contention or evidence that the petitioners were not "otherwise admissible at the time of entry."[27] While admitting that legislative history might be used in construing a statute, the dissent noted that it should not be used when the words are clear and when Congress must have realized that aliens would attempt entry by posing as citizens.[28] Reasoning that the Supreme Court's interpretation of section 241(f) in *Errico* shuns a literal reading of the statute to avoid thwarting its humanitarian purpose, Judge Mulligan stated, therefore, that if the statute could be read literally to support such a purpose, the courts should do so. The dissent also argued that since the Immigration and Naturalization Service has broad powers to investigate anyone they believe or suspect to be an alien[29] and to determine the true status of persons entering under claim of citizenship, a person should not be required to bear the burden of the immigration officer's error. Judge Mulligan concluded that the inconvenience to the Immigration and Naturalization Service in making a *post hoc* investigation of the petitioners' admissibility is minimal when compared to the effects of deportation upon the alien, and upon the deported alien's children, who as United States citizens must now suffer an involuntary exile.[30]

This decision created a split among the circuits in the interpretation of section 241(f).[31] To gauge the full impact of the instant

27. Under the majority's rationale, this would be irrelevant, since the petitioner conceded that he must bear the burden of establishing that he was admissible at the time of his entry. 492 F.2d at 255.

28. Judge Mulligan noted that "entry" is defined in §101(a)(13) of the Immigration and Nationality Act as "*any* coming of an alien into the United States . . . ." (Emphasis added.)

29. The Immigration and Nationality Act §235(a).

30. 492 F.2d at 264.

31. Since the instant case was decided, the Fifth Circuit in *Gonzalez de Moreno v. United States Immigration and Naturalization Serv.*, 492 F.2d 532 (5th Cir. 1974), and *Gonzalez v. Immigration and Naturalization Serv.*, 493 F.2d 461 (5th Cir. 1974) (*per curiam*; relied on *Gonzalez de Moreno*), has followed *Lee Fook Chuey* in holding there is no material difference between an alien who fraudulently entered by falsely gaining a visa, and one who fraudulently entered under a false claim of citizenship. Furthermore, the Fifth Circuit held that, due to its

decision, it must be recognized that, quota restrictions notwithstanding, the intent of Congress in passing section 241(f) *may* have been merely to waive the deportation of aliens entering the United States through fraud or misrepresentation, who would have been admissible under the immigration laws if they had gone through the prescribed procedures.[32] Thus, if one accepts the argument that Congress was legislatively pardoning section 212(a)(19) violators who were closely related to United States citizens, the Supreme Court in *Errico* expanded section 241(f) far beyond the original intent of Congress. Although that argument is not being advocated, such an analysis serves to highlight the problems of interpreting legislative intent faced by a court in dealing with arguments based on section 241(f). Reliance must, in the end, be placed upon the court's ability to balance the policies inherent in the Immigration and Nationality Act, as espoused in *Errico* and the legislative history of the Immigration and Nationality Act. The determination must be made as to whether the basic policy of the Immigration and Nationality Act, in its requirement that all entering aliens must be subjected to inspection, should take precedence over the ameliorative function of section 241(f), and the recognition that the entrance of any alien through a fraud or misrepresentation committed at *any* point in the investigation or entry deprives the Immigration and Naturalization Service of an effective inspection. Yet it should be noted that, in cases involving deportation, the general rule of statutory interpretation is to resolve the doubt in favor of the alien.[33] When consideration is made of section 241(f) in future cases, therefore, the humanitarian nature of that section may be the deciding factor.

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ameliorative function, Congress intended that the courts should not be "niggardly in their interpretation" of section 241(f). Gonzalez de Moreno v. United States Immigration and Naturalization Serv., 492 F.2d 532, 538 (5th Cir. 1974).

32 That conclusion was reached in a pre-*Errico* article, *Immigration: The Criterion of "Otherwise Admissible" as a Basis for Relief from Deportation Because of Fraud or Misrepresentation,* 66 COLUM. L. REV. 188 (1966).

33 *See Errico,* 385 U.S. at 225 (citing the rule laid out in *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948)).

JURISDICTION—FLAG OF CONVENIENCE SHIPPING—NLRB WITHOUT AUTHORITY OVER LABOR DISPUTES WHEN VIRTUALLY NONE OF THE RESPONSES OF A FOREIGN SHIPOWNER TO THE PICKETING OF HIS VESSEL WOULD BE LIMITED TO A WAGE-COST DECISION BENEFITING AMERICAN WORKINGMEN

Plaintiffs, foreign corporations operating alien-manned Liberian registered vessels[1] between the United States and foreign ports, sought to enjoin picketing[2] of their vessels. Before a Texas court, plaintiffs alleged that the picketing was a tortious[3] inducement to breach their contracts with the foreign union representing their crews. Defendant unions argued *inter alia*[4] that the Labor Management Relations Act (LMRA)[5] ousted the state court of subject

1. Two vessels were involved: one—the *Northwind*—was owned by a Liberian corporation; the other—the *Theomana*—was owned by a Liberian corporation and managed by a British corporation. The beneficial owners are not apparent from the reports.

2. The picketing occurred at the Port of Houston while the vessels were docked within the port. Four pickets were assigned each vessel. Speaking to no one, they carried signs and distributed pamphlets. The signs read as follows: "ATTENTION TO THE PUBLIC[:] THE WAGES AND BENEFITS PAID SEAMEN ABOARD THE VESSEL THEOMANA NORTHWIND ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN. THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE STANDARDS AND LOSS OF OUR JOBS. PLEASE DO NOT PATRONIZE THIS VESSEL. HELP THE AMERICAN SEAMEN. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL ON THIS SITE." [Printed names of six unions.] Longshoremen and other port workers refused to cross the picket lines to load and unload the vessels.

3. TEX. REV. CIV. STAT. ANN. art. 5154(d), §4 (1948) provides: "It shall be unlawful for any person, singly or in concert with others, to engage in picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated or selected by the employees for the purpose of collective bargaining, or certified as the bargaining unit under the provisions of the National Labor Relations Act."

4. It was also argued that the Norris-La Guardia Act, 29 U.S.C. §101, *et seq.* (1932) [hereinafter cited as Norris-La Guardia Act] prohibited the granting of the injunction sought; that the activities sought to be enjoined were protected by constitutional guaranties of free speech; that TEX. REV. CIV. STAT. ANN. art. 5154(d), §4 (1947), if applicable, was unconstitutional; and that the owners were without clean hands in that their conduct was contrary to the public policy of the United States to promote the merchant marine, as pronounced in 46 U.S.C. §§1101, 1241 (1970). 482 S.W.2d 678 (1972). No court decided any of the above questions on the merits.

matter jurisdiction over the dispute in favor of the National Labor Relations Board. The Texas Court of Civil Appeals, concluding that the picketing was "arguably" a protected activity under section 2(7) of the LMRA, dismissed the complaint for want of subject matter jurisdiction.[6] On direct appeal to the United States Supreme Court, *held,* reversed. When virtually none of the responses of a foreign shipowner to the picketing of his vessel would be limited to a wage-cost decision benefiting American workingmen, the picketing is not "in commerce" within the meaning of sections 2(6) and 2(7) of the LMRA. *Windward Shipping (London), LTD. v. American Radio Association,* 415 U.S. 104 (1974).

It has long been settled that a foreign merchant ship entering an American port submits itself to the laws and jurisdiction of the port.[7] As a matter of comity and accommodation in international maritime trade,[8] however, American courts to a large extent have refrained from the exercise of jurisdiction and enforcement of

5. Labor Management Relations Act §§2(6)-(7), 29 U.S.C. §§152(6)-(7) (1947) [hereinafter cited as LMRA] provides:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

6. The Texas Court of Civil Appeals reviewed the previous decisions and found that all were distinguishable. However, the court determined that the validity of the instant picketing was "suggested" by *Marine Cooks & Stewards v. Panama,* 362 U.S. 365 (1960) (a case factually similar to the instant case but decided under the Norris-La Guardia Act).

7. Although some authorities recognize exceptions to this universally acknowledged rule of general applicability, the weight of authority, which includes the United States position, permits no exception. *See* P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 144-94 (1927); 2 J. MOORE, INTERNATIONAL LAW DIGEST 272-86 (1906). *See also* 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 230-42 (1941); 1 C. HYDE, INTERNATIONAL LAW 735-39 (2d ed. 1947).

8. Wildenhus's Case, 120 U.S. 1 (1887) (dictum); the Ester, 190 F. 216 (E.D.S.C. 1911) (the court declined jurisdiction of a libel for unpaid wages brought by a seaman against a Swedish vessel).

United States law against foreign ships[9] and have often narrowly construed ambiguous federal legislation directed wholly at foreign vessels. In a leading decision concerning judicial restraint from exercising jurisdiction the United States Supreme Court, in *Benz v. Compania Naviera Hidalgo,*[10] addressed the question whether the LMRA of 1947 preempted federal district court jurisdiction of a suit for damages resulting from an American union picketing a foreign ship (operated entirely by foreign seamen under foreign articles) in support of an on-board strike while the vessel was temporarily in an American port. The court concluded that Congress had not intended that the LMRA apply to the dispute in question,[11] especially in light of the limited American connection with the on-board controversy.[12] Subsequently, in *Marine Cooks &*

9. See *Sandberg v. McDonald,* 248 U.S. 185 (1918) in which the Court construed §24 of the Seamen's Act of 1915, 38 Stat. 1164—which precludes both American and foreign vessels from giving advances on seamen's wages and which subjects foreign vessels in United States waters to the same sanction as those imposed upon American violators—not to apply to advances made by a foreign vessel in foreign ports. *Compare* Neilson v. Rhine Shipping Co., 248 U.S. 205 (1918) (section 24 of Seamen's Act not applicable to advances by an American vessel abroad), *and* Petition of Canadian Pac. Ry., 278 Fed. 180 (W.D. Wash. 1921). 38 Stat. 1169 (1915), 46 U.S.C. §672 (a) (1952) (which prohibits vessels of a certain size from leaving American ports unless three quarters of the crew of each department are able to understand the orders of the officers, does not apply to foreign vessels), *with* Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920) (section 4 of the Seamen's Act of 1915, which entitles a seaman to half of his accrued wages at every port where the vessel takes or discharges cargo, applies in favor of a British subject demanding half of his wages notwithstanding articles, signed in Liverpool, which provide payment of wages at the end of the voyage).

10. 353 U.S. 138 (1957). The strike by the alien crew over wages and working conditions occurred aboard a Liberian flag vessel docked in Portland harbor. Although the vessel sailed under a Liberian flag, it was owned by a Panamanian corporation whose stockholders were apparently not Americans. Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing,* 69 YALE L. J. 498, 509 n.74 (1960).

11. 353 U.S. at 143, 144.

12. 353 U.S. at 142. The *Benz* Court's concern with the effect of a contrary holding upon international relations and the possibility of international discord and retaliatory action undoubtedly controlled the result. However, broad statements articulating these fears were a poor guide to future decisions. The opinion raised more questions than it answered, and legal theories, proposed by various commentators encompassing more than a statement of the facts and the result,

Stewards v. Panama S.S. Co.,[13] the Court apparently restricted the scope of the *Benz* decision by sharply distinguishing it on factual and statutory grounds.[14] The Court, in retrospect, said the question in *Benz* was whether the LMRA of 1947 governed the internal labor relations of the ship involved and noted that unlike *Benz* the American unions in the *Marine Cooks & Stewards* case were not interested in the internal economy of the ship but were picketing on their own behalf, not on behalf of foreign employees.[15] The Court's hindsight view of *Benz* in *Marine Cooks & Stewards* seemed to indicate that the *Benz* decision, notwithstanding the broadly announced concern for comity in international maritime affairs that underlay the decision, might be limited to the facts of the case.[16] Taken together *Benz* and *Marine Cooks & Stewards* offered an uncertain guide to the resolution of future disputes. In 1961, the NLRB in *West India Fruit and S.S. Co.*[17] decided it had

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were merely speculation; the opinion did, however, seem to indicate a marked deference to the claims of international comity. *See generally* Note, *supra* note 10, at 498 (a contemporary discussion of the *Benz* decision).

13. 362 U.S. 365 (1960). The factual situation out of which *Marine Cooks & Stewards* arose is remarkably similar to that of the instant decision. There an alien-manned, Liberian-registered ship was picketed by American union boats protesting the loss of American jobs to foreign-flag shipping. As a result of the union's action, the ship was unable to unload its cargo. No on-board dispute was involved.

14. The precise question presented in *Marine Cooks & Stewards* was whether the Norris-La Guardia Act §§101, 104, deprived the federal courts of jurisdiction to issue an injunction against union picketing of respondent's alien-manned, foreign-flag vessels entering Puget Sound. The narrow question in *Benz* was the jurisdictional reach of the LMRA. Largely upon the strength of *Benz* and in spite of the different statutes involved, the Circuit Court had refused to dissolve the District Court's temporary injunction. *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 265 F.2d 780 (9th Cir. 1959). The Circuit Court decision was subsequently reversed by the Supreme Court, which found the statutory difference crucial. The distinction drawn by the Court seemed highly artificial at best and at the time was perhaps a mask, covering a rapid retreat from *Benz*, which obviated the necessity of directly overruling it.

15. 362 U.S. at 371 n.12.

16. The Court later explicitly repudiated this proposition. McCulloch v. Sociedad Nacional, 372 U.S. 10, 18 (1962).

17. 130 N.L.R.B. 343 (1961) (the ship involved, though of Liberian registry, was manned by Cuban nationals, and had plied only the waters between Cuba and the United States coast since being purchased by its American owners and apparently never had been near Liberian waters).

jurisdiction to hear an unfair labor-practice complaint filed by an American union against an American corporation operating an alien-manned, Liberian-registered ship between Cuba and the United States.[18] The test applied by the Board was whether there were substantial American contacts with the vessel.[19] Two years later, however, the Supreme Court in *McCulloch v. Sociedad Nacional*[20] and *Incres S.S. Co. v. International Maritime Workers Union*[21] repudiated such a "balancing of contacts" theory and said that such a procedure might ultimately require Board inquiry into the internal discipline and order of all foreign vessels.[22] The claims of international comity and trade were deemed paramount.[23] The breadth of the Court's decisions, coupled with a failure to distin-

18. *See also* Peninsular and Occidental S.S. Co., 132 N.L.R.B. 10 (1961) (a case argued with *West India Fruit* and decided some months later); Peninsular and Occidental S.S. Co., 120 N.L.R.B. 1097 (1958) (an earlier case foreshadowing the latter approach of *West India Fruit*).

19. 130 N.L.R.B. at 354-55 (1961). In taking this approach the Board was adopting the Supreme Court's approach to jurisdictional problems involving the Jones Act, 46 U.S.C. §688 (1970) as announced by the Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Romero v. International Term Co.*, 358 U.S. 354 (1959). Interestingly, the Board cited *Benz* as authority. For a critical discussion of *West India Fruit* and the "substantial contacts" test as a device to define the jurisdictional reach of the National Labor Relations Act see Note, *supra* note 10, at 498.

20. 372 U.S. 10 (1963). *McCulloch* came to the Supreme Court on appeal from an NLRB certification of an American union as the representative of unlicensed seamen employed upon certain Honduran-flag vessels of a Honduran corporation, a wholly owned subsidiary of United Fruit Company of Boston. The crews were composed almost entirely of Honduran nationals and all of the crews had signed Honduran shipping articles. The vessels regularly called at United States and Honduran ports as well as Central and South American ports.

21. 372 U.S. 24 (1963). *Incres* arose as a result of a New York Court of Appeals decision in which that court held itself without jurisdiction, as required by the Labor Management Relations Act, to enjoin the picketing of appellant's vessels by American unions. The vessels involved were Italian-owned and-manned cruise ships operating under Liberian registry and sailing regularly from New York City to Caribbean and Italian ports. The company maintained agents in New York City but its principal office was in London.

22. 372 U.S. at 19.

23. The Court approved *Benz* and made no attempt to distinguish it. 372 U.S. at 18, 19. In addition, the Court took judicial note of the "vigorous protests from foreign governments" and the international problems created for the United States by the NLRB's "assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags." 372 U.S. at 17.

guish among foreign-flag vessels[24] or substitute any new guide for the discredited "balancing of contacts" test, rendered the exact scope of the decisions unclear.[25] In *Longshoremen's Ass'n v. Ariadne Shipping Co.*[26] a Florida state court subsequently held it had jurisdiction to decide a dispute arising from the picketing of a foreign-registered, alien-manned cruise ship. The United States unions were protesting, in part, substandard wages paid American labor loading and unloading the vessels in Florida ports. Subsequently, the United States Supreme Court reversed the Florida court's *Ariadne* decision.[27] The Court distinguished *Benz, McCullough,* and *Incres* as cases in which American union activity was directed at the relationship between the foreign employee and the foreign employer and held the dispute threatened no interference in the internal affairs of a foreign-flag ship likely to lead to conflict with foreign or international law.[28] The question whether the dispute embraced "internal discipline and order" thus appeared central to the preemption issue in labor disputes involving foreign-flag ships.

In the instant case the Supreme Court noted that a literal reading of "affecting commerce" in sections 2(6) and 2(7) of the LMRA would preempt state jurisdiction in disputes of the type presented by *Benz, McCulloch,* and *Incres,* as well as *Ariadne,* but refused to attribute such an overriding intention to Congress in light of principles of comity in maritime trade.[29] Moreover, the Court de-

24. "In lumping all foreign flags together, the court sacrificed policy for simplicity, and it did so despite a warning that the different classes of flags of convenience presented quite distinct problems, and that 'the thorny nature of the problems as well as its grave implications made this a peculiarly suitable occasion for limiting the Court's decision to the exact question before it [brief for the Unites States at 13].' It would have been well had that advice been heeded." Currie, *Flags of Convenience, American Labor, and the Conflict of Laws,* 1963 SUP. CT. REV. 34, 100.

25. *See* Goldie, *Recognition and Dual Nationality—A Problem of Flags of Convenience,* 39 BRIT. Y.B. INT'L L. 220, 249-54 (1963) [hereinafter cited as Goldie].

26. *International Longshoremen's Ass'n v. Ariadne Shipping Co.*, 215 So. 2d 51 (Fla. 1968), *rev'd*, 397 U.S. 195 (1970).

27. 397 U.S. 195 (1970).

28. 397 U.S. at 200.

29. 415 U.S. at 113. The Court recalled its refusal to adopt an expansive, literal reading of the Jones Act in *Lauritzen* because of "longstanding principles

termined that the *Benz* and *Incres* rationale was applicable in all situations in which American union picketing activity involves tangible interference with the maritime operations of foreign vessels. Thus, since the picketing sought to affect shipboard affairs by compelling the payment of higher wages to alien crews, it was outside the ambit of the LMRA. Accordingly, the Court held that when none of the responses of a foreign shipowner to picketing would be confined to a wage-cost decision benefiting American workingmen, the picketing is not "in commerce" within the meaning of sections 2(6) and 2(7) of the LMRA and, thus, not within the jurisdictional purview of the NLRB.

The dissent noted that for the first time the Court had squarely faced the problem of the use of economic weapons by American unions in an attempt to improve domestic competitive positions *vis-à-vis* foreign shipping, and that for the first time the NLRB's statutory jurisdiction turned upon the identity of the competitor affected by the picketing.[30] *Ariadne* was deemed by the dissent to be controlling; the essential question then focused on whether the labor dispute would involve the NLRB in an inquiry into the internal relations between foreign crews and shipowners. Even if it be correct that the dispute could not be accommodated by a wage decision affecting only wages paid within this country, the dissent found that an "internal relations inquiry" by the NLRB was not a

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of comity and accommodation in international maritime trade" and, in a footnote, it also rejected the " 'candid and brash appeal' made by the seamen and various *amici* that the Court should 'extend the law to this situtation [*Lauritzen*] as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own.' [*Lauritzen v. Larsen*] 345 U.S. at 593." 415 U.S. at 113 n.13. The court went on to compare its construction of the Jones Act with the Labor Management Relations Act. "We are even more reluctant to attribute to Congress an intention to disrupt this comprehensive body of law by construction of an Act unrelated to maritime commerce and directed solely at American labor relations." 415 U.S. at 113 n.13.

30. Justice Brennan apparently is adverting to this *non sequitur:* the NLRB has no authority to regulate the picketed party's affairs; therefore it is without authority to remedy unlawful picketing of the party. 415 U.S. at 117. *See also* Note, *supra* note 10, at 520-23, *passim* (1960), which warns that *Benz* should not be taken as ousting the NLRB of jurisdiction over flag-of-convenience labor disputes other than those arising from on-board disputes among foreign nationals and foreign owners—the *Benz* situation—and that, regardless of the ultimate authority of the Board in the flag-of-convenience area, relief lies not with the state courts but with the NLRB.

fortiori required, and, therefore, concluded that the NLRB's statutory jurisdiction preempted state jurisdiction.

The effect of the instant decision is to foreclose with some finality[31] any effective domestic union picketing of "flag of convenience" vessels that is conducted for the primary purpose of conserving American jobs rather than ameliorating American working conditions.[32] It is apparent that the practical concern of American unions since *Benz* has been job protection[33] and it is equally apparent that the Court's concern has been the international consequences of the injection of American labor machinery into foreign-flag shipping. The Court, however, has consistently failed either to distinguish among foreign flag vessels[34] or examine relevant international law; nevertheless these two related but separable issues are involved in all of the foregoing cases. The first is whether, as a matter of international law, the flag flown by a vessel is determinative of vessel nationality in all cases or is only of contingent importance in the determination.[35] If only contingent, a related question is under what circumstances may it be shown that the flag is not dispositive of the question of vessel nationality.[36]

31. *But see* 415 U.S. at 116 (dissent, indicating that respondents may have a first and fourteenth amendment defense and citing *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58 (1964) and *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

32. Since World War II the decline in American shipping and concomitant transfer of American vessels to foreign registries and replacement of American crews with foreign nationals has been steady and precipitous. *See* BOCZEK, FLAGS OF CONVENIENCE 11-32 (1962) [hereinafter cited as BOCZEK]: Note, *supra* note 10, at 498-503.

33. *See generally,* Note, *Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts*, 60 COL. L. REV. 711 (1960).

34. *See* notes 24 and 25, *supra.*

35. It is undoubtedly the accepted view that compliance with the applicable registry law of the state whose flag a ship flies confers, without qualification, the nationality of that state upon the vessel. *See* RIENOW, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL (1937) and BOCZEK *supra* note 32, at 91-124.

36. The world-wide advent and continuing growth of flag-of-convenience fleets has caused a re-examination of the traditional view that a vessel's flag is conclusive proof of nationality—unimpeachable except when it can be shown the flag is flown in violation of that nation's laws—and the more fundamental principle from which the first is derived; a ship can have but one nationality. Asking whether the Island of Tobago can indeed pass a law to bind the rights of the whole world, at least one commentator has concluded that a state's prerogative to confer

Only if it is concluded that a vessel is of foreign nationality does the question of policy arise *viz.* whether, as a matter of comity and accommodation in international maritime trade, American courts should decline to apply American labor law to foreign ships within their jurisdiction. Focusing upon the second issue, the Supreme Court has always assumed the answer to the first.[37] Understandably the Court has been reluctant to delve into complex questions[38] of ship nationality—an area that has produced as much heat as light and is fraught with international ramifications.[39] The question, however, is central to flag-of-convenience issues. By assuming *sub silentio* that a ship's flag is dispositive of its nationality, the Court has been able to avoid the real issue and reach a decision upon the policy question. In leaving the genuine issue to more appropriate bodies, the Court has perhaps taken the wiser course but, in so doing, has sacrificed clarity for narrow decisions of uncertain scope, which, because never reaching the fundamental issue, have left the Court groping for a workable prospective standard.[40] For example, the *Ariadne* test of whether the dispute embraced "internal discipline and order"[41] was as much an after the fact benediction as it was a guide to deciding whether the LMRA should be construed as applying to the ship—assuming it was found to be foreign—by virtue of its presence in American waters. The present decision, however, represents an attempt to formulate a standard that can adjust the competing claims of American seamen and international seabourne commerce on other than an ad

its nationality upon a ship and have it recognized by all the world is not unrestricted. *See generally* Goldie *supra* note 25.

37. The Court's failure to enunciate its traditional position on the international law question or even to recognize the issue before deciding the derivative policy question has been responsible, in part, for uncertainty over the reach of its decisions beyond the facts of each case. *See, e.g.,* discussion of *McCulloch's* scope in Goldie, *supra* note 25.

38. *Compare* BOCZEK 91-124 *with* Goldie (particularly the discussion of the *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] I.C.J. REP. 4 and its implications for determining ship nationality).

39. *See* Note, *Labor Law, International Law and the Panlibhon Fleet,* 36 N.Y.U.L. REV. 1342, 1366-70(1961).

40. *Id.* at 1355-56 (1961) (history and evolution of the internal discipline and order doctrine).

41. In the instant case the dissent as well as the majority (though the majority took the opportunity to announce a new test) applied the test with varying results.

hoc basis. The "limited to a wage-cost-decision benefiting American workingman" criteria adopted by the Court adequately distinguishes the instant decision from *Ariadne* but whether in predictive value and ease of application it is an improvement over the old internal order and discipline test remains to be seen.

Daniel A. Green

JURISDICTION—THE MERE FACT THAT A WHOLLY OWNED SUBSIDIARY DOES BUSINESS WITHIN THE FORUM STATE IS INSUFFICIENT IN ITSELF TO SUBJECT THE FOREIGN PARENT CORPORATION TO PERSONAL JURISDICTION AND VENUE WITHIN THE JUDICIAL DISTRICT

Tokyo Shibaura Electric Company, Ltd., is a Japanese corporation engaged in the production of electronic calculators. The calculators are sold in Japan to its wholly owned subsidiary incorporated in New York, Toshiba America, Inc. Toshiba, in turn, ships the calculators to the United States where they are sold and distributed from offices and warehouses in New York City, Chicago, and Los Angeles. Petitioners, two California corporations,[1] brought an antitrust action[2] against both the Japanese parent and its subsidiary. The respondent parent company moved to dismiss for lack of personal jurisdiction and improper venue. Relying on the jurisdiction and venue provision of the Clayton Act,[3] Tokyo Shibaura argued that it had not "transacted business" within the district since it had no direct business transactions in California.[4] Petitioners, however, contended that respondent's activities in selling its products to a wholly owned subsidiary, which in turn made sales and deliveries within the state, constituted a practical everyday business of a substantial character that came within the meaning of the statutory phrase "transacting business."[5] Petitioners further

1. O.S.C. Corporation and O.S.C. Corporation of California, both based in Los Angeles.

2. Petitioners were seeking treble damages, injunctive relief and forfeiture of inventory in the antitrust action. In addition, they included a count based on breach of contract.

3. 15 U.S.C. §22 (1958), part of Section 12 of the Clayton Act, provides: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district in which it is an inhabitant, or wherever it may be found."

4. Both parties stipulated to the following facts: Tokyo Shibaura has never registered to do business in California ; it does not own or lease property in California; it has no bank account in California; it has never sold its electronic calculators to either plaintiff and in fact it sells only to Toshiba in Japan, pursuant to letters of credit; it has no officer, director, employee or other representative in California for any business purpose; it has no salesmen, dealers or jobbers in California; it has solicited no business in California; it has no branch office, warehouse, or other place of business in California.

5. In an antitrust action under the Clayton Act, if the defendant alleges that

alleged that Tokyo Shibaura had made shipments directly to its subsidiary in California and argued that a district court decision,[6] which held that such shipments fell within "the everyday concept of doing business," was directly to the point. The district court disagreed and granted respondent's motion to dismiss. On appeal to the Ninth Circuit Court of Appeals, *held*, affirmed. Absent a showing that a foreign corporation in fact controlled and managed the subsidiary, the mere fact that a wholly owned subsidiary does business within the state is insufficient to subject the foreign corporation to personal jurisdiction and venue within the district. *O.S.C. Corporation v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974) (*per curiam*).

Courts have differed over what constitutes the transaction of business by a foreign corporation, bringing it within the scope of 15 U.S.C. §22.[7] In the early antitrust case of *Eastman Kodak Co. v. Southern Photo Materials Co.*,[8] the United States Supreme Court stated that a corporation would be subject to the jurisdiction of a district court if, "in the ordinary and usual sense it transacts business therein of any substantial character."[9] However, this left open the question whether a corporation was amenable to suit on the basis of the activities of its subsidiary. Outside the antitrust area, the Supreme Court had established the rule in *Cannon Mfg. Co. v. Cudahy Packing Co.*[10] that the activities of a subsidiary do

venue is improper, the burden of proof to establish proper venue rests with the plaintiff. *See, e.g.*, Hayashi v. Sunshine Garden Prod., Inc., 285 F. Supp. 632, 633 (W.D. Wash. 1967), *aff'd sub nom.* Hayashi v. Red Wing Peat Corp., 396 F.2d 13 (9th Cir. 1968).

6. Sunbury Wire Rope Mfg. Co. v. United States Steel Corp., 129 F. Supp. 425 (E.D. Pa. 1971) (Michigan corporation with sales of almost $100,000,000 annually was found to be "transacting business" in the eastern district of Pennsylvania by delivering approximately $600,000 worth of steel into the district over a two year period).

7. Under the early intrepretations of the antitrust laws, a corporation was amenable to suit in a judicial district only if it resided in that district or if its officers and agents could be found carrying on the business of the corporation within the district. *See, e.g.*, Bank of America v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923); Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264 (1917). However, this restrictive notion of jurisdiction based on physical presence was altered by Section 12 of the Clayton Act, which served to expand the basis of jurisdiction of the courts over corporations. 15 U.S.C. §22 (1970).

8. 273 U.S. 359 (1927).

9. 273 U.S. at 373.

10. 267 U.S. 333 (1925). In *Cannon*, a breach of contract action was initiated

not subject its parent to the personal jurisdiction of local courts provided the separation of the two corporate entities is maintained.[11] Subsequently, the landmark decision in *International Shoe Co. v. Washington*[12] replaced the traditional jurisdictional tests of presence,[13] consent,[14] and doing business[15] with the minimum contacts test. This test allows courts to assume jurisdiction over foreign corporations without violating the due process clause so long as traditional notions of fair play and substantial justice are not violated.[16] The idea of "minimum contacts" with the forum state, established by *International Shoe* and further defined by the Supreme Court in *Hanson v. Denckla,* generally means that any positive corporate activities within the state are sufficient to sustain jurisdiction.[17] In spite of this apparent loosening of Constitu-

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in North Carolina against a Maine corporation whose maintenance of a local subsidiary was its only alleged contact with the forum. The foreign corporation completely dominated its subsidiary, operating it, in effect, as a branch of the parent. However, the Supreme Court ruled that there was no basis for extending personal jurisdiction over the foreign corporation since it had maintained formal corporate separateness from its subsidiary. 267 U.S. 333 (1925).

11. For a discussion of the *Cannon* decision and the corporate separateness test see 104 U. PA. L. REV. 381, 404-05 (1955).

12. 326 U.S. 310 (1945).

13. Under the presence theory, by engaging in sufficient business within the forum, the corporation is "present" there, and thus amenable to process. *See, e.g.,* Bank of America v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923); Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264 (1917).

14. The original consent theory was founded on the proposition that a state may admit or exclude a foreign corporation on its own terms. Thus, as a condition to doing business within its borders, the state could impose the requirement that a corporation appoint an agent to receive process within the state. Such condition could be express or implied *See, e.g.,* St. Clair v. Cox, 106 U.S. 350, 356 (1882).

15. The "doing business" theory is closely related to the consent theory. The rationale is that by engaging in business within the forum, the foreign corporation impliedly consents to the jurisdiction of the local courts. *See, e.g., Henry L. Doherty v. Goodman,* 294 U.S. 623 (1935); *Flexner v. Farson,* 248 U.S. 289 (1919).

16. "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less . . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

17. 357 U.S. 235, 251 (1958). *See, e.g.,* McGee v. International Life Ins. Co.,

tional due process requirements for exerting jurisdiction over foreign corporations, the *Cannon* rule of corporate separateness has still been followed.[18] The influence of *International Shoe*[19] is evident, however, in cases holding foreign parent corporations subject to local jurisdiction on the grounds that the corporate separation between parent and subsidiary was fictitious,[20] that the parent has held the subsidiary out as its agent,[21] or simply that the parent has exercised too much control over the subsidiary.[22] The prime example of the erosion of the *Cannon* corporate separateness test in the antitrust area is *United States v. Scophony Corporation of America*.[23] In *Scophony* the Supreme Court approved the assertion

355 U.S. 220 (1957) (certificate of reinsurance delivered by mail within the state after solicitation of original contract by mail); Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952) (president maintained office, paid salaries and purchased machinery within the state).

18. *See, e.g.*, Phillip Gaul & Son v. Garcia Corp., 340 F. Supp. 1255 (E.D. Ky. 1972); Hayashi v. Sunshine Garden Prod., Inc., 285 F. Supp 632 (W.D. Wash. 1967), *aff'd*, 396 F.2d 13 (9th Cir. 1968); Global Publishing Corp. v. Grolier, Inc., 273 F. Supp. 637 (D. Mass. 1967).

19. A great deal has been written about the ramifications of the *International Shoe* decision. *See, e.g.*, Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577-86 (1958); Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 930-32 (1960).

20. *See, e.g.*, Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962), *aff'd*, 325 F.2d 713, *cert. denied*, 84 S. Ct. 1334, 377 U.S. 931 (1964) (common officers of foreign parent and subsidiary met together at higher echelon levels to make general policy and to lay down detailed instructions concerning specific operations).

21. *See, e.g.*, Curtis Publishing Co. v. Cassel, 302 F.2d 132 (10th Cir. 1962) (distributor, wholly owned subsidiary of publisher, remitted subscription payments to publisher and received a commission and purchased newsstand copies within agreed price for delivery at designated points and received credit for unsold copies from publisher); Hoffman Motors Corp., v. Alfa Romeo S.p.A., 244 F. Supp. 70 (S.D.N.Y. 1965) (foreign parent completely controlled subsidiary, appointing its own officers and employees as directors, officers and employees of subsidiary and paying their salaries).

22. *See, e.g.*, Luria Steel and Trading Corp. v. Ogden Corp., 327 F. Supp. 1345 (E.D. Pa. 1971) (10 of 28 officers or directors of foreign parent served as officers or directors of wholly owned subsidiaries and numerous types of actions were required to be reported to the parent by a subsidiary before taking or approving of such action); K.J. Schwartzbaum, Inc., v. Evans, Inc., 44 F.R.D. 589 (S.D.N.Y. 1968) (daily activities of wholly owned subsidiary were controlled by employees and staff members of parent).

23. 333 U.S. 795 (1948).

of jurisdiction over a foreign corporation based upon the local operations of a subsidiary despite the fact that the British parent and its American subsidiary had maintained their separate corporate identities. The Court reasoned that where a corporation has a wholly owned subsidiary performing services which would ordinarily be performed by its own employees, the parent company should be required to submit to the jurisdiction of the forum where, for all intents and purposes, it carries on its business.[24] Thus, the Court appeared to adopt a test of economic reality based on "the practical and broader business conception of engaging in any substantial business operations."[25] It looked behind the corporate veil to determine whether the foreign parent in fact transacted business within the court's jurisdiction in the ordinary and usual sense.[26] On the other hand, adherence to the *Cannon* corporate separateness rule was exhibited by the Ninth Circuit decision in *Hayashi v. Sunshine Garden Products, Inc.*[27] In *Hayashi*, an Ohio corporation was sued for antitrust violations in the state of Washington. Its sole contact with Washington consisted of activities by a wholly owned Canadian subsidiary which had some business contacts in the forum state. Although the activities of the subsidiary in Washington were of substantial interest to the parent, the Court of Appeals found no basis for jurisdiction since formal corporate separateness between parent and subsidiary had been maintained. Despite cases such as *Hayashi*, a growing number of courts have held that where a parent has sufficient control over a subsidiary, the foreign parent is "transacting business" within the antitrust venue statute by reason of the activities of the subsidiary.[28]

24. 333 U.S. at 808.

25. 333 U.S. at 807.

26. "Whether a corporation 'transacts business' in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be 'found' anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges." United States v. Scophony Corp. of America, 333 U.S. 795, 819, 867 (1948) (Frankfurter, J., concurring).

27. 285 F. Supp. 632 (W.D. Wash. 1967), *aff'd*, 396 F.2d 13., (9th Cir. 1968).

28. *See* notes 20-22 *supra* and accompanying text.

As prescribed by the *Cannon* doctrine, the court in the instant case examined the extent to which corporate separateness between the respondent and its subsidiary had been maintained. Finding that the formality of separate corporate identities had been observed, the court concluded that there was no basis for extending personal jurisdiction over the foreign parent under 15 U.S.C. §22.[29] In rejecting petitioners' contention that the proper test under the antitrust venue statute was not the corporate separateness of parent and subsidiary, but rather the "everyday concept of transacting business" expressed in *Scophony*, the court cited its own prior holding in *Hayashi*.[30] Although not directly addressed in its *per curiam* opinion, the court implicitly acknowledged that it was faced with important policy and commercial considerations in determining whether to subject a foreign corporation to its jurisdiction in this particular factual situation. It is apparent that the court was reluctant to exercise jurisdiction because of the potentially far-reaching effect on international trade such a decision would have.[31] The court went on to state that even if the *Cannon* doctrine has been qualified by the *Scophony* definition of "transacting business," jurisdiction would not exist in the instant case since petitioners had failed to establish that respondent had "transacted business" within the *Scophony* sense in the forum.[32] Moreover, petitioners' reliance on the *Sunbury Wire Rope* decision

29. 491 F.2d at 1066-67.

30. 285 F. Supp. 632. *See also*, Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D.C. Utah 1962), *aff'd*, 325 F.2d 713, *cert. denied*, 377 U.S. 931 (1964), which the court cites as lending further support to the *Cannon* doctrine.

31. Quoting from *Intermountain Ford Tractor Sales Co. v. Massey-Ferguson, Ltd.*, 210 F. Supp. 930 (C.D. Utah 1962), the court said: *"Ordinary business practices completely removed from the local scene could not be so magnified in their supposed local effect without subjecting almost every foreign manufacturer to the consequences of local operations merely because their products eventually reach local dealers or consumers. The most loose concept of liberalized venue and service requirements would not countenance such result."* 491 F.2d at 1068 (emphasis added by the court).

32. "Even assuming we were to find that the Scophony definition of 'transacting business' has limited the *Cudahy* holding, we do not find that the appellants have sufficiently established that Tokyo Shibaura transacted such an amount, or any, business within the Central District of California, as to be within the practical everyday business or commercial concept of doing or carrying on business of a substantial character." 491 F.2d at 1068.

was rejected by the court as it could find no evidentiary basis for the allegation that Tokyo Shibaura had made shipments directly to Toshiba in California.[33]

The court's decision in the instant case clearly demonstrates that the *Cannon* doctrine, despite some erosion,[34] still has substantial influence. The practical effect of the *Cannon* rule is to insulate the parent corporation from the jurisdiction of the forum in which its subsidiary does business. Supporters of such a result point to its possible favorable effects on international trade,[35] contending that the insulation of foreign corporations from the jurisdiction of local courts will encourage foreign businesses to enter United States markets. It will also possibly result in similar favorable treatment of United States corporations by foreign courts. However, to deny local jurisdiction in a particular case on the basis of the maintenance of corporate separateness between a parent and its subsidiary raises serious questions under the rationale of *International Shoe*.[36] According to this rationale,[37] considerations of "fair play and substantial justice,"[38] embodied in such factors as the interest of the particular state or judicial district in providing a forum for its residents, the relative availability of evidence, the relative burden of defense and prosecution in the forum rather than at some other place, the ease of access to some alternative forum, and the extent to which the cause of action arises out of the defendant's local activities, must be taken into account in determining whether jurisdiction should be exercised.[39] In this context, it seems appropriate to ask whether the separate existence of a wholly owned subsidiary, created (at least in part) for the purpose of limiting shareholder liability, properly has anything to do with the question of jurisdiction. If it is reasonable to exercise jurisdic-

33. 491 F.2d at 1066.

34. At least one writer feels that the erosion has been so extensive that *Cannon* is virtually limited to its facts. Comment, *Jurisdiction Over Parent Corporations,* 51 CALIF. L. REV. 574, 584 (1963).

35. Justice Breitel of New York recognized these policy considerations in *Frummer v. Hilton Hotels, Int'l,* 19 N.Y.2d 533, 539-41; 227 N.E.2d 851, 855-56; 281 N.Y.S. 2d 41, 46-47 (dissenting opinion), *cert. denied,* 389 U.S. 923 (1967).

36. *See* note 11 *supra* at 405.

37. *See* note 14 *supra* .

38. 326 U.S. 310, 316, (1945).

39. *See, e.g.,* Regie Nationale Des Usines Renault v. Superior Court, 208 Cal. App. 2d 702, 703, 25 Cal. Rptr. 530, 531 (1962).

tion over a foreign corporation which itself has sufficient contacts with the forum to meet the standard of *International Shoe*, it would seem equally reasonable to exercise jurisdiction over a foreign corporation which has the same contacts with the forum through a subsidiary. Whether a foreign corporation sells its products through its own office or sales force in the forum state or through a wholly owned subsidiary, the result is the same—the foreign corporation has sold its product in the local market. Thus, by substituting the economic reality test of *Scophony* for the corporate separateness test of *Cannon* and by emphasizing the purpose and result of the particular corporate structure rather than its form, the due process policies of fair play and substantial justice might be better served.

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