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Ronald L. Smallwood

Arden J. Lea

William R. Lauer

John R. Meldorf

Annette Adams

See next page for additional authors

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Authors

Ronald L. Smallwood, Arden J. Lea, William R. Lauer, John R. Meldorf, Annette Adams, and Randolph R. Slaton

RECENT DECISIONS

ADMIRALTY—FLORIDA OIL POLLUTION ACT—STATE OIL POLLUTION REGULATION OF MARITIME ACTIVITIES IS PERMISSIBLE SO LONG AS THERE IS NO FATAL CONFLICT BETWEEN THE STATE LEGISLATION AND FEDERAL MARITIME REGULATORY SCHEMES

Plaintiffs,[1] merchant shippers, sought to enjoin the application of the Florida Oil-Spill Prevention and Pollution Control Act,[2] which imposed on shippers and terminal facilities strict and unlimited liability for oil pollution cleanup costs incurred by the State and for oil pollution damages suffered by the State or private parties. Plaintiffs claimed that the Florida Act unconstitutionally conflicted with preemptive federal maritime law,[3] especially the Admiralty Extension Act[4] and the Water Quality Improvement Act of 1970 [WQIA].[5] Defendant, the State of Florida, argued that the Florida Act was valid because of the nonpreemption clause in

1. Also included as plaintiffs were world shipping associations, members of the Florida coastal barge and towing industry, owners and operators of oil terminal facilities and heavy industries located in Florida.

2. FLA. STAT. ANN. § 376.12 (Supp. 1972) [Florida Act] provides in part: "Liabilities of licensees—. . . [A]ny licensee and its agents or servants, including vessels destined for or leaving a licensee's terminal facility, who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the state for *all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others.* In any suit to enforce claims of the state under this chapter, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this chapter it need only plead and prove the fact of the prohibited discharge or other polluting condition and that it occurred." (emphasis added).

3. American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241, 1244-45 (M.D. Fla. 1971), *rev'd,* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). Additional contentions of plaintiffs, which were not reached by the three-judge federal court, included: (1) the Florida Act violated the commerce clause, since it sought to regulate foreign and interstate commerce; (2) the Florida Act denied plaintiffs substantive and procedural due process under the fourteenth amendment; and (3) the Florida Act denied plaintiffs equal protection of the laws under the fourteenth amendment. 335 F. Supp. at 1244-45.

4. 46 U.S.C. § 740 (1970) provides in part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land.*" (emphasis added).

5. 33 U.S.C. § 1161 (1970) [hereinafter cited as WQIA].

the WQIA[6] and that the State can constitutionally enact oil pollution legislation that provides remedies unavailable in existing federal maritime oil pollution law. A three-judge federal district court[7] invalidated the Florida Act, concluding that state oil pollution legislation is unconstitutional when it conflicts with general admiralty rules or with congressional enactments in the maritime field.[8] On direct appeal to the United States Supreme Court, *held*, reversed. State legislation that establishes recovery by the State of cleanup costs for oil spillage and imposes strict and unlimited liability on polluting vessels and terminal facilities that cause oil

6. The WQIA contains a nonexemption clause that specifically provides: "(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency *under any provision of law for damages to any publicly-owned or privately-owned property* resulting from a discharge of any oil or from the removal of any such oil. (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil into any waters within such State. (3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section." 33 U.S.C. § 1161(o)(1)-(3) (1970) (emphasis added).

Other sections of the WQIA provide: (1) There should be no discharge of oil into or on the navigable waters and shorelines of the United States (33 U.S.C. § 1161(b)(1) (1970)); (2) The owner or operator of a vessel or an onshore or offshore facility is subject to limited liability without fault for the costs expended by the government in cleaning up an oil spill. The amount of liability of a vessel is limited to 100 dollars per gross ton or fourteen million dollars, whichever is less. The liability of an onshore or offshore facility is limited to eight million dollars (33 U.S.C. § 1161(f)(1)-(3) (1970)); (3) When the spillage results from willful negligence or misconduct, liability for cleanup costs can be unlimited (33 U.S.C. § 1161(f)(1)-(3) (1970)); (4) There is an exception from liability for cleanup costs if the discharge was caused solely by an act of God, act of war, negligence of the United States or act or omission of another party (33 U.S.C. § 1161(f)(1) (1970)); and (5) The establishment of a National Contingency Plan was authorized to assign prevention and cleanup duties and responsibilities among federal departments and agencies, in coordination with state and local agencies, for water pollution control (33 U.S.C. § 1161(c)(2)(A) (1970)).

7. 28 U.S.C. § 2281 (1970) (three-judge court required to enjoin a state statute).

8. 335 F. Supp. at 1246, 1248. The three-judge court found that the conflict *infra* invalidated the Florida Act. The court reasoned that the substitution of absolute liability for proof of negligence or unseaworthiness as a condition to unlimited recovery in the Florida Act materially changed the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters. The lower court also warned that upholding the conflicting Florida legislation would sound the death knell for the principle of uniformity. 335 F. Supp. at 1248.

spill damage to the State or private parties invades no regulatory area preempted by general maritime law, the Admiralty Extension Act or the WQIA. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

The scope of the federal maritime law is enunciated in article III, section 2 of the United States Constitution,[9] which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. When coastal states extended their police power to protect their vital interests in their shorelines and created remedies for local problems springing from maritime activities in their ports, conflicts between state and federal maritime law arose over the source of the substantive law to be applied.[10] The demarcation between the limits of the state police power and the ambit of the federal maritime law has vacillated.[11] In 1917, the United States Supreme Court, in *Southern Pacific Co. v. Jensen*,[12] faced the question whether federal maritime law exclusively preempts state legislation in maritime areas that touch the state's interests. The Court concluded that state legislation that contravenes the essential purpose expressed in an Act of Congress, that materially prejudices the characteristic features of the general maritime law or that interferes with the proper harmony and uniformity of that law in international and interstate relations is invalid.[13] The Court

9. U.S. CONST. art. III, § 2, cl. 1. This constitutional grant of power was implemented by the Judiciary Act of 1789, which provided in part: "[T]he district courts shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . *saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it* . . . ." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76-77 (1789), *as amended*, 28 U.S.C. § 1333 (1970) (emphasis added).

The "saving clause" exception to exclusive federal admiralty jurisdiction has been interpreted to mean that the common law is competent to grant relief in any maritime cause, aside from some statutory exceptions, provided the relief sought is affordable in the ordinary in personam action. D. ROBERTSON, ADMIRALTY AND FEDERALISM 4 (1970).

10. For a discussion of federal-state conflict in the admiralty context see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 43-47 (1957).

11. *Compare* Lindgren v. United States, 281 U.S. 38 (1930) (Jones Act superseded state death legislation concerning the rights of seamen) *with* The Hamilton, 207 U.S. 398 (1907) (state statute upheld as supplementing maritime law when maritime law denied recovery for wrongful death and state statute granted such relief when injuries took place within jurisdiction).

12. 244 U.S. 205 (1917) (operator of electric freight truck carrying cargo between dock and vessel fatally injured; court allowed no state recovery because application of state statute conflicted with federal maritime law).

13. 244 U.S. at 216.

in *Jensen* justified the concept of uniformity in maritime law by noting that the Constitution refers to a system of law exclusively preemptive and uniformly operative throughout the entire country[14] and that that system could not tolerate additions or changes by state legislation.[15] The *Jensen* uniformity doctrine has subsequently been diluted. Later cases have held that uniformity is only one of several considerations in the determination of preemption.[16] Four years after *Jensen,* the Court drew a less rigid boundary for the application of state law. In *Western Fuel Co. v. Garcia,*[17] the Court declared that state wrongful death statutes could apply to torts occurring on navigable waters. The Court reasoned that when death results from a maritime tort committed on navigable waters within a state whose statutes give a right of action for wrongful death, the subject is maritime but local in character. Therefore, the specified state modification of or supplement to the maritime rules applied in admiralty courts, if the modification or supplement follows the common law, works no material prejudice to the characteristic features of the general maritime law.[18] This maritime but local exception also justified the application of a state survival statute to a maritime situation.[19] The Court determined that a state may modify or supplement the maritime law by creating liability for maritime torts, which a court of admiralty would recognize, so long as the state action is neither hostile to the fundamental features of the maritime law nor inconsistent with federal

14. *See* The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874) (steamer seized against liens for mariner's wages, salvage services and necessaries furnished the vessel while in home port).

15. *See* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). A bargeman, working in a maritime capacity, fell into a river and drowned. The bargeman's widow was denied her claim for benefits under the New York Workmen's Compensation Act because the attempted congressional delegation of authority to the states to extend state workmen's compensation law to a maritime worker on a vessel in navigable waters defeated the purpose of the Constitution to establish a uniform body of maritime law. 253 U.S. at 160-61, 164.

16. *E.g.,* Davis v. Department of Labor & Indus., 317 U.S. 249 (1942); Skiriotes v. Florida, 313 U.S. 69 (1941); United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953). *See generally* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 172.

17. 257 U.S. 233 (1921).

18. 257 U.S. at 242. "Material prejudice" is used to describe state legislation that is "destructive" to the federal maritime structure.

19. Just v. Chambers, 312 U.S. 383, 387-91 (1941) (cause of action for wrongful death because of alleged carbon monoxide poisoning aboard yacht held to survive in admiralty against owner of yacht).

legislation. State legislation in the maritime area thus has survived constitutional challenges when the federal courts are satisfied that the state enactment supplements rather than conflicts with the general maritime law. Moreover, the Court's characterization of the state legislation as supplementary rather than conflicting has become increasingly determinative of the statute's validity.[20] Therefore, within a "twilight zone"[21] in which federal and state interests coincide, the Court has sanctioned concurrent jurisdiction. The relaxation of the uniformity doctrine has revealed the Court's recognition of legitimate state concerns in protecting local interests through additional or supplementary legislation. In such cases the police power of the states has justified the state statute even though the state legislation overlaps the maritime boundary.[22] Superimposed on the general maritime law are several congressional statutes that either directly regulate oil pollution or substantially affect regulation of oil pollution by coastal states. The Admiralty Extension Act, promulgated in 1948, expanded maritime recovery provisions to damage to docks, beaches and bridges.[23] Accordingly, oil pollution became a maritime tort even

20. "Neither does the Constitution nor any federal statute preclude states from passing laws which directly affect admiralty matters; indeed a considerable body of state law in the admiralty area has long existed. Federal case law, however, has developed the nebulous, qualified limitation rule that state statutes may supplement, but not conflict with the general maritime law." McCoy, *Oil Spill and Pollution Control: The Conflict between State and Maritime Law,* 40 GEO. WASH. L. REV. 97, 102 n.32 (1971).

21. Davis v. Department of Labor & Indus., 317 U.S. 249 (1942). In *Davis,* a worker who had been dismantling a bridge was killed by a fall from a barge beneath the site. Even though the injury occurred in what the *Jensen* Court might have characterized as the federal domain, the Court in *Davis* determined that no conflicting federal administrative proceedings had begun under the Longshoremen's and Harbor Workers' Compensation Act, therefore, it would "look solely to state sources for guidance." 317 U.S. at 257. Within this "twilight zone" federal and state jurisdiction was concurrent.

22. Skiriotes v. Florida, 313 U.S. 69, 75, 77 (1941) (state regulation of commercial sponge harvesting equipment upheld). *Compare* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (court rejected the notion that state law *must* govern in the absence of a federal statute on a maritime rule regarding wrongful death) *with* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (court upheld Detroit air pollution ordinance as applied to vessel in maritime navigation).

23. *See* United States v. Matson Nav. Co., 201 F.2d 610, 614-17 (9th Cir. 1953) (cause of action for damage to dike, which extended from shore into navigable water, was cognizable in admiralty). Historically, according to the locality test, which stated that no maritime tort occurred unless both the commission of the

if the damage was consummated on land, when the spillage was caused by a vessel on navigable waters.[24] The maritime tort for oil pollution required proof of negligence or at least proof of some unseaworthy condition before liability could be imposed on the shipowner.[25] Although admiralty jurisdiction had been extended by the Admiralty Extension Act to embrace damage consummated on land, the states were not precluded from exercising their prior jurisdiction. The Court observed in *Victory Carriers, Inc. v. Law,*[26] that even though the Admiralty Extension Act intruded on an area that had previously been reserved for state law, Congress intended to create a concurrent remedy in admiralty for the previously existing common law tort action.[27] Congress contemplated the creation of no exclusive cause of action in the Admiralty Extension Act; rather victims of injuries, which the courts had termed "ship-to-shore" torts, were afforded an additional form of relief—in admiralty.[28] Several federal statutes that directly regulate oil pollution have supplemented the maritime tort for oil pollution.[29] In 1966, amendments to the Oil Pollution Act of 1924[30] extended its cover-

act and the consummation of the harm take place on navigable waters, no federal maritime recovery for oil pollution damage to the shore existed. *See* The Plymouth, 70 U.S. (3 Wall.) 20, 33 (1866). *See generally* Sweeney, *Oil Pollution of the Oceans,* 37 FORDHAM L. REV. 155, 164-65 (1968).

24. 46 U.S.C. § 740 (1970).

25. Negligence or unseaworthiness are usual prerequisites for successful maritime tort actions. *See, e.g.*, United States v. Standard Oil Co., 217 F.2d 539 (6th Cir. 1954) (libel in admiralty for destruction of tanker because of fire resulting from discharge of gasoline into dock and water required proof of negligent discharge); Salaky v. The Atlas Barge No. 3, 208 F.2d 174 (2d Cir. 1953) (suit in admiralty against barges and their owners to recover for damage to small craft from oil sludge discharged into water required proof of barge owner's negligence).

26. 404 U.S. 202 (1971).

27. 404 U.S. at 209 n.8; *accord,* United States v. Matson Nav. Co., 201 F.2d 610, 617 (9th Cir. 1953). For the legislative history of the Admiralty Extension Act of 1948 see S. REP. No. 1593, 80th Cong., 2d Sess. (1948); H.R. REP. No. 1523, 80th Cong., 2d Sess. (1948).

28. S. REP. No. 1593, 80th Cong., 2d Sess. (1948); H.R. REP. No. 1523, 80th Cong., 2d Sess. (1948).

29. In 1966, the Refuse Act of 1899, ch. 425, §§ 13, 16, 30 Stat. 1121 (codified in scattered sections of 16, 33 U.S.C.), was held applicable to prohibit discharges of oil into navigable waters. The small fines provided by the Act (2,500 dollars maximum) could not adequately compensate the federal government for the injury to navigable waters and to marine life, caused by large oil spills. For a summary of various federal statutes concerning oil pollution see Note, *Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970,* 55 CORNELL L. REV. 973, 973-77 (1970) [hereinafter cited as CORNELL].

30. Ch. 316, 43 Stat. 604, *as amended,* Act of November 3, 1966, Pub. L. No.

age to discharges on or into internal as well as coastal navigable waters. The amendments defined *discharge* as a grossly negligent or willful act;[31] the statute, therefore, precluded enforcement for merely negligent acts. The Oil Pollution Act of 1961[32] was amended in 1966 to prohibit the discharge of oil or oily mixtures[33] by ships of American registry within 50 miles of land. The penalty provisions of the Oil Pollution Act of 1961 were mild; a maximum fine of 2,500 dollars and a maximum term of imprisonment of one year were prescribed.[34] To alleviate some of the problems resulting from the inadequacies of these statutes, Congress enacted the Water Quality Improvement Act of 1970. In the WQIA Congress proscribed the discharge of oil into or on the navigable waters and shorelines of the United States.[35] The WQIA broadly defined *discharge,*[36] abrogated the gross negligence standard of the Act of 1924[37] and enlarged the scope of federal oil pollution regulation. The WQIA imposed limited financial liability for costs incurred by the federal government in cleaning up an oil spill.[38] The liability extended to spills caused by both vessels and terminal facilities.[39] The WQIA established a National Contingency Plan to assign prevention and cleanup duties and responsibilities among federal departments and agencies, in coordination with state and local agen-

89-753, § 211(a), 80 Stat. 1252 (repealed 1970) [hereinafter cited as Oil Pollution Act of 1924].

31. Oil Pollution Act of 1924 § 211(a).
32. 33 U.S.C. §§ 1001-15 (1970), *amending* 33 U.S.C. §§ 1001-15 (1964).
33. 33 U.S.C. § 1001(e) (1970), *amending* 33 U.S.C. §§ 1001(e) (1964).
34. 33 U.S.C. § 1005 (1970).
35. 33 U.S.C. § 1161(b)(1) (1970).
36. 33 U.S.C. § 1161(a)(2) (1970).
37. Oil Pollution Act of 1924 § 211(a).
38. 33 U.S.C. § 1161(f)(1) (1970).
39. 33 U.S.C. § 1161(f)(2)-(3) (1970). Since this section places a fourteen-million-dollar limit on recovery from a polluting vessel, the WQIA is in apparent discord with the Limited Liability Act, 46 U.S.C. §§ 181-96 (1970) (this statute had its origin in the Act of March 3, 1851, ch. 43, § 3, 9 Stat. 635). The Limited Liability Act states that the liability of the owner of any vessel for any loss, damage or injury by collision without the privity or knowledge of such owner shall not exceed the amount or value of the interest of such owner in such vessel and her freight then pending. Limited Liability Act, 46 U.S.C. § 183(a) (1970). In addition, the Court has determined that the vessel and pending freight is to be valued after the accident has occurred. *See, e.g., In re* Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968), *modified,* 409 F.2d 1013 (2d Cir. 1969) (recovery limited to the one life boat that survived the sinking of the ship). For a history of federal limitation of liability see Note, *Limitations of Liability in Admiralty: An Anachronism from the Days of Privity,* 10 VILL. L. REV. 721, 725-33 (1965).

cies, for water pollution control;[40] the Act specifically implemented this federal-state cooperation by disclaiming federal preemptive or exclusionary legislation over oil pollution jurisdiction.[41] Later in 1970 the Florida Legislature passed the Oil Spill Prevention and Pollution Control Act [Florida Act][42] to complement the WQIA, especially its treatment of state and private recovery for property damage.[43] The Florida Act allowed recovery for oil pollution cleanup costs incurred by the State of Florida and for pollution damages to the State and to private property,[44] and imposed unlimited liability without fault on onshore and offshore terminal facilities for the discharge of oil.[45] Significant discrepancies between the Florida Act and the WQIA appear in the extent of liability imposed and the amount of recovery allowed. The Florida Act allows no defenses to strict liability;[46] the WQIA permits four defenses.[47] The Florida Act provides unlimited recovery for spillage caused by vessels or terminal facilities when caused by either willful or negligent discharges.[48] The WQIA, however, differentiates between willful and negligent discharges, allowing unlimited recovery for damages caused by willful discharges and limited recovery for negligently caused damages.[49]

In the instant case the Supreme Court noted that jurisdiction over sea-to-shore oil pollution—historically within the reach of the police power of the state—was not wrested from the states by the Admiralty Extension Act.[50] The Court rejected the theory of exclusive federal preemption over oil pollution,[51] and placed the Florida

40. 33 U.S.C. § 1161(c)(2)(A) (1970).

41. 33 U.S.C. § 1161(o)(1)-(3) (1970).

42. FLA. STAT. ANN. § 376.021(6) (Supp. 1972).

43. Since the WQIA did not concern state or private recovery for property damage, the WQIA left these damages to fault-oriented maritime remedies.

44. FLA. STAT. ANN. § 376.12 (Supp. 1972).

45. This liability also applies to any vessel that discharges oil on State waters or shore while destined for or leaving any Florida port. FLA. STAT. ANN. § 376.12 (Supp. 1972).

46. After liability has been determined, however, the Florida Department of Natural Resources "*may*, after hearing, waive the right to reinbursement to the [Florida coastal protection] fund from such person if the department finds that the occurrence was the result of [the same four WQIA defenses]." (emphasis added). FLA. STAT. ANN. § 376.11(6)(b) (Supp. 1972).

47. 33 U.S.C. § 1161(f)(1) (1970).

48. FLA. STAT. ANN. § 376.12 (Supp. 1972).

49. 33 U.S.C. § 1161(f)(1) (1970).

50. The Court observed that the Admiralty Extension Act did not purport to supply the exclusive remedy. 411 U.S. at 343.

51. In the instant case the Court confined *Jensen* to its facts and declined to

Act within the "twilight zone" in which state regulation concurrent with federal regulation remains permissible.[52] Moreover, the Court determined that the WQIA not only disclaims exclusive federal preemption over state regulation of oil pollution damages but presupposes coordinated and cooperative action between federal and state authorities in the regulation of oil pollution.[53] Scrutinizing the WQIA and the strict and unlimited liability provisions of the Florida Act, the Court discerned no significant conflict warranting the invalidation of the Florida Act.[54] Since Congress had

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move the *Jensen* line of cases shoreward to oust state law from any shoreside oil pollution caused by ships on navigable waters. 411 U.S. at 344. The United States Supreme Court, however, did not completely reject or overrule *Jensen* or the uniformity doctrine.

52. 411 U.S. at 344. By placing the instant case outside of the *Jensen* doctrine of uniformity and within the "twilight zone" the Supreme Court made the following remarks in summation: "*Jensen* and *Knickerbocker Ice* have been confined to their facts, *viz.* to suits relating to the relationship of vessels, plying the high seas and our navigable waters, to their crews. The fact that a whole system of liabilities was established on the basis of those two cases, led us years ago to establish the 'twilight zone' where state regulation was permissible." 411 U.S. at 344. In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), the Court said that *Jensen* and its progeny mark isolated instances where "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope." 358 U.S. at 373. *See* Just v. Chambers, 312 U.S. 383 (1941), in which the Court reiterated that a state may modify or supplement maritime law even by creating a liability that a court of admiralty would recognize and enforce, provided the state action is not hostile "to the characteristic features of the maritime law or inconsistent with federal legislation." 312 U.S. at 388.

53. 33 U.S.C. § 1161(o)(2) (1970). *See* note 6 *supra.* The main purpose for the disclaimer (that nothing in that section preempts any State from "imposing any requirement or liabilty with respect to the discharge of oil into any waters within such State") is that the scheme of the Act is one which allows—though it does not require—cooperation of the federal regime with a state regime. 411 U.S. at 332. According to the Conference Report, "any State would be free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties. These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts." H.R. CONF. REP. No. 91-940, 91st Cong., 2d Sess. 42 (1970) (cited by Justice Douglas in the instant case, 411 U.S. at 329).

54. In particular the Court concluded that: (1) there is no fatal conflict between the federal Limitation of Liability Act and section 12 of the Florida Act concerning the damages assessed terminal facilities violating the Florida Act; (2) although section 12 of the Florida Act and the federal Limitation of Liability Act might clash over the amount of recovery that can be reclaimed from vessels violating the Florida Act, the Supreme Court said that this section of the Florida Act had not yet been construed by Florida Courts so it is susceptible of an

not expressly intended exclusive federal preemption over maritime oil pollution regulation and since the Supreme Court found no fatal conflict between the Florida Act and federal maritime regulatory schemes, the Supreme Court held that concurrent Florida oil pollution regulation of maritime activities is permissible.

When the Supreme Court, in the instant case, characterized the Florida Act as "nonfatal" to federal maritime law and placed it within the "twilight zone" in which state legislation is permissible, the Court determined that the Florida Act fits into the federal framework of oil pollution regulation, as outlined by the WQIA. Although the Court implied that its holding diluted the *Jensen* uniformity doctrine,[55] the case represents an expansion of the type of state legislation categorized as "nonfatal." Consequently, the uniformity doctrine remains a viable instrument for invalidating any state legislation that the Court characterizes as fatal or detrimental to federal maritime oil pollution regulations. One significant result of the decision in the instant case is that negligence is no longer a prerequisite to the assessment of liability for oil pollution damages.[56] This new remedy offers an alternative to the maritime tort remedy, which is based on negligence or unseaworthiness; the Court has sustained a state remedy that, in effect, removes a difficult obstacle to oil pollution recovery—proof of negligence or unseaworthiness.[57] The judicial affirmation of the Florida Act cou-

interpretation that might be in harmony with the Federal Act (WQIA); (3) the Federal Act determines damages measured by the *cost to the United States for cleaning up* oil pollution while the Florida Act relates, in part, to the *cost to the State of Florida in cleaning up* the spillage; and (4) potential claims under section 12 of the Florida Act for "other damage in curred by the state and for damages resulting from injury to others" are in no way touched by the WQIA. 411 U.S. at 331.

55. 411 U.S. at 344.

56. Another result of no-fault liability will undoubtedly be a shift of the burden of oil pollution damages to the maritime insurance companies, which in turn pass the cost on to the insured and ultimately to the customers of terminal facilities and the consumers of sea freight. *See generally* Mendelsohn, *Maritime Liability for Oil Pollution-Domestic and International Law,* 38 GEO. WASH. L. REV. 1, 23 (1969).

57. It is difficult to prove negligence in oil pollution cases because the facts that bear on the question of negligence are peculiarly within the possession of the vessel's agents or owners. Another underlying consideration is upon whom the burden of oil pollution damages should rest. Should the innocent shore owner or the government suffer the burden of damages? "Or should it be the vessel owner, together with the oil cargo-owner, who profit from the carriage contract, appreciate the full risks that are involved, and are in the optimum position to bear the

pled with the Court's emphasis on the WQIA disclaimer of preemption[58] and the statutory federal-state scheme of oil pollution control constitutes not only an approval of concurrent jurisdiction over oil pollution regulation but an encouragement to future state action within the oil pollution scheme of WQIA. The Court, however, drew no definitive boundary between valid state activity and state activity that conflicts with federal statutory schemes. Although the Court upheld the Florida Act's provision of unlimited liability against terminal facilities,[59] the issue of unlimited liability of polluting vessels was avoided.[60] Perhaps evasion of this issue represents a subtle warning to states to act with caution in promulgating oil pollution legislation and to realize that the instant case is not an open invitation to destroy the WQIA scheme or to contravene general maritime doctrines. Whether the Court would permit unlimited and strict liability for increasingly serious oil pollution damages caused by vessels[61] remains an unanswered question. The Court's answer will depend on the Court's juxtaposition of the Limited Liability Act,[62] the Admiralty Extension Act and the

losses or distribute those risks through self, mutual or other forms of insurance?" Mendelsohn, *supra* note 56, at 14-15.

58. For criticisms of the WQIA see Comment, *The Control of Pollution by Oil Under the Water Quality Improvement Act of 1970*, 27 WASH. & LEE L. REV. 278, 290-99 (1970) [hereinafter cited as W & L].

59. A few months after the *Askew* decision was rendered, a Maine Supreme Judicial Court decided to uphold unlimited liability for terminal facilities that had violated a Maine anti-pollution statute. That court said "that Congress did not intend to restrict the states to the eight-million-dollar limit imposed on reimbursement of federal clean-up costs [for oil pollution damages caused by terminal oil facilities]." Portland Pipe Line Corp. v. Environmental Improvement Comm'n, 307 A.2d 1, 45 (Me. 1973). In addition the court determined: "That provision [WQIA section 1161(o) waiving preemption] when construed with the statements of congressional intent . . . indicates to us that Congress left the states free to devise whatever standards of liability were deemed necessary to realize the state's objectives." 307 A.2d at 45.

60. 411 U.S. at 331. Here the Court only reiterated the Solicitor General's argument concerning unlimited liability of polluting vessels.

61. For a discussion of the magnitude of the vessel oil pollution problem see Note, *Admiralty Remedies for Vessel Oil Pollution of Navigable Waters*, 7 TEXAS INT'L L. J. 121, 121-24 (1971). The *Torrey Canyon* spilled 15 million gallons of oil (one-half of its cargo), which contaminated 75 to 175 miles of beach; the *Delian Apollo* spilled 5-10 million gallons of oil outside the harbor of St. Petersburg, Florida, which contaminated 20 miles of beach. *Id.* at 121 n.3.

62. Some commentators call for unlimited liability for polluting vessels: "Indeed, liability limited to $100 per gross registered ton will rarely, if ever, be sufficient to cover cleanup costs. The $14 million ceiling, on the other hand,

WQIA. If the Court strictly construes the Admiralty Extension Act as extending the Limited Liability Act's provisions for limitation of vessel recovery to include damages caused by oil spills even when the injury is to the shore, then the Court would probably not approve state statutes setting forth unlimited liability for vessel oil pollution. On the other hand, if the Court construes the WQIA provisions for recovery from polluting vessels as congressional intent to alter or abrogate the existing limitations on recovery from vessels as set forth in the Limited Liability Act, then the Court could allow the states to impose unlimited liability on polluting vessels. The latter interpretation is the more attractive because it would allow the state a more complete recovery for vessel oil spillage cleanup costs and allow a more adequate remedy for vessel oil pollution damages to the state or private parties. Under this interpretation the WQIA remedies coupled with the state implementations would offer adequate remedies to counter the increasing problems of oil pollution.

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effectively limits cleanup cost liability to.52,000 tons of oil. Six tankers capable of discharging more than that amount of oil already exist. Two of these, the *Universe Island* and the *Universe Kuwait,* could each spill over 300,000 tons of oil; the cleanup costs following such a discharge could be approximately $80 million." CORNELL, *supra* note 29, at 982-83 (footnotes omitted).

"In the *Torrey Canyon* spill the true cost of cleanup per gallon of oil released approached $.70 per gallon . . . . However, the 1970 Act [WQIA] limits liability to $100 per gross ton, thus setting the cleanup cost at $.22 per gallon, a totally unrealistic figure in light of the *Torrey Canyon* disaster." W & L, *supra* note 58, at 297 (footnotes omitted).

ADMIRALTY—JONES ACT—SHIPOWNER IS NOT A PROPER DEFENDANT IN A SUIT UNDER THE JONES ACT BROUGHT BY EMPLOYEE OF A CONCESSIONAIRE

Plaintiff, seeking compensation for injuries allegedly sustained in a shipboard accident,[1] brought suit under the Jones Act[2] and under general maritime law[3] against both the owner of the vessel and the concessionaire engaged by the shipowner.[4] At the conclusion of the evidence, the trial court dismissed the Jones Act claim against the shipowner because the shipowner was not plaintiff's employer; the court also dismissed the Jones Act claim against the concessionaire because it did not own or control the vessel.[5] On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. A shipowner is not a proper defendant to a Jones Act action brought by an employee of an independent con-

1. Plaintiff allegedly suffered injury when the ladder to her upper berth gave way. Plaintiff struck her face on the ladder and fell to the deck of the cabin, injuring her lower back. There was no eyewitness to the mishap, and conflicting testimony on whether plaintiff had reported the accident.

2. 46 U.S.C. § 688 (1970) provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy . . . shall apply; . . . and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

3. Plaintiff sought recovery under the doctrine of seaworthiness and maintenance and cure. For a consideration of the problems raised by the joinder of Jones Act, maintenance and cure and unseaworthiness claims, see 51 CALIF. L. REV. 412 (1963).

4. The shipowner, American Export Isbrandtsen Lines, had agreed by contract to allow the concessionaire, House of Albert, to maintain, staff and operate the barber and beauty shops on its three passenger liners. House of Albert had engaged plaintiff in the capacity of a hairdresser in one of its concession operations.

5. The trial court also dismissed the unseaworthiness claim against the shipowner on the ground that plaintiff had "failed to show by a fair preponderance of the evidence that the accident occurred as she has testified." Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 168 (2d Cir. 1973). On appeal, the court held this evidentiary finding by the trial court sufficient. The appellate court noted that even if it assumed *arguendo* that the injuries arose during plaintiff's service to the ship, she would still be denied recovery under maintenance and cure because she had failed to offer proof of financial loss. 475 F.2d at 172.

tractor hired to perform duties aboard ship, even though that employee is entitled to the status of seaman. *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973).

Because recovery was not available to a seaman under general tort law for injuries received as a result of the negligence of the captain or any member of the crew,[6] maintenance and cure[7] was for many years the seaman's primary remedy. The enactment of the Jones Act by Congress in 1920, however, gave seamen injured in the course of their employment a cause of action for negligence with a right to trial by jury. Additionally, by incorporating the provisions of the Federal Employers Liability Act (FELA)[8] into the

6. "[A]ll the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure. [T]he seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident." The Osceola, 189 U.S. 158, 175 (1903). Thus, as a practical consequence, most suits brought against shipowners alleging negligence were barred by the fellow-servant rule. For a comprehensive list of otherwise meritorious claims that were defeated in this manner, see 2 M. NORRIS, THE LAW OF SEAMEN § 658, at n.11 (3d ed. 1970).

7. Maintenance and cure developed from sea codes, enacted in the Middle Ages, which have been considered by later courts as the common law of the sea. *See* H. BAIER, ADMIRALTY LAW OF THE SUPREME COURT § 1-1 (2d ed. 1969); 2 M. NORRIS, *supra* note 6, § 540. In the United States, Justice Story recognized maintenance and cure as a proper seamen's remedy as early as 1823. *See* Harden v. Gordon, 11 F. Cas. 480 (No. 6047) (C.C.D. Me. 1823). The scope of recovery for maintenance and cure has been described as follows: "A seaman who is ill or injured aboard a vessel while she is at sea is entitled to food, berth, medical advice, first aid, antiseptics, and such medicines as the ship's medicine chest affords and such surgery and nursing as the master or member of the crew selected by him can give." 2 M. NORRIS, *supra* note 6, § 548; *see* Farrell v. United States, 336 U.S. 511 (1949). Maintenance and cure is an implied term of every maritime contract. *See, e.g.*, Crooks v. United States, 459 F.2d 631 (9th Cir. 1972); Siders v. Ohio River Co., 351 F. Supp. 987 (W.D. Pa. 1970), *aff'd*, 469 F.2d 1093 (3d Cir. 1972). Furthermore, the duty of a ship to provide maintenance and cure is independent of fault. *See* De Zon v. American President Lines, 318 U.S. 660 (1943); The Iroquois, 194 U.S. 240 (1904). Moreover, the courts have been hesitant to preclude recovery of a seaman by making restrictive distinctions or narrow definitions of relevant terms and any doubts or ambiguities concerning recovery have generally been resolved in the seaman's favor. *See* Vaughan v. Atkinson, 370 U.S. 965 (1962); Warren v. United States, 340 U.S. 523 (1951).

8. 45 U.S.C. §§51 *et seq.* (1970) (originally enacted as Act of April 22, 1908, ch. 149, 35 Stat. 65). The Supreme Court has stated, however, that Congress, by incorporating FELA provisions in maritime law, did not intend to impose liability

Jones Act, Congress abolished the shipowner's tort defenses of fellow-servant,[9] contributory negligence[10] and assumption of risk.[11] The Jones Act's loose drafting[12] has allowed the courts to construe liberally the provisions of the Act in favor of the injured seaman. Thus the courts have accorded the status of seaman to members of many diverse vocations employed aboard ship.[13] Furthermore, courts have considered a seaman to be in the course of his employment even when injured ashore[14] and have imposed liability on shipowners for negligence that was only remotely related to the seaman's injury.[15] Yet, the Jones Act consistently has been interpreted to allow seamen to sue only their employer.[16] But when there is a possibility that a seaman could sue either of two parties, the courts set forth no clear-cut test to be used in determining who is the proper "employer defendant" for Jones Act purposes.[17] In

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in maritime questions only when liability would attach in railway cases. *See* Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 377 (1932).

9. 45 U.S.C. § 54 (1970).

10. 45 U.S.C. § 53 (1970) provides that contributory negligence will not bar recovery, but the damages will be diminished by the jury in proportion to the amount of negligence attributable to the employee.

11. 45 U.S.C. § 54 (1970).

12. One authority sarcastically has suggested that the Jones Act might have better been struck down by the Supreme Court as "offensive to the due process clause by reason of impossibly bad drafting." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-20, at 282 (1957). *See generally* H. BAIER, *supra* note 7, at § 1-9.

13. *E.g.*, Keefe v. Matson Navigation Co., 46 F.2d 123 (W.D. Wash. 1930) (telephone operator); *In re* Famous Players Lasky Corp., 30 F.2d 402 (S.D. Cal. 1929) (actors); The Sea Lark, 14 F.2d 201 (W.D. Wash. 1926) (musician); The J.S. Warden, 175 F. 314 (S.D.N.Y. 1910) (bartender).

14. *See* Magnolia Towing Co. v. Pace, 378 F.2d 12 (5th Cir. 1967) (off-duty seaman injured on land while traveling to work entitled to Jones Act benefits).

15. The Supreme Court, for instance, has held that although a hemispherical scoop was provided by a shipowner for dipping ice cream, it was foreseeable that the scoop would fail to remove hard-packed ice cream and a cook could cut his hand while attempting to loosen the ice cream with a butcher knife. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1956). *See also* McIllwain v. Placid Oil Co., 472 F.2d 248 (5th Cir. 1973).

16. *See, e.g.*, Roth v. Cox, 210 F.2d 76 (5th Cir. 1954); Stallworth v. McFarland, 350 F. Supp. 920 (W.D. La. 1972).

17. Questions involving the issue of two "employers" have commonly involved charter, agency or concessionaire agreements between the owner of the vessel and a third party in which a seaman, usually to gain the benefit of a jury trial, has attempted to have his selected defendant regarded as an employer under the Jones Act. The Jones Act makes no express requirement but speaks of the "defen-

Cosmopolitan Shipping Co. v. McAllister,[18] the Supreme Court considered whether a shipping company could be the employer of a seaman injured on a ship owned by a governmental agency, the War Shipping Administration.[19] The Court held that the company was an agent of the federal government and thus was not the employer of the seaman for Jones Act purposes.[20] A similar problem arose in *Schiemann v. Grace Line, Inc.*,[21] in which a barber hired by an independent contractor to perform services aboard ship was injured and sued the shipowner. Using the FELA standard of "right of control," the court determined that the defendant shipowner did not have the potential for control necessary to bring him within employer status and, therefore, dismissed the suit.[22]

In the instant case, the court held that an employee-employer relationship between adverse parties is a prerequisite to the institution of either a Jones Act or maintenance and cure suit.[23] Because both remedies are designed to protect persons performing shipboard services, the court reasoned that a cause of action under the Jones Act and maintenance and cure should be available to anyone employed aboard ship, even those not employed by the ship itself. Therefore, the court found plaintiff entitled to the status of seaman and thus eligible to bring a Jones Act and a maintenance and cure action against her employer. Relying on

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dant employer" and from this the courts have reasoned that an employment relationship must exist for a seaman to bring suit. *See* note 2 *supra*.

18. 337 U.S. 783 (1949).

19. By contract, the United States Government and the defendant shipping company had agreed that the United States was the operator of the ship, employer of the crew and principal of the "agent" shipping company. 337 U.S. at 795-96; *see* 38 GEO. L.J. 131 (1949).

20. "The solution of the problem of determining the employer under such a contract depends upon determining whose enterprise the operation of the vessel was. Such words as employer, agent, independent contractor are not decisive. No single phrase can be said to determine the employer. One must look at the venture as a whole." 337 U.S. at 795.

21. 269 F.2d 596 (2d Cir. 1959). *Schiemann* closely parallels the instant case. In both instances, the independent contractor who hired the subsequently injured employee had agreed by contract with the shipowner that the employee would be considered the concessionaire's employee, but the employees in both cases had signed ship's articles.

22. 269 F.2d at 598.

23. The court held that since both causes of action require an employment relationship, cases concerning proper plaintiffs and defendants to these actions could be read interchangeably. 475 F.2d at 169. *See* note 7 *supra* and accompanying text.

Cosmopolitan Shipping,[24] the court, however, determined that only one party can be sued as an employer.[25] To determine who is a seaman's employer, the court concluded that a "plain meaning"[26] test should be applied to the employment contract with the right of control as one of the fundamental factors to be considered. The majority then noted that the instant case involved a factual situation virtually identical to that in *Schiemann*.[27] Applying the *Scheimann* holding that a barber employed by an independent contractor to perform services aboard ship is not under sufficient control of the shipowner to make the barber the ship's employee,[28] the court ruled that as a matter of law plaintiff was an employee of the concessionaire. Consequently, the court affirmed the trial court's removal of the employment issue from the jury. Since the requisite employee-employer relationship was lacking between plaintiff and the shipowner, the court further found that the trial court properly dismissed plaintiff's Jones Act and maintenance and cure claims against the shipowner. Addressing itself to the remaining Jones Act claim against the concessionaire, the majority concluded that plaintiff had failed to advance any legal theory that would support a claim of negligence against this defendant since it was admitted that the concessionaire had no control over the operation of the vessel. Hence, the court determined that the trial court correctly had directed a verdict for the concessionaire.

The dissent maintained that a shipowner should be liable to a

24. *See* note 18 *supra*.

25. It has been maintained, however, that although the *Cosmopolitan* opinion speaks of "suit," the evident meaning of the court was that only one person or company could be held *liable* as an employer. 2 M. NORRIS, *supra* note 6, § 670, at 313 n.11.

26. "In determining a seaman's employer, a court must look to the 'plain and practical' meaning of employment and employer." 475 F.2d at 171.

27. *See* note 21 *supra*.

28. The majority in the instant case quickly dismissed plaintiff's having signed articles with the master of the vessel by citing a 1919 Supreme Court FELA railroad decision as authority for the proposition that the "[s]igning of ship's articles makes a seaman subject to the rules and discipline of the ship, but this does not make him the ship's employee." 475 F.2d at 171 n.9. The cited case held that an employee of one company did not become the employee of a different company merely because when killed he was subject to the defendant company's rules and regulations. Hull v. Philadelphia & Reading Ry., 252 U.S. 475 (1919). *Hull* would appear to be of doubtful precedential value since case law on employment relationships has markedly changed since 1919. Furthermore, the plaintiff in that case was not a party to any contractual agreement as was the present plaintiff and FELA standards are not necessarily controlling in maritime cases.

seaman under the Jones Act because of a seaman's status *qua* seaman. The dissenting judge further argued that *Schiemann* was erroneously decided because it used FELA standards to determine a maritime employment relationship contrary to Supreme Court directives set forth in *Cortes v. Baltimore Insular Line, Inc.*,[20] and noted that with the exception of *Schiemann* no case has denied a seaman employed by another recovery against a negligent shipowner. Reasoning that the existence of an employee-employer relationship should be determined in light of the liberal purposes of social legislation, the dissent argued that a shipowner should not be allowed to escape liability to a seaman for negligence because of a contract with a concessionaire. To hold otherwise, the dissent concluded, would leave a gaping hole in the coverage of the Jones Act.

The effect of the instant decision is to limit Jones Act coverage to only those seamen directly employed by a shipowner, thereby excluding from coverage any shipboard employees of independent contractors. Examined in the light of economic reality, this decision suggests a course shipowners might follow to circumvent Jones Act liability, *i.e.* by allocating duties normally performed by seamen to the employees of contractors. Thus, shipowners would be immune from liability for want of an employment relationship and independent contractor-employers would not be liable for employee injuries resulting from shipboard activities outside the scope of the contractor's operation. The reasoning of the majority is at best questionable. As the dissent correctly noted, the court's application of FELA standards to ascertain the existence of a maritime employment relationship is in conflict with past Supreme Court decisions.[30] Furthermore, both the majority and dissent failed to give due consideration to the shipping articles signed by plaintiff, which are required by statute to be executed before commencement of a voyage[31] and constitute the basic contract of employment between a seaman and the shipowner.[32] The Form of Articles of Agreement[33] requires that a seaman submit to the lawful

29. *See* note 8 *supra* and accompanying text.

30. *Id.*

31. 46 U.S.C. §§ 564 *et seq.* (1970).

32. *See* Bunn v. Global Marine, Inc., 428 F.2d 40 (5th Cir. 1970); The Seatrain New Orleans, 127 F.2d 878 (5th Cir. 1942); Petition of Karlsson, 302 F. Supp. 628 (N.D. Cal. 1969); 2 M. NORRIS, *supra* note 6, § 88.

33. 46 U.S.C. § 713 (1970) provides, in relevant part, that crewmembers agree "to conduct themselves in an orderly, faithful, honest, and sober manner, and to

orders of the master of the ship, and Congress has authorized severe penalties for willful disobedience by a seaman of the commands of the captain of the vessel.[34] Since plaintiff in the instant case was under articles, the court could have found him to be an employee of the defendant shipping company on any of three different grounds. First, plaintiff could have been recognized as the shipowner's employee as a matter of law in view of the proper execution of a federally required contract of employment. Secondly, assuming *arguendo* that the right of control should be used as the exclusive test of maritime employment,[35] it appears that under the articles of agreement the captain of the ship is given sufficient control over the plaintiff to bring the shipowner within the status of employer.[36] To argue that a master who has the congressionally granted authority to imprison a seaman for disobedience to a command does not have the right to exercise extensive control over that seaman seems fallacious. Thirdly, the majority disregards the possibility that a seaman may have two employers.[37] In performing her duties aboard the vessel, plaintiff was effecting the purposes of both the concessionaire and the shipowner since the shipping company would have been required to hire a hairdres-

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be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master . . . in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore . . . ."

34. 46 U.S.C. § 701 (1970) sets out various penalties for offences committed by a seaman under articles. The most extreme involve disobedience to the commands of the master: "Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month. Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea, by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of a sum of not more than twelve days' pay, or by imprisonment for not more than three months, at the discretion of the court."

35. The court recognized that the right of control was only one factor to consider in determining the employment relationship. 475 F.2d at 171. It then, however, proceeded to use the control test exclusively in reaching its decision.

36. It should be noted that the *right* to control is the critical factor in the test; the actual exercise of control is not relevant. *See* Matonti v. Research Cottrell, Inc., 202 F. Supp. 527 (E.D. Pa. 1962); 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 44.10 (1967).

37. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 226 (1957).

ser had it not retained the concessionaire.[38] Plaintiff, thus, could be considered as the employee of both companies.[39] Yet the majority quickly dismissed plaintiff's signing of articles with the master of the vessel. The Jones Act has traditionally been broadly construed to effectuate its purpose as remedial legislation.[40] Recently, the Supreme Court broadly construed the intent of Congress concerning the jurisdictional reach of the Jones Act. In *Hellenic Lines Ltd. v. Rhoditis*,[41] a Greek seaman was injured while employed under a Greek shipping contract on a ship of Greek registry owned by a Greek corporation whose principal stockholder was a Greek citizen domiciled in the United States. The defendant shipping company maintained two company offices in the United States and the injury occurred while the ship was in American territorial waters. The Court, emphasizing the "liberal purposes" of the Jones Act, held that sufficient contacts with the United States existed to provide the Greek seaman with the protection of the Jones Act.[42] The lower courts should continue to interpret liberally the Jones Act provisions and grant coverage to seamen employed by independent contractors who otherwise will be left without Jones Act protection for most of the voyage.[43]

Arden J. Lea

38. The dissent caustically observed in the instant case: "A cruise ship which tried to attract female passengers without providing hairdressing services would soon be converted to duty as a cargo vessel." 475 F.2d at 173.

39. Professor Larson has noted that "[t]here has always been a noticeable reluctance on the part of Anglo-American courts to emulate the wisdom of Solomon and decree that the baby be divided in half. Courts are showing an increasing tendency, however, to dispose of close cases, not by insisting on an all-or-nothing choice between two employers both bearing a close relation to the employee, but by finding a joint employment on the theory that the employee is continuously serving both employers under the control of both." 1A A. LARSON, *supra* note 36, § 48.40.

40. *See* notes 13, 14 and 15 *supra*.

41. 398 U.S. 306 (1969).

42. 398 U.S. at 310 (1969).

43. Presumably, under the present decision, a seaman who is an employee of a concessionaire would be protected by the Jones Act during his working hours from negligence of the concessionaire. For injury suffered from any other source, ordinarily off hours, seemingly no Jones Act protection would be available.

ANTITRUST—IMPORT RESTRICTIONS—DIVESTITURE ORDERED TO RESTORE COMPETITION FOLLOWING FINDING OF VIOLATION OF SECTION 7 OF THE CLAYTON ACT MAY BE ACCOMPANIED BY IMPORT RESTRICTIONS WITHOUT BREACH OF GERMAN/AMERICAN TREATY OR GATT PROVISIONS

Plaintiff, a manufacturer of automobile air conditioning units,[1] successfully prosecuted an action[2] against defendant, a Volkswagen importer, for violations of section 7 of the Clayton Act[3] stemming from defendant's acquisition and subsequent subsidiary operation of Delanair, plaintiff's principal competitor[4] in the Volkswagen air conditioner market.[5] Pursuant to the district court's leave for argument on the propriety of remedial devices proposed to alleviate the acquisition's anticompetitive effects, plaintiff urged that defendant be ordered to divest itself of Delanair and be enjoined from importing automobiles with air conditioning units

1. Calnetics' principal business had been the manufacture and sale of "Meier-Line" air conditioning units for the Volkswagen family of automobiles (Volkswagen, Porsche and Audi). The low horsepower, air-cooled engines of these cars had presented many peculiar engineering and design problems, discouraging many makers of "air" units for conventional American cars from entering the Volkswagen field, but Calnetics had produced a workable unit and marketed 4,134 in 1969—all through Volkswagen Pacific, a west coast distributor of the cars, under an exclusive supply agreement.

2. Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606 (C.D. Cal. 1972).

3. Section 7 of the Clayton Act reads in pertinent part: "No corporation engaged in commerce shall acquire . . . the assets of another corporation engaged also in commerce, where . . . the effect of such acquisition may be to substantially lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1970).

4. Delanair had sold 37,127 units in 1968 for installation on Volkswagen or Porsche automobiles. That was 82.3% of the 1968 Volkswagen air conditioning market. The following year, production and engineering problems, which ultimately led to the sale, caused output to fall off to 24,149 units, or 52.4% of the market. But by 1971, operating as a subsidiary of Volkswagen of American, production rebounded to 68,211 units (71% of the 1971 market) without any engineering modification to the 1969 product. In all these periods, Calnetics and three other manufacturers divided the remainder of the market. 348 F. Supp. at 610 n.4, 613.

5. 348 F. Supp. at 610. Since the German manufacturer of Volkswagen had never installed original equipment (OE) air conditioning, the principal marketing potential for Calnetics, Delanair and the others lay in the after-import predelivery chain. The "customers" were defendant's 14 regional distributors and their constitutuant network of dealers. The large after-market potential was not a focus of the section 7 action. *See* note 30 *infra.*

into the United States.[6] Defendant, a wholly owned subsidiary of Volkswagenwerk A.G., the largest German-based industrial enterprise,[7] opposed divestiture and asserted that the import restriction would violate the German/American Treaty of October 29, 1954,[8] as well as various sections of the General Agreement on Tariffs and Trade (GATT)[9] to which both the Federal Republic of Germany

6. Plaintiff also sought to prohibit defendant, or any of its successors, from producing automobile air conditioning units in the United States for ten years; to limit defendant's procurement of air conditioning units from a divested Delanair to no more than 50% of its annual requirements; and to recover attorney's fees. The definition of "automobile" for purposes of the import restriction was to include any model of Volkswagen, Porsche or Audi and any successor or replacement models produced by Volkswagenwerk A.G., the parent of defendant. The restriction was to run seven years.

7. FORTUNE, Sept. 1973, at 204. Volkswagenwerk A.G. is the sixth largest industrial corporation based outside the United States, and the world's fourth largest automaker (behind General Motors, Ford and Chrysler). *See* 1973 FORTUNE 500.

8. Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593. Article XVI(1) reads: "Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use."

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

The defendant cited the following sections of GATT:

"*Article I*—GENERAL MOST-FAVORED-NATION TREATMENT

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

. . . .

Article III—NATIONAL TREATMENT ON INTERNAL TAXATION AND REGULATION

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products,

and the United States are contracting parties. By memorandum to the State Department, the Federal Republic protested that the import restriction would discriminate against German citizens and

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and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

. . . .

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulations relating to the mixture, processing or use of products in specified amounts or proportion which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

. . . .

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

. . . .

Article XI—GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

. . . .

Article XIII—NON-DISCRIMINATORY ADMINISTRATION OF QUANTITATIVE RESTRICTIONS

industry.[10] On supplemental hearing before the District Court for the Central District of California, *held,* divestiture ordered and injunction granted. Restoration of a competitive environment, which has been distorted by violations of section 7 of the Clayton Act, may be accomplished by divestiture and import restrictions to insure the viability of the divestiture, without breaching the terms of the German/American Treaty or GATT. *Calnetics Corp. v. Volkswagen of America, Inc.,* 353 F. Supp. 1219 (C.D. Cal. 1973).

Since the Supreme Court's ruling in *United States v. du Pont & Co.,*[11] tying arrangements and acquisitions that result in the vertical merger of a supplier into a manufacturer/marketer may be proscribed by the courts under section 7 of the Clayton Act when they foreclose, or threaten to forclose, competitors of either the supplier or the marketer/manufacturer from a segment of the market otherwise open to them.[12] According to the teachings of *Brown Shoe Co. v. United States,*[13] considerations broader than market foreclosure, such as the nature and purpose of the acquisition or the relative trend toward concentration within the industry, may

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1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."

10. In a note dated November 10, 1972, the Federal Republic communicated its concern to the Department of State. It advised the Department of State that while it intended in no way to "influence the determination of American courts in matters within their competance," it did wish to object "to this proposal which heavily discriminates against German industry and, in its opinion violates Article 16, Section 1 of the German/American Treaty of October 29, 1954 as well as Article III, Para. 1 and Article I of GATT.

To prevent importation of automobiles with factory-installed air conditioners discriminates both against German manufacturers of the vehicles and also German manufacturers of air conditioners for installation in vehicles. To impose the prohibition under consideration by the court would unfairly apply to these manufacturers sanctions in a dispute in which they were not a party.

. . . .

The Embassy repeats that it has no desire to interfere in a pending procedure before the American courts. It would however be grateful if the above mentioned arguments could be brought to the attention of the appropriate authorities." 353 F. Supp. at 1226.

11. 353 U.S. 586 (1957).

12. Brown Shoe Co. v. United States, 370 U.S. 294, 323-24 (1962).

13. 370 U.S. 294 (1962).

also become determinative of section 7 violations. More recently, vertical market entry through supplier acquisition was forbidden in *Ford Motor Co. v. United States*,[14] even though entry would be otherwise permissible if achieved through internal growth, which would necessarily have similar effects on an already oligopolistic market. Threshold delineations of both the technological[15] and the geographic[16] parameters of the market in question must precede any inquiry into possible section 7 violations. So long as a contraction of competitive opportunity is the result, however, even foreign conduct is within the scope of the antitrust laws.[17] The potential collision of those socio-economic policies underlying American antitrust law[18] with the growing body of foreign antitrust law[19] and

14. 405 U.S. 562 (1972).

15. Standards for determining the technological scope of the market (line of commerce) were first articulated in United States v. du Pont & Co., 351 U.S. 377, 393 (1956). They include reasonable interchangeability of use and cross elasticity of demand. A third standard—peculiar characteristics and uses—was added by United States v. du Pont & Co., 353 U.S. 586, 593-95 (1957).

16. Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962), mandates that "[t]he geographic market selected must . . . correspond to the commercial realities of the industry and be economically significant." *See* Elzinga & Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 17 ANTITRUST BULL. 45 (1973).

17. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.); *cf.* FTC v. Eastman Kodak Co., 274 U.S. 619, 629-30 (1927) (Stone, J., dissenting). *See also* United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

18. "Many people believe that possesion of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them. . . . [Congress] did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social and moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purpose." United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) (L. Hand, J.).

19. *E.g.*, Restrictive Trade Practices Act, 4 & 5 Eliz. 2 (1956) (Great Britain); Law No. 54 of 1947 (Japan); Act of June 26, 1953, Concerning Control and Regulation of Prices, Dividends and Competitive Conditions (Norway). Such legislation has often exempted export cartels. *See* ANTITRUST LAWS (Friedmann, ed. 1956).

the net effect on those politico-economic considerations militating in favor of greater international trade[20] have been the subject of much discussion, particularly among the parties to GATT.[21] Although such inquiries have produced no solution of international dimension,[22] American courts have not been blind to potential for international confrontation inherent in the extraterritorial application of United States regulatory law.[23] In *United States v. General ElectricCo.*,[24] an otherwise appropriate antitrust remedy was modified as applied to a foreign defendant, to eliminate a potential affront to the sovereignty of the Netherlands and to minimize the chance of international political rupture. While it is not clear

20. *See* Note, *Critique of U.S. Trade Policy*, 7 TEX. INT'L L.J. 639 (1972).

21. GATT Doc. L/283 (proposal of Denmark-Norway-Sweden); GATT Doc. L/261/Add 1 (German proposal); GATT 7th Supp. BISD 29 (1959), *reprinting* GATT Doc. L/907, in which the contracting parties resolved "to appoint a group of experts to study and make recommendations with regard to whether, to what extent if at all, and how the contracting parties should undertake to deal with restrictive business practices in international trade. . . ."

22. J. JACKSON, WORLD TRADE AND THE LAW OF GATT § 20.3, at 526 (1969). *See also* GATT 9th Supp. BISD 171 (1961), in which the panel of experts appointed to study international restrictive business practices (note 21 *supra*) concluded that no consensus yet existed among nations sufficient to permit the design of an effective control procedure.

23. *E.g.*, Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956): "We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." 234 F.2d at 647. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965), which catalogues those potential moderating considerations: "(a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state." *Id.* at 116.

24. 115 F. Supp. 835, 878 (D.N.J. 1953) (following the Netherlands' strong protest, a proposed injunction was modified to exclude defendant N.V. Phillips Gloeilampenfabrieken, a Dutch corporation, from many portions of the decree requiring conduct potentially in conflict with local law). For a comprehensive list of protests of foreign governments to remedies sought to be imposed by United States courts pursuant to antitrust actions see *Extracts From Some Published Material on Official Protests, Directives, Prohibitions, Comments, Etc.*, in REPORT OF THE FIFTY-FIRST CONFERENCE HELD AT TOKYO 565 (Int'l Law Ass'n. ed. 1964).

whether that same discretion may be exercised when sheer conflict of national economic interests is engendered by application of antitrust remedial formulae,[25] it is beyond question that policy considerations other than those of the antitrust laws may be relevant to relief even though not pertinent to the issue of liability.[26] Complicating the question of remedial propriety is the increasing use by large-scale foreign enterprises of wholly owned subsidiaries incorporated in the United States for the conduct of their United States business. The nominal domesticity of these American subsidiaries leaves them technically without resort to any special consideration due foreign defendants. However, courts often have implicitly recognized the foreign base of such United States subsidiaries when, particularly in tort actions, they have chosen to look past the place of incorporation to sustain jurisdiction over a foreign parent whose only contacts with the forum were through the subsidiary.[27]

In the instant case, the court determined that the defendant's acquisition of Delanair suppressed competition in an air conditioning market that is structurally limited to the Volkswagen family of automobiles because of engineering peculiarities,[28] and that territorially encompasses the entire United States. After finding that defendant should be required to divest itself of Delanair to restore competition, the court determined that import restrictions were necessary to the maintenance of that divestiture and the restored competitive environment. The court found no conflict between the

25. *See* United States v. The Watchmakers of Switzerland Information Center, Inc., 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965), *modifying*, Civil No. 96-170 (S.D.N.Y. 1964). The modification of judgment to accomodate the foreign defendants culminated a chain of events that included participation of the Swiss Government in the proceedings as amicus curiae. A vehemently anti-American public reaction swept Switzerland in the wake of the antitrust attack in the United States on that country's largest export industry. N.Y. Times, Oct. 21, 1954, at 41, col. 4. It has been suggested that "[t]o the extent that the local business community is identified with the government or [represents] . . . public opinion, such resentment [to application of United States antitrust laws] cannot be dismissed as mere private objections based on obvious self-interested desires to avoid regulation of all types." K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 43 (1958).

26. K. BREWSTER, *supra* note 25, at 248.

27. *Compare* Regie Nationale des Usines Renault v. Superior Court, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962), *and* Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd., 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965), *with* Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292 (6th Cir. 1964).

28. *See* note 1 *supra*.

language of the German/American Treaty or GATT and the import restrictions to be imposed. Noting that the treaty and GATT deal almost exclusively with discriminatory practices, the court observed that neither the Clayton Act nor its application discriminate between foreign and domestic violators.[29] The court's conclusion was fortified by its further observation that competition restoration would be thwarted by defendant's resort to its foreign parent's German assembly line as the point from which it would exercise market control.[30] Consequently, the court found no treaty or GATT limitations on its authority to issue import restrictions that are necessary to accomplish divestiture and reestablish competition that had been suppressed by an acquisition found violative of section 7 of the Clayton Act.

The injunction, if permitted to stand on appeal, may not only subject American commerce with Germany to the risk of retaliatory restrictions, but also may harm the cause of increased multinational trade. Volkswagenwerk's American marketing activities generate a substantial share of the Federal Republic's foreign exchange revenues.[31] Germany is therefore likely to be no less sensitive about a court order limiting Volkswagen's ability to compete for the American automobile buyer's dollar than was the Netherlands in *General Electric* when a United States court threatened imposition of antitrust remedies on the Netherlands' largest in-

29. Given the court's limitation of its order to automobiles manufactured by Volkswagenwerk A.G., and the scope of the order—any import—the logical implication is that German goods, as such, are not singled out for discriminatory treatment by the restriction. Any product of Volkeswagenwerk, regardless of national source, is within its purview. Only as automobiles are incidently manufactured by Volkswagenwerk in Germany are German goods affected, but their maker, not their Germanness, is the reason.

30. Air conditioners may be installed at any of five points along the automobile's trip from factory to consumer: (1) at the factory; (2) by the defendant importer; (3) by any one of the fourteen regional distributors; (4) by the selling dealer; or (5) by an independent installer in what could be termed the aftermarket. The court noted that "it takes little imagination and little or no expertise to recognize that, preferentially, air conditioners will be installed in Volkswagen automobiles in the descending levels of distribution." 348 F. Supp. at 622.

31. The Federal Republic's foreign exchange revenues derived from exports to the United States were $3.651 billion in 1971. *See* 1973 WORLD ALMANAC 428. Volkswagen of America's 1971 sales were 522,000 units, which, at $2000 per vehicle, generated $1,440 billion or slightly more than a third of West Germany's American-earned foreign exchange revenue for that year. *See* Wall Street J., Jan. 2, 1973, at 6.

dustrial enterprise[32] with similar economic consequences in prospect. Both the *General Electric* and *Swiss Watchmakers*[33] discretionary remedy modifications, though nominally ascribed to concern for potential affronts to foreign sovereignty, reflect a judicial recognition of the political facts of international economic life.[34] That the order in the instant case is directed to a nominally American defendant ought not to mask its effect, which, like those of *General Electric* and *Swiss Watchmakers,* dictates production or marketing policy to a foreign concern. By implying[35] the simplistic assertion that defendant's point of incorporation forecloses any possibility that the order would discriminate against German goods, the court ignores the basic question presented when antitrust laws fashioned for the needs and economic realities of internal American society are sought to be applied in such a way as to materially affect foreign industry and therefore international commerce. The order, as written, works to the detriment of the principal aim of GATT, which is to prevent the pursuit of self-interested national regulation of international trade in a manner that harms other nations and results, when combined with retaliatory actions, in a sharp and chaotic restriction in the level of worldwide commercial activity.[36] The priority of the policies embodied in domestic antitrust law to those of increased international trade implicit in the court's analysis might yet be valid. However, given the all-or-nothing nature of the remedial dilemma,[37] those competing policies ought to be examined in a manner conscious of the conflict, and a decision ought to be based on that examination. Furthermore, plaintiff's status as a private litigant must weigh in the decision, since Calnetics' demand for import restrictions cannot be presumed to be the product of that prosecutorial discretion customarily exercised in the remedial phase of Justice Department-

32. FORTUNE, *supra* note 7, at 203. N.V. Phillips Gloeilampenfabrieken is the third largest corporation based outside the United States.

33. *See* notes 24 & 25 *supra.*

34. *See* K. BREWSTER, *supra* note 25, at 9.

35. *See* note 29 *supra.*

36. *See* J. JACKSON *supra* note 22, at 9.

37. *See* note 30 *supra.* Faced with Volkswagenwerk's international resources and with the knowledge that the after-import predelivery markets could be all but eliminated through factory installation, no attempt to rehabilitate such a market would succeed unless the importation of factory-installed units was prohibited.

instituted antitrust actions against foreign defendants.[38] Ultimately, the question faced by the court is the more fundamental issue of how national sovereigns can secure basic compliance by multinational enterprises with their internal social norms, while not simultaneously threatening international commerce. Any court confronting such an issue must be aware that its determination will become a part of that *ad hoc* framework within which multinational business activity will be increasingly confined.[39]

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38. "In all such instances [potential antitrust action against foreign defendants], where appropriate, we [the Justice Department's Antitrust Division] consult with the officials of other Government agencies, such as the Department of State. . . ." Hansen, *The Enforcement of the United States Antitrust Laws by the Department of Justice to Protect Freedom of United States Foreign Trade*, 11 ABA ANTITRUST SECTION 75, 76 (1957). The Antitrust Division also reported that it maintains an informal "Antitrust Notification and Consultation Procedure" with Canada, and on a less specific basis with other nations, under which the Division notifies the foreign government of the action prior to its institution. Testimony of Mr. Zimmerman concerning International Aspects of Antitrust, *Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Committee*, 89th Cong., 2d Sess., pt. I, at 494-95 (1966).

39. *See generally* Litvak & Maule, *The Multinational Corporation: Some Economic and Political-Legal Implications*, 5 J. WORLD TRADE L. 631 (1971).

FOREIGN RELATIONS LAW—STANDING TO SUE—WEIMAR ART COLLECTION DENIED STANDING TO INTERVENE BECAUSE IT IS AN AGENCY OF THE GERMAN DEMOCRATIC REPUBLIC, AN UNRECOGNIZED GOVERNMENT

Plaintiff, the Federal Republic of Germany (FRG), brought suit in federal court to recover from defendant two paintings,[1] which plaintiff alleged were stolen during the American armed forces' occupation of Germany following World War II.[2] The Weimar Art Collection, a juristic entity created under the laws of the German Democratic Republic (GDR),[3] attempted to intervene, alleging that it was the owner of the collection from which the paintings had been taken.[4] Plaintiff and defendant moved to dismiss the

1. The two paintings, which were painted by Albrecht Duerer about 1490, were portraits of Hans and Felicitas Teicher.

2. The paintings in question had been part of the Ducal collection of Weimar since 1824, which had been displayed in a museum that since 1921 had been known as *Staatliche Kunstsammlungen*—Government Art Collection. Toward the end of World War II, the paintings were removed to Castle Schwartzburg in Thuringia, (formerly the Duchy of Weimar) for safekeeping. In the spring of 1945, the American armed forces overran large portions of Thuringia. The paintings were stolen prior to the American withdrawal from Thuringia in July 1945 and appeared in New York in the collection of the defendant, Edward I. Elicofon. Plaintiff contends that the paintings were owned by the Third Reich and claims them as successor in interest to the Third Reich pursuant to the Joint Declaration of Three Allied Powers, September 18, 1950.

In addition, Grand Duchess Elisabeth Mathilde Isidore Erbgrossherzogin Von Sachsen-Weimar-Eisenach was allowed to intervene. The Grand Duchess alleged the paintings were assigned to her by the Grand Duke of Saxony-Weimar, their prior rightful owner, on August 8, 1968. Although her interests are not important to the present decision, the court will be faced with a judicial interpretation of the act of state doctrine in the trial to decide title to the paintings. The apparent basis for the Grand Duchess' claim is that title to the paintings never passed to the Third Reich by confiscation and therefore remained with the Grand Duke. Thus, her claim to title, arising from the assignment by the Grand Duke to her, is valid as against the claim of the FRG to be the successor in interest to the Third Reich. Her claim undoubtedly will be based on the Bernstein exception, by which the United States Government supported private efforts to nullify certain acts of state of the Third Reich. *See* note 38 *infra*. The district court's granting of the motion to intervene by the Grand Duchess may indicate either a willingness to extend the Bernstein exception or to clarify it.

3. The FRG, often referred to as West Germany, is the only German government recognized by the United States; the United States has never recognized the GDR as a legitimate German government.

4. On partition of Germany by the Allied powers in 1945, the Soviet forces assumed full control of their zone and sequestered all German assets from the

complaint of the Collection on the ground that the proposed intervenor lacked standing to sue because it is an instrumentality of a government that is not recognized by the United States.[5] The Collection argued that its status as a juristic entity provided it with standing to sue regardless of the lack of standing of the GDR.[6] The District Court for the Eastern District of New York, *held*, the Collection could not sue if it is an instrumentality of the GDR. In a supplemental opinion following an evidentiary hearing on the matter, the court *held*, the proposed intervenor is an instrumentality of the GDR and therefore lacks standing to sue in federal court. *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd per curiam*, 478 F.2d 231 (2d Cir. 1973).

Lander, or German states. In October 1949, the Soviet forces responded to the Three Powers agreement, which created the FRG, by announcing the formation of the German Democratic Republic, comprising all the territory formerly part of the Soviet military zone in Germany. The GDR was a centralized government whose *Volkskammer* (People's Chamber) was the highest organ of the Republic. In 1952, the *Volkskammer* furthered democratic centralism by dissolving the *Lander* and replacing them with *Bezirke* (administrative districts) under the direct control of the central government. In 1966, the proposed intervenor, whose assets had been sequestered by the Soviet forces in 1945 and returned to the local *Bezirke* by the *Volkskammer* in 1952, was renamed *Kunstsammlungen zu Weimar*—the Weimar Art Collection—under the direct control of the Minister of Culture and Education. The Collection remained under ministerial control until after the FRG initiated this action. Then, in April 1969, the Minister granted juristic entity status retroactively to the Weimer Art Collection, giving its director broad control and authority to contract on behalf of the Collection and to sue to protect the Collection's interests. The *Statut* (by-laws) of the Collection provides for a board of directors appointed by the Lord Mayor of Weimar. The Director serves at the will of the Lord Mayor. Financing for the Collection comes from admissions fees, sales and subsidies granted by the City Council of Weimar.

5. Plaintiff also contended that it represented the interests of all German people as the only recognized lawful successor to the Third Reich. Defendant contended that the court lacked jurisdiction to allow the motion to intervene because the proposed intervenor is a citizen of an unrecognized government. Defendant's claim was based on an interpretation of 28 U.S.C. § 1332(a)(2) (1970), which allows federal jurisdiction in actions between a United States citizen and a foreign state or citizen thereof. Defendant contended the GDR is not a "foreign state" within the meaning of this section and therefore the Collection, being a creation of the GDR, similarly lacks standing.

6. In the alternative, the proposed intervenor contended that it had standing to sue under the 1923 treaty between Germany and the United States. Treaty with Germany on Friendship, Commerce and Consular Rights, Dec. 8, 1923, 44 Stat. 2132, T.S. No. 725. The Collection also contended that as an agent of the GDR, which is an agent of the USSR, it had standing as an agent of the USSR, which is recognized by the United States.

In *United States v. Pink*,[7] the Supreme Court held that the President, as sole organ of the political departments of the Government, has exclusive authority to recognize and engage in diplomatic relations with foreign sovereigns.[8] This authority had been recognized earlier in the leading decision of *United States v. Belmont*.[9] In that case, the United States claimed assets deposited in a New York bank by a Russian corporation prior to the Bolshevik Revolution. The United States contended that the nationalization of the corporation gave the Soviet Union a valid claim, which passed to the United States under the Litvinov Agreement.[10] The New York Court of Appeals ruled that the Soviet nationalization decrees violated New York public policy, and refused to grant them extraterritorial effect.[11] Therefore, the court held, the Soviet Union did not possess a valid claim to the funds that could be assigned to the United States.[12] The Supreme Court reversed, stating that the political departments of government have exclusive power to recognize foreign governments and that this recognition validates all prior acts of state of that government.[13] The Court further noted that the President has the authority to speak as the sole organ of the government in foreign affairs.[14] The President's power of recognition was thus conclusive on the courts because his decision was a political question not cognizable by the judicial branch of government.[15] His determination clearly overrode state law. The power of the President to recognize foreign sovereigns was

7. 315 U.S. 203 (1942).
8. 315 U.S. at 229-30.
9. 301 U.S. 324 (1937).
10. Prior to the recognition of the USSR by the United States, a delicate diplomatic area involved assets claimed by the USSR by confiscation of former Imperial Russian corporations but located in the United States. As part of the preliminaries to diplomatic recognition of the USSR, the Soviet Foreign Minister Litvinov assigned these claims to the United States in an exchange of letters with President Franklin Roosevelt, with the understanding that a report on the disposition of each claim would be forwarded to Litvinov. In return, the United States agreed to give up all claims for confiscated American property in the USSR. It was anticipated that the United States would use money obtained through the Litvinov Agreement to pay claims for American property confiscated in the USSR.
11. 301 U.S. at 327.
12. 301 U.S. at 327.
13. 301 U.S. at 330.
14. 301 U.S. at 330.
15. 301 U.S. at 328.

the central issue in *Belmont*; the refusal of the President to recognize a government was deemed equally binding on the courts as early as 1808. In *Rose v. Himely*,[16] Chief Justice John Marshall refused to recognize judicially a rebel government from which the President had withheld recognition. More recently, the affirmative aspects of nonrecognition were recognized in *The Maret*,[17] which involved the question of title to an Estonian freighter. In 1940, the USSR occupied Estonia and created the Estonian Soviet Socialist Republic (ESSR). The Soviets also nationalized all ships of Estonian registry. Since the United States never recognized the ESSR, title to the *Maret* became the issue; the court refused to recognize title in the Estonian Steam Ship Lines,[18] the Soviet-created authority over all nationalized Estonian vessels. The court reasoned that no distinction could be drawn between the binding effect of recognition and nonrecognition and, therefore, the courts are bound by the President's political decision in either instance. Consequently, because the President had refused to recognize the ESSR, the courts could give no effect to the acts of the unrecognized ESSR Government in deciding who had title to the ship.[19] The prior owners were held to be the rightful owners and the nationalization decree was ignored. Thus, the President has authority to recognize or to refuse to recognize a foreign sovereign and his decision is a political one that is not judicially reviewable. Both acts are equally conclusive of the question of recognition. But the question of the standing of an agent of an unrecognized government in United States courts is less clear.[20] In *Amtorg Trading Corp. v. United States*,[21] the Court of Customs and Patent Appeals allowed Amtorg, a corporation wholly owned and controlled by the government and citizens of the USSR but incorporated and domiciled in New York, to bring an action to recover a penalty levied by the Secretary of the Treasury for dumping Soviet matches on the United States market, even though the USSR had not been recognized by the executive branch. The court refused to pierce the

16. 8 U.S. (4 Cranch) 240 (1808).

17. 145 F.2d 431 (3d Cir. 1944).

18. 145 F.2d at 442.

19. 145 F.2d at 442.

20. Although the court in *The Maret* was not faced with the agency issue, it may be reasoned that if the decrees of an unrecognized government cannot be given effect by the United States courts, the actions of its agents are similarly unprotected. Yet contrary authority on this point exists.

21. 71 F.2d 524 (C.C.P.A. 1934).

corporate veil, stating that it would do so only to avoid an inequitable result.[22] Although pointing out that ownership of Amtorg was unimportant to the issues involved, the court ruled that majority control of a corporation does not make the owner a real party in interest to the suit.[23] This decision was expanded in *Upright v. Mercury Business Machines*,[24] in which an assignee of a note signed by the defendant in payment for typewriters shipped openly through United States customs by an agent corporation of the GDR brought suit in New York to recover payment. The court struck down defendant Mercury's contention that Upright could not bring suit as successor to an agent of an unrecognized government. The court stated that it must look behind the nonrecognition doctrine to determine whether reliance on the doctrine as a defense in that lawsuit served a worthwhile purpose. It observed that courts may have to notice judicially the actions of a de facto government to guarantee justice,[25] and noted that nonrecognition serves only a limited political purpose that should not be exaggerated.[26] The court stated in *Upright* that it should look to the facts of the case to determine whether the political policy of nonrecognition would be defeated if the action were allowed,[27] and concluded that justice required that the action be allowed.[28] In cases in which

22. 71 F.2d at 528.

23. 71 F.2d at 529.

24. 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961), *rev'g* 26 Misc. 2d 1069, 207 N.Y.S.2d 85 (Sup. Ct. 1960). For an analysis of the effect of this decision on the courts see Lubman, *Unrecognized Governments In American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275 (1962).

25. *E.g.*, United States v. Home Ins. Co., 89 U.S. 99 (1875). The Court validated the Civil War incorporation of a Georgia insurance company and allowed recovery of the proceeds of the sale of captured cotton. Thus the Court gave credence to the actions of a de facto government although de jure recognition of the secessionist government had been withheld by the President.

26. 213 N.Y.S.2d at 420. The court relied on early decisions defining the act of state doctrine in ruling that absent an allegation and proof of wrongful seizure, the internal acts of state of the GDR were not in issue: Banque de France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y. 1929) (decision of the political department should not affect the private rights that may depend on the existing condition of the state); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924) (the acts of the Russian Socialist Federated Soviet Republic (RSFSR) in confiscating branch of the defendant bank did not relieve defendant of liability to plaintiff because an account is merely a claim against the bank and not against specific assets located in the confiscated branch).

27. 213 N.Y.S.2d at 422.

28. The court completed the opinion by questioning whether corporations of

the requirements of justice were less clear, the courts have avoided policy questions or inequitable results by placing the subject of the controversy in trust. The trust device was used first in *Russian Reinsurance v. Stoddard*,[29] in which directors of a defunct Czarist insurance company sued to recover assets deposited in a New York bank as security against possible claims.[30] The court took judicial notice that the acts of the de facto government in Russia had been recognized de jure by France, the present domicile of most of the directors, and therefore concluded that the right of the directors to act had to be determined by the laws of the Russian Socialist Federated Soviet Republic (RSFSR) as interpreted in France.[31] The court concluded by stating that since the RSFSR, if recognized by the United States, could sue to recover the securities as successor to Russian Reinsurance by confiscation of the corporation, the court would expose the New York bank to double liability by granting relief.[32] Thus, relief was denied and the securities remained in trust. The trust doctrine also was applied to postpone disposition of assets held by an American bank for the state-owned Bank of China in *Bank of China v. Wells Fargo Bank & Union Trust Co.*[33] Although the court recognized that the decision on recognition by the political department was conclusive on the courts, it noted that the existence of a de facto communist government could not be ignored and its internal acts had to be considered by the courts as long as they did not violate United States foreign policy principles.[34] The thrust of the *Bank of China*,

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the GDR might have standing to sue. Judge Steuer, in a concurring opinion, contended that an East German corporation would not itself have standing to sue. 213 N.Y.S.2d at 423.

29. 240 N.Y. 149, 147 N.E. 703 (1925).

30. A condition precedent to the company's registration as a foreign corporation in New York was the deposit of the securities in issue in a New York bank. 240 N.Y. at 149, 147 N.E. at 703.

31. 240 N.Y. at 162, 147 N.E. at 706.

32. 240 N.Y. at 168, 147 N.E. at 709.

33. 92 F. Supp. 920 (N.D. Cal. 1950), *aff'd*, 190 F.2d 1010 (9th Cir. 1951), *modified on rehearing*, 104 F. Supp. 59 (N.D. Cal. 1952) (funds awarded to Nationalist Chinese bank directors).

34. 92 F. Supp. at 923. Thus the court had to discern the United States foreign policy. The court in this instance reasoned that to hold the funds in trust pending the outcome of the hostilities and subsequent diplomatic maneuvering was not contrary to American foreign policy interests because the funds, as assets of a bank whose charter purposes did not include the common defense of Nationalist China, could not be used by the government for that purpose. Thus the defense

Upright and *Russian Reinsurance* decisions relating to the ability of agents of unrecognized governments to sue in United States courts thus has resulted in freedom of the courts to review foreign policy within the factual setting of each case. In a related development, the Supreme Court allowed an assignee of a recognized but unfriendly government to recover in contract in *Banco Nacional de Cuba v. Sabbatino*.[35] The Cuban Government, with which the United States had broken diplomatic relations, had nationalized a sugar company that was formerly owned by American citizens. The prior owners had contracted for the loading and sale of a shipment of sugar that lay in port at the time of the nationalization. Prior to allowing the vessel to sail, the Cuban Government required a renegotiated sales contract, for which payment was refused when plaintiff assignee attempted to collect in New York. The funds were placed subsequently in temporary receivership and the plaintiff, an agent of the Cuban Government, sued the receiver for recovery. Justice Harlan pointed out that despite the broken relations, comity remained between Cuba and the United States.[36]

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of the mainland and Formosa was not jeopardized by the actions of the court. But the court did not consider that the bank, being two-thirds owned by the government, could amend its charter or loan any needed money to the government for defense purposes. Thus the court clearly contravened foreign policy objectives by allowing a claim by the People's Republic of China to freeze the assets sought by the lawfully appointed directors of the plaintiff bank. The court ultimately avoided sensitive foreign policy matters in this decision. Because there was a question of who were the directors of the bank, the utilization of the trust avoided the need for ruling on both the agency and the act of state questions that will be of importance in the final resolution of the instant controversy.

35. 376 U.S. 398 (1964).

36. In 1923, the New York Court of Appeals ruled in *Wulfsohn v. Russian Socialist Federated Soviet Republic* that the RSFSR could not be sued in the courts of the United States. 234 N.Y. 372, 138 N.E. 24 (1923); *see also* The Penza, 277 F. 91 (E.D.N.Y. 1921) (libel filed by the RSFSR seeking title to two steamers dismissed because the RSFSR had not been recognized by the political department); The Rogdai, 278 F. 294 (N.D. Cal. 1920) (libel by the RSFSR to recover warship sold to the Czarist government by the United States dismissed). Furs previously belonging to the plaintiff had been confiscated by the RSFSR and sold to a third party. Plaintiff sought to attach the furs when they were brought into the United States to complete the sale. In holding that the writ of attachment would not stand, the court reasoned that because the RSFSR had not consented to suit in United States courts and because consent is the only bais for suit against a foreign government, no suit could be brought. 234 N.Y. at 376, 138 N.E. at 26. The court asserted that the question of recognition of a foreign sovereign was political, although it observed that there was no doubt as to the de facto existence

He refused to assess the degree of friendliness between the two countries and held instead that courts must determine the existence of comity on the sole basis of the presence or absence of diplomatic recognition. Therefore, comity existed as a result of any relationship between the United States and a recognized government short of war.[37] Plaintiff, consequently, had standing to sue. Thus, the state of the law on the standing of an unrecognized government to sue in United States courts at the time of the present decision was that while an unrecognized government could not sue, corporations owned or controlled by an unrecognized government or individuals relying on the internal police acts of an unrecognized government may in some circumstances litigate in the courts of the United States. When confusion over the de facto status of litigants has existed, the courts have on occassion avoided any dispositive action.[38]

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of the RSFSR. 234 N.Y. at 376, 138 N.E. at 26. The *Wulfsohn* decision was followed closely by a ruling that the RSFSR lacked standing to sue. Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923). The court held that the Soviet government could not demand the right to sue because that right existed only when comity was present and that since comity was lacking between the United States and the RSFSR, no suit could be brought. Comity is the granting of a privilege between nations, not as a matter of right but out of deference and good will. Although not part of international law, the concept represents the courtesy mutually extended between sovereigns. One result of comity is that a foreign government is allowed to sue and gain judgment in the courts of another government.

37. 376 U.S. at 410.

38. There are several corollary decisions relating specifically to post-war Germany which should be noted. The status of the 1923 Treaty (*see* note 6 *supra*) has been questioned. As to the treaty power generally, the Supreme Court has held that the political department, rather than the judiciary, is the sole determinator of whether a treaty has remained in force after subsequent international events. Terlinden v. Ames, 184 U.S. 270, 288 (1901). The Court held in *Clark v. Allen* that the Trading with the Enemy Act was not necessarily inconsistent with the 1923 Treaty and that since there was no evidence that the collapse of the Third Reich was treated by the political department as ending the treaty commitments, the realty inheritance provisions of article IV of the Treaty remained in effect. 331 U.S. 503 (1947). The Court again questioned the validity of the 1923 Treaty in regard to inheritance when it struck down an Oregon escheat statute that limited inheritance by aliens to those residing in a state which allowed reciprocal inheritance rights to Oregon citizens. Zschernig v. Miller, 389 U.S. 429 (1968). The Court did not address fully the treaty issue but rather held that the escheat statute violated the treaty power of the federal government. In a separate opinion, Justice Harlan concurred in the result solely on his belief that the 1923 Treaty remained in force. 389 U.S. at 462.

In the instant decision, the court determined that while unrecognized governments cannot litigate in the United States, corporations controlled by them may be allowed to sue, depending on the facts of the case. The court examined *Sabbatino*, prefacing this examination by an assertion that the Supreme Court by that decision had invited a re-examination of the courts' role in foreign policy matters, but concluded that the Supreme Court's distinction between recognized and unrecognized governments in *Sabbatino* was authority for holding that only recognized governments, regardless of their political proximity to the United States, may sue in federal court. The court arrived at this conclusion by refusing to examine degrees of friendliness in foreign affairs other than the recognition or nonrecognition of a state. To allow the GDR to intervene would be to recognize judicially the GDR as the government of East Germany and this would violate United States foreign policy and exceed the scope of judicial activity in foreign affairs sanctioned by *Sabbatino*. Therefore, the court stated, the Weimar Art Collection could intervene only if it were a juristic entity independent of the GDR. In a supplemental opinion following an evidentiary hearing on this matter, the court ruled that the Collection does not have standing to intervene because it lacks sufficient independence from the GDR and is essentially an agent of that government.[39] The court noted that the Collection presently is under the control of the Lord Mayor of Weimar, who appoints and discharges the director of the Collection. In addition, the Collection is dependent on the City Council of Weimar for operat-

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Similarly, the acts of state of the Third Reich have been at issue. The courts have undone the acts of the Third Reich as part of United States foreign policy objectives. Letter from Jack B. Tate, Acting Legal Advisor to the State Department, to Bennett, House, & Couts, Counselors at Law, April 13, 1949, in 20 DEP'T STATE BULL. 592-93 (1949). As a result of this policy, Arnold Bernstein, a Jewish shipowner who was coerced into relinquishing title to his shipline by the Third Reich, was able to bring suit to recover his former assets. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954), *modifying* 173 F.2d 71 (2d Cir. 1949). This Bernstein exception has not been extended and was sidestepped in *Menzel v. List*, when the court held the seizure of a Marc Chagell painting by the Nazi Einsatzstab Rosenberg group was mere unlawful plunder and title to the painting had never passed to List. 49 Misc. 2d 300, 313, 267 N.Y.S.2d 804,818 (1966). The court cited generally the Nuremberg Trials as authority. United States v. Goering, 6 F.R.D. 69, 120-23 (1946). Both title to the Duerer paintings and the 1923 Treaty are peripheral to the question of standing.

39. 358 F. Supp. at 753.

ing funds. As a result of the "democratic centralism" set out in article 88 of the Constitution of the GDR, this local control of the Collection is in reality state control. The court ruled that this control is real and not illusory, citing article 10 of the GDR Constitution, which vests title to all property in the people through the people's government. The court concluded its supplemental opinion by observing that the juristic entity status was contrived only to permit the Collection, as an agency of the GDR, to intervene in the United States court. This observation was based on the facts of the Collection's receipt of juristic entity status only after commencement of the present action, the failure of the *Statut* creating the Collection to free the Collection from governmental interference and the absence of a complete conveyance of the corpus of the Collection by the government to the director. Thus, the court denied the Collection standing to sue.[40]

The decision in this case complies with the case law on the standing of agents of an unrecognized government to sue in federal courts and is realistic in light of the courts' acquiescence to State Department answers to questions of foreign policy.[41] Because the FRG is recognized by the United States as the only government of Germany, the court logically barred the proposed intervention. This decision, however, evidences a retrenchment in the courts' thinking concerning standing to sue by indicating either that *Upright* is no longer good law or that it is limited to situations in which the litigant has relied to his detriment on an act of an unrecognized government based on its police power or is an assignee of that government and seeks just enforcement of a valid, nonpolitical claim. Thus, contrary to the general liberalizing of the courts' attitude in standing questions, anticipated by some commentators as a result of *Upright*,[42] this decision denies a litigant a hearing on the substantive merits of his plea because of his tie to an unrecognized government, which in no way materially relates

40. In resolving the Treaty question, the court held that since the Collection lacked standing to sue, it was unable to benefit from the Treaty. 358 F. Supp. at 757. To permit suit under the Treaty would allow the GDR to circumvent United States foreign policy at any time by creating a juristic entity to bring suit. Letter from Carl Salans, Acting Legal Adviser to the State Department, to Harlington Wood, Jr., Assistant Attorney General, July 31, 1972, in 358 F. Supp. at 757.

41. *See, e.g.*, 478 F.2d at 232.

42. The commentators, notably Lubman (*see* note 24 *supra*) had presumed that *Upright* would result in a limited opening of the courts to unrecognized governments through assignment of interest.

to his claim. This retrenchment also appears inconsistent with the trend toward improved relations between the United States and Eastern Europe and with the normalization of relations sought as a part of the FRG's *Ostpolitick*.[43] More importantly, this decision precludes a just disposition of the two paintings.[44] Despite the court's breaking new ground procedurally by carefully examining the relationship between the Collection and the GDR before denying standing to the Collection,[45] the preclusion of the Collection from the suit guarantees an unjust result. The claim of the FRG to be successor owner of the paintings can succeed only if the paintings were stolen from the Collection, which at the time was an agency of the Third Reich. The question of nonrecognition has no bearing on the question of ownership, and therefore an injustice to the Collection results. The court's attempt to mitigate this injustice by referring to the FRG as trustee of the interests of all the German people only confounds the issue by tacitly conceding own-

43. In recent years, Chancellor Willy Brandt has attempted to normalize relations between the FRG and the Eastern bloc nations within the Soviet sphere. Brandt has identified this policy as *Ostpolitick*, or politics with the East. It is designed to lessen Cold War tensions and lead to a more realistic assessment of current European politics. It appears that a strong underlying element of the *Ostpolitick* is the abandonment of the previously hoped-for reunification of Germany. *See, e.g., Man of the Year: Willy Brandt*, TIME, Jan. 4, 1971, at 1.

44. It is irrelevant to substantive American foreign policy objectives who should be declared the rightful owner of the paintings. No valid trade, military or political decision would be thwarted by a judicial determination that the paintings were taken from the Weimar Art Collection in 1945. If defendant does not hold valid title, the apparent true holder, as de facto successor to the Third Reich, will be denied a claim. The paintings then would go either to the intervenor by denying the Third Reich's act of state in nationalizing the Collection or to the plaintiff as trustee for the true owner, the Collection, to which the FRG succeeded de jure as the only recognized successor to the Third Reich. This latter course appears artificial because the FRG can gain control of the paintings only if the Collection, denied standing to sue, is in fact the rightful holder of title. The reasons for denying standing to the Collection thus hinge on a technicality unrelated to the only issue—ownership of the paintings.

45. Once before, an American court has looked this critically at an East German juristic entity. In *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, the court analyzed the evolution and structure of defendant East German corporation in holding that defendant had infringed the patent rights of the plaintiff. 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971). The sole purpose in the court's examination of defendant corporation in that decision, however, was to determine whether defendant or plaintiff had succeeded to the trademark of Carl Zeiss Stiftung of Jena following World War II. The relationship between the defendant and the GDR was never at issue.

ership by the Collection and forestalling ultimate disposition of the paintings. If the court finds for the plaintiff and gives title in trust to the FRG, a result that can occur only if the Collection is the true owner of the paintings, then the trust concept must be enunciated more clearly to avoid a judicial transfer of title from the Collection to the FRG. The court spoke of a trust in vague terms and did not follow the *Russian Reinsurance* rationale, which placed title to disputed goods in an independent trustee having no tie to either plaintiff.[46] A clear statement of the trust doctrine, if that is how the court ultimately disposes of the paintings, is necessary to avoid uncertainty and the loss of claim to title by the apparent true owner, the Weimar Art Collection. But despite a possible compromise between the adverse claims of title by use of the trust concept, a result difficult to anticipate now that one of the claimants has been denied standing, the denial of standing to the Collection represents an unfortunate return to outmoded dependence on the doctrine of nonrecognition as a bar to justice.

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46. The court ruled that the FRG, as the only recognized government of Germany, could serve as trustee for all the German people of the paintings. Having created the possibility of a trust, the prospects of injustice may be forestalled by the court. If the court had created a trust in the United States to hold the paintings, however, it could be argued that this would run contrary to American foreign policy by clearly denying the claim of the FRG to represent the German people. The court denied similar foreign policy objectives in *Bank of China* by temporarily nullifying the Nationalists' claim to the subject securities. China, however, was in a state of revolutionary flux at the time of the *Bank of China* decision. Nevertheless, it is clear that the FRG does not exercise control over the collection from which the subject paintings allegedly were taken but that, in fact, this control is exercised by an unrecognized government whose stability and longevity is unquestioned. If a trusteeship in the FRG is created, some safeguards for the ultimate disposition of the paintings should be created.

LAW OF THE SEA—HISTORIC BAYS—A BODY OF WATER IS A HISTORIC BAY WHEN CONTINUOUS AUTHORITY IS EXERCISED BY THE COASTAL STATE AND RECOGNIZED BY FOREIGN NATIONS, DESPITE UNITED STATES GOVERNMENT DISCLAIMERS

Plaintiff, the United States, brought suit in the District Court for the District of Alaska against defendant, the State of Alaska, to quiet title[1] to submerged land beneath lower Cook Inlet, a body of water situated off the Alaskan coast.[2] In March and April of 1967, defendant had offered a tract of approximately 2500 acres of the submerged land located more than three geographical miles[3] from the shore of Cook Inlet for a competitive oil and gas lease sale. Plaintiff advanced three arguments in support of its contention that the United States rights in the resources of the submerged lands preclude Alaska's action: (1) the seaward limit of the area in which defendant has exclusive rights to the natural resources of the subsoil and seabed of Cook Inlet is limited to three geographical miles seaward from the baseline from which the territorial sea is measured; (2) the United States has exclusive rights to the natural resources of the subsoil and seabed of lower Cook Inlet since the submerged land in dispute is neither inland waters nor a historic bay; and (3) the executive branch of the government has denied that lower Cook Inlet is a historic bay and the determination involved is a political decision not cognizable by the court.[4] Defendant based its claim of dominion and control over the resources of the disputed waters on the contention that Cook Inlet is a historic bay, and thus inland waters,[5] within the meaning of the Convention on the Territorial Sea and Contiguous Zone.[6] The District

1. Plaintiff also filed a motion for a temporary restraining order to enjoin the State of Alaska from issuing any mineral leases on the outer continental shelf of Cook Inlet. The motion was denied on the ground that no risk of irreparable harm existed. Post Trial Brief for Plaintiff at 2, United States v. Alaska, 352 F. Supp. 815 (D. Alas. 1972).

2. The tract of land in dispute is located more than three geographical miles from the shore of Cook Inlet and from an imaginary 24-mile line drawn across Cook Inlet at Kalgin Island. Post Trial Brief for Plaintiff at 2.

3. Three geographical miles equals approximately 3.45 land miles.

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

5. Defendant argued that the entire area of Cook Inlet located landward of Cape Douglas and Point Gore, including the Barren Islands, is inland waters of the State of Alaska, and therefore Alaska has exclusive rights to the natural resources of the subsoil and seabed located beneath lower Cook Inlet. Post Trial Brief for Plaintiff at 2.

6. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958,

Court for the District of Alaska *held*, the State of Alaska has exclusive rights to the subsurface resources of lower Cook Inlet. Foreign maritime nations' respect for the effective and continuous exercise of authority over the area by Alaska and the United States establishes that lower Cook Inlet is a historic bay and inland waters. *United States v. Alaska*, 352 F. Supp. 815 (D. Alas. 1972).

The controversy between coastal states and the United States concerning ownership of the natural resources of the subsoil and seabed has been a frequent and sensitive subject for congressional and judicial consideration. The first Supreme Court case involving a dispute between the United States and a coastal state over the natural resources of the subsoil and seabed was *United States v. California*.[7] In that case, California claimed ownership of the resources of the subsoil and seabed under the three-mile marginal belt as incident to those elements of sovereignty that it exercised in that maritime area.[8] The United States contended that it possessed exclusive rights to the subsurface resources in the disputed area. The Supreme Court held that the rights to subsurface resources lying beneath the territorial sea were vested exclusively in the national government.[9] Six years later Congress, in effect, reversed this holding by enacting the Submerged Lands Act of 1953,[10] which granted two rights to a coastal state: first, the exclusive rights to natural resources located beneath the territorial sea; and secondly, the exclusive rights to subsurface resources located beneath "inland waters."[11] The effect of the Submerged Lands Act

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[1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective September 10, 1964) [hereinafter cited as Convention]. The Convention formulated internationally accepted rules for delineating the location of baselines from which the territorial sea is measured and for determining inland waters and historic waters.

7. 332 U.S. 19 (1947).

8. 332 U.S. at 29.

9. 332 U.S. at 19.

10. 43 U.S.C. §§ 1301-03, 1311-13 (1970).

11. The Submerged Lands Act grants to the states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and water . . . ." 43 U.S.C. § 1311(a)(1) (1970). "Boundaries" for purposes of the Act include the seaward boundaries of a state "as they existed at the time such State became a member of the Union, or approved by the Congress," but subject to the limitation that the term "boundaries" will not be construed to extend from the coastline more than three geographical miles into the Atlantic Ocean or more than three marine miles into the Gulf of Mexico. 43 U.S.C. § 1301(b) (1970). "Coastline" is defined in § 2(c) as the composite "line of ordinary low water along that portion of the

was to grant each coastal state all submerged land and subsurface resources landward of a line three geographical miles from its coastline. A definition of "inland waters" for puroses of the Submerged Lands Act is found in the second *United States v. California*,[12] in which the dispute focused on the amount of submerged lands granted to the State of California under the provisions of the Act. The resolution of the issue turned on the definition of inland waters and the Court held that the definition of inland waters contained in the Convention on the Territorial Sea and Contiguous Zone (Convention) would apply for purposes of the Submerged Lands Act. The Convention provides rules for delineating the location of the baseline from which the territorial sea of a nation is measured. Once the baseline of a coastal nation is determined, all waters located landward of the baseline form part of the inland waters of the coastal nation.[13] Thus, for purposes of the Submerged Lands Act, the coastal state possesses exclusive rights to the resources located beneath the waters landward of the determined baseline. Under the provisions of the Convention, bays[14] that belong exclusively to a coastal nation are considered to be part of the inland waters of that nation. While the Convention places limits on the size and configuration of bays that may be considered part of the inland waters of a coastal nation,[15] article 7, paragraph 6 of the Convention states that those limits do not apply to "historic bays."[16] Although the term "historic bays" is not defined in the Convention, in *United States v. Louisiana*[17] the Supreme Court

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coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301 (1970).

12. 381 U.S. 139 (1964).

13. Convention, art. 5, ¶ 1.

14. Article 7, paragraph 2 of the Convention on the Territorial Sea and the Continguous Zone defines a bay as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast."

15. Under the Convention, a maritime area is a "bay," and inland waters of a coastal nation if "(1) the identation of the bay is of a curvature that its area is larger than the area of a semicircle whose diameter is a line drawn across the mouth of indentation, and (2) the distance between headlands of the bay does not exceed twenty-four miles." Convention, art. 7, ¶¶ 3, 4.

16. Historic bays do not have to satisfy the two requirements outlined in the Convention for "bays." When it is determined that a maritime area is a historic bay, the area is considered part of the inland waters of the coastal nation despite its failure to satisfy the semicircle test and the 24-mile closing rule.

17. 394 U.S. 11, 23, *rehearing denied*, 394 U.S. 994 (1969).

approved a test for determining whether an area of water is a historic bay. This test consists of three factors: (1) the extent of authority exercised over the area by the state claiming the historic right; (2) the duration of the exercise of authority; and (3) the attitude of foreign nations toward the exercise of authority over the area.[18] The position of commentators concerning the first requirement is that the authority over the area must be the equivalent of sovereignty, and the sovereignty must be effectively enforced.[19] The dominant view in international law on the second requirement does not establish a precise length of time necessary for a finding of continuity. It is generally required, however, that the exercises of authority over a period of time must amount to "usage."[20] Two conflicting views on the third requirement have been advanced. One line of authority requires only that the community of foreign nations tolerate the exercise of sovereignty by the coastal nation over the maritime area.[21] The other line of authority maintains that acquiescence of foreign nations to the exercise of sovereignty is required.[22] In applying the principles contained in this three-part test, the Supreme Court has imposed three modifications. The first modification, stated in *United States v. Louisiana*, requires that domestic tidelands controveries be viewed as if the claim were being made by the United States and opposed by a foreign nation.[23] The second modification requires that consideration be given to state exercises of soveignty over the disputed area.[24] The third

18. The test was taken from a study prepared by the Secretariat of the United Nations, *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN. 4/143 (1962) [hereinafter cited as *Juridicial Regime*].

19. It is generally asserted by international publicists that the sovereignty must be openly and effectively enforced. The intent of the nation claiming historic title will be determined by the deeds of the nation, not its proclamations. *See, e.g., Juridical Regime* ¶¶ 98, 100.

20. *Juridical Regime* ¶ 104.

21. *Juridical Regime* ¶ 132.

22. *Juridical Regime* ¶ 106.

23. 394 U.S. at 77.

24. 394 U.S. at 77. The Supreme Court did not provide an exhaustive list of acts or activities of a state that are required to constitute effective exercises of authority over an area. The acts most frequently cited by prominent writers on this subject include: the exclusion of foreign vessels from the disputed waters; the subjection of foreign vessels to the internal legislation or regulations of the coastal state that govern the area; and the continuous enforcement by the coastal state of the regulations that pertain to the area. *Juridical Regime* ¶¶ 89-94.

modification, discussed in the second *United States v. California*,[25] states that a disclaimer[26] by the United States that disputed waters are historic waters will be decisive unless the party claiming historic title establishes proof of historic title that is "clear beyond doubt."[27]

The court in the instant case thoroughly examined the judicial and legislative background of historic bays and the general principles of international law relevant to claims of historic title. The court noted that the Submerged Lands Act of 1953 vests coastal states with exclusive rights to subsurface resources beneath the territorial sea and inland waters, and concluded that a historic bay should be considered inland waters within the meaning of the Convention on the Territorial Sea and Contiguous Zone. After close study of the applicable judicial precedents and congressional enactments on historic bays, the court employed the test adopted by the Supreme Court in *United States v. Louisiana* to determine whether lower Cook Inlet is a historic bay. Before examining the requirements of the test, the court considered the three modifications engrafted by the Supreme Court on the application of the general principles of international law contained in the test. The court followed the first modification, which requires it to view the dispute as if the claim were being made by the United States and opposed by another nation, and also adhered to the second modification, which requires a court to take into consideration state exercises of sovereignty over the body of water in dispute. In addition, the court noted the third modification, requiring that decisive weight be given to a disclaimer by the United States that a particular maritime area is a historic bay or historic waters. The court rejected the first United States disclaimer on the ground that it was haphazardly prepared and was of dubious substance.[28] The second United States disclaimer was determined by the court to

25. 381 U.S. at 175.

26. A disclaimer by the United States that disputed waters are historic waters is a repudiation and a denial by the federal government that a maritime area is historic waters or a historic bay.

27. 381 U.S. at 175. The "clear beyond doubt" quantum of proof standard is not favored by all commentators. Some commentators urge that a less stringent standard of proof would be acceptable to prove historic title. *See Juridical Regime* ¶ 158. The "clear beyond doubt" standard of proof, however, has been imposed by the Supreme Court and is the requisite standard in the United States for a showing of historic title.

28. 352 F. Supp. at 819.

be self-serving. The court reasoned that in light of the strong evidence of sovereignty asserted by the State of Alaska over lower Cook Inlet, the United States disclaimer's approached "an impermissible contraction of territory."[29] The court, therefore, declined to place decisive weight on the United States disclaimers, but, relying on the standard of proof enunciated in the second *United States v. California*,[30] concluded that Alaska must present evidence establishing historic title "clear beyond doubt"[31] to override the United States disclaimers. The court next focused on the three requirements of the Supreme Court test that must be established "clearly beyond doubt" to find that lower Cook Inlet is a historic bay. First, the court concluded that the United States and the State of Alaska had exercised effective sovereignty over lower Cook Inlet by enforcing various congressional and state enactments that regulated fishing activity in Cook Inlet,[32] and most clearly by the

29. The Supreme Court, in stipulating that a disclaimer by the United States that disputed waters are historic waters is decisive, also added a warning. The Court indicated that in cases in which there was conclusive proof of historic title and in which historic title may have already ripened, to allow a disclaimer to preclude acknowledgement of historic title would approach an "impermissible contraction of territory." 394 U.S. at 77 n.104. The implication of the Court's warning is that in these situations a United States disclaimer should not be dispositive.

30. 381 U.S. at 175.

31. The "clear beyond doubt" standard is the standard necessary to override the decisive effect of a United States disclaimer of the existence of historic waters. The party claiming historic title must show "clearly beyond doubt" that the disputed waters are historic waters. *See* 381 U.S. at 175.

32. The court viewed several congressional and state enactments as evidence of exercises of authority over lower Cook Inlet by the United States and Alaska. The first was the Alien Fishing Act, ch. 3299, 34 Stat. 263 (1906). The Act, under the jurisdiction of the United States, made it unlawful for aliens to fish in Alaskan waters. Testimony from those individuals who enforced the Act in Cook Inlet established that the waters of Alaska included all of Cook Inlet landward of a line extending from Cape Douglas to Point Gore, including the Barren Islands.

The second exercise of United States sovereignty exercised over Cook Inlet was the creation and establishment of the Southwestern Alaska Fisheries Reservation. In a Department of Commerce Circular, the regulations covering Cook Inlet described the Inlet as the area "north of the latitude of Cape Douglas . . . including the Barren Islands . . . and all shores and waters of Cook Inlet." Dep't of Commerce Cir. No. 251, at 8 (9th ed. Jan. 9, 1923). The court noted evidence that established that pursuant to the administrative regulations, lower Cook Inlet was patrolled and the regulations were enforced.

The third exercise of authority by the United States over lower Cook Inlet noted by the court was the passing and enforcement of the White Act, ch. 272, 43 Stat.

seizure of the Japanese fishing vessel *Banshu Maru* that had intruded into lower Cook Inlet in 1962.[33] The court then concluded that the evidence established clearly beyond doubt that the exercises of sovereignty over lower Cook Inlet by Alaska continued uninterrupted from 1906 to the date of dispute, and that the exercise of sovereignty for that length of time amounted to "usage."[34] In determining whether foreign maritime nations have acquiesced to the exercise of sovereignty over lower Cook Inlet, the court relied on testimony and evidence that indicated a general and lengthy absence of foreign fishing vessels in Cook Inlet. The court also took note of an agreement between Japanese and Alaskan officials after the *Banshu Maru* incidents that prohibited Japanese fishing in lower Cook Inlet.[35] Although documented incidents of intrusions into the Inlet by Canadian vessels were introduced,[36] the court reasoned that historic title to lower Cook Inlet probably vested in Alaska before the date of the Canadian intrusions. Therefore, the

464 (1924). The Act regulated fishing activity, and enforcement of the regulations occurred through various districts. Cook Inlet was one of the districts that was subject to the provisions of the Act. The Cook Inlet division was described in the Act as the area located landward of Cape Douglas and Point Gore, including the Barren Islands. Again, the court noted the testimony of enforcement officials who patrolled lower Cook Inlet and enforced the regulations.

The fourth exercise of sovereignty was the Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339 (1958), by which Alaska assumed authority and control over the fisheries previously within the jurisdiction of the Alien Fishing Act and the White Act. Alaska formulated its own regulations for fishing activities and Cook Inlet was included within the scope of the regulations. The definition of Cook Inlet, for purposes of the Alaskan regulations, was the waters located landward from the line drawn from Cape Douglas to Point Gore, including the Barren Islands. 352 F. Supp. at 820.

33. In 1962, the Japanese fishing vessel, the *Banshu Maru*, sailed into the southernmost point of lower Cook Inlet, near the Barren Islands. After remaining in Cook Inlet for a few hours, the Japanese vessel sailed into the Shelikof Strait. The Alaskan authorities sighted the Japanese vessel when it was in Cook Inlet and seized the *Banshu Maru* in the Shelikof Strait. The court noted this incident as the clearest exercise of sovereignty over Cook Inlet by the State of Alaska. The court did not, however, resolve whether the United States Government condoned or condemned the seizure. 352 F. Supp. at 820.

34. 352 F. Supp. at 820.

35. 352 F. Supp. at 821.

36. The evidence in the case established that there had been several incidents of intrusions into Cook Inlet by Canadian halibut fishing vessels. The court concluded, however, that the number of such intrusions was low, and that the isolated intrusions were not germane to the issue of the emergence of historic title to lower Cook Inlet. 352 F. Supp. at 821.

court concluded that the evidence showed clearly beyond doubt that foreign nations have acquiesced to Alaska's exercise of authority over lower Cook Inlet. Because the court found that the evidence showed an effective and continuous exercise of sovereignty over lower Cook Inlet and foreign nations' acquiescence to the exercise of sovereignty over the area, the court concluded that lower Cook Inlet is a historic bay and, therefore, inland waters within the meaning of the Submerged Lands Act, and held that the State of Alaska has exclusive rights to the subsurface resources located beneath it. The court then examined plaintiff's argument that the issue of historic bays directly relates to the territorial extent of United States jurisdiction, and thus is a political decision that should be resolved by the executive branch of the government. Plaintiff strongly urged that the court should defer to the position of the executive branch stated in the United States disclaimers.[37] The court reasoned that the United States continuously had viewed Cook Inlet as a historic bay and concluded that a decision by the court upholding Cook Inlet as a historic bay would not interfere with the authority of the executive branch to conduct foreign relations.[38]

In the instant case, the court concluded that the State of Alaska has exclusive rights to the natural resources of the subsoil and seabed beneath lower Cook Inlet by determining that the requirements for the emergence of historic title had been satisfied clearly beyond doubt under generally established principles of international law. Although the court diligently applied the three-part test, the repeated incidence of "conflicting evidence"[39] coupled with a failure of the court to offer the bases on which it resolved the conflicts of evidence undermines the importance that otherwise could have attached to the case. The decision of the court to override the United States disclaimers and adjudicate the case

37. The position of the executive branch stated in the United States disclaimers was that Cook Inlet is not a historic bay, and that United States sovereignty does not extend outside of the three-mile territorial limit measured from the normal baseline of the Inlet. Post Trial Brief for Plaintiff at 27-32.

38. 352 F. Supp. at 821.

39. On two occasions the court noted that the evidence before it was conflicting. After stating that Alaska clearly exercised sovereignty over Cook Inlet by seizing the *Banshu Maru*, the court noted that the evidence was conflicting on whether the United States Government approved or disapproved of the sizure. The reports of intrusions by Canadian halibut fishing vessels into Cook Inlet were also conflicting.

probably was motivated by economic considerations: the dependence of the State of Alaska on the subsurface resources and fishing in Cook Inlet;[40] and recognition of the substantial source of capital that potentially could be channeled into Alaska from the exploitation of the subsurface resources of Cook Inlet. It is equally plausible that the United States claim was based on similar economic underpinnings. Nevertheless, the decision does suggest trends and raises questions of considerable importance. First, the case seems to indicate clearly that courts will no longer bow automatically to a disclaimer by the United States that disputed waters are historic inland waters. Rather, a suit involving a historic bay claim will be adjudicated on the merits despite a disclaimer by the government unless the evidence of continuous exercises of authority is questionable.[41] More important, and related to the attitude of the court toward such disclaimers, is the question of deference raised by this decision. The United States has maintained that the determination of a maritime area as historic waters is a political decision subject exclusively to executive treatment because it defines and establishes the territorial limits of United States jurisdiction.[42]

40. One of defendant's primary theories of recovery was that Cook Inlet is a "vital bay." Defendant introduced testimony to prove that Cook Inlet is vital to the economic interests of Alaska. Post Trial Brief for Defendant at 16-21. Plaintiff rejected this theory on the ground that "vital interests" is not an accepted element of historic title, and is therefore irrelevant to the determination of the historic bay issue. Post Trial Brief for Plaintiff at 17 n.2.

41. In United States v. California, 381 U.S. 139, 185 (1965), the United States argued that a claim to historic inland waters could be maintained only if endorsed by the United States Government. The Supreme Court did not expressly rule on this argument. Instead, the Supreme Court ruled that the United States disclaimer was decisive only because the evidence of continuous exercises of sovereignty was so "questionable." 381 U.S. at 175.

42. Plaintiff argued that the issue of historic bays directly affects the territorial boundaries of the United States, that the determination of the territorial extent of United States jurisdiction is a political decision only for the executive or legislative branch, and that the judicial branch has continuously deferred to the executive determinations on this question. Post Trial Brief for Plaintiff at 21-23. In support of its position of deference in cases that affect the territorial extent of United States jurisdiction, plaintiff cited Jones v. United States, 137 U.S. 202 (1890): "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." 137 U.S. at 212.

Therefore, the judiciary is obligated, under the auspices of the separation of powers doctrine, to defer to the position of the executive branch. The court responded by hastily dismissing this argument without discussing any applicable precedent that either sustains or refutes the government's position. The crucial yet unresolved question raised by this case is whether, in determining the existence of a historic bay, general principles of international law and historic evidence will, under the doctrine of deference, have to yield to executive decisions of the territorial limits of United States jurisdiction. A definitive rule, issued by the Supreme Court, that lower courts must follow in deciding claims of historic waters is needed. Hopefully, the courts will not be precluded automatically from rendering an independent decision on the existence of historic bays or historic waters based on evidence of historic title and general principles of international law. Until there is a ruling on this issue, the courts may either defer to the executive branch or decide a hisoric bay claim by determining whether, under general principles of international law, the requirements for the existence of a historic bay have been satisfied clearly beyond doubt.

Annette Adams

TARIFFS—COUNTERVAILING DUTIES—REBATES OF NONEXCESSIVE INTERNAL TAXES NOT DIRECTLY RELATED TO DUTIABLE IMPORTS ARE SUBJECT TO COUNTERVAILING DUTIES

Pursuant to section 303 of the Tariff Act of 1930,[1] which requires the levy of a countervailing duty on articles imported into the United States whose production or export has received a "bounty or grant" from the exporting country,[2] the Secretary of the Treasury assessed a countervailing duty on certain fabricated structural steel units[3] imported by appellant[4] from Italy.[5] Appellant protested the assessment of the duty, posing two grounds for its argument

1. Section 303 reads in part: "Whenever any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country . . . and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid . . . in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated." 19 U.S.C. § 1303 (1970). *See generally* Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL. INT'L BUS. 17 (1969); Butler, *Countervailing Duties and Export Subsidization: A Re-Emerging Issue in International Trade*, 9 VA. J. INT'L L. 82 (1968).

2. Originally, tariffs protected only products that were threatened by imports. Products that did not need protection required neither a tariff nor the additional protection of a countervailing duty. Thus, the countervailing duty, which began as a setoff of foreign subsidies that had been granted to negate the effect of a United States tariff, became, as tariffs lessened in importance, a measure to insure fair competition between domestic products and imports that had received a competitive advantage from subsidies. *See generally* Feller, *supra* note 1, at 19-23.

3. These galvanized "tower units" are employed in the erection of electrical transmission towers. The countervailed items include steel angles and gusset plates, classified under Tariff Schedules of the United States (TSUS), 19 U.S.C. § 1202, Sch. 609.86, 657.20 (1970) respectively. The regularly assessed duties were not challenged.

4. Appellant American Express Company was one of nine custom house brokers who imported the countervailed articles into the United States after the effective date of the countervailing duty order.

5. The Secretary's order assessing the countervailing duty is T.D. 67-102, 19 C.F.R. § 16.23(f), April 21, 1967.

that rebate of the Italian "Basic Rate Taxes"[6] does not constitute a bounty or grant within the meaning of section 303, and that the Secretary, therefore, had exceeded his authority by levying the duty: first, that the taxes are "internal taxes,"[7] which previously have not been countervailed; and secondly, that since the rebates of these taxes did not exceed the value of the original taxes levied, the Secretary, in line with his previous decisions, could not countervail them.[8] The Customs Court rejected appellant's conten-

6. The "Basic Rate Taxes" included: customs duties and other import charges (levied on machinery and equipment used in the fabrication of the tower units, but not for material for the tower units themselves), registration taxes, stamp taxes (collected on various documents), stamp taxes on transportation documents (for the transportation of items within Italy), insurance stamps *(bollo di surrogazione)*, mortgage taxes (on real property), advertising and publicity taxes, government licenses and authorizations, motor vehicle registration taxes and other taxes (surtaxes on the above taxes). These taxes were rebated by the Italian Government under Italian Law No. 639. American Express Co. v. United States, 472 F.2d 1050, 1054 (C.C.P.A. 1973). The Basic Rate Taxes amounted to 15.08 lire per kilogram, of which 13.67 lire per kilogram was rebated and later countervailed.

7. "Internal taxes" are those taxes that are absorbed within the operation of an enterprise; for example, the Basic Rate Taxes in this case were incurred simply by the operation of the enterprise. Internal taxes are more closely akin to direct taxes, which are levied on profits or income, than they are to indirect taxes. Indirect taxes are only indirectly related to profits or income, and are usually associated with the cost of a particular product. This is the basis for the classical economic idea that since the indirect taxes—*e.g.*, excise, sales and turnover taxes—are borne by particular products in ascertainable amounts, those taxes are fully shifted forward to be paid by the consumer in the price of the product, rather than being more directly absorbed and paid by the enterprise in its operation. L. KIMMEL, TAXES AND ECONOMIC INCENTIVES 131 (1950).

8. Appellant also contended that the Secretary failed to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.* (1970); that the countervailing duty violated the most-favored-nation provisions of article I(1) of the General Agreement on Tariffs and Trade (GATT), *done* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, and the Treaty of Friendship, Commerce and Naviagation with Italy, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965; and that it had been denied equal protection of the law under the fifth amendment to the Constitution since the imported tower units had been discriminated against when countervailed.

The validity of appellant's contention that the provisions of the APA had been violated turned on a determination of whether the process of levying the countervailing duty constituted "rule making," in which case the APA would be applicable, or constituted an adjudicatory proceeding. Had the court found this to be rule making, the failure of the Secretary to publish notice of his proposed § 303 inquiry in the Federal Register, as is required under the APA for rule making, 5

tions.[9] On appeal to the Court of Customs and Patent Appeals, *held*, affirmed. When taxes refunded on products manufactured in, or exported from, a foreign country bear no direct relation to the products or to the raw materials used therein, the full value of the refunded taxes constitutes an indirect bounty within the purview of section 303, which requires the imposition of a countervailing duty on the importation of those products, in the amount of the determined bounty. *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973).

The first countervailing duty statute in the United States[10] applied solely to European sugar imports; section 5 of the Tariff Act of 1897,[11] however, extended the application of the countervailing duty to all dutiable imports.[12] Section 5 authorized the Secretary of the Treasury to determine the existence of any "bounty or grant" on a dutiable good imported into the United States and required him to assess a countervailing duty in the amount of any such subsidy found. No statute, however, has defined the term

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U.S.C. § 553(b), would have been error. Since the court found this to have been an adjudicatory determination, however, the failure to publish notice was not error. Some five months after T.D. 67-102 was issued, the customs regulations in 19 C.F.R. 16.24 were amended to provide for publication of notice of impending countervailing duty investigations. 19 C.F.R. 16.24(d).

Serious shortcomings exist in the present countervailing duty statute, the most apparent of which is the lack of consideration of fundamental fairness in § 303. *See* Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). *See generally* City of Lawrence v. C.A.B., 343 F.2d 583 (1st Cir. 1965); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

9. American Express Co. v. United States, 332 F. Supp. 191 (1971). The Customs Court found appellant's original protest to the regional commissioner had been too broad to confer jurisdiction on the regional commissioner since appellant had alleged only that the Secretary had violated the APA and had not included any specific allegations, and held that it was too late at trial to add specificity since the review would bypass the regional commissioner. Due to that jurisdictional "defect," the court found that no issue relating to the APA was properly before it. Further, the court found no competent evidence to warrant a finding of contemporaneous knowledge on the part of the Secretary to support a charge of discrimination under the most-favored-nation clauses. The court found no protection for appellant under the fifth amendment.

10. Act of October 1, 1890, ch. 1244, § 237, 26 Stat. 584.

11. Act of July 24, 1897, ch. 11, § 5, 30 Stat. 205.

12. *See* note 2 *supra*.

"bounty or grant." In *Downs v. United States*,[13] the Supreme Court considered a Russian plan which, in addition to exempting sugar exporters from the regular excise tax, granted them negotiable certificates for exported sugar. These certificates were, in essence, drawbacks of an additional excise tax that was imposed when a manufacturer's production rose above a specified level. Since the only criterion for the issuance of the certificate was the exportation of sugar, the Court sustained the Secretary's finding that the certificates were subsidies. In *Nicholas & Co. v. United States*,[14] the importer claimed that fixed amounts paid by the British Government to liquor exporters were paid to offset the expenses incurred in complying with the British regulations governing distillers. Rejecting this argument, the Court held that the payments constituted bounties or grants subject to the imposition of a countervailing duty.[15] *United States v. Hill Bros. Co.*[16] involved a Dutch system under which all manufacturers received tax credits for excise taxes. Since sugar exporters were exempt from the excise taxes, but nevertheless received the tax credit, the court found that the credits were direct subsidies subject to a countervailing duty. Broad statements by the Supreme Court in *Downs*[17] and *Nicholas*[18] indicate that any form of tax remission by a foreign government constitutes a bounty or grant; this language, however, has customarily been interpreted as mere dicta.[19] Section 303 of the Tariff Act of 1930 also fails to define the phrase "net amount of such bounty"[20]—the standard by which the Secretary determines the amount of the countervailing duty to be assessed. Furthermore, the statute does not provide the Secretary with any guidelines to determine the definition. In practice, the Secretary steadfastly has interpreted the statute to require the imposition of a countervailing duty only when a foreign government has engaged in excessive remission of taxes,[21] despite the broad dicta in *Downs* and

13. 187 U.S. 496 (1903).

14. 249 U.S. 34 (1919).

15. It should be noted that the *Nicholas & Co.* Court did not consider other drawbacks involved: "We do not find it necessary to go into such confusing considerations." 249 U.S. at 37.

16. 107 F. 107 (2d Cir. 1901).

17. 187 U.S. at 513, 515.

18. 249 U.S. at 40-41.

19. *E.g.*, Feller, *supra* note 1, at 118-20.

20. *See* note 1 *supra*.

21. Debate between the leading proponents of the countervailing duty in the

Nicholas, and has imposed countervailing duties only in the amount of the excess.

In the instant case, the court first determined that no practice has been established for countervailing remitted taxes that are not directly related to the exported product since such rebates seem to be of recent origin, and reasoned that this case thus is one of first impression; and that, therefore, the broad concept of bounty or grant found in *Downs* and *Nicholas* need not be considered.[22] Moreover, the court applied the test of whether the taxes were "directly related to the product" to determine whether their remission constituted a bounty or grant, and reasoned that since the Basic Rate Taxes were not directly related to the tower units the taxes were not fully shifted forward to the Italian consumer,[23] and therefore the entire amount of the remission could be countervailed. The bounty that resulted from the drawback encouraged exportation since the manufacturer could achieve a larger profit through exportation than he could have achieved from domestic sales,[24] since the remission of taxes on export was greater than the taxes levied and attached to the domestic price of the product. The court found significant support for its position that the remission of the Basic Rate Taxes was a bounty in a decision of the European Economic Community (EEC) Court of Justice.[25] That court held

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Tariff Act of 1894, ch. 349, 28 Stat. 509, supports the position that the term "net amount" refers only to a drawback of taxes in excess of the taxes originally levied by the home country. *See* 26 CONG. REC. 5705, 5715 (1894) (remarks of Senators Jones and Caffrey).

22. Note that *Downs, Nicholas* and *Hill* all involved only tax rebates or subsidies directly related to the products concerned.

23. *See* note 7 *supra*. If the entire amount of the taxes had been directly related there would have been no countervailing duty on nonexcessive rebates since the manufacturer supposedly would have included the tax in the price of the product and thus would be receiving the same profit margin whether he sells domestically or exports, since indirect taxes supposedly inure to the immediate benefit of the consumer. That is, the ultimate consumer receives "immediate" services from the government to which he pays the sales tax charged on the goods he purchases.

24. The encouragement of exportation is one of the goals the countervailing duty seeks to defeat in addition to the primary objective of preventing the "unfair" competitiveness of the imported items. *See* Butler, *supra* note 1, at 83: "Such support of goods intended for export is generally designed to acquire foreign exchange for a stable balance of payments position, to assist a weak industry . . . or to enhance national prosperity by increasing the revenues from foreign trade."

25. EEC Comm'n v. Italian Republic, 3 Comm. Mkt. L.R. 367 (1966).

that drawbacks made under Italian Law No. 639 [26] violated article 96 of the Treaty of Rome,[27] which provides that products exported to member states may not "benefit from any drawback of internal charges in excess of those charges imposed . . . on them." The charges were not imposed directly on the products and this lack of a direct relation made it impossible to determine the effects of the charges on the manufacturing costs of the products.[28] The court found additional international recognition of its "direct relationship to the product" test for determining which taxes can be drawnback without incurring countervailing duties in a Working Party Report adopted by the contracting parties of the General Agreement on Tariffs and Trade.[29] In its definition of "subsidies," the Report included drawbacks of direct taxes or those charges associated with the operation of the enterprise itself.[30]

This case is one of first impression concerning countervailing duties imposed for the rebate of internal taxes. The court contin-

26. Italian Law No. 639 is the law under which the Basic Rate Taxes involved in the instant case were rebated.

27. Treaty Establishing the European Economic Community, *signed* March 25, 1957, 298 U.N.T.S. 3 (effective Jan. 1, 1958).

28. 3 Comm. Mkt. L.R. at 368.

29. GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 186-87 (9th Supp. 1961).

30. The court also found that the Secretary's determination did not constitute rule making under the APA. The court disregarded appellant's contention that the amendment to 19 C.F.R. 16.24 (*see* note 8 *supra*) indicated that T.D. 67-102 should have been preceded by some publication of notice and that interested parties should have been notified, even though appellant's uncontradicted evidence showed that besides the Italian Government, the only other interested party that had notice prior to the issuance of T.D. 67-102 was Societa Anonima Elettrificazione (SAE), the manufacturer. Brief for Appellant at 27.

In support of appellant's most-favored-nation contention, the court accepted census reports showing that items were imported from third countries that were classified by the Treasury Department in the same TSUS categories as the tower units (*see* note 4 *supra*); but the court found no evidence to indicate that the articles would fall within the limited class of "galvanized fabricated structural steel units for the erection of electrical transmission towers," nor did it find sufficient evidence to establish that the third countries made refunds for taxes that were susceptible to being countervailed. The court found that appellant had failed to prove any discrimination that violated the most-favored-nation clauses. The court found no evidence to establish that any conception of equal protection within the fifth amendment applied to the determinations of the Secreary under § 303, and thus there could be no violation of that amendment. Further, there would be no support for that contention since there was no proof of discrimination. 472 F.2d at 1061.

ued a line of cases that has upheld the Secretary's definition of remissions subject to countervailing duties, and so extended approval for the Secretary to include internal taxes in his definition. Previously, countervailing duties have been limited to subsidies directly related to the product. Since taxes directly related to a product are not fully shifted forward to the domestic consumer[31] under modern economic theory,[32] strict application of a direct relation test will require a subtle examination of the tax structure to which an imported product is subject in its home country. On the other hand, the court seemed to reaffirm a traditional concept of the countervailing duty—that nonexcessive rebates on taxes directly related to the product will not be countervailed. It is likely, therefore, that disagreements will arise over which taxes are directly related to the product and over whether those taxes are included in the domestic price of the product, that is, whether they have been fully shifted forward to the domestic consumer. In the instant case, the tenuous connection between the taxes and the product was found by the court to have insufficient directness, even though appellant claimed that these taxes actually were shifted forward to the Italian consumer.[33] Excessive rebates of directly related taxes are countervailed because they are obvious subsidies to increase the competitive stance of exports and to encourage exports by raising the profit for exports compared with the

31. Indirect taxes, which classical economic theory held to be shifted fully forward to the ultimate consumer, are now thought to be shifted forward only partially in the price of the product. The remainder is absorbed somewhere within the total cost of the enterprise rather than being paid directly by the consumer. Thus, "export sales which receive a rebate equal to the indirect taxes imposed on like goods sold for domestic consumption obviously receive a subsidy if the seller's markup is less than his technical indirect tax liability." Feller, *supra* note 1, at 52.

32. NATIONAL BUREAU OF ECONOMIC RESEARCH & BROOKINGS INSTITUTION, THE ROLE OF DIRECT AND INDIRECT TAXES IN THE FEDERAL REVENUE SYSTEM 217-93 (1964); N. SINGER, PUBLIC MICROECONOMICS 141 (1972). Here it should be noted that "high-growth continental countries rely far less on direct taxes than on indirect taxes," and that rapid growth is more easily achieved "due to the high rate of saving made possible by this heavy reliance on indirect taxes." NATIONAL BUREAU OF ECONOMIC RESEARCH & BROOKINGS INSTITUTION at 218. This fact might tend to explain the reliance on rebates of internal taxes in the instant case and the assortment of those internal taxes rebated.

33. The complexities that arise when internal, "hidden" taxes are countervailed have been partly mitigated by the Tariff Act of 1930, whereby the Secretary is allowed to estimate the amount of the bounty or grant. 19 U.S.C. § 1303 (1970).

profit on the same goods sold in the home country. Internal taxes and *taxe occulte*[34] like those involved in this case not only encourage exports but also stimulate[35] the manufacturer's entire business and the industry that manufactures the product. *Taxe occulte*, then, may simply be positive, outward-reaching forms of subsidies based on an "infant industry" theory of protection of the home industry by enabling it to grow stronger through exportation, rather than insulation from foreign competition.[36] Similarly, the countervailing duty serves as a protective tariff in the United States. It does not operate as the protector of a theoretical form of international competition and free trade, but as the protector of a domestic manufacturer or industry.[37] As presently applied, the countervailing duty is in many cases a source of abuse. Many imported products receive bounties or grants and are not countervailed.[38] Moreover, as this case and others demonstrate, the process and standards for the imposition of a countervailing duty

34. The court found that the "Basic Rate Taxes" constitute what in international tax parlance is known as "*taxe occulte.*" *Taxe occulte* includes that element of tax in an article that is "hidden" since it is not directly charged to the produced item, and that is paid on other goods or services consumed in the production of the article such as auxiliary materials (fuel, packing, etc.), durable capital equipment (buildings, vehicles, etc.) and services (transportation, advertising, etc.). ORGANIZATION FOR ECONOMIC CO-OPERATION AND REDEVELOPMENT (OECD), REPORT ON BORDER TAX ADJUSTMENTS pt. I(25) (Oct. 12, 1964).

35. Since such taxes are generally viewed as being taxes on the enterprise itself, their drawbacks benefit the entire operation of that enterprise by lowering the total operating costs when exporting any product that receives the drawbacks.

36. This is premised on the concept that after some period of time, the industry would not need the subsidies to compete effectively with products from, and in, other nations.

37. The domestic manufacturer of an article similar to an imported item, which he thinks should be countervailed, is usually the one to initially complain to the Secretary and request an investigation, even though injury might not be present or likely. (In the instant case, the complaint was initially lodged by the "Ad Hoc Committee" of domestic tower unit producers.) In addition, there might be no real need of protection, due either to the established position of the manufacturer or to a price on the subsidized imported product that is still not competitive. In these situations, the countervailing duty would only inure to the detriment of the American consumer by denying him a wider choice of goods at differing prices. It is certainly questionable whether the countervailing duty in this case is protecting "competition" or whether it is protecting an oligopolistic industry *from* competition.

38. The most obvious examples are products manufactured in Communist countries. *See* Butler, *supra* note 1, at 106-07.

remain vague, if not nonexistent. The Secretary wields extensive power to determine which dutiable products to examine, which to ignore, and finally, which to countervail. With the reduction and abolition of many tariffs, especially following the Kennedy Round of tariff negotiations, the countervailing duty, along with other nontariff barriers to international free trade, looms with larger presence now than at any time in our past.[39] Section 303 should be amended to operate more equitably and in line with the overall foreign commercial policy of the United States. Appropriate changes that could be enacted include: (1) a set of standards for determining the existence of a bounty or grant and its amount; (2) a requirement that injury be shown to a domestic industry, or that injury be shown to be likely;[40] (3) inclusion of nondutiable items (with the lessening importance of tariffs, no reason exists why nondutiable items should not receive the valid protection of the countervailing duty); (4) provision for presidential review of the imposition of the countervailing duty, and authority for him to suspend or waive countervailing duties that he finds would interfere with the overall international policy of the United States;[41] (5)

39. For eight years the countervailing duty lay in desuetude with no new countervailing orders being issued. From April 1, 1967, to December 31, 1968, however, the Secretary imposed all the following countervailing duties: T.D. 67-102 (the tower units involved in the instant case); T.D. 67-240 (sugar content of certain articles from Australia—for which three different rates were declared in 1972); T.D. 68-2 (same as T.D. 67-240); T.D. 68-11 (canned tomato paste from France); T.D. 68-112 (canned tomato concentrates from Italy); T.D. 68-149 (steel welded wire mesh from Italy); T.D. 68-192 (merchandise from France assessed to mitigate subsidies granted by the French Government to exporters in the wake of the student-worker revolution of May 1968. The order recalled T.D. 49821 in 1939 when, to counter Germany's currency manipulations, the Secretary imposed a countervailing duty on all dutiable merchandise imported from Germany; the order was discontinued by T.D. 51371 in 1945.); and T.D. 68-288 (ski-lifts from Italy). Since that date, six more countervailing duties have been ordered in addition to rate changes on previous orders: T.D. 69-113 (certain steel products from Italy); T.D. 71-117 and T.D. 71-118 (barley and molasses from France); T.D. 72-122 (compressors and parts thereof from Italy); T.D. 73-10 (X-radial steel belted tires from Canada); and T.D. 73-85 (refrigerators, freezers, other refrigerating equipment from Italy). 19 C.F.R. 16.24(f).

40. Absence of an injury provision serves simply as a protectionist device at times when no injury is likely or present; further, requiring that injury must be shown would bring the United States within article VI of the GATT.

41. While there is undoubtably presidential review at the present, it applies before the Secretary has reached his conclusions, rather than being applicable after the Secretary has determined whether there exists a bounty to be counter-

inclusion of provisions for the imposition of a countervailing duty under the Administrative Procedure Act to provide a more sure base for decisions and a recognized procedure. Moreover, the countervailing duty itself should be reexamined in the light of present conditions and needs to assure its employment as a trade instrument of fine tuning rather than a crude weapon of tariff retaliation.

Randolph R. Slaton

vailed. Post-determination review would result in less discretionary action on the part of the Secretary in his picking and choosing of those products to be investigated for a countervailing duty.